

LEGAL AFFAIRS

Worldwide "Chain of Title" to Copyright

by Paul Edward Geller

Who may exploit copyright in a work? Monies earned from the work in markets around the world could turn on this question. Due diligence in checking title to copyright internationally requires a reasonably systematic answer.

The image of a chain of title, at first blush, seems applicable to copyright in the United States. The U.S. Copyright Act spells out in whom copyright initially vests and refers to the priority of recordation in the U.S. Copyright Office in governing the priority of transfers of copyright subsequent to vesting. But the law regarding

the initial vesting and subsequent transfer of copyright is far from uniform worldwide, and the United States is among a minority of jurisdictions with public recording systems specifically designed for copyright transfers. n1

By force of habit, we may continue to speak in terms of "chain of title," but subject to a number of caveats. Most importantly, we borrow the image of a "chain" from real property, but it rather oversimplifies what happens to "title" in copyright worldwide. Title to real property pertains to but one tangible thing fixed in space and, normally, is governed by the law of the place where the property is located. But any work in which copyright can be vested and transferred is likely to be disseminated worldwide, sometimes at the speed of light. And a variety of laws may affect entitlements in that work in the course of its travels.

Thus the question of chain of title to copyright in a work worldwide largely turns on issues that cannot be

decided without answering threshold questions concerning the choice of law. This article will briefly outline the full range of these issues and indicate the most important of these conflicts questions.²

1. What rights, if any, are in effect?

If a work is in the public domain in a country, the question of who owns rights to exploit it there is moot. But, if it is protected, the law and treaties of the country will tell us what rights are available there, that is, to what rights there may be entitlements.

Analysis at this point has to proceed country by country for the simple reason that copyright is territorial. Territoriality means that the law of each national jurisdiction where the work is to be used -- including all the treaty obligations of that country -- governs the rights available in the work there.³ Thus, for example,

most works first published in the Soviet Union before 1973 will be in the public domain in most of the world, since the laws of most countries did not include any copyright treaty with the Soviet Union until it joined the Universal Copyright Convention (U.C.C.) on May 27, 1973. The situation may be far more complex for older works originating in the United States, because most countries have protected U.S. works under a variety of treaties and like arrangements in the course of the last hundred years.

Two different cases involving the same works, those of Buster Keaton published in the United States, illustrate just how closely protection depends on the law and treaties of the country where protection is sought. In the Federal Republic of Germany, protecting U.S. works under a bilateral copyright agreement since 1893 and the U.C.C. since 1955, Keaton's film works were protected even though they had fallen into the public domain in the

United States before the time of German infringement.ⁿ⁴ Thus, in the Federal Republic, as a result of the combined effect of both the earlier and later treaties, the rights available in Keaton's works included the full panoply of rights a German author could have exercised in comparable works. In France, however, where only the U.C.C. came into play, Keaton's works had fallen into the public domain prior to suit.ⁿ⁵

Thus, to determine whether a work originating in one country is protected in another country, and to what extent it is protected there, it is necessary to see whether it satisfies the conditions of the domestic law or treaty obligations of that country. Most works created by U.S. nationals and first published in the U.S.A. today, for example, are protected in most countries by virtue of at least one of a number of treaties. In most countries, the dispositive treaty, since March 1, 1989, will be one of the Acts of the Berne Convention.ⁿ⁶

Just as copyright arises in a work under the laws and treaties of each country where it is exploited, these laws may affect title to that copyright in a variety of ways. These ways will now be considered.

2. Is presumptive title to the rights sufficient?

Once we know copyright in a work exists in a given country, we may then ask: for what purposes is chain of title to copyright needed there? It will sometimes not be necessary to provide as complete a showing of title to obtain standing to assert copyright in court as for other purposes, notably profiting from copyright uses.

For example, Article 15 of the Berne Convention establishes minimum rights to standing in the form of certain presumptions. If a work is protected under the Berne Convention, Article 15 allows the person named on the work in customary fashion as its author, absent

proof to the contrary, to bring suit for infringement. Similarly, where the author is not so named, as on an anonymous work, Article 15 allows the publisher, presumptively that named on the work, to commence an infringement suit and to represent the author's interests in that suit. Although, as explained below, the meaning of the term "author" may not always be clear in international copyright, Article 15 should be liberally construed to allow for standing.ⁿ⁷ Thus, for example, the usual credits on a motion picture could be argued to include all of the possible authors of the work among the contributors they mention.ⁿ⁸

But what if the exploiting or suing party is not the "author" or "publisher" named on a work? More precisely, should a party claiming copyright by virtue of a contract with the named author or publisher benefit from a presumption of standing akin to theirs? The Berne Convention does not directly answer this question, and

it becomes even more of an open issue where the Berne Convention is not invoked to protect the work in question. Answering it in the negative, the British High Court, Chancery Division, seemed to require a contractual claimant to make proof of title in some absolute sense, "link by link" through the "chain" of title, in order to bring a civil infringement suit.⁹ By contrast, the Argentine Supreme Court allowed a party, which sought protection under the U.C.C. and based its entitlement on contract, to have a criminal infringement action prosecuted upon a showing of title to the work at issue that merely withstood any attempt at rebuttal.¹⁰

Similarly, some national laws will sometimes authorize a collecting society to collect royalties without its necessarily having an authorization, much less a formal assignment for the purposes of collection, from every claimant ultimately entitled to pocket these royalties. Proof of "adequate" title then need not be the same for

purposes of establishing standing to sue or to collect royalties on behalf of copyright claimants as for establishing an entitlement to pocket monies from copyright uses. Such monies might include damages awarded in an infringement suit or royalties held in trust by a collecting society.

We now have to turn to analyzing chain of title in that latter, more absolute sense of who gets the money. Here, the image of a chain may be more appropriate in that we can proceed from a starting point, the initial vestees of rights in a work, and follow out the fate of these rights through a series of transfers.

3. In whom do rights initially vest?

The starting point for chain of title in any one work will not necessarily be the same for all purposes worldwide. In some cases, the same work might start with

different holders of rights in different countries, depending on what law defines "author" or specifies other initial holders of rights in each country. To some extent, contractual arrangements can nonetheless anchor chain of title in the same party worldwide.

For example, in both the United States and the Federal Republic of Germany, copyright initially vests in authors, but the U.S. definition of the "author" of so-called works for hire easily includes corporate employers, while the West German definition of "author" is limited to natural persons. French law, as a matter of principle, only considers each of the flesh-and-blood creators of a work as an "author"; nonetheless, it exceptionally vests copyright in the possibly corporate editor or publisher of so-called collective works, defining such works by the very difficulty of attributing authorship to those natural persons who contribute to their creation. It is in cases of joint or team works, especially film and

other audiovisual works, as well as in cases of software, that there is perhaps the greatest variation from country to country in definitions of "author" or other parties in whom rights are to initially vest.¹¹

Nonetheless, in the case in which one natural person authors a work outside any master-servant relationship, all possibly applicable laws will initially vest copyright in that author. Thus only beyond that classic case -- often, as just noted, in cases of works for hire, collective works, joint and team works, especially audiovisual works, and software -- will the problem of choosing the law to govern the initially vesting of rights arise. As a rule of thumb, one can expect judges, if they apply the principle of national treatment set out in the international copyright treaties, to be prone to apply the definition of "author" effective for domestic works in the country where copyright is used. But that rule of thumb is not a rule of law, nor do the international treaties or national

authorities uniformly establish any clear-cut conflicts rule to control the choice of varying definitions of "author" or other initial holders of rights in a given case. Indeed, there is dispute concerning the Berne Convention, some commentators insisting that the Convention text only allows for recognizing flesh-and-blood authors, not corporate authors of works for hire.¹²

Fortunately, it is often possible to short-circuit such uncertainty, by using proper contracts with all those parties who contribute to the original creation of a work. Consider a feature film created by a team of contributors: assume that all the members of the team and their principals work under written agreements, some of them as employees and some as independent contractors. These contracts, at the source of the work, may clearly allocate to one party whatever rights of economic exploitation will vest in all the potentially creative contributors as well as their principals and, therefore, in all

possible "authors" and other initial holders of rights by whatever copyright law applies. If these contracts are enforced to the letter, these rights will at once vest in, or be transferred to, that single party, effectively anchoring chain of title in that party.¹³

Optimally, the contracts relative to our hypothetical feature film will all have the same choice-of-law clause. Even then, however, the contracts are not sure to have the same law, that spelled out as chosen by the parties, govern their effect on all points. This possibility brings us to the next phase of inquiry into chain of title: the effect of any contract purporting to transfer title.

4. Do any contracts transfer title?

How are we to know which rules of law govern the enforcement of a given copyright contract? Consider any one contract which purports to transfer copyright

worldwide in a feature film made in the United States. When, if at all, will U.S. copyright rules, most notably those allowing termination of transfers or vesting rights in works for hire, come into play? Or, for example, will French rules against the alienation of moral rights restrict the transferee's options for adapting the film work for French showings? Suppose that the contract includes a clause stating that California law is to govern its effect. To what extent will California contract rules then apply?

Any contract purporting to transfer copyright may be subject to two different types of choice-of-law approaches. On the one hand, the copyright treaties for the most part require country-by-country application of copyright rules, that is, application of the law of each country where rights are exploited. On the other hand, contracts are usually subject to the contract rules of the law freely chosen by the parties, that is, the law which

the parties decide to write into their agreement as governing it. To avoid a larger conflict between these different choice-of-law approaches, a judge may employ the method of analysis called "problem selection" or depeage of issues, which allows different rules drawn from different laws to dispose of different issues raised as regards the same contract.¹⁴ Thus, in the case of a copyright contract, possibly subject to copyright and contract laws at the same time, such analysis would disentangle the issues on which copyright rules should be dispositive and those which contract rules should govern.

An English case illustrates such analysis.¹⁵ There the court had to decide what law disposed of the issue: could an assignment of "the full copyright for all countries" in a song effectively convey U.S. renewal copyright? The court immediately referred to U.S. law to ascertain "the precise nature of that to which it [the contract] is claimed to apply," since that law would

establish whether U.S. renewal copyright by definition was susceptible of transfer at all. The fact that the court held U.S. law, that of the country defining the right in question, to be dispositive of the assignability of that right contrasted with its finding that the "agreement was a purely English contract and must be interpreted according to English law."¹⁶ In the law which superseded that of U.S. renewal copyright after 1976, however, there are rules allowing an author to terminate transfers: these rules, by their statutory definition, cannot be contractually waived or transferred. By the same token, as purely copyright rules rather than contract rules, they only affect a contract insofar as it transfers U.S. copyright and could not be invoked against that contract insofar as it transfers foreign rights.¹⁷ Contract rules, for example, governing construction, would apply to that contract irrespective of the rights it transferred.

One issue, in particular, can be critical to chain of title: where different third parties claim to benefit, respectively, from different conveyances which purport to transfer to each of these parties the same rights to exploit the same work, which party's claims will prevail? The most authoritative commentators conclude that each protecting country is free to fashion a rule of priority effective within its national territory in accord with its perception of interests in regulating copyright commerce within that territory.¹⁸ Jurisdictions such as the United States might and do choose to maintain systems of recordation because their territories are so large, and copyright commerce so multifarious within national borders, that recordation rather than common knowledge within the local trade will alone protect third parties acquiring rights. Other jurisdictions, however, apply the rule that the first transfer in time prevails over all subsequent transfers, so that recordation simply provides evidence

of which transfer was made first. The law of each country thus has to be consulted to follow out chain of title in this regard.¹⁹

Throughout the best of all possible worlds there would be but one system for assuring chain of title to copyright. The film industry has begun to move toward this goal in providing for national recordation systems where none existed before and in contemplating an international recordation system.²⁰ Under the auspices of the World Intellectual Property Organization, a Treaty to establish a proposed International Register of Audiovisual Works was concluded on April 20, 1989: its Article 4(1) would have adhering countries deem statements recorded in the International Register to be true until proof to the contrary.²¹ It should be noted that such recognition may well be decisive for jurisdictions which give priority domestically to the first transfer in real time, assuming that any presumption of a specific date of

transfer raised by international recordation is not rebutted. But it need not in itself have legal effect against a local recordation to the extent a jurisdiction deems the priority of transfers to be domestically secured only by actually recording them in a national system.ⁿ²²

There is also some consensus to the effect that rules of form, notably rules requiring copyright transfers to be in writing, are contract rules.ⁿ²³ For example, according to this view, if the law applicable to contract issues did not require such a writing, U.S. copyright could be orally assigned. However, it is less certain that rules requiring that the contract expressly mention all the rights of exploitation to be transferred, or that rights for future and unknown modes of exploitation not be subject to transfer, will be considered as mere contract rules. The situation regarding the contractual waiver of moral rights is even less settled.ⁿ²⁴

5. Has there been any transfer by law?

Various kinds of laws can effectuate transfers of copyright to third parties without any intervening contractual or like relation. Such laws include community property and other laws governing the allocation of assets in marriage, bankruptcy and related laws governing the attachment of assets by creditors, and inheritance laws. Unfortunately, there is no uniform and clear-cut set of choice-of-law rules to govern how such laws might apply to copyright interests worldwide. The best that can be done here is to raise some typical issues.

In California, one court has deemed copyright to fall within the marital community but, only focusing on U.S. copyright, did not make clear whether it covered foreign as well as U.S. copyright.ⁿ²⁵ Seminal case law in France held copyright to fall outside the marital community only insofar as the author's moral rights included within French copyright are not property interests, thus

allowing French courts to subject the economic value of copyright in a work, notably eventual proceeds from exploitation or damages for infringement of economic rights, to community allocation.²⁶ Whether including foreign copyrights within the marital community involves a possible conflict with foreign copyright laws may thus depend on what the order in a case actually says. If it merely divides up monies actually or potentially earned from copyright exploitation abroad, there may be no real conflict of laws to resolve. The same reasoning might be extended to including foreign rights within a debtor author's estate.²⁷

There is a U.S. case which ruled that U.S. copyright in a work originating in Germany was subject to the inheritance laws of the jurisdiction of the deceased author.²⁸ Nonetheless, this is but one precedent, and it does not confront either of the rather tangled sets of issues that arise, on the one hand, when both moral and economic

rights devolve on possible heirs and', on the other, when the term or vesting of copyright varies according to the heir claiming it. The difficulty of such issues is all too well illustrated by the conflict between the Second and Ninth Circuits in the United States on the issue of heirs' renewal claims, based on U.S. copyright, to control derivative works.²⁹ Such issues of reversion also arise in the recesses of some other Anglo-American copyright laws, notably those of the United Kingdom and of Canada.³⁰

Conclusion

In tracing chain of title to copyright worldwide, three points should be kept in mind. To begin with, if the work in question has fallen into the public domain where it is to be used, the question of title is moot. Further, if it is a matter of simply asserting copyright, for example, to

combat piracy, there are arguments that in some cases presumptive title should suffice. Finally, where it is a matter of exploiting copyright in a country, choice-of-law questions may arise both at the starting point of, and at each link in, the chain of title to rights exercisable in that country.

NOTES

1. For laws and priority systems of major jurisdictions, see the chapters, respectively, at Sec. 4[21][d], in P. Geller and M. Nimmer (editors), *International Copyright Law and Practice* (1989) [hereinafter *International Copyright*].

2. For a more detailed analysis, see Geller, *International Copyright: An Introduction* Secs 6[2]-[3] [hereinafter *Geller*], in *International Copyright*, supra note 1,

also published in expanded form as *Harmonizing Copyright-Contracts Conflicts Analyses*, 25 Copyright 49 (1989).

3. This is often called the "law of the protecting country": it should be distinguished from the law of the forum in which an infringement suit is brought. See *London Film Productions Ltd. v. Intercontinental Communications, Inc.*, 580 F.Supp. 47 (S.D.N.Y. 1984).

4. *Atlas Film v. Janus Film*, Bundesgerichtshof, Jan. 27, 1978, Case no. I ZR 97/76, [1979] *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* -- Internationaler Teil 50, in English translation in 10 *International Review of Industrial Property and Copyright Law [IIC]* 358 (1979).

5. S.A. Galba Films c. M. Friedman, Cour d'appel, Paris, Ire ch., April 24, 1974, 83 *Revue internationale du droit d'auteur* [RIDA] 106 (1975), in English translation in 7 *IIC* 130 (1976), *aff'd.*, Cass. civ., Ire ch., Dec. 15, 1975, 88 *RIDA* 115 (1976).

6. For a detailed framework of analysis for analyzing the protection of works internationally, see Geller, *supra* note 2, Secs. 3-5. For a Berne framework, see Geller, *Copyright Protection in the Berne Union: Analyzing the Issues*, 5 *Intellectual Property Journal* 1 (1989), to appear in *VLA-Columbia J. Law & the Arts*.

7. See, e.g., the "Bora Bora" decision, *Bundesgerichtshof*, July 10, 1986, Case No. I ZR 128/84, 1986 *GRUR* 887, in English translation in 19 *IIC* 411 (1988) (mention of names on printed copy of song, without

specifying contributions to song by each named party, held sufficient to trigger Berne right to maintain suit).

8. See Geller, *supra* note 2, at n. 640. As indicated there, the Paris Act of the Berne Convention adds a provision, in Article 15(2), according to which the legal or natural person named on a cinematographic work as its "maker" is presumed to be such.

9. *Columbia Picture Industries v. Robinson*, [1986] Fleet Street Reports 367, 378. The High Court also noted that "pirates may justifiably have some optimism that, if challenged, their challenger will fail to establish its copyright title." *Id.* One might ask what justifies this approach to standing if its effect is to encourage piracy.

10. *In re S.A. Editorial Noguez*, S.C.J.N., May 16, 1962, Fallos 252. This approach would seem more

appropriate at least where it is a matter of stopping piracy on the spot, a goal supported by public policy, or where defendant's interests may be protected by conditioning plaintiff's preliminary relief on the posting of a bond.

11. For definitions in major jurisdictions, see the chapters, respectively, at Sec. 4[1], in *International Copyright*, supra note 1.

12. For a critical analysis of differing approaches to this problem under national laws and the international conventions, see Geller, supra note 2, Sec. 4[2][a][ii].

13. To avoid the effect of the provisions allowing for terminating transfers as to U.S. rights, it may be desirable to differentiate contractual language relative to U.S.

rights in works made for hire in the U.S.A. and foreign rights in the same works.

14. For U.S. and European uses of such analysis, respectively, see 1 A. Ehrenzweig and E. Jayme, *Private International Law* 119-121 (1972); 1 H. Batiffol and P. Lagarde, *Droit internationale prive*, para. 595 (1981).

15. *Campbell Connelly & Co. Ltd. v. Noble*, (1963) 1 *Weekly Law Reports* 252.

16. *Id.* at 255. This analysis is consistent with that followed in cases in which the issue of the reversion or assignability of renewal copyrights accorded by the Copyright Act 1911 of the United Kingdom has been resolved pursuant to British law on both sides of the English Channel. See *Redwood Music, Ltd. v. Francis, Day & Hunter Ltd.*, [1978] *Reports of Patent Cases* [R.P.C.]

429, *Redwood Music, Ltd. v. B. Feldman & Co.*, [1979] 385 R.P.C. 1, both aff'd and rev'd in part, [1979] R.P.C. 385; *Chappell & Co., Ltd. v. Redwood Music, Ltd.*, [1981] R.P.C. 337; *Ste. Boosey and Hawkes Ltd. c. Taverne*, Trib. civ., Bayonne, May 16, 1972 (unreported), as commented by Desbois, Note, 25 *Revue trimestrielle de droit commercial* 624, 627 (1972).

17. See 3 D. Nimmer and M. Nimmer, *Nimmer on Copyright* Sec. 11.02[B][2] (1989).

18. See E. Ulmer, *Intellectual Property Rights and the Conflict of Laws* 47 (1978); Francon, *Les droits sur les films en droit international prive* (in English translation: *Films rights in international private law*) 74 *RIDA* 5, 41-43 (1972).

19. For these laws in major jurisdictions, see the sources cited *supra* note 1.

20. See, e.g., Brennan, 2d Generation Video Piracy: Export Assns. Move to Strike Back, *Variety* (Weekly), Jan. 20, 1988, 159-160 (anticipates a system that "could eventually replace the myriad registration procedures mushrooming around the world with one simple, unified system").

21. For the text of the Treaty, accompanying Regulations, and related documents, see *Diplomatic Conference for the Conclusion of a Treaty on the International Registration of Audiovisual Works*, 25 *Copyright* 165 (1989). Note that the Treaty will go into effect, pursuant to its Article 12, three months after the fifth of five countries becomes a party to it.

22. Note that, under Article 4(1), the evidentiary value of a statement on the Register does not take effect (i) if the statement cannot be valid under applicable copyright law or (ii) if it is contradicted by another statement on the Register. Registration thus seems to shift the burden of proof concerning the truth of factual matters stated in the Register, but does not substitute for acts legally needed to secure priority of title for rights in a given country for example, recordation in the U.S. Copyright Office for U.S. rights.

23. See Ulmer, *supra* note 18, at 54; Francon, *supra* note 18, at 37-41. See, e.g., *Ste. Les Films Richebe c. Ste. Roy Export, Charlie Chaplin*, Cass. civ., Ire ch., May 28, 1963, 41 RIDA 134 (1963) (copyright conveyance in conformity with U.S. not French requirements of form, but concluded in France, held valid in France). But see N. Kleine, *Urheberrechtsverträge im Internationalen*

Privatrecht 112-120 (1986) (suggesting that some rules of form may apply as part of copyright, not contract, law).

24. For further treatment of these problems, see the sources cited supra note 2.

25. In re Marriage of Worth, 195 Cal.App.3d 768, 241 Cal.Rptr. 135, 136, 139-140 (1987) (only the preemption issue, peculiar to U.S. copyright, decided).

26. See L'affaire Lecocq, Cass. civ., June 25, 1902, Dalloz, 1903, 1, 5, concl. Beaudoin, note A. Colin; L'affaire Jamin-Canal, Trib. civ., Seine, April 1, 1936, Cass. civ., May 14, 1945, Dalloz, 1945, 285, note Desbois.

27. Note that, on a rationale like that of the seminal French dissolution cases just cited, many Continental

European and related copyright laws preclude any creditor's attachment of an author's copyright, especially prior to exploitation.

28. *Brecht v. Bently*, 185 F.Supp. 890, 893 (S.D.N.Y. 1960).

29. Compare *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977), with *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir. 1988), cert. granted sub. nom. *Stewart v. Abend*, 58 U.S.L.W. 3181 (Oct. 2, 1989).

30. See *Comish, United Kingdom Sec. 4[3][c]*, in *International Copyright*, supra note 1; *Vaver, Canada Sec. 4[3][b]*, id. See, e.g., cases cited supra note 16.

Paul Geller is in private practice in Los Angeles. He also teaches a seminar in international Copyright at the University of Southern California Law Center and, this

semester, is teaching intellectual property at Stanford Law School. With Melville B. Nimmer he edited and now serves as the General Editor for International Copyright Law and Practice, a collective treatise published by Matthew Bender. Copyright 1989 by Paul Edward Geller. [ELR 11:5:3]

RECENT CASES

Dismissal of securities law claim arising from contract to produce "Cagney and Lacey" television series is upheld by appeals court

Prior to 1982, Mace Neufeld Productions produced the television series "Cagney and Lacey." In a 1982 contract, Orion Pictures Corporation and producer Barney Rosenzweig assumed the production of the series from

Neufeld. Neufeld, who agreed to invest cash and expected future compensation in the project, was to receive fifty percent of all fees paid by Orion to Rosenzweig in connection with Rosenzweig's production services, and seventy-two percent of all net profits from the series that exceeded a certain level. The contract also required Orion to consult with Neufeld on specified "substantial" matters.

Neufeld claimed that Orion and Rosenzweig breached the contract, and sued Orion alleging that the company fraudulently sold him an investment contract in violation of section 10(b) of the Securities Exchange Act of 1934.

A Federal Court of Appeals has upheld the District Court's dismissal of Rosenzweig's securities claims and pendent state law claims.

The court found that the Neufeld-Orion contract, a "private agreement, negotiated directly and individually by the parties," was not a security. It was noted that no

prospectus was sent to Neufeld or any other would-be investor. Furthermore, stated Judge Canby, the contract was never intended to be publicly traded, and was not the type of contract that Congress intended to be included within the definition of a security under the 1934 Act.

Judge Canby agreed with the District Court that Neufeld's contractual consulting right and continued involvement in the project were not characteristic of a security, for an investment contract usually anticipates profits derived from " the entrepreneurial or managerial efforts of others" (emphasis by the court).

Mace Neufeld Productions, Inc. v. Orion Pictures Corporation, 860 F.2d 944 (9th Cir. 1988) [ELR 11:5:9]

Anheuser Busch public service film does not misappropriate name and likeness of Hispanic war hero for commercial purposes

In the early 1980s, a subsidiary of Anheuser Busch Companies produced a thirteen minute film entitled "Heroes." The film, which was made at the request of the National Association of Latino Elected and Appointed Officials, portrayed the activities of Hispanic Congressional Medal of Honor recipients. An eighty second segment of the film depicted the heroic conduct of Roy Benavidez; the segment used Benavidez's name and drawn illustrations of his likeness.

Benavidez claimed that Anheuser Busch misappropriated his name and likeness without permission and sued the company in a Texas state court. Anheuser Busch removed the case to a Federal District Court which

determined that the company did not commercialize Benavidez's personality.

In upholding the District Court judgment on behalf of Anheuser Busch, Federal Court of Appeals Judge Reavley noted that "Heroes" was a public service film produced for educational purposes and did not advertise or promote Anheuser Busch or its products in any way. The only reference to the company appeared in the credits shown at the end of the film; the credits included the statement that "Heroes" was "made possible by Anheuser Busch, Inc. and its family of wholesalers."

Benavidez argued that the film was shown at various convention hospitality centers where product logos were displayed and where free beer was distributed, and that such showings constituted an attempt to capitalize on Benavidez's good name and reputation in order to obtain a commercial benefit. The District Court did not decide the question of whether the company actually showed

"Heroes" at any convention, and Judge Reavley agreed that it was unnecessary to resolve this question - even if the film were shown in the manner described by Benavidez, it "would not transform the otherwise unobjectionable documentary into a commercial advertisement..." Neither the makers of the film nor Anheuser Busch were attempting to increase sales of the company's products - no beer was sold at the hospitality centers where the film allegedly was shown; no orders for beer were solicited, and convention goers were not required to watch the film in order to receive free refreshments, noted the court. And it was observed that the possibility that Anheuser Busch enjoyed increased goodwill in the Hispanic community due to the production of the film did not amount to the type of commercial benefit sufficient to support a claim for misappropriation.

Benavidez v. Anheuser Busch, Inc., 873 F.2d 102 (5th Cir. 1989) [ELR 11:5:9]

Federal Court of Appeals affirms, solely on ground of laches, denial of copyright holder's motion to enjoin publication of biography of L. Ron Hubbard, the late founder of the Church of Scientology

A Federal Court of Appeals in New York has affirmed, solely on the ground of laches, a District Court decision (ELR 10:12:17) refusing to enjoin Henry Holt and Company from distributing the book "Bare-Faced Messiah: The True Story of L. Ron Hubbard."

New Era Publications, the licensee of certain copyrights bequeathed to the Church of Scientology by its founder, claimed that the use of published and

unpublished material by Hubbard in the biography written by Russell Miller, constituted copyright infringement.

The District Court, in a lengthy opinion, found that "Bare-Faced Messiah" infringed "to some degree" Hubbard's copyrights in previously unpublished -letters and diaries. But the court limited New Era to the remedy of damages.

Federal Court of Appeals Judge Roger J. Miner first reviewed the procedural history of New Era's claim, noting that despite the fact that an attorney representing the Church of Scientology had corresponded with Holt in May of 1986 in an attempt to discourage the publication of the book, the action to enjoin publication was not filed in the United States until May 4, 1988.

Judge Miner, after describing the contents of Miller's book, disagreed with the District Court's views on the proper application of the four fair use factors in this

case. In particular, Judge Miner mentioned the District Court's distinction between the use of an author's words to display the distinctiveness of his writing style and the use of an author's words to make a point about his character - the District Court found "far greater justification" for the latter use than for the former. Judge Miner stated that such a distinction was "unnecessary and unwarranted in applying the statutory fair use purpose factor. As long as a book can be classified as a work of criticism, scholarship or research, as can the book here, the factor cuts in favor of the book's publisher, whether the copyrighted matter is taken from a literary lion like J.D. Salinger or a purported prophet like L. Ron Hubbard."

The District Court also added an unwarranted gloss" to the second fair use factor - the nature of the copyrighted work -according to Judge Miner. Stating that the court made it clear in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), cert. denied, 108 S.Ct. 213 (1987)

that unpublished works normally enjoy complete protection, Judge Miner rejected the District Court's distinction between the use of protected expression to "enliven" the text and the use of protected expression to communicate "significant points" about the subject.

In turning to the fair use factor dealing with the effect on the market for the copyrighted work, Judge Miner again expressed a substantial difference from the District Court's analysis. New Era had argued that it planned to commission an authorized biography of Hubbard and stated that all of Hubbard's writings would be made available to the author of such a work. The market for New Era's book would likely be affected by Holt's book, observed Judge Miner.

The grounds for the District Court's denial of injunctive relief were rejected by Judge Miner who stated that the Court of Appeals' observation that "the fair use doctrine encompasses all claims of first amendment in the

copyright field ... never has been repudiated ... An author's expression of an idea, as distinguished from the idea itself, is not considered subject to the public's 'right to know.'"

Nevertheless, the prejudice suffered by Holt as the result of New Era's "unreasonable and inexcusable" delay in bringing the infringement action warranted the application of the doctrine of laches to preclude injunctive relief. A belated permanent injunction would result in the total destruction of the biography since it would not be economically feasible to reprint the book after deleting the infringing material; the judgment of the District Court was affirmed accordingly.

Chief Judge James L. Oakes, in a concurring opinion, agreed with court's ruling, but expressed the view that it was unnecessary for the majority opinion to do anything other than affirm the denial of an injunction for laches. It seemed to Judge Oakes that the majority went out of its

way to take issue with Judge Leval's opinion and doing so, "even by way of dictum, tends to cast in concrete *Salinger v. Random House, Inc.*..... *Salinger*, even if rightly decided on its facts, involved "underlying, if latent, privacy implications" which were not present in the instant case due to Hubbard's death, and the application of *Salinger* seemed to Judge Oakes to prevent a necessary flexibility in granting equitable relief in copyright cases.

Judge Oakes proceeded to summarize Judge Leval's principal conclusions with respect to the allegedly infringing use of unpublished material as follows: prior cases did not preclude a finding of fair use as to unpublished material, but rather required the user of such material to "establish a highly convincing case in favor of fair use;" *Holt* met its burden as to the great majority of unpublished materials; "*Bare-Faced Messiah*" used only an "infinitesimal" amount of Hubbard's words; and all of

the circumstances of the case required the denial of a permanent injunction.

Judge Oakes would have found that the District Court made an appropriate distinction between the instant case and *Salinger*, and agreed with Judge Leval that "words that are facts calling for comment are distinguishable from words that simply enliven text." The biography quoted the unpublished writings in order to depict some of Hubbard's more unfortunate actions, such as, stated Judge Oakes, alleged lying and boasting. There were only a few instances in which there was an improper basis for quoting unpublished material.

Furthermore, the amount and substantiality of the quotations used in this case were "easily distinguishable" from *Salinger* and from *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985; ELR 7:2:8). The quotations were not "the heart" of the work, and

were a small fraction of two chapters in "Bare-Faced Messiah."

Most significantly, stated Judge Oakes, the District Court correctly found that anyone with an interest in reading Hubbard's writings would not satisfy that interest by reading Miller's book or the quotations contained therein. It appeared to Judge Oakes that the majority did not provide any indication why Judge Leval's finding of fact with respect to the fair use factor of the effect of the use of copyrighted material on the market for New Era's forthcoming book was clearly erroneous.

In turning to the "truly critical question" of the remedy available to the copyright holder for the use of a "small, but more than negligible, body of infringing material," Judge Oakes noted the District Court's findings that New Era did not suffer an irreparable injury and that the interests of free speech in the instant case exceeded New Era's interest in an injunction. When a biographer

or historian has made limited use of primary source material and the use has not affected the marketability of the material, the grant or denial of an injunction should be a matter for the court's discretion, stated Judge Oakes. Applying traditional equitable principles, Judge Oakes would have found that in this case the following factors warranted the denial of an injunction: the public interest in the dissemination of information; an interest in fostering creativity; providing the best balance between copyright interests and the First Amendment interests in issue; and the delay in New Era's proceeding which amounted to laches.

New Era Publications International v. Henry Holt and Company, Inc., 873 F.2d 576 (2d Cir. 1989) [ELR 11:5:10]

United States Supreme Court upholds New York City's regulation of noise levels at Central Park concerts

New York City may require performers using a Central Park amphitheater to use sound-amplification equipment And a sound technician provided by the city, the United States Supreme Court has ruled.

In 1986, the city, in an attempt to accommodate area residents and concert audiences, adopted guidelines for the use of the amphitheater.

Rock Against Racism had sponsored an annual program of speeches and rock music at the Naumberg Acoustic Bandshell. The association, upon learning that it would be expected to comply with the guidelines at an upcoming concert, sought an injunction against the enforcement of certain regulations. The District Court issued a preliminary injunction barring the enforcement of

the sound-amplification rule, and the association was permitted to use its own sound equipment and technician. Unfortunately, the concert, as in prior years, generated complaints about excessive noise from park users and nearby residents.

In a subsequent proceeding to review the association's claim for damages and a declaratory judgment, the District Court upheld the sound-amplification guidelines as a valid time, place or manner regulation.

A Federal Court of Appeals reversed the District Court's decision, finding that there were alternative means of controlling volume without interfering with the association's ability to control the sound mix of its concerts.

The United States Supreme Court, in reversing the Court of Appeals ruling, stated that the city's ordinance was valid on its face and found that the Court of Appeals erred in requiring the city to prove that its

regulation was the least intrusive means of furthering a legitimate governmental interest.

Justice Anthony Kennedy first observed that music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state." It was found that the regulation in issue was content-neutral; the city did not plan to impose a standard sound mix on performers; and the guidelines limited the discretion of the city's sound control officials.

Justice Kennedy then reaffirmed the point that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least- restrictive or least-intrusive means of doing so." New York's substantial interest in limiting sound

volume was served in a direct and effective way by the reasonable requirement that the city's sound technician control the sound mix during performances. The city also was concerned with providing sufficient amplification to reach all listeners within the concert-ground - the guidelines furthered this interest as well.

In all, the guidelines did not interfere with artistic control by performers over sound quality; had no effect on the quantity or content of expressive activity beyond regulating the extent of amplification; and therefore were valid under the First Amendment.

Justice Marshall, with whom Justice Brennan and Justice Stevens joined in dissent, would have found that the city's Sound Amplification Guidelines were not narrowly tailored to serve an interest in regulating loud noise and constituted an impermissible prior restraint. For Justice Marshall, the government's interest in avoiding loud sounds did not justify giving the government "total

control" over sound equipment, for such control would enable public officials to censor speech, "by a single turn of a knob," in advance of its expression. As a system of prior restraint, according to Justice Marshall, the guidelines were presumptively invalid and did not contain the detailed and neutral safeguards to prevent city officials from abusing their discretion with respect to sound quality or volume. The court's decision, in Justice Marshall's view, will mean that the government will not have to "balance the effectiveness of regulation with the burdens on free speech ... [and] need only assert that it is most effective to control speech in advance of its expression," a result which "eviscerates the First Amendment."

Ward v. Rock Against Racism, Case No. 88-226
(U.S.Sup.Ct., June 22, 1989) [ELR 11:5:11]

Atlanta sports agent wins reversal of conviction on charge of tampering with a sports contest arising from contract with Auburn University football player Kevin Porter

An Alabama appellate court has reversed the conviction of sports agent Jim Abernethy on a charge of tampering with a sports contest. A jury had acquitted Abernethy on charges of commercial bribery and unlawful trade practice, but the sports agent was sentenced to one year imprisonment and a \$2,000 fine for the offense of game-tampering.

In August 1987, Abernethy signed Auburn University football player Kevin Porter to a three year contract. Porter agreed to pay Abernethy specified fees for any professional sporting contracts or commercial endorsements negotiated by the agent. Abernethy gave Porter \$2,000 when the contract was signed, and agreed to

give the athlete \$900 each month, an additional \$900 holiday bonus, and \$100 for every interception Porter made. Porter received a total of \$1800 from Abernethy in the fall of 1987 before Abernathy left the sports agent business.

The contract between Abernethy and Porter violated the rules of the National Collegiate Athletic Association, and Porter eventually was declared ineligible and was not permitted to play in Auburn's Sugar Bowl game with Syracuse University.

The appellate court found that there was no evidence that Abernethy acted with criminal intent in his association with Porter. Alabama law defines the crime of tampering with a sports contest as follows: A person commits the crime of tampering with a sports contest if, with intent to influence the outcome of a sports contest, he: "(1) Tampers with any sports participant or sports official, or with any animal, equipment or other thing

involved in the conduct or operation of a sports contest, in a manner contrary to the rules and usages purporting to govern the sports contest in question..." In the instant case, stated the court, a violation of the NCAA rules and regulations would not constitute the criminal offense of tampering with a sports contest unless the requisite intent was shown. It was found that the term "outcome of a sports event," as used in the statute and in connection with a football game, meant the final score of the game, and did not include "the playing statistics of any individual football player."

The court therefore rejected the government's argument that Abernethy's criminal intent was demonstrated by the sports agent's knowledge of the NCAA rules prohibiting the professionalization of athletes, and of the risk that Auburn University, by playing an ineligible athlete, might have to forfeit its games.

Porter testified that both he and Abernethy intended that the athlete play every game of the season, and that his contract with Abernethy had no effect on his playing performance.

The court concluded by stating that the crime of tampering with a sports contest was " obviously not intended to and does not embrace the agent contract type of situation involved in this case." "By remarkable coincidence," observed Judge Bowen, the Alabama Athlete Agents Regulatory Act of 1987 became effective on the same day that Porter signed the contract with Abernethy. The Act does not specifically prohibit or make criminal sports contracts with student-athletes, but does require sports agents to register with a state regulatory commission. The commission may refuse to grant, revoke, or suspend the registration of a sports agent applicant who "has engaged in conduct which violates or causes a student-athlete to violate any [NCAA rule or

regulation] governing student-athletes and their relationship with athlete agents." The court stated that it was not asked to decide, and would not indicate its view as to whether Abernethy was guilty of violating of the provisions of the Alabama Athlete Agents Regulatory Act.

Abernethy v. State, 545 So.2d 185 (Ala.Cr.App. 1988), cert. den., Ala.Sup.Ct., (May 26, 1989) [ELR 11:5:12]

Student athlete's action challenging drug testing program of Northeastern University is rejected; separate proceeding against the National Collegiate Athletic Association is remanded to state court

In February 1988, a Federal District Court in Massachusetts remanded to a Massachusetts trial court an action brought by David F. Bally challenging, under the

Massachusetts Privacy Act and the state's Civil Rights Act, the drug testing and consent form protocol of the National Collegiate Athletic Association.

The NCAA had attempted to remove the action to federal court, but the court found that there was no issue of federal law that was essential (emphasis by the court) to Bally's claim; the Massachusetts statute provided a remedy for interference with rights created by both federal and state law, and Bally alleged both. Furthermore, the Massachusetts Civil Rights Act provided a remedy for the violation of state statutory rights as well as federal and state constitutional rights. Since Bally pleaded a "plausible" state statutory right of privacy, neither of his constitutional claims was essential to the Civil Rights Act claim. In all, the NCAA did not prove that original federal question jurisdiction was present.

Bally also had sued Northeastern University with respect to the school's drug testing program for student

athletes. In January 1989, a trial court granted summary judgment for Bally on his civil rights and privacy claims, but ruled that the university did not violate any contractual duties owed to Bally.

The Supreme Judicial Court of Massachusetts has reversed the trial court judgment. The court found that the drug testing program was "indiscriminate, impartially administered testing," and was not the type of direct assault required for obtaining relief under the Massachusetts Civil Rights Act - Bally did not allege either an individualized threat nor a threat of serious harm. Northeastern merely excluded Bally from intercollegiate sports when he refused to sign a drug test consent form.

In turning to the privacy claim, the court noted that Bally failed to allege any public disclosure of confidential information.

Bally v. National Collegiate Athletic Association, 707 F.Supp. 57 (D.Mass. 1988); Bally v. Northeastern University, 532 N.E.2d 49 (Mass. 1989) [ELR 11:5:13]

Student athlete's action challenging University of Washington's drug testing program is remanded to state court

After a series of proceedings (see ELR 9:11:15; 9:4:19), a Federal District Court denied student athlete Elizabeth O'Halloran's motion to remand to state court an action challenging the University of Washington's drug testing program. A Federal Court of Appeals has reversed the District Court's order, and has remanded the action to the District Court with directions that the court remand the entire case back to the state court from which it was removed.

Judge Alarcon noted that the university, in response to O'Halloran's complaint, cited the requirements of its membership agreement with the National Collegiate Athletic Association; the issues raised by the university presented "a pure question of state law." And the NCAA, as an unincorporated association, was not entitled to seek removal on the ground of diversity of citizenship. The District Court therefore did not have subject matter jurisdiction over the third-party complaint involving the NCAA and removal was improper.

O'Halloran v. University of Washington, 679 F.Supp. 997 (W.D.Wash. 1988); 856 F.2d 1375 (9th Cir. 1988)
[ELR 11:5:13]

Professional boxer recovers \$160,000 in compensatory damages from lawyer and promotion company, but punitive damage award will be reviewed

Professional boxer Harlan Alonzo Smith, known as Lonnie Smith, entered a contract with Jack B. Solerwitz in 1985 whereby Solerwitz agreed to act as Smith's attorney and legal advisor in connection with a proposed championship match for the boxer. Smith subsequently signed a contract with Lightning Bolt Productions, Inc., a licensed boxing promoter, granting the company the exclusive right to promote boxing matches for Smith; Solerwitz was a principal in Lightning Bolt.

After winning the World Boxing Council superlight-weight championship in August 1985, Smith received \$24,000 from Lightning Bolt, but did not receive the remaining \$76,000 of the compensation due under his contract with the company, nor a \$200,000 bonus.

When Smith sued Lightning Bolt and various other parties for breach of contract, breach of fiduciary duty and fraud, the company paid Smith, pursuant to an order of the Federal District Court, an additional \$117,000.

A Federal District Court jury awarded Smith compensatory damages (based on certain contractual guarantees) of about \$600,000 and assessed punitive damages against Solerwitz in the amount of \$1.25 million and against Lightning Bolt in the amount of \$750,000. In response to motions for judgment notwithstanding the verdict or for a new trial, the court found that an award of about \$160,000 in damages would more accurately reflect the total compensation to which Smith was entitled, as would punitive damages of \$500,000 against Solerwitz and Lightning Bolt jointly. Smith agreed to accept these amounts, and the court, accordingly, denied the motions of the Lightning Bolt parties.

A Federal Court of Appeals has affirmed the award of compensatory damages to Smith, vacated the award of punitive damages, and remanded the matter for further proceedings.

Judge Amalya L. Kears, writing for a three judge panel of the court, found that the motion for judgment notwithstanding the verdict on the fraud claim was properly denied because, in part, the evidence at trial was sufficient to support a finding that Lightning Bolt and its officers had made affirmative representations that implied that "the company was financially able to promote the boxing match or that at the very least they had concealed its lack of assets." It was shown that the company did not have sufficient capital to promote the bout.

With respect to the award of punitive damages, Judge Kears first determined that punitive damages were available to Smith in view of the "stream of misrepresentations" to the boxer. Both Solerwitz and Lightning

Bolt, stated the court, "violated the duties that arose from their relationships of trust and confidence with Smith and so grossly disregarded these duties that their conduct exhibited a high degree of moral culpability." However, Judge Kearse found that there was some merit in Lightning Bolt's contention that the amount of the punitive damages award was excessive given the evidence that the company had no substantial assets; Solerwitz, however, did not show that the award against him was disproportionate to his wealth.

Judge Kearse concluded by pointing out that the District Court erred in holding Lightning Bolt and Solerwitz jointly liable for the \$500,000 punitive damage award. An award against Lightning Bolt, individually, of no more than \$100,000, stated the court, would likely deter future similar conduct by the company. Therefore, on remand, the District Court will determine the appropriate reduction of the punitive damage award against

Solerwitz, and, unless Smith agrees to remit the punitive damages against Lightning Bolt in excess of \$100,000, must order a new trial as to the appropriate amount of the company's liability for punitive damages.

Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363 (2d Cir. 1988) [ELR 11:5:14]

Cable television franchise requirements of three Bay Area cities violate First Amendment

After finding that the exclusive cable television franchise arrangements of three California cities violated the First Amendment rights of cable television operators such as Century Federal, Inc. (ELR 9:3:17), Federal District Court Judge Eugene Lynch subsequently considered the constitutionality of the minimum

requirements that the cities sought to impose on prospective cable television franchisees.

In September 1987, Judge Lynch concluded that the cities' access channel, universal service, and state-of-the-art technical and equipment requirements violated the First Amendment. It was further found that subjecting cable operators to fees in excess of the cities' costs from the franchising process was not unconstitutional per se, but that issues of fact concerning the imposition of fees precluded summary judgment on this question.

About one year later, the court reviewed Century Federal's claims concerning the cities' financial requirements for franchise holders. The cities argued that they were entitled to an annual franchise fee of five percent of Century Federal's gross receipts as a cable operator in return for the use of the cities' property interests in the public rights of way which would be occupied by the company's cable.

Judge Lynch, although agreeing that the cities possessed property interests in the public rights of way, expressed "serious doubts" that the franchise fee was content neutral. And, using a time, place, and manner analysis, the court stated that even if the franchise fee were viewed as content neutral, the fee was not narrowly tailored to serve a significant interest - the cities did not show that they made any attempt to charge all comparable users an equal rent or that they otherwise sought narrowly to tailor the fee to their interest in revenue. Furthermore, there was no alternative forum for cable television operators to communicate since cable has to pass through public rights of way.

An analysis under the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968), also led the court to conclude that the cities' franchise fee was a far greater restriction on speech than was necessary to serve an interest in raising revenue.

The court determined that while under some circumstances the cities might charge a non-discriminatory rent for the use of their rights of way even though the forum was a "limited public forum," in the instant case the franchise fee impermissibly discriminated against speakers exercising protected First Amendment rights and therefore was unconstitutional. Century Federal thus was entitled to summary judgment on the franchise fee issue. Summary judgment also was available to Century Federal with respect to the cities' construction and performance bond requirements since these requirements also were not shown to be "legitimate nondiscriminatory bonding requirements that apply equally to all comparable users of the public rights of way..."

Century Federal, Inc. v. City of Palo Alto, 710 F.Supp. 1552 (N.D.Ca. 1987); 710 F.Supp. 1559 (N.D.Ca. 1988) [ELR 11:5:15]

Landmark designation for theater is upheld in Philadelphia; New York court permits alterations of landmark theater in that city

Courts in Pennsylvania and New York recently have considered actions involving theaters designated as historic landmarks.

In *Sameric Corporation v. City of Philadelphia*, Sameric Corporation, the owner of the Boyd Theatre in downtown Philadelphia, challenged the designation of the theater as historic. The Philadelphia Historical Commission had cited the interior and exterior of the theater as a rare example of a substantially "intact Art Deco movie palace."

In affirming the trial court's decision dismissing Sameric's action, the Commonwealth Court agreed that

substantial evidence supported the Commission's findings, and that the designation of the interior of the theater as historic was not an unconstitutional exercise of the state's police powers - the theater's interior was "an essential part of the community's historic and aesthetic values."

Judge Crumlish stated that "As trustee of the historic environment, the Commonwealth must execute a far-sightedness which, at times will necessarily transcend private interests. Allowing a private property owner to escape designation of his building's interior simply because the owner may choose to deny public access deprives the Commonwealth the opportunity (emphasis by the court) to preserve its historic resources."

In New York, the Committee to Save the Beacon Theater challenged the city's Landmarks Preservation Commission's preliminary approval of certain alterations to the interior of a landmark theater. The owner of the

theater and its lessee sought permission to put a cabaret and discotheque, including a dance floor, bar, restaurant and kitchen area, in the theater; the proposed alterations included the removal of seats from the orchestra area and from a balcony, the temporary removal of landmark protected lighting fixtures, the upgrading of mechanical, electrical and lighting systems, and the construction of a non-permanent dance floor. The lessee planned to establish an escrow fund which would allow for the restoration of the theater at the end of its seven year lease.

After conducting hearings, the Commission stated that it would grant the requested certificate if a number of conditions were met.

The Committee brought a lawsuit raising various claims, including the argument that the proposed alterations would damage the interior of the theater.

The trial court found that the Commission's proposed decision to grant a Certificate of Appropriateness was

arbitrary and capricious, enjoined the Commission from issuing a Certificate, and enjoined the lessee from proceeding with any alterations to the interior of the theater.

A New York appellate court has ruled that since the Commission issued a Notice of Approval but had not yet issued its Certificate of Appropriateness, the matter lacked the finality required for judicial review. The court observed that the lessee was not entitled to the Certificate until substantial conditions were met - if the conditions were not satisfied, the Certificate might never be issued.

Given the finding that the matter was not "ripe for judicial review," the merits of the petition were not reached. However, stated Judge Smith, if the court were to reach the merits, it would conclude that the lower court erred in finding that the determination of the Commission was arbitrary and capricious. Judge Smith noted that the members of the Commission included historical and

architectural experts "to whom deference should have been given on the basis of this record ... especially since these specialists were acting within their field of expertise." And the Commission, on the basis of extensive and detailed findings, seemed to have reasonably reached its decision that although certain "factors" would be shielded from view by non-permanent fixtures, they also would be shielded from harm. In all, the Commission did not abuse its discretion in proposing to issue the Certificate of Appropriateness for the alterations.

Sameric Corporation v. City of Philadelphia, 558 A.2d 155 (Pa.Cmnwlth. 1989); Committee to Save the Beacon Theater v. City of New York, 541 N.Y.S.2d 364 (N.Y.App. 1989) [ELR 11:5:15]

Antitrust claim based on manufacturer's termination of artwork dealership is rejected

In 1985, the Edna Hibel Corporation, a manufacturer of works such as collector plates and lithographs created by Hibel, terminated a non-exclusive dealership with Sol Winn. Winn sued the company for violating section 1 of the Sherman Act, claiming that Hibel combined with Elegante Shoppes, a competing dealer, to protect Elegante from price competition and to maintain Hibel's retail price schedule on its products.

A Federal District Court granted Hibel's motion for a directed verdict, and a Federal Court of Appeals has upheld the decision on the ground that Winn failed to establish that Hibel and Elegante acted in concert to fix prices.

Judge Tjoflat noted that "artwork such as that created by Hibel is a unique product whose market is based on

individual taste and perceived investment value rather than competitive market conditions. Thus, retail price maintenance is not easily subject to outside competition, and could in fact enhance the product's investment value."

Winn's evidence did not exclude the possibility that Hibel acted independently of Elegante's complaints about Winn's discounting activities. And Hibel had sufficient reason to maintain a retail price structure to have acted independently, given that much of the value of the Hibel artwork was derived from their presumed investment value. Judge Tjoflat observed, with respect to the Hibel products, that "discounting by Winn served to cheapen their image in the eyes of the investing public and therefore undermined their attractiveness to potential customers as well as their value to those already owning them."

Winn v. Edna Hibel Corporation, 858 F.2d 1517 (11th Cir. 1988) [ELR 11:5:16]

Costume manufacturer obtains permanent injunction barring competitor from distributing similar products

A Federal District Court in California has granted National Theme Productions' request for a permanent injunction barring Jerry B. Beck, Inc. from manufacturing and distributing certain copyrighted masquerade costumes, including "Rabbit in Hat," "Tigress," "Magic Dragon," and "Pampered Pup." National Theme claimed that when its business relationship with Beck ended in November 1986, Beck retained the patterns and markers which had been used to produce the National Theme costumes. Apparently, in 1987, Beck used the patterns

and markers to produce his own line of Halloween and masquerade costumes.

Chief Judge Gordon Thompson, Jr. first noted that National Theme's costumes were copyrightable, if at all, "to the extent that they have features which can be identified separately and are capable of existing independently as a work of art ... The features only need be conceptually separable from the utilitarian functions of the garments to be entitled to protection under copyright law." In the instant case, the costumes were useful articles because they were "made up of items which are meant to be worn..." However, noted Judge Thompson, the costumes "were not...designed to optimize their function as clothing;" primarily represented "the artists' arbitrary conceptions responsive to their aesthetic sensibilities;" and therefore were protectable as applied art under the copyright law.

The court then found that National Theme's costumes were not standard renditions of common ideas, and that it was "obvious" that Beck captured the total concept and feel of National Theme's protected expression - the similarities between the costumes were "overwhelming; the differences virtually undetectable or insignificant." National Theme established substantial similarity in both the ideas and expression involved in the costumes in issue and was entitled to a permanent injunction prohibiting Beck from further activities with respect to those costumes.

National Theme Productions, Inc. v. Jerry B. Beck, Inc.,
696 F.Supp. 1348 (S.D.Ca. 1988) [ELR 11:5:16]

Georgia statute banning exit polling is ruled unconstitutional

A Federal District Court in Georgia, in a decision issued in June 1988 but not published until early 1989, has held unconstitutional a Georgia statute making it a misdemeanor punishable by imprisonment of up to one year or a fine of up to \$1,000 or both, for any person to conduct an exit poll or public opinion poll with voters on any primary or election day within 250 feet of any polling place. The court, after reviewing the evidence concerning the value of the information gathered by exit polls, found that the statute, by restricting the freedom to speak about elections, government and politics, "strikes at the very core of the First Amendment." The argument that the use of written questionnaires, rather than oral interviews, constituted unprotected "conduct" was rejected - the physical method of collection did not

provide a basis for restricting otherwise protected activity.

Judge Robert H. Hall further found that the statute was a "content-based" restriction on speech because it regulated a specific subject matter. And although the state's interests in maintaining "the sanctity and decorum" of the polls and in encouraging citizens to vote were compelling, the statute was not narrowly tailored to promote these interests. It was noted that the statute proscribed all exit polling, no matter how unobtrusive and non-disruptive. Furthermore, several other less restrictive statutory provisions were available to insure the peace, order and decorum of the polls.

The statute also was found overbroad in that it prohibited the "orderly administration of non- disruptive exit polling as well as disruptive activity."

Judge Hall concluded that a ban on exit polling within the interior of the building in which the polling place is

located and within 25 feet of the exit of such a building would be constitutional, and, with such a narrowing construction, granted motions for summary judgment brought by the three major networks and permanently enjoined the enforcement of the statute beyond 25 feet of the exit of any building in which a polling place is located.

National Broadcasting Company, Inc. v. Cleland, 697 F.Supp. 1204 (N.D.Ga. 1988) [ELR 11:5:17]

Edmonton Oilers are not subject to jurisdiction in Rhode Island in dispute involving hockey player, but National Hockey League's motion for dismissal is denied

In 1988, Rhode Island hockey player John Clark Donatelli sought to be declared a free agent by the National Hockey League. The NHL ruled that Donatelli still was the property of the Edmonton Oilers Hockey Corp. After an arbitrator reached the same conclusion, Donatelli sued Edmonton and the NHL in a Rhode Island trial court. The NHL parties filed a petition for removal to federal court, and subsequently filed a motion to dismiss for lack of federal jurisdiction.

Federal District Court Judge Lagueux found that Donatelli did not show that Edmonton had any contacts, let alone the requisite level of minimum contacts, with Rhode Island to subject the team to the court's jurisdiction.

The contacts of the NHL itself, such as sending scouts into the state to report on amateur hockey players and selling goods bearing the NHL logo, also were not sufficient to establish the court's jurisdiction. However,

stated the court, an unincorporated association is subject to the personal jurisdiction of every forum having general in personam jurisdiction over one or more of its members. The NHL did not incorporate and was not entitled "to cloak itself in the mantle of a corporation in order to escape this Court's jurisdiction." It was found that the Boston Bruins had the necessary minimum level of contacts with the state to provide the court with general in personam jurisdiction over the team; the court therefore had general personal jurisdiction over the NHL through the Bruins, concluded Judge Lagueux, for "the actions of the Bruins corporation [were], in effect, the actions of the NHL for jurisdictional purposes."

Donatelli v. National Hockey League, 708 F.Supp. 31 (D.R.I. 1989) [ELR 11:5:17]

Briefly Noted:

Attorneys Fees/USFL-NFL Action.

A Federal District Court has ruled that the National Football League must reimburse the now-defunct United States Football League for \$5.5 million in attorneys fees arising from an antitrust action in which a jury, in 1986, found the NFL liable on the USFL's claim of actual monopolization in the major league professional football market. The jury awarded the USFL only nominal damages of \$1.00 as a result of the NFL's conduct. A Federal District Court entered judgment on the jury's verdict and the judgment was upheld by a Federal Court of Appeals (see ELR 10:3:9). In response to the USFL's motion seeking attorneys fees, the NFL pointed out that the USFL lost a major portion of its case, and did not prove any damage with respect to the claim on which the

USFL prevailed. But the jury's finding of injury and an antitrust violation precluded the NFL's argument that the USFL was not a prevailing party under section 4 of the Clayton Act, stated Judge Peter K. Leisure. The court observed that the parties were involved in an extremely complex action involving unique issues, and that the litigation proceeded at a "breakneck pace." However, in view of the fact that the USFL achieved limited success, the court set "reduced" fees for the litigation of the main action at \$5.2 million; additional fees for preparing the fee application brought the total award to about \$5.5 million.

United States Football League v. National Football League, 704 F.Supp. 474 (S.D.N.Y. 1989) [ELR 11:5:18]

Copyright Infringement/"Mickey Mouse."

A Federal District Court in Washington, D.C. has found that an unlicensed distributor of merchandise displaying Mickey Mouse and Minnie Mouse violated the Walt Disney Company's trade dress in the "charming mouse characters," and enjoined Carl Powell from further infringing activities. Judge Gesell, stating that the evidence showed "gross impropriety wholly without justification," awarded Disney statutory damages of \$90,000, and attorneys fees of \$20,000.

Walt Disney Co. v. Powell, 698 F.Supp. 10 (D.D.C. 1988) [ELR 11:5:18]

Contracts/Jurisdiction.

When Leo Heaps, a Canadian citizen and journalist, sued various parties for the alleged misappropriation of contract rights, the complaint was dismissed as to the two New York parties, Simon & Schuster and Home Box Office Corp. Heaps claimed that he had obtained the exclusive rights to Juval Aviv's story concerning his experiences as a member of an Israeli counter-terrorist team sent to Europe to assassinate those responsible for the Munich Olympics massacre. Heaps sought assistance from two Canadian publishers, but in his lawsuit the journalist contended that the publishers contacted Aviv directly for the rights to publish a book about his experiences, and that the publishers then entered contracts with Simon & Schuster and with Home Box Office for the United States and film rights, respectively, to the story. A New York appellate court has ruled that the

trial court incorrectly denied the Canadian parties' motion to dismiss on grounds of forum non conveniens, and granted the motion on the condition that the Canadian parties stipulate to waive any statute of limitations and personal jurisdiction defenses in Canada. *Heaps v. Simon & Schuster, Co.*, 540 N.Y.S.2d 437 (N.Y.App. 1989) [ELR 11:5:18]

Bankruptcy/CBS Interest Claim.

Soon after Peaches Records and Tapes filed for a Chapter 11 bankruptcy petition, the company and CBS Records entered into a cash collateral stipulation which was approved by the bankruptcy court. Under the stipulation, CBS, which asserted a partially secured and partially unsecured claim totalling about \$5.5 million, was provided a replacement lien which was to have "the

same validity, enforceability and priority as the pre-Chapter security interest. The security interest was subordinate to a first priority lien in favor of Citibank. The liquidation of Peaches Records' property prompted extensive litigation. A final order eventually was entered pursuant to which CBS obtained a superpriority claim; the amount of the claim was about \$1.7 million - a sum equal to the value of CBS' collateral established as of the petition date. In mid-1988, the bankruptcy court found that CBS, an unsecured creditor, was not entitled to an additional \$1.1 million in interest on its section 507(b) superpriority claim. A Federal Court of Appeals has agreed with the ruling, stating that the applicable statute did not support the conclusion that a claim holder under section 507(b) also would be entitled to an additional superpriority claim for interest on the decreased value of the collateral. CBS's claim also was contrary to

the general rule disallowing postpetition interest to unsecured creditors, concluded the court.

In re Peaches Records & Tapes, Inc., Bankr. Nos. LA 81-06676, LA 81-06677 (9th Cir., Aug. 2, 1989) [ELR 11:5:19]

Sex Discrimination/"Ladies Day" Promotion.

The Iowa Supreme Court has reversed a trial court decision dismissing Charles Ladd's sexual discrimination claim against the Iowa West Racing Association, doing business as Bluffs Run. According to Ladd, every Wednesday afternoon during the summer of 1987, Bluffs Run sponsored a "Ladies Day" promotion in which women obtained free admission into the grandstand area of the race track and discounted prices on

food, drinks, and souvenirs. Men were required to pay the usual prices for these items. In his lawsuit, Ladd claimed that the promotion violated the Iowa Civil Rights Act, and sought to recover damages as well as to enjoin Bluffs Run from reinstating the "Ladies Day" promotion. The court stated that the language of the relevant statute made it an unlawful practice to discriminate against any person because of sex "in the furnishing of the accommodations, advantages, facilities, services, or privileges of any public accommodation." The Bluffs Run promotion was "clearly violative" of the statute by discriminating against men in the furnishing of its facilities and services, and the trial court erred by dismissing Ladd's action, concluded the court in remanding the case for further proceedings consistent with its opinion.

Ladd v. Iowa West Racing Association , 438 N.W.2d 600 (Iowa 1989) [ELR 11:5:19]

Sex Discrimination/Rodeo Barrel Racer.

Lance Graves claimed that the Women's Professional Rodeo Association discriminated against him in violation of Title VII by denying him membership in the association because of his sex. The association's action, according to Graves, deprived him of the opportunity to earn a living in the field of professional rodeo barrel racing. A Federal District Court in Arkansas has rejected Graves' argument that the association exercised such "pervasive control" over the means and manner of work of its members that it was within the scope of Title VII. The court noted that the association was voluntary, and did not pay wages, withhold taxes, or provide insurance for its members. Although the association set rules to be followed by members competing in a particular contest,

the association did not tell its members when and where to participate. Even if the association were found to be an employer subject to the provisions of Title VII, Graves could not show any interference with at least a potential employment relationship -the only interference alleged was Graves' inability to participate in a competition for prize money. Graves, in the absence of an employment-type relationship, was not an individual protected by Title VII. The court stated that it was without jurisdiction to retain the pendent state law claims.

Graves v. Women's Professional Rodeo Association, Inc., 708 F.Supp. 233 (W.D.Ark. 1989) [ELR 11:5:19]

Horse Racing/Trainer Suspension.

When horse trainer Kathy Hutchinson was charged with violating state law by administering medications to horses within 48 hours of a race at Canterbury Downs racetrack, the track stewards, in part, imposed a \$500 fine on the trainer and suspended her license for 30 days. The Minnesota Racing Commission agreed with the track stewards, and a Minnesota appellate court has upheld the Commission's decision. The court found that the Commission did not violate Hutchinson's rights of due process, and that the Commission's decision was supported by substantial evidence.

Matter of Hutchinson, 440 N.W.2d 171 (Minn.App. 1989) [ELR 11:5:19]

IN THE NEWS

Missouri restricts sale to minors of overly violent films

The state of Missouri has restricted the sale to persons under 17 of overly violent films.

The so-called "slasher movie" law provides, according to news reports, that a film will be considered overly violent if the average person might find that the film appeals to a morbid interest in violence by minors; depicts violence that is patently offensive to the average person, applying contemporary adult community standards; and lacks serious literary, artistic, political or scientific value for minors. [Oct. 1989] [ELR 11:5:20]

Ringo Starr blocks producer from releasing album recorded by former Beatle in 1987

A Georgia trial court has granted Ringo Starr an order restraining the release of an album recorded in 1987 by the former Beatle. Starr claimed that his problem with alcohol, for which he has received treatment, impaired the quality of the album, and that the use of another drummer's services altered the sound of the album. Under the order, record producer Chips Moman and CRS Records of College Park, Georgia, may not distribute the album prior to a trial on Starr's action. [Oct. 1989] [ELR 11:5:20]

Arbitrator awards \$10.5 million to players on account of collusion on free agency by major league baseball team owners in 1985-1986

Arbitrator Tom Roberts has entered a \$10.5 million award against the 26 major league baseball clubs in accordance with his 1987 ruling (ELR 9:5:19) that the team owners had conspired to restrict player free agent movement after the 1985-1986 season. The award will benefit 139 players, including Kirk Gibson, Carlton Fisk, and the no longer active Don Sutton and Tommy John, who claimed that they suffered "salary shortfall" in 1986 due to the collusion of the team owners. Future proceedings will be held to consider the players' claims that the collusion also affected the length of multi-year contracts, bonus provisions, and buyout options. The Major League Players Association and the owners' Player Relations Committee will prepare guidelines for allocating the arbitrator's award to individual players. [Oct. 1989] [ELR 11:5:20]

Federal Communications Commission reaffirms fine against California "dial-a-porn" company

The Federal Communications Commission has reaffirmed a \$600,000 fine imposed against Intercambio, Inc. of San Jose, California (ELR 9:12:19); the fine was based on the company's failure to restrict access by minors to its dial-a-porn services, and for transmitting obscene material across state lines. [Oct. 1989] [ELR 11:5:20]

DEPARTMENTS

Book Review:

International Copyright Law and Practice, edited by Melville B. Nimmer and Paul Edward Geller

Earlier this year -- on March 1st, 1989 to be exact -- the United States finally joined the Berne Union and adhered to its Convention for the Protection of Literary and Artistic Works. In doing so, the U.S. entered the fourth stage of its development insofar as international copyright is concerned.

For more than 100 years -- from 1790, when our first copyright statute was enacted, until 1891 -- the United States gave no effect whatsoever to copyrights owned by foreigners; and U.S. copyrights in turn received no protection abroad. On balance, during that period, the U.S. apparently concluded that it was better to be a "pirate" nation, because we copied more than was copied from us.

In 1891, U.S. law was amended to provide, for the first time, copyright protection to works from those nations which protected U.S. works, as determined by the

President or as a result of bilateral treaties. We did not join Berne at that time, though Berne already was five years old by then. Nor did we join Berne in the following decades, despite growing dissatisfaction with the rather tangled web of bilateral treaties and Presidential proclamations that were then all we had.

By the time the U.S. was anxious to join a multi-national convention, like Berne, in the 1950s, the U.S. Copyright Act fell so far short of what Berne required for membership, that adherence to Berne was a political impossibility. As a result, the U.S. instigated the creation of a then-new multi-national copyright treaty called the Universal Copyright Convention -- a convention whose membership standards were tailored to conform to then-existing provisions of the U.S. Copyright Act. The U.S. adhered to the U.C.C. in 1955, and for works published from then until March 1, 1989, the U.C.C. was the vehicle by which U.S. works obtained copyright

protection in most foreign countries of the world, and vice versa.

The Copyright Act of 1976 amended U.S. law so significantly, that it almost, but not quite, satisfied the requirements of Berne membership. So when it became apparent, over the course of the next 13 years, that even the U.C.C. was inadequate for U.S. purposes, only a handful of further revisions were necessary to upgrade U.S. law one more time, thus making it compatible with Berne and opening the door for U.S. membership in the Berne Union.

Though the basis for international protection of U.S. copyrights has changed from stage-to-stage, the bilateral treaties and proclamations to which the U.S. is a party, the U.C.C., and the Berne Convention have one feature in common. All of them provide that as a general rule, the protection afforded to U.S. works abroad is determined by the copyright laws of the foreign countries in

which protection is sought Oust as the protection afforded to foreign works in the U.S. is determined by U.S. copyright law). Thus, for the most part, what American lawyers refer to as an "international copyright" question is really a question of foreign copyright law, to be researched and analyzed in much the same way as foreign lawyers would research and analyze what for them is a purely domestic copyright question.

It is this foreign-law nature of international copyright that makes it difficult for American lawyers to do international copyright research. In order for an American lawyer to know what protection a U.S. work would receive in Japan or Germany, for example, it is necessary to know something about Japanese or German copyright law; and this sort of information has not been easy to come by. Though the texts of foreign copyright statutes are published in the U.S. in English translation, those statutes -- by themselves -- do not provide any clearer

picture of foreign copyright than the Copyright Act of 1976 -- by itself -- provides of U.S. law.

The burden of obtaining knowledge about foreign copyright laws has been eased, quite substantially, by International Copyright Law and Practice, a massive one-volume treatise edited by the late Professor Melville B. Nimmer (the original author of the "bible" of American copyright law, Nimmer on Copyright) and Los Angeles attorney Paul Edward Geller.

International Copyright Law and Practice consists of 23 separately-authored chapters, each of which is virtually a mini-treatise in itself. Twenty-one of these chapters describe the national copyright laws of the following countries: Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, Germany, Greece, Hong Kong, Hungary, India, Israel, Italy, Japan, the Netherlands, Poland, Sweden, Switzerland, the United Kingdom, and the United States. Another chapter

describes the way in which the trade laws of the European Economic Community affect copyright principles among the twelve countries that are members of the E.E.C. Each of these chapters was written by a noted copyright attorney from the country whose law is described in that chapter. The chapter on United States law, for example, was written by none other than David Nimmer, the current author of Nimmer on Copyright.

The first chapter in the book is entitled "International Copyright: An Introduction," and was written by the book's editor Paul Edward Geller (who also authored the "Legal Affairs" article in this issue of the Entertainment Law Reporter). This lengthy chapter (it runs 189 pages by itself) serves both as an explanation of how to use the treatise and as a detailed exposition of the sometimes intricate principles of international copyright. Indeed, this chapter is so academic in its content and presentation, that it easily could have been published

separately by a university press as a work of pure and high-level scholarship.

The treatise as a whole is extremely practical, and features two especially noteworthy characteristics. First, though English is a second language for most of its authors, it is entirely readable even by those for whom (Americanized) English is their only language. Second, the organization of all of the national-law chapters is virtually the same, so that the same copyright principle is discussed at the same section of each chapter. In other words, duration of copyright appears at section 3 of each chapter, ownership and transfer at section 4 of each, fair use at section 8[2], and so forth. This makes it quite simple and quick to research any issue in every chapter, so long as the reader knows where that issue is discussed in any chapter. American lawyers may therefore want to begin their research in David Nimmer's chapter on United States law, because they will be most

familiar with it, and when they have identified the section number in which the issue is analyzed in that chapter, turn to the same section number in the chapters on the foreign countries whose laws they are researching.

As technology shrinks the world, and as copyrighted U.S. works become a major revenue-producing export, questions involving international copyright have become ever more common. While foreign law specialists can always be consulted -- and still should be whenever time and resources permit -- *International Copyright Law and Practice* is an excellent place for an American lawyer to get at least a preliminary view of the copyright laws of foreign countries. It is a worthy companion to *Nimmer on Copyright* and will probably become one of the most thumbed volumes owned by entertainment and copyright lawyers.

International Copyright Law and Practice is published by Matthew Bender & Company, Inc., 1275 Broadway,

Albany, N.Y. 12204; phones (518)487-3000 and (800)833-3630.

Lionel S. Sobel
[ELR 11:5:21]

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Shouldn't California's Retraction Statute Protect Magazines Too? by Glenn Schwarzbach, 18 Southwestern University Law Review 197 (1989)
[ELR 11:5:23]