LEGAL AFFAIRS

Recent Tax Cases

by Schuyler M. Moore

Recent cases, including a U.S. Supreme Court case, have a profound and sweeping impact on the entertainment industry. Everyone in the entertainment industry should be aware of these recent developments.

Loan-Out Corporations

A common thorn for the entertainment industry is the treatment of one-man loan-out corporations. In Sargent v. Commissioner, 93 T.C. No. 48 (1989), the tax court held that a hockey player's loan-out corporation should be disregarded, and the hockey player should be treated as an employee of the hockey club, on the basis of substance over form. The same result may be reached with respect to most individuals acting through loan-out corporations in the entertainment industry, particularly actors. This approach has already been adopted by both the courts and the IRS with respect to foreign loan- out corporations (Rev. Ruls. 74-330 and 331 and Johansson, 336 F.2d 809), and there is no basis to distinguish domestic loan-out corporations. In fact, the IRS has recently instigated a payroll audit of a mini-major and is challenging a substantial number of domestic loan-out corporations that were paid.

Based on these developments, a studio or producer may want to insist on imposing employee wage withholding in all circumstances for payments made to loan-out corporations. At the very least, the studio or producer that does not withhold should obtain a tax indemnity from the individual, perhaps secured by a letter of credit. If withholding is not imposed, the studio or producer runs the risk of later having to pay the IRS the amount of taxes that should have been withheld plus interest and penalties.

Amortization of Advances

It is common in the film industry for a licensee to pay a fixed advance payment that is recoupable by the licensee out of the licensor's share of revenues. For example, the license may be for a ten year term, and recoupment may occur in the first or second year. The standard practice has been to amortize advance payments for tax purposes over the entire term of the license using the income forecast method. In John Phillips v. U.S., 89-2 U.S.T.C. Para. 9407 (D.C.N.Y. 1989), the court held that minimum advance royalties paid by book publishers to book authors should be amortized by the publishers over the term of recoupment of the advance, not over the life of the rights held by the book publisher. An identical approach was adopted by the IRS and the court in Jostens, Inc. v. Commissioner, T.C.M. 1989-656 (1989), to permit amortization of advance royalties paid for trade names, trademarks, and copyrights as such advance royalties were recouped. By analogy, these cases should apply to the amortization of advance payments for film rights also. This approach will allow for substantial acceleration of the amortization of such advance payments, permitting amortization over the term of recoupment instead of over the term of the film rights.

This approach could also be used to accelerate the deduction of advance payments to profit participants, such as actors and directors, as long as the contract contains express recoupment provisions. The current standard contract often provides for implicit recoupment (e.g., a

$1 million payment plus 5% of net profits over $20 million), and it would be better to provide for express recoupment (e.g., a $1 million payment plus 5% all net profits, but the producer recoups the first $1 million otherwise payable to the profit participant). In this manner, the advance payments may be amortized over the period of express recoupment.

Advance Payments

Another common, devastating problem in the entertainment industry is that advance payments are taxable upon receipt, even to an accrual method taxpayer. In Indianapolis Power & Light Company v. Commissioner (January 9, 1990), the U.S. Supreme Court confirmed that advance payments are taxable. The Court defined advance payments as non-refundable payments. That is, the payee is "guaranteed" that it can keep the money as long as the payee performs its own obligations under the contract. However, the court held that "deposits" are not taxable. The Court defined "deposits" as refundable payments that are made to secure the payor's performance of its legal obligations under the contract, including its obligation to make payments under the contract. Thus, if the payor fulfills its obligations under the contract, including its obligation to make payments, the deposit is refunded, so the payee is not "guaranteed" that it can keep the specific funds deposited.

Most importantly, the Court held that a deposit was not taxable even if the contract calls for minimum payments that exceed the deposit. This holding is found in the Court's discussion of lease deposits, which it stated were non-taxable: "The typical lease deposit secures the tenant's fulfillment of a contractual obligation to pay a specified rent throughout the term of the lease."

A deposit will be non-taxable even if the payor can elect to apply the deposit against amounts owed to the payee, and even if such election is frequently done. However, if there is a stated or unstated agreement from the outset that the deposit will automatically be applied against future payments, the deposit will be treated as a taxable advance payment. A deposit is non-taxable even if the funds are co- mingled with the payee's other funds and even if no interest is paid of the refund.

This case provides the blueprint on how to avoid the common problem of immediate taxation on the receipt of an advance. With precise, tax-sensitive drafting of the contract, taxation can be deferred for some time:

a. The payment should specifically be referred to as a "refundable deposit" that is made to secure future payment obligations.

b. To achieve the desired economic result, the contract should provide for minimum future payments at least equal to the deposit. For example, a film license could provide that the licensor would receive a share of net profits but that one year after delivery of the film, the licensee would owe the licensor a guaranteed minimum amount at least equal to the deposit.

The conservative course is to not allow the payor to elect to apply the deposit against the amounts owed in the future. Ideally, the payor would first make payment to the payee, and the payee would subsequently release the deposit to the payor. However, the payor may insist that these payments be made simultaneously, perhaps through an escrow.

There is a risk of an IRS challenge on the grounds of substance over form, although the Supreme Court did specifically state that a deposit is non-taxable even if the minimum payments exceed the deposit. However, to protect against penalties in the event of an IRS challenge, it may be prudent to obtain in advance a legal opinion on the tax consequences of the particular contract and perhaps to disclose the position being taken on the tax return.

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[ELR 11:11:3]

RECENT CASES

United States Supreme Court lets stand decision awarding $1.2 million in damages to owners of the play "Kismet" in copyright infringement action arising from use of music in MGM Grand Hotel's production "Hallelujah Hollywood"

The United States Supreme Court, refusing to succumb to the allure of ancient Baghdad, has declined to review a Federal Court of Appeals decision ordering Metro-Goldwyn-Mayer Inc. and the MGM Grand Hotel to pay about $1.2 million in damages to the owners of the copyright in the dramatico-musical play "Kismet."

The ancient dispute, as reported at ELR 7:6:7, involved the use of about six minutes of music from "Kismet" in a musical revue entitled "Hallelujah Hollywood;" the

MGM Grand Hotel began presenting performances of the revue in 1974.

When Frank Music Corporation sued various MGM parties for copyright infringement, unfair competition and breach of contract, a Federal District Court found that the Kismet material contained visual representations of the dramatic play of the same name, and thus exceeded the scope of the hotel's blanket license agreement with ASCAP. The District Court awarded $22,000 in damages to the Kismet parties.

A Federal Court of Appeals affirmed the holding that the MGM Grand was liable for copyright infringement, but remanded the matter for reconsideration of the amount of profits attributable to the infringement; the court also suggested that the District Court consider whether Donn Arden, the producer of the revue, and MGM, Inc. should have been held liable along with the MGM Grand.

On remand, the District Court awarded the Kismet parties almost $345,000 against the MGM Grand, as well as $115,000 in attorneys, fees, but dismissed the action against MGM, Inc. and Arden.

Federal Court of Appeals Judge Fletcher first noted that the District Court, on remand, calculated MGM Grand's net profit from "Hallelujah Hollywood" at $6.1 million. The District Court had found that the Kismet segment, one of ten acts, lasted for ten minutes of the 100 minute revue, and concluded that ten percent of the profits of the revue were attributable to the segment.

Judge Fletcher stated that the District Court, in allocating the profits attributable to the segment, correctly reviewed the parties' relative contributions to the segment, including the creativity of the producers, performers and other individuals involved in staging the material. However, the court erred in weighing these contributions so heavily, for, according to Judge Fletcher, "there will be shows in which the attraction of the costumes, scenery or performers outweighs the attraction of the music or dialogue. On the other hand, a producer's ability to stage a lavish presentation, or a performer's ability to fill a hall from the drawing power of her name alone, is not a license to use freely the copyrighted works of others."

The court concluded that apportioning seventy-five percent of the Kismet segment to the contribution of the MGM parties grossly undervalued the importance of the Kismet parties. The segment essentially was "Kismet," with contributions by the MGM parties, stated Judge Fletcher; the segment was not a new work incidentally using elements of "Kismet." A "fairer" apportionment would have allocated seventy-five percent of the segment to elements provided by the Kismet parties, and twenty-five percent to the contributions of the MGM group. Based on this allocation, the Kismet parties were entitled to $552,000 as direct profits from the infringement.

Judge Fletcher next pointed out that the court, in its previous opinion, had held that the Kismet parties were entitled to recover, in addition to direct profits, a proportion of ascertainable indirect profits from MGM's hotel and gaming operations attributable to the promotional value of "Hallelujah Hollywood." The District Court, after reviewing a myriad of factors, concluded that two percent of MGM Grand's indirect profit was attributable to the revue. Judge Fletcher agreed that this conclusion was not clearly erroneous, and awarded the Kismet parties indirect profits of almost $700,000.

The District Court's refusal to award prejudgment interest was reversed. Judge Fletcher noted that while the Copyright Act of 1909 did not mention prejudgment interest, such interest serves to compensate an injured party for the loss of the use of money he/she would otherwise have had. Stating that the issue was one of first impression before the court, Judge Fletcher held that prejudgment interest was an available remedy under the 1909 Act, and remanded the issue to the District Court to enter an award of such interest on the apportioned share of the MGM parties' profits; the Kismet parties, noted the court, had requested prejudgment interest only from the date of the last infringing performance.

In turning to the question of the liability of MGM, Inc., Judge Fletcher found that the District Court clearly erred in not finding that MGM, Inc. and MGM Grand had "a substantial and continuing relationship with respect to the infringing activities," and concluded that MGM, Inc. was jointly and severally liable for the judgment against MGM Grand. The court pointed out, among other factors, that during the time of the infringing performances, MGM Grand was wholly owned by MGM, Inc.; that only material that had been used in MGM, Inc. films was used in the tribute segments of the revue; and that Arden "actively consulted" with personnel from MGM, Inc. in preparing the revue.

The court rejected the Kismet parties' argument seeking to hold MGM, Inc. additionally liable for an award of the company's own profits, or for statutory damages. The "downstream corporate benefits" to MGM, Inc. from the infringement were found "too attenuated and too speculative" to support a further award to the Kismet parties from an apportionment of the company's corporate profits. Judge Fletcher then found that the award to the Kismet parties of a share of MGM Grand's profits plus prejudgment interest adequately compensated the Kismet parties for their injuries, noting that an award of mandatory statutory damages against MGM, Inc. would have granted the Kismet parties a windfall.

Judge Fletcher agreed with the District Court's conclusion that Donn Arden was an employee of MGM Grand and that his involvement with the revue was within the course and scope of his employment. The record indicated that Arden received only a weekly salary, and did not receive royalties based on the revenues or profits from the revue. Again, statutory damages were found inappropriate because the Kismet parties were awarded "ample compensation" from MGM Grand and MGM, Inc. and deterrence would not be furthered, stated Judge Fletcher, by imposing statutory damages against Arden. There was no evidence that Arden knew or should have known that MGM erred in assuring him that he could use material from "Kismet."

With respect to the Kismet parties's pendent claims for breach of contract and breach of the implied covenant of good faith and fair dealing, Judge Fletcher first stated that, in view of the determination that there existed a substantial and continuing connection between MGM, Inc. and MGM Grand, the Kismet parties' pendent claims should not have been dismissed on the ground of the lack of such a relationship. However, the dismissal of the pendent claims was affirmed because any recovery available to the Kismet parties under the state law claims either would duplicate the profits awarded on the copyright infringement claim, or, if based on actual damages, would be precluded by the court's affirmance of the District Court's previous finding that the Kismet parties failed to prove actual damages from the infringement.

The award of attorneys' fees was upheld, but, stated Judge Fletcher, the District Court erred in failing to explain the basis for the amount awarded. The Kismet parties must show the number of hours reasonably spent in connection with their copyright claims, and the District

Court, on remand, must make specific findings of the rate and hours the court determined to be reasonable.

Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545 (9th Cir. 1989) [ELR 11:11:5]

CBS loses breach of contract dispute with leader of musical group "Boston," but Federal District Court jury rejects Tom Scholz's conspiracy claim against record company; earlier ruling ordered CBS to pay over $4 million in deferred royalties to Scholz and denied company's motion to dismiss performer's counterclaims

A Federal District Court jury has found that Tom Scholz, the leader of the musical group "Boston," did not breach a contract with CBS Records when he did not deliver a record album to CBS within five years. The jury, however, rejected Scholz's claim that CBS engaged in a conspiracy against him when the company tried to prevent him from signing with other record companies.

The litigation began in 1983 when CBS brought a $20 million breach of contract action against Boston; the background of the dispute, and the decision of a Federal District Court in New York awarding Boston more than $3 million deferred royalties held by the record company were reported at ELR 10:3:10.

In mid-1988, the court considered several defenses and counterclaims raised by Scholz. Scholz asserted that CBS was estopped from claiming that the failure to deliver a third "Boston" album within the time specified in the parties' agreement was a material breach of the agreement. Scholz stated that in reliance on certain representations made by CBS concerning delivery dates, Scholz purchased the interests of other members of the group, and continued to work on material for another album.

Judge Vincent L. Broderick found that there were triable issues of fact with respect to various elements of Scholz' estoppel defense and with respect to Scholz' claim that CBS intentionally waived its right under the agreement to the timely delivery of the third album.

Scholz next claimed that the Boston parties would be obligated to deliver only one album, if any, under the recording agreement. Judge Broderick stated that it was "plausible," as maintained by Scholz, that a second option period never commenced, and denied CBS' motion for summary judgment with respect to this defense.

In a fourth affirmative defense, Scholz alleged that CBS failed to provide a recording fund as required by the agreement. The court determined that an issue of fact was raised as to whether or not a recording fund of $65,000 was withheld from Scholz, and, if so, whether or not that prevented the delivery of the next "Boston" album.

Judge Broderick dismissed Scholz' claim that CBS' action was barred by the statute of limitations.

In turning to Scholz' counterclaims, the court found that there were genuine issues of fact concerning whether CBS, in the marketing and labeling of a solo album featuring Barry Goudreau, misled the public into believing that the album was by "Boston." Goudreau had been a performer in the group.

The court next refused to dismiss Scholz' counterclaim alleging that in 1 977, representatives of CBS knowingly made false representations in order to persuade Scholz to consent to the deferral of the payment of his royalties, and to consent to the inclusion in the deferral agreements of a provision allowing CBS to terminate the deferral arrangement. The fact that Scholz' attorneys first proposed a deferred compensation plan did not preclude the performer's fraud claim, stated Judge Broderick, because Scholz presented evidence suggesting that CBS entered into the deferral agreements with the intent not to perform, and to use the deferral arrangement as a means of obtaining leverage over the Boston parties.

Scholz' counterclaims for promissory estoppel and for fraud also were not subject to dismissal, ruled the court. The claims were based on oral representations allegedly made to Scholz in 1981 by Walter Yetnikoff, the president of CBS Records. According to Scholz, Yetnikoff stated that CBS would not withhold royalties payable to Scholz under the recording agreement so long as Scholz continued to work on the third Boston album.

Summary judgment was not available to CBS with respect to Scholz' counterclaim asserting that CBS maliciously breached a fiduciary duty by withholding his deferred royalties - there was evidence supporting

Scholz' claim that CBS had a fiduciary obligation with respect to the deferred royalties.

The court next refused to grant CBS' motion for summary judgment on Scholz' counterclaim alleging that CBS, in violation of its fiduciary duty, knowingly and wrongfully misappropriated royalties due Scholz and Boston. Again, there was a question of fact as to whether or not the royalties constituted a "mere debt" or were being held by CBS in a fiduciary capacity.

Scholz also was allowed to proceed with his counterclaim alleging tortious interference with precontractual relations, ruled the court. The performer claimed that when he attempted to negotiate a contract with two other recording companies for the production of the third Boston album, CBS wrongfully interfered by threatening to sue the parties involved and to discontinue business with the other companies. According to Scholz, a four month delay in signing his contract with

MCA cost him over $300,000. The court declared that the disposition of Scholz' claim depended, in part, on whether or not CBS was acting to protect its interest in the recording agreement with Scholz; this issue depended, in part, on whether or not CBS, as argued by Scholz, had previously breached the agreement.

The court found that issues of fact were present on Scholz' ninth counterclaim asserting antitrust violations arising from the activities of CBS, Geffen Records and MCA with respect to the third Boston album. The question of whether the parties entered into an agreement which unreasonably interfered with the marketing of the album would involve, again, the question of whether CBS'actions were justified.

Judge Broderick next reviewed Scholz' first counterclaim seeking summary judgment on the alleged breach of the deferral agreements, and the payment of the royalties held by CBS which would have been paid to the members of Boston in 1980, but for the provisions of the deferral agreements. The court agreed that the three deferral agreements represented separate contractual obligations; that breach of the deferral agreements and breach of the recording agreement were not based on the same set of operative facts; and that Scholz was entitled to divide his first counterclaim into two counterclaims - one for breach of the recording agreement, and the other for breach of the deferral agreements. CBS had conceded that there was no basis for retaining the royalties owed to Scholz under the deferral agreements, and there were no genuine issues of fact with respect to the meaning of the agreements.

Scholz' motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure was denied.

According to Scholz' attorney, CBS has paid Scholz over $4 million since the court entered judgment in September, 1988.

CBS Inc. v. Ahern, Case No.83 Civ. 7918 (S.D.N.Y., May 27, 1988; Sep. 7, 1988) [ELR 11:11:6]

Limited partnerships may proceed with rescission, RICO and third party beneficiary claims against Columbia Pictures arising from purchase of films, but court dismisses claims alleging fraud, negligence, copyright infringement, tortious interference with economic relations, as well as a section 1962(a) RICO claim, and certain tax claims

During the period from 1973 to 1975, Columbia Pictures Industries, Inc. and Columbia Pictures Entertainment, Inc. sold a number of films to seven New York limited partnerships. The partnerships, which were formed by Lester Perksy and Richard Bright, paid for the films with a combination of cash and promissory notes secured by the films; a percentage of the earnings from the films was to go toward repaying the promissory notes. Columbia agreed to market and distribute the films.

The partnerships eventually sued Columbia, claiming, in part, that Columbia engaged in practices which served to reduce competition in the market for the licensing of the partnerships' films; that Columbia breached its contractual and fiduciary duties by delaying or failing to report revenues earned by the films, charging improper costs and fees, failing to credit the partnerships for revenues earned by the films, and failing to exploit the films in all available markets; and that Columbia engaged in extortion, and improperly exercised a purported option to continue distributing the films.

The partnerships further alleged that Columbia, by claiming both the investment tax credit and depreciation allowance for the films on its tax returns, breached the company's contractual warranty that it would "do nothing for tax purposes to derogate" the partnerships' ownership of the films.

In the late 1970s, the Internal Revenue Service disallowed various tax benefits claimed by certain partners. After a trial involving partners of two of the partnerships, the Tax Court entered a judgment adverse to the partnerships. Persky and Bright estimated that the judgment would result in an increased tax liability for the partners of nearly $65 million; an appeal of the Tax Court's decision is pending.

In November 1988, Columbia filed an action in a Federal District Court in New York seeking a declaratory judgment upholding the company's extension in perpetuity of its distribution rights in the films. When the partnerships filed a lawsuit in a Federal District Court in California, the parties agreed that the partnerships would bring all their non-antitrust claims against Columbia before the court in New York, and that the claims would be consolidated with Columbia's declaratory judgment action.

Judge Sand, in considering the partnerships' attempt to recover the tax losses incurred before the Tax Court, first found that the partnerships had standing to assert the tax claims on behalf of the partners. It was noted that the effort to recover the tax liabilities of individual partners arose from the contracts between the partnerships and Columbia, not between the individual partners and Columbia.

The court next granted Columbia's motion to dismiss the partnerships' indemnity claim on the grounds of prematurity to the extent that the partnerships sought indemnity for the tax liability which the partnerships had not yet paid. However, the complaint sufficiently alleged a causal relationship between Columbia's conduct and the legal expenses incurred by the partnerships in the Tax Court proceeding, stated Judge Sand. It was plausible that when the Internal Revenue Service learned from its audit that both the partnerships and Columbia were claiming the tax benefits of ownership of the same property, the agency may have decided to end its settlement discussions with certain partners, thus precipitating the Tax Court litigation.

Judge Sand found the partnerships' fraud claims "redundant," for there was no allegation of monetary damages or adverse consequences flowing from the alleged fraud which were not encompassed within the contract claim itself, and also granted Columbia's motion to dismiss the partnerships' claims for tortious interference with economic advantage, and for copyright infringement.

However, the court refused to dismiss a rescission claim, and also denied Columbia's motion to dismiss Persky and Bright's claim for breach of contract as third party beneficiaries - the fact that Persky and Bright were general partners in the partnerships did not foreclose the possibility that they also were intended third party beneficiaries of the contracts.

In turning to the partnerships' claims under the Racketeer Influenced and Corrupt Organizations Act, Judge Sand noted that Columbia was involved in the operation or management of the partnerships by virtue of the company's role in "the very process" through which the partnerships obtained income. The partnerships alleged that Columbia violated section 1962(a) of the Act by deriving income from a pattern of racketeering activity and investing all or part of that income in operating the studio. But Judge Sand found that the partnerships did not allege that they were injured specifically by the use or the investment of income purportedly derived from racketeering activity, and dismissed the claim under section 1962(a).

The partnerships also alleged the violation of section 1962(b) of the Act in that Columbia purportedly acquired or maintained "an interest in or control of" the partnerships through a pattern of racketeering activity. Judge Sand found that the partnerships adequately alleged that the studio acquired an interest in or control of the partnerships, as well as an injury proximately caused by the conduct prohibited by section 1962(b), and the required "nexus" between the pattern of racketeering and the acquisition or maintenance of an interest in or control of the partnerships. The court noted that the partnerships had alleged that Columbia, in entering the contracts, "misrepresented and intentionally failed to disclose the extent of third party participation rights in the films misrepresented and intentionally failed to disclose the production costs of the films, and intentionally misrepresented to [the partnerships that it would do nothing to derogate from [their] ownership of the films."

Judge Sand returned to the partnerships' fraud claims, which, although earlier found redundant, would provide, if sufficiently alleged, the basis for the federal RICO claims. The court concluded that the partnerships alleged sufficient facts to establish the basis for their claims of fraud, and thus properly alleged RICO predicate acts.

Vista Company v. Columbia Pictures Industries, Inc., 725 F.Supp. 1286 (S.D.N.Y. 1989) [ELR 11:11:8]

Investors in film rights prevail in RICO claim against seller, but damage award of $3.9 million is reversed

Another proceeding alleging violations of the Racketeer Influenced and Corrupt Organizations Act in connection with the purchase of feature films arose when nineteen parties, in late 1980, purchased the non-theatrical distribution rights in twenty-three feature films and television episodes from C. Elvin Feliner, Jr., Robert J. Levine, Palm Beach Properties, Inc., Metropolitan Properties, Inc., and Krypton Corporation. Feltner was the sole shareholder, a director and the chairman of the three corporations; Levine was an officer of each corporation.

The investors failed to distribute or lease the films, primarily because the films were unauthorized copies or because unauthorized copies were readily available. Fourteen of the nineteen investors were audited by the Internal Revenue Service; the IRS disallowed several substantial deductions.

A Federal District Court jury awarded a total of about $3.9 million in treble damages to the investors.

Federal Court of Appeals Judge Wellford agreed with the District Court that the burden of proof for the investors on their RICO claim was a preponderance of the evidence standard. The court next found that the pleadings in the case sufficiently described and distinguished the enterprise" and the participating "persons," as well as a "pattern of racketeering activity" (although commenting that the latter was a "close question"). The jury had found that each of the Feltner parties committed wire and mail fraud (except Krypton, which committed only mail fraud) - the "pattern" did not require "multiple schemes," stated Judge Wellford.The court granted Krypton's motion for a directed verdict because during the relevant time period, the company, which was not yet incorporated, did not have the capacity to hold either legal or beneficial title to property, and thus could not violate RICO because it was not a legal "person."

With respect to the issue of damages, the court found that the investors' damages should have been limited to the amounts, assessed jointly and severally against the Felttner parties, equal to their investment in the program, collectively about $211,000. It was noted that there was no evidence presented as to a reasonable value or estimate of lost profits, that the investors were not misled about the tax consequences of the purchase, and that any claims based on physical injury or mental suffering were not allowed under RICO because they were not injuries to business or property.

Fleischhauer v. Feltner, 879 F.2d 1290 (6th Cir. 1989) [ELR 11:11:9]

Award of $600,000 in profits from the film "Amadeus" as additional community property in divorce proceeding brought by former wife of producer Saul Zaentz is upheld

The value of Saul Zaentz's production and financial contributions to the film "Amadeus" were properly allocated as community property, a California appellate court has ruled.

Saul and Lynda Zaentz were married in October 1978, and separated in November 1983. In 1982, Saul Zaentz agreed to serve as the producer of "Amadeus" for a fee of $300,000 plus expenses. When the Zaentzes separated, postproduction work on the film had begun; the film was released in 1984.

Saul Zaentz claimed that since the Saul Zaentz Company received the producer's share of the profits (the other equal shares went to director Milos Forman and writer Peter Shaffer), Lynda Zaentz was not entitled to any part of the profits. At the time of trial, the film had gross receipts of nearly $50 million. A submission of profit data as of December 1985 estimated that the Saul Zaentz Company would realize a profit of nearly $2.6 million from its share of "Amadeus," plus about $2.5 million in interest on funds advanced for production, and deferred facilities rental fees of $700,000.

Presiding Judge John T. Racanelli first embarked on "a circuitous journey through a labyrinth of interlocking and interrelated corporate entities, family trusts and closely owned holding companies," in order to obtain the relevant financial history of the Saul Zaentz Company. The court then noted that the trial court, in awarding $600,000 to the community over and above the $300,000 and per them paid to Zaentz, emphasized Zaentz's unique services in connection with producing the film, and the scope of the community's and Saul

Zaentz's investment in "Amadeus," including Zaentz's personal guarantee of $6 million, based, in part, on community assets.

There was "more than ample evidence" upon which the trial court could have based its decision, stated Judge Racanelli. Furthermore, the court acted within its discretion in reopening the evidence to consider profits generated by the film through 1985, for whether or not the film was completed and receiving income at the time of separation, "the time and artistic energies expended occurred in some appreciable degree during the marriage." Saul Zaentz was the "linchpin" of the operations of the Saul Zaentz Company, in the trial court's view, and performed many important services for which he would have been entitled to reasonable compensation if such benefits had not been directed to the company. And by personally guaranteeing the $6 million bank loan and agreeing to raise the necessary funds to produce the film or indemnify the other venturers, Zaentz placed the community assets at risk.

In all, the trial court arrived at "a patently just and equitable determination" in ordering reimbursement to the community of an additional $600,000, and the error, if any, in not setting forth the calculations underlying the valuation of assets was found "clearly harmless."

Judge Racanelli concluded by rejecting Lynda Zaentz's claim that the marital community was entitled to receive a much greater share of the profits from the film because Saul Zaentz purportedly diverted a business opportunity from the community to his separate property, the Saul Zaentz Company. It should be noted that the trial court also had awarded Lynda Zaentz, among other items, spousal support of $5,000 a month for 1986 through 1988; about $200,000 as her share of other community property; and about $250,000 of Lynda Zaentz's claimed $400,000 in attorneys fees.

Zaentz v. Zaentz, Case No. A038989 (Ca.Ct.App., Feb. 23, 1990) [ELR 11:11:10]

Literary agent may not divert commissions, fees or royalties due former agency pending resolution of dissolution proceeding

Jerome S. Traum has obtained an injunction preventing Morton L. Janklow, pending a final determination in a corporate dissolution proceeding, from diverting any commissions, royalties or fees due the literary agency Morton L. Janklow Associates, Inc., including any payments made pursuant to a contract between Simon & Schuster and former President Ronald Reagan.

As described by New York trial court Judge Myriam J. Altman, Traum and Janklow were law partners in the firm of Janklow & Traum, and partners in the literary agency; Janklow owned a 69.4 percent share of the agency, and Traum owned a 30.6 percent share. The agency represented many well-known writers, such as Jackie Collins, Danielle Steele, and Sidney Sheldon. Traum apparently provided most of the legal services for the agency, and Janklow acted as the writers' agent.

In January 1989, Janklow entered into a partnership agreement with Lynn Nesbit, another literary agent, and formed Janklow & Nesbit Associates. Traum, contrary to his expectations, did not receive any interest in the new agency.

In October 1989, Traum brought a corporate dissolution proceeding, claiming that the new agency constituted an "oppressive act" by Janklow. According to Traum, Janklow & Nesbit were entering agreements for new literary works with authors who also were clients of Morton L. Janklow Associates, thereby depriving the agency of corporate opportunities. Traum also alleged that Janklow diverted corporate assets, such as a $50,000 commission from the sale of rights to one of Sidney Sheldon's novels.

Janklow & Nesbit Associates, stated Traum, also retained commissions payable to Morton L. Janklow Associates pursuant to a contract between Simon & Schuster and former President Ronald Reagan.

Judge Altman denied Janklow's motion to dismiss, and found that Traum alleged sufficient facts to support claims that Janklow engaged in "oppressive action" toward Traum, and claims that Janklow misappropriated the assets of the agency. A hearing will be required to consider whether Traum condoned Janklow's conduct, whether Janklow breached his fiduciary duty to both Morton L. Janklow Associates and to Traum in failing to segregate certain checks, and whether Janklow committed corporate waste in leasing additional office space and purportedly using the space and other assets for the activities of Janklow & Nesbit.

Pending further proceedings, Judge Altman granted Traum's request for injunctive relief as described above, but found that there was no evidence that Janklow was "looting" the agency or otherwise diverting the agency's assets to his personal use.

Judge Altman then observed that the hearing to which the parties were entitled would be "wasteful of court time and the time of the parties" in view of the unique nature of Janklow's services. The sole issue in the proceeding, in Judge Altman's view, was the value of Morton L. Janklow Associates based on the extent of the agency's assets, and the parties "have the option to get to that point quickly or slowly and at little or great expense.

Traum v. Morton L. Janklow Associates, Inc., New York Law Journal, p. 24, col.5 (1990) [ELR 11:11:10]

New York's "Son of Sam" law may be applied to royalties due former Wall Street Journal columnist R. Foster Winans from book discussing his conviction on federal charges

In June 1985, former Wall Street Journal columnist R. Foster Winans was convicted of securities fraud, wire fraud, mail fraud and conspiracy in connection with his activities, during 1983 and 1984, in leaking the contents of his columns to a stockbroker in exchange for a share of the profits from trading on such market sensitive information. Winans' conviction on the conspiracy counts was reversed, but a Federal Court of Appeals and the

United States Supreme Court affirmed the writer's conviction on the remaining counts.

In 1986, St. Martin's Press published Winans' book, "Trading Secrets: Seduction and Scandal at Wall Street."

Subsequently, the New York State Crime Victims Board, acting under Executive Law section 632-a, asked St. Martin's Press for copies of the company's contracts with Winans, and requested that the publisher suspend any payments to the author. St. Martin's Press refused to supply any of the requested information, claiming that section 632-a did not apply because Winans had not been accused or convicted of any state crime. Eventually, the publisher brought an interpleader action, seeking to determine the proper allocation of royalties.

Winans claimed that section 632-a, commonly referred to as the "Son of Sam" law, violated the First and Fourteenth Amendments.

New York trial court Judge Sherman, citing a 1985 amendment to the Executive Law, found that the legislative history of the statute indicated that the legislature intended to include all crimes, whether state crimes under state laws other than the penal law as well as crimes under federal law, within the reach of section 632-a.

Judge Sherman next noted that the amendment, which became effective on August 1, 1985, was applied correctly to Winans' crimes and did not violate the ex post facto clause. The purpose of the statute was to aid in compensating victims of crime -section 632-a was not a criminal statute "nor a civil statute attempting to disguise criminal penalties." Judge Sherman questioned the decision in United States v. MacDonald, 607 F.Supp. 1183 (1985; ELR 7:11:14) in which the court found that the forfeiture provision of a statute known as the federal "Son of Sam" law, as applied to Dr. Jeffrey MacDonald, violated the ex post facto clause of the United States

Constitution; the court determined that the statute was both retrospective and disadvantageous to MacDonald, but did not consider, according to Judge Sherman, whether the forfeiture provisions amounted to a criminal statute.

However, even if the finding in MacDonald was valid, the New York statute applicable in the instant proceeding differed from the federal law, and "clearly" was civil in nature. Judge Sherman pointed out that New York's statute requires a hearing before the Crime Victims Board, a civil agency, with a right to judicial review; that New York's statute directs the Board to hold any proceeds in escrow for a five year period and requires a civil judgment against the criminal prior to the payment of any money to the victims, with a reversion of any remaining proceeds to the criminal after the five year period. It also was noted that New York courts have upheld the retrospective application of section 632-a. In all, the retrospective application of the 1985 amendment to the statute, enlarging crimes to include "any crime" did not violate the ex post facto clause of the United States Constitution, declared Judge Sherman.

The court rejected Winans' argument that federal law preempted state legislation concerning remedies for victims of crime.

Judge Sherman concluded by discussing Winans' claim that the discriminatory financial burden of section 632-a would prevent or limit a criminal from writing his/her story, and thus inhibited expression based on its message, ideas, subject matter or content in violation of the First Amendment.

The court referred to the decisions in Children of Bedford, Inc. v. Petromelis and Simon & Schuster v. New York State Crime Victims Board, in which a New York trial court and a Federal District court, respectively, upheld the constitutional validity of section 632-a. Judge

Sherman stated that although the statute may restrict First Amendment freedoms by delaying immediate payment to a criminal-author, the restriction "was incidental to the governmental interest of providing a source of funds to compensate victims of the crime." Thus, the target of the statute was not the speech itself but the profit derived by a criminal from the publicity generated by his/her criminal acts.

Judge Sherman disagreed with Winans' argument that the statute should have been subjected to strict scrutiny, and stated that section 632-a was not directed at the views expressed by the criminal-author, but only sought to regulate the proceeds obtained from the publicity generated by the criminal acts. Again, any inhibition of speech was merely incidental. The statute was not content nor speaker based, and did not restrict expression based upon either the severity of the crime committed or the viewpoint of the criminal-author.

For Judge Sherman, "freedom of speech does not guarantee a criminal's right to maximize profits in return for selling his story to the media and the mere fact that the criminal may not immediately profit from such expressive activity does not prevent such speech." The statute had a rational basis and any incidental restriction on First Amendment freedom was no greater than was essential to the governmental interest.

The court emphasized that the criminal-author is not prohibited from earning income from his/her writing as long as it does not concern the criminal acts he/she has committed.

The statute did not violate the due process requirements of the Fourteenth Amendment due to vagueness, and, in all, was constitutionally valid in all respects.

The court, accordingly, granted the Board's motion for summary judgment, ordered St. Martin's Press to pay the Board all royalties then due Winans, as well as all future royalties upon becoming due, and also ordered the publisher to provide the Board with a copy of the subject publishing contract and other information so that the Board can reach a final determination in the matter.

Judge Sherman stated that Winans' argument that the statute was not applicable because there allegedly was no victim to the writer's crime was an issue not properly before the court; the Board will address the issue at a hearing prior to rendering its final determination and order.

St. Martin's Press, Inc. v. Zweibel, New York Law Journal, p. 25, col. 1 (Feb. 26, 1990) [ELR 11:11:11]

Crime Victims Board's determination that book by Jean Harris is subject to New York's " Son of Sam" law is upheld

In October 1987, the New York Crime Victims Board determined the book "Stranger in Two Worlds" by Jean Harris was subject to section 632-a of the Executive Law, also known as the "Son of Sam Law." The book was written pursuant to a contract whereby Macmillan, Inc. agreed to pay Harris a total of $55,000. After deducting a ten percent commission paid to Harris' agent, the Board ordered Harris to pay to the Board the $45,000 which Harris already had received from the publisher, and to turn over to the Board any other amounts due under the contract.

A New York trial court has upheld the Board's decision. The court first rejected the argument raised by the Children of Bedford, a charitable trust, that the Board failed to identify the particular passages of Harris' book which were within the scope of section 632-a. Judge Israel Rubin pointed out that there was a general allegation concerning the subject material, but that it was "quite unnecessary" for the Board to identify specific passages as statutorily objectionable. "

The court then emphasized that the statute did not exclude material which was introduced during trial and thus was a matter of public record. Also rejected was the claim that the two chapters dealing with the death of Herman Tarnower were a relatively minor portion of the book; the entire book was centered around Tarnower's death, stated Judge Rubin, and at least half of the book was comprised of the story of the crime. The fact that Jean Harris expected no economic benefit from the publication of the book did not preclude the operation of the statute, for section 632-a applies to assignees of any person convicted of a crime. Although the Children of Bedford trust was a "laudable undertaking," the court declared that the funding of that trust with money derived from the sale of a book about a crime would be contrary to the statutory intent and adverse to the interests of the crime victim.

In turning to the trust's First Amendment argument, the court pointed out that section 632-a does not prohibit a person convicted or accused of a crime from communicating the details of the crime, and does not prohibit the press from conveying such information to the public or from obtaining a financial benefit from so doing. The statute prevents the perpetrator from receiving any profit from communications concerning the crime "unless and until all proceeds have been held in escrow for five years and made available to satisfy any civil judgment obtained against the wrongdoer."

Section 632-a regulates the disposition of property, not speech, according to Judge Rubin. And the trust did not establish that the First Amendment would protect not only the right of a "criminal-author" to expression but also the right to payment for the exercise of that right.

The statute served to provide a means "to attach funds due to a tortfeasor in order to satisfy potential judgments which may be obtained by injured parties."

Even if it were assumed that the statute would have some inhibiting effect on the free exchange of information, as argued by the trust, any such impact would result not from limiting the expression of a particular idea or viewpoint, but from complying with an attachment plan which might have the effect of discouraging the flow of information. However, declared Judge Rubin, the state's interests "in providing a source of funds to compensate victims of a crime who might otherwise have no source of redress and in banning a given perpetrator from reaping a potential windfall from the publicity generated by a particularly controversial or infamous crime significantly outweigh the minimal impact of the dissemination of information..." To the extent section 632-a might inhibit First Amendment activity, the statute "places no burden thereon which is not narrowly tailored to a compelling State interest"

Judge Rubin concluded by finding that the statute was not vague or overbroad.

Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894 (N.Y.Cnty. 1989) [ELR 11:11:12]

Constitutionality of New York's "Son of Sam" law is upheld in action brought by publisher of "Wiseguy: Life in a Maria Family"

New York Executive Law section 632-a, known as the "Son of Sam" law, did not violate the First or Fourteenth Amendment rights of " career criminal" Henry Hill or his publisher, a Federal District Court in New York has ruled.

As described by Judge John F. Keenan, the purpose of the law is to prevent those accused or convicted of a crime from profiting from the commercial exploitation of their crimes by contracting for the production of books, movies, magazine articles, or television shows in which the crime is reenacted or in which "the person's thoughts, feelings, opinions or emotions" about the crime are expressed. Payments made to a criminal under the specified contracts must be placed into escrow for five years; victims of the reenacted crime are given five years from the creation of the escrow account in which to bring a civil action and recover a judgment against the criminal or his/her representatives.

In 1980, Henry Hill was arrested and charged with six counts of conspiracy to sell drugs. Hill cooperated with the government, and was placed into the Federal Witness Protection Program.

In 1981, Simon & Schuster, author Nicholas Pileggi, and Hill entered into a contract for an autobiographical non-fiction work based on organized crime in New York City. Simon & Schuster agreed to pay unspecified sums to Sterling Lord, a literary agency, for the benefit of Pileggi and Hill.

In late January 1986, just after Simon & Schuster published "Wiseguy: Life in a Mafia Family," the New York State Crime Victims Board directed the publisher to suspend payments to Sterling Lord.

Subsequently, the Board determined that "Wiseguy" was subject to section 632-a because the book contained "Hill's thoughts, feelings, opinions and emotions about and admissions to his participation in criminal activities." The Board also found that Pileggi was a co-author, not a representative of Hill, and thus was not subject to the statute. However, Sterling Lord was an agent of Hill, declared the Board, and was required to turn over to the

Board its ten percent share of Hill's proceeds. The Board ordered Hill to turn over to its escrow account about $96,000 paid to him by Simon & Schuster through Sterling Lord; if Hill did not turn over the money, Simon & Schuster was ordered to pay that amount to the Board. Simon & Schuster also was ordered to turn over all outstanding money payable to Hill, including any future royalties payable to Hill or his representatives under the publishing contract.

Simon & Schuster sought declaratory and injunctive relief, claiming that section 632-a violated the First Amendment and was unnecessarily vague and overbroad in violation of the Fourteenth Amendment.

Judge Keenan first found that the Board, in requiring publishers to submit contracts for review, did not engage in unlawful conduct and did not prohibit expression; in reviewing the contracts,the Board attempted to determine the applicability of section 632-a, and did not determine the newsworthiness or educational value of a proposed work. The statute does not prohibit any "expressive activity," noted the court; the effect of section 632-a is limited to the nonexpressive activity of receiving a profit.

The court proceeded to observe that the state's interest in compensating crime victims is not related to the suppression of free expression and any burden on free expression is "merely incidental." Again, the profit-making aspect of the speech, not the speech itself, is the "target" of section 632-a, for "the clearly abhorrent and repulsive aspect is that with the admission of his crimes, Hill is able to profit."

Judge Keenan pointed out that the statute did not indicate "legislative hostility" to the viewpoint of an author who writes about criminal activity. In reviewing publishing contracts, the Board considers whether the speaker is an accused or convicted criminal; whether the book discusses the accused or convicted criminal's crime; whether, if the speaker is not accused or convicted, the book contains admissions to the commission of a crime; and whether there are victims to the discussed crime who could obtain a civil judgment against the speaker. The Board does not use a "sliding scale" to determine if the crime involved is "more horrible" than another; all crimes for which there are victims are covered by section 632-a.

In view of the above, the court declined to apply a strict scrutiny test. Rather, using the standards set forth in United States v. O'Brien, 391 U.S. 367 (1968), the court found that the New York state legislature acted within its authority in enacting the statute; that the state had an important governmental interest of victim compensation; that the state's interest was not related to the freedom of expression; and that any incidental restriction of First Amendment freedom imposed by section

632-a was not greater than was essential for the government's interest in compensating crime victims. Section 632-a was not unconstitutional on its face nor as applied in this case, declared Judge Keenan.

With respect to Simon & Schuster's Fourteenth Amendment claims, the court stated that although section 632-a "may not be the most carefully drafted statute ever passed by the New York State legislature," the statute provided fair notice of which parties and situations would be subject to review, and provided guidelines for compliance. Hill was known as a long-time participant in organized crime, noted Judge Keenan, and "Wiseguy" was written in order to obtain an "inside look" at organized crime. Simon & Schuster "actively pursued" Hill's "thoughts, feelings, opinions [and] emotions" regarding such crime.

The court therefore granted the Board's motion for summary judgment, and ordered the dismissal of the complaint.

Simon & Schuster, Inc. v. New York State Crime Victims Board, 724 F.Supp. 170 (S.D.N.Y. 1989) [ELR 11:11:13]

United States Supreme Court upholds sanctions against individual lawyer, but not law firm, for filing meritless claims against Marvel Entertainment

The United States Supreme Court has ruled that the sanctions available under Rule 11 of the Federal Rules of Civil Procedure may be imposed against individual lawyers only, not their firms.

The issue arose, as reported at ELR 10:10:19, in a proceeding brought in 1982 by actor Northern Calloway. Calloway, best known for his role as "David" in the television program "Sesame Street," claimed that Marvel Entertainment Group infringed his copyrighted script for a proposed animated science fiction movie entitled "The Skyrider." Marvel presented contracts indicating that Calloway had sold his rights in "The Skyrider" to LMN Productions, and that LMN had transferred those rights to the Marvel parties.

A Federal District Court dismissed Calloway's complaint (with leave to refile) on the ground that the complaint did not specify the registration number of his copyright and the dates upon which the alleged acts of infringement occurred.

An amended complaint, signed by Calloway's lawyer, Ray L. LeFlore, was filed. The amended complaint remedied the defects cited by the court and also asserted that Calloway's signatures on the option documents were forged.

In 1984, LeFlore joined with Radovan Pavelic to form the law partnership of Pavelic & LeFlore; court papers in the case subsequently were signed "Pavelic & LeFLore By /s/ Ray L. LeFlore (A Member of the Firm) Attorneys for Plaintiff."

The District Court directed a verdict in favor of Marvel on the allegation of forgery. After a six week trial, a jury, notwithstanding Calloway's arguments challenging the validity of the contracts, returned a verdict in favor of Marvel.

The court, stating that the forgery claim had no basis in fact, and was not investigated sufficiently by the lawyers, imposed Rule 11 sanctions in the amount of $50,000 on the law firm of Pavelic & LeFlore, and $50,000 on Ray L. LeFlore.

A Federal Court of Appeals upheld the imposition of sanctions against the law firm and against LeFlore, but, on the court's own motion, reinstated Calloway's appeal of a separate judgment imposing sanctions of $100,000 against the actor.

The United States Supreme Court has reversed the Court of Appeals' decision with respect to the $50,000 in sanctions imposed against the law firm of Pavelic & LeFlore on the ground that Rule 11 provides that when a paper is signed in violation of the Rule, a court may "impose upon the person who signed it ... an appropriate sanction." Justice Antonin Scalia noted that the Rule "strikingly" departs from normal common-law assumptions such as that of delegability - the signing attorney represents that the filed paper is factually and legally responsible, and that "he personally has applied his own judgment. Where the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed."

The Court of Appeals judgment therefore was reversed insofar as it allowed Rule 11 sanctions to be imposed against Pavelic & LeFlore, and the case was remanded for further proceedings.

Justice Marshall, in dissent, viewed the court's interpretation of Rule 11 as overly restrictive in reading into the Rule "an absolute immunity for law firms from any sanction for their misconduct." The court's decision would result in an "unnecessary erosion of the discretion of federal judges," stated Justice Marshall, for the Rule could be read as allowing a court to impose sanctions on any juridical person, including the law firm of the individual signer. Justice Marshall concluded by emphasizing that the decision "unwisely ties the hands of trial judges who must deal frequently and immediately with

Rule 11 violations and ill serves the goal of administering that Rule justly and efficiently."

Pavelic & LeFlore v. Marvel Entertainment Group, Case No. 88-791 (U.S. Sup.Ct., Dec. 5, 1989) [ELR 11:11:14]

Federal Court of Appeals denies petition for rehearing sought by publisher in action involving use of unpublished material in biography of L. Ron Hubbard

The United States Supreme Court, in February 1990, let stand a Federal Court of Appeals decision (ELR 11:5:10) refusing to enjoin Henry Holt, Co. from distributing the book "Bare-Faced Messiah: The True Story of L. Ron Hubbard." The Court of Appeals affirmed, solely on the ground of laches, a Federal District Court ruling (ELR 10:12:17).

The District Court had found that "Bare-Faced Messiah," written by Russell Miller, infringed "to some degree" Hubbard's copyright in previously unpublished letters and diaries, but would have limited New Era to the remedy of damages. A panel of the Court of Appeals disagreed with the District Court's views on the proper application of the fair use factors in the case, and emphasized that "an author's expression of an idea, as distinguished from the idea itself, is not considered subject to the public's 'right to know.'"

In a decision issued in August 1989, the Court of Appeals denied Henry Holt's petition for rehearing and suggestion for rehearing in banc. Judge Roger J. Miner noted that although Holt may have been "dissatisfied with certain nondispositive language" in the panel's majority opinion, the company was the prevailing party and its proposal for an in banc bearing was "unprecedented." Judge Miner declared that the panel majority opinion (which he wrote) was " consistent with settled law and [left] no room for misunderstanding;" questioned whether the opinion dissenting from the denial of the petition would have any authority to "dispel misunderstanding;" and refused to commit the Court of Appeals to the language of the dissenting opinion.

Judge Miner declined to recognize as an element in the fair use balance the distinction made by the dissenting opinion between " copying expression to enliven the copier's prose and doing so where necessary to report a fact accurately and fairly." There was nothing in the panel's majority opinion, recalled Judge Miner, that would bar the copying of small amounts of unpublished expression either to report facts accurately and fairly or to "enliven the text." Indeed, in the instant case, a different finding on the "amount and substantiality" fair use factor might have resulted in the same outcome were]aches not available as a defense. However, that outcome "would not have hinged on the distinction between factual reportage and text enlivening."

In all, fair use, stated Judge Miner, is never to be liberally applied to unpublished copyrighted material, even if the work is a matter of such high public concern as the memoirs of President Ford (Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985; ELR 7:2:8), reversing 723 F.2d 195 (2d Cir. 1983; ELR 5:7:4).

With respect to the remedy available in the event that a purported infringer copies more than a minimal amount of unpublished expressive content, it appeared to Judge Miner that "all now agree" that an injunction would not be the automatic consequence of infringement. Although the panel majority maintained the view that an injunction would have been a proper remedy in the instant case except for the issue of laches, the majority proposed to amend its opinion at 873 F.2d 576, at page 584, col. 1, line 4 to read as follows: "Since [under ordinary circumstances] the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use, id. at 96, the consequence of the district court's findings seem obvious." (bracketed material added to original).

Judge Jon 0. Newman, in dissenting from the denial of rehearing in banc, stated that a rehearing was warranted in order to prevent misunderstanding that might deter authors and publishers from undertaking lawful writings in the fields of scholarly research, biography, and journalism. Judge Newman emphasized that the holding of the panel opinion was based on the doctrine of laches, and proceeded to comment on the standards for infringement and for the issuance of an injunction. First, Judge Newman expressed confidence that the panel opinion did not adopt the proposition that the copying of some small amounts of unpublished expression to report facts accurately and fairly can never be fair use. And, as Judge Miner apparently agreed, the panel opinion was not to be understood as narrowing the court's equitable discretion in granting injunctive relief. Judge Newman chose to mention that the public interest, as well as equitable considerations such as laches, would be a relevant factor for a court deciding whether to issue an injunction.

New Era Publications International, APS v. Henry Holt, Co., 884 F.2d 659 (2d Cir. 1989) [ELR 11:11:15]

Showtime/The Movie Channel obtains blanket license from ASCAP for fee of $0.15 per subscriber for 1984-1988

A Federal District Court in New York has set a $0.15 per subscriber fee for the blanket music license between Showtime/The Movie Channel, Inc. and the American Society of Composers, Authors and Publishers; the license covers the period from April 4, 1984 through December 31, 1988. According to news reports, ASCAP will receive about $1.2 million per year, the organization had sought $2 million. Magistrate Michael H. Dolinger declined to set a per-program license fee, leaving the negotiation of such a fee to the parties.

Magistrate Dolinger noted that Showtime produces and transmits programming, primarily theatrical films, through pay cable television channels. ASCAP, citing its course of dealings with Showtime's principal competitor, Home Box Office, argued that a reasonable fee would be $0.25 per subscriber.

It was found that ASCAP did not show that the fees agreed to by Home Box Office for 1980 through 1985 would constitute a reasonable rate for Showtime/The Movie Channel; the agreement between ASCAP and the Disney Channel also was not "an appropriate model," stated Magistrate Dolinger. The relevance of the comparable agreements was questioned because, in the magistrate's view, ASCAP possessed the type of leverage that, if utilized, would likely compel the cable program suppliers to agree to non-competitive, or excessive, fee levels, and because ASCAP in fact exerted such leverage to achieve this result.

Magistrate Dolinger reviewed the music industry licensing practices which apparently resulted in the perception on the part "of most, if not all" of the cable companies that they had no realistic alternatives, such as direct or source licensing, to obtaining a blanket license. "Even if the companies were mistaken in believing they lacked viable options, their bona fide belief that this was the fact is relevant in assessing whether the negotiated agreements are an appropriate measure of a reasonable fee," declared the magistrate. After emphasizing that the instant proceeding did not involve antitrust issues, Magistrate Dolinger concluded that the concerns of the cable companies apparently "constrained" their negotiating posture, and that prior negotiated agreements, although entered into after arms length negotiations, were not necessarily appropriate as a "dollar-for-dollar" measure of a reasonable fee for Showtime/The Movie Channel.

The magistrate then found that the evidence indicated that ASCAP took advantage of perceived weaknesses in the cable companies' negotiating position, and that the fee agreements reached by ASCAP with the cable licensees thus reflected a "de facto but significant inequality of bargaining leverage."

Magistrate Dolinger pointed out that the cable companies had reached agreements with BMI, ASCAP's principal counterpart, at markedly lower rates, ranging from about $0.09 to $0.13 per subscriber. The record did not support ASCAP's argument that the rate differential was warranted by the cable companies' valuation of the blanket licenses issued by the two organizations. In all, ASCAP's proposed $0.25 fee for Showtime/The Movie Channel was not a reasonable fee.

Showtime/The Movie Channel's proposal for setting a blanket license fee on the basis of the intrinsic value of the music that is made available under the license was rejected, after detailed consideration, by Magistrate Dolinger. The essential premise, for the magistrate, was that the relevant market for competitive pricing purposes, was the market for "aggregative performance licenses, not the market for the services of individual composers and musicians." The method of valuation proposed by Showtime/The Movie Channel focused on the payments made by producers for the initial acquisition of music or other creative services, and did not fully reflect the benefits conveyed by a performing rights society's blanket license to a cable programming service.

In order to set a reasonable rate, Magistrate Dolinger stated that BMI's negotiated rates for Showtime/The Movie Channel and comparable licensees were a fair starting point for setting an ASCAP fee. The most recent agreements between BMI and Showtime/The Movie Channel and Home Box Office involved payments of between $0.12 and $0.13 per subscriber. However, the ASCAP license provided access to a repertory about three times as large as the BMI repertory; this, along with other factors, supported some differential between the BMI and ASCAP rates.

Magistrate Dolinger concluded that a reasonable adjusted rate annual fee for Showtime/The Movie

Channel's blanket license from ASCAP for the period from April 4, 1984 to December 31, 1988 was $0.15 for each subscriber, with the fee payable to be computed monthly to conform to the records of the cable company reflecting the number of its subscribers.

Showtime/The Movie Channel's request that the magistrate set a per-program license fee was rejected since it appeared to the magistrate that ASCAP would be prepared to negotiate a fee for such a license, notwithstanding the organization's previous refusal to quote such a fee. The magistrate directed ASCAP to transmit to the cable company a proposal for a license and undertake good faith negotiations concerning the terms of such a license. However, if the parties fail to reach an agreement with the time period specified, either party would be entitled to seek appropriate judicial relief.

United States of America v. American Society of Composers, Authors and Publishers, Case No. Civ. 13-95 (S.D.N.Y., Oct. 12, 1989) [ELR 11:11:16]

Magistrate sets interim ASCAP music license fees for pay cable program suppliers and basic cable services

In a separate proceeding before Magistrate Dolinger, Turner Broadcasting System and other cable television program suppliers sought to clarify the scope of Article V(A) of the consent decree under which ASCAP licenses the public performance rights to the music of the organization's members.

The Turner parties claimed that they were entitled to a license that would cover the actual performance of their programs by cable system operators. ASCAP contended that cable program suppliers were not "telecasting networks" within the meaning of Article V(A) and that the license available to the program suppliers covered only their use of the music, and not its actual performance by cable system operators.

After stating that ASCAP's motion for summary judgment with respect to the above issue would be addressed in a separate opinion, Magistrate Dolinger considered ASCAP's application for the setting of interim fees to be paid by the Turner parties during the pendency of the litigation.

It first was noted that the Turner parties, by requesting a license from ASCAP, had the right to perform the music in the organization's repertory, and, indeed, were exercising that right. Therefore, under the consent decree, ASCAP was entitled to seek an interim fee award pending the resolution of the terms of the license, including its scope.

Magistrate Dolinger next recalled that the purpose of the interim fee award "is to ensure a continued flow of revenue to the copyright holders during the period when the applicant holds the right to perform their music but no final fee has been established." In determining a reasonable fee for the pay cable program suppliers, the magistrate turned to the "readily determinable fee" of Showtime/The Movie Channel (see above), and stated that he saw no reason not to apply the fee of $0.15 per subscriber to the 1989-91 period; apparently both ASCAP and Showtime/The Movie Channel were willing to accept the prior fee award as an appropriate measure of an interim fee. (ASCAP, according to Magistrate Dolinger, agreed to treat the system operators carrying the programming of Showtime/The Movie Channel as licensed during the interim period, and not to seek payment from them, at least on an interim fee basis, for the company's programming).

The magistrate also set the interim fee for Home Box Office, the Disney Channel, Playboy Video Entertainment Group, SportsChannel/Prism Associates, Bravo Company and American Movie Classics Company at $0.15 per subscriber.

In turning to ASCAP's application for fees from basic cable services, Magistrate Dolinger noted that customers do not pay a separate fee for a system's basic package of cable transmissions; system revenues are derived from a combination of customer payments to the system operator and advertising fees. On the basis of previous agreements with MTV and The Nashville Network, ASCAP sought from the basic cable services an interim fee in the amount of 0.7 percent of gross revenues.

With respect to MTV, the magistrate found no compelling reason for declining to extend the prior fee agreement, which called for a specified sum to be paid for a given period of music use. The interim fee for MTV thus was set at the previously agreed-upon annual fee (not revealed by the magistrate). The magistrate similarly set the interim fee for The Nashville Network.

Magistrate Dolinger then observed that the rest of the basic cable services had not previously entered into licensing agreements with ASCAP; that the evidence indicated that the cable services used significantly less music than MTV and The Nashville Network; and that for interim fee purposes, it would be appropriate to set a fee comparable to that set for Showtime/The Movie Channel. However, since the fee for Showtime/The Movie Channel was defined on a per subscriber basis, and since the basic cable companies did not have a comparable set of subscribers for their services, Magistrate Dolinger defined the fee in terms of percentage of gross revenue. The $0.15 per subscriber fee amounted to about 0.3 percent of the gross revenue for Showtime/The Movie Channel for the period of April 4, 1984 through December 31, 1988, noted the magistrate, and the same fee was set for USA Network, Lifetime Television, The Discovery Channel, The CBN Family Channel, Black Entertainment Television, Arts and Entertainment Cable Network, and Turner Network Television.

The fee for blanket licenses for Turner's two news services, CNN and Headline News, also was set, on an interim basis, at 0.3 percent of gross revenue, notwithstanding the fact that Turner obtained direct licensing for most of the music used by the services.

United States of America v. American Society of Composers, Authors and Publishers, Case No. Civ. 13-95 (S.D.N.Y., Oct. 12, 1989) [ELR 11:11:17]

IN THE NEWS

Copyright infringement claim against Stevie Wonder is rejected

A Federal District Court jury in California has rejected a $25 million copyright infringement action against Stevie Wonder involving the song "I Just Called to Say I Love You."

Lloyd Chiate claimed that Wonder's work infringed a song written in 1976 by Chiate and Lee Garret. According to Chiate, Wonder heard the song, entitled "I Just Called to Say," several times in 1977 and 1978. Wonder stated that he had heard a tape of the song in 1978, but claimed that he wrote "I Just Called to Say I Love You" in 1976. [Apr. 1990] [ELR 11:11:19]

Jerry Tarkanian and National Collegiate Athletic Association settle long-standing dispute

Jerry Tarkanian and the National Collegiate Athletic Association have agreed to settle a thirteen year old dispute concerning Tarkanian's coaching activities at the University of Nevada, Las Vegas.

As reported at ELR 10:10:16, the United States Supreme Court ruled that the NCAA did not violate Tarkanian's constitutional rights in seeking to have the coach suspended after the NCAA reported that the university committed 38 violations of association rules, including ten violations purportedly involving Tarkanian.

The NCAA subsequently asked the Nevada Supreme Court to lift a trial court ruling that prevented the university from complying with an NCAA order to suspend Tarkanian. In September 1989, the Nevada Supreme Court ordered the trial court to review the injunction;

however, pending such review, the injunction barring any suspension of Tarkanian would remain in effect.

According to news reports, Tarkanian has agreed to pay his own legal fees resulting from the dispute, as well as $21,000 in legal fees incurred by the NCAA. The parties also agreed that the provisions of the trial court's injunction directed against the NCAA would be lifted, but that the provisions barring the university from suspending Tarkanian would remain in effect. [Apr. 1990] [ELR 11:11:19]

Aretha Franklin must pay $230,000 in expenses incurred by producer of failed musical

A Federal District Court Magistrate has ordered Aretha Franklin to pay Ashton Springer about $230,000 in expenses incurred by the producer in connection with the show "Sing Mahalia Sing."

As described at ELR 10:12:9, Franklin had agreed to perform the title role in the Broadway musical. When Franklin did not arrive in New York to begin rehearsals, the production was suspended. Federal District Court Judge Whitman Knapp had found the singer liable, on a theory of promissory estoppel, for the producer's losses. [Apr. 1990] [ELR 11:11:19]

Inventor wins $25 million jury verdict in action against Mattel, Inc. over "Hot Wheels" toy race track; court orders $46 million interest payment

A Federal District Court jury has awarded Jerome Lemelson about $25 million in damages in the inventor's patent infringement action against Mattel Inc. Lemelson sued the toy company in 1977, claiming that Mattel's "Hot Wheels" toy willfully infringed his patent for a flexible plastic race track.

Judge Charles Kocoras recently rejected Mattel's motion to overturn the verdict or grant a new trial, and refused to triple the damages awarded to Lemelson or to require Mattel to pay the inventor's attorney fees. However, Judge Kocoras' final order set forth the procedure and percentages to be used in setting the amount of interest due Lemelson; according to news reports, the interest will amount to $46 million. Mattel. plans to appeal the verdict. [Apr. 1990] [ELR 11:11:19]

Recording Industry Association anti-piracy update

The Recording Industry Association of America has announced its year-end summary of anti-piracy activities for 1989.

During the year, law enforcement officials, with RIAA assistance, seized about 937,000 pirate, bootleg and counterfeit cassettes. In July 1989, Los Angeles County deputies confiscated more than 300,000 alleged counterfeit tapes and 3.5 million alleged counterfeit insert cards; the deputies arrested ten individuals on charges of violating state anti-piracy laws.

The seizure of counterfeit labels increased from over 7.6 million in 1988 to about 19.9 million in 1989. Increases also were reported in seizures of pirate audio/video master tapes, and illicit compact discs. According to the RIAA, the United States Customs Service was responsible for ninety percent of the seized compact discs, due to the foreign origins of most illegal CDs

-over ninety-five percent of all illicit CDs seized in 1989 were manufactured abroad.

Once again, about fifty percent of all product seized in 1989 was confiscated in California, and sixty percent of all convictions/guilty pleas occurred in the state.

California's new felony anti-piracy legislation became effective in January 1989 (ELR 10:8:16). Subsequently, new felony statutes were enacted in Virginia (ELR 11:1:19), Texas, Florida, North and South Carolina, and Alabama. The statutes provide penalties ranging from three to five year prison terms and from $100,000 to $250,000 in fines.

The RIAA successfully settled several lawsuits against parties engaged in the unauthorized importation and distribution of cassettes, albums and compact discs.

An anti-piracy hotline, 1-800-BAD-BEAT, has provided the organization and law enforcement officials with crucial information about counterfeiting activities.

Steve J. D'Onofrio, the RIAA's Vice President, Director of Anti-Piracy Operations/Deputy General Counsel, has commented that "...the offense of recording piracy is being taken seriously by law enforcement, by legislators, by juries, and by judges... Record companies lose hundreds of millions of dollars each year to these crimes, and it is essential that violators be treated in a manner consistent with the harm that they inflict. The enactment of new felony legislation throughout the U.S. now allows judges to hand down significant sentences for significant crimes." [Apr. 1990] [ELR 11:11:20]

RIAA prevails in copyright infringement actions against flea market vendors of pirated and counterfeit cassettes

The Recording Industry Association of America has obtained damage awards and settlements in several civil copyright infringement actions brought against flea market vendors of pirate and counterfeit cassettes.

A Federal District Court in the Middle District of North Carolina ordered Frances Hughes Manus to pay the maximum statutory damages of $200,000, plus about $2400 in attorney fees and court costs to PolyGram Records and Sire Records.

A Federal District Court in the Eastern District of North Carolina ordered George Earl Joyner to pay $70,000, plus about $2000 in attorney fees and court costs to eight record company members of the Association.In the above cases, as well as in three other cases in which the vendors paid an undisclosed amount to the record companies to settle pending litigation, the vendors were enjoined from selling unauthorized recordings to the public of the companies' copyrighted works. [Apr. 1990] [ELR 11:11:20]

Directors Guild of America ratifies television and film contract

The members of the Directors Guild of America have voted to ratify the terms of a new three year film and television contract.

The contract, which will go into effect on July 1, 1990, provides for a pay increase of 13.84 percent over the three years of the contract; increases various production fees; includes a provision for auditing residual payments; and allows producers to schedule work for Guild crews on any five out of seven consecutive days without having to pay premiums for Saturdays and Sundays, unless those days are the sixth and seventh days worked in a row. [Apr. 1990] [ELR 11:11:20]

Writers Guild of America ratifies new contract with CBS

The Writers Guild of America and CBS have entered a new three year contract; the contract covers more than 300 of the network's television and radio newswriters, editors, desk assistants, researchers, promotion writers and graphic artists, working in Los Angeles, New York, Chicago, and Washington, D.C.

The contract, according to news reports, provides for a five percent pay increase retroactive to March 2, 1990, and another five percent increase on September 1, 1991. There also will be an increase in fees for certain additional work by newswriters, desk assistants and other staff members; increased safety measures for users of video display terminals; and extra holiday and vacation pay for certain employees.

Guild members, as of September 1991, will pay up to twenty percent of CBS' premium costs for a member's health coverage. [Apr. 1990] [ELR 11:11:20]

Screen Actors Guild votes to approve proposal to take over jurisdiction of Screen Extras Guild

The membership of the Screen Actors Guild has voted to approve the Guild's proposal to take over the jurisdiction of the Screen Extras Guild. The Screen Actors Guild will not assume any of the Screen Extra Guild's assets or liabilities, and will not be required to include representatives of the Screen Extras Guild on its board of directors. However, extras who were members of the

Screen Extras Guild as of December 1, 1989 will become eligible to join the Screen Actors Guild, and individuals who show that they have worked three days as professional extra in a motion picture covered by a Screen Actors Guild contract also will become eligible to join the Guild.

According to news reports, the Screen Actors Guild already has jurisdiction over extras working in motion picture and filmed-television work on the East Coast; the takeover will provide the Guild with national jurisdiction over such extras. [Apr. 1990] [ELR 11:11:21]

Las Vegas musicians ratify agreement ending lengthy strike

Musicians from Local 369 have ratified a new contract, ending a 7 1/2 month strike against five Las Vegas hotels.

The hotels agreed to provide severance pay of $28,000 for each of the forty-six production show orchestra members who lost jobs when three hotels - Bally's, the Flamingo Hilton, and the Tropicana - introduced tape and synthesizer music. A limited number of musicians will be rehired. Other musicians will divide a "buy-out" payment of $50,000. The hotels may hire musicians when needed for a production at $150 per day for each of the first three days and $100 for the fourth through sixth day.

Unlike previous contracts, the hotels have not guaranteed that musicians in their "celebrity" rooms will be hired a minimum number of weeks per year. [Apr. 1990] [ELR 11:11:21]

Jukebox owners and performing rights organizations agree on music licensing terms

The Amusement & Music Operators Association and the three major performing rights organizations have agreed on a music licensing arrangement, according to news reports.

The current jukebox compulsory license will be suspended upon a determination by the Copyright Royalty Tribunal that a sufficient number of jukebox owners have entered negotiated licenses.

Further details concerning the terms of the jukebox licenses will be reported when such details become available. [Apr. 1990] [ELR 11:11:21]

Federal Communications Commission revokes license of KQEC-TV in San Francisco

The Federal Communications Commission has revoked the license of KQEC-TV, the public broadcasting station in San Francisco. The Commission awarded the station's frequency to the Minority Television Project.

KQEC was off the air from January to May 1980. According to news reports, KQEC, the UHF "sister station" to the KQED, a VHF station, was cited for lying to the Commission concerning the reason the station was off the air. The Commission agreed with a staff review board finding that the station went off the air due to financial difficulties, rather the technical difficulties, as claimed by the licensee.

KQED has announced that the station intends to appeal the Commission's decision. [Apr. 1990] [ELR 11:11:21]

DEPARTMENTS

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Battle of the Privileges: First Amendment vs. Sixth Amendment by Eileen F. Tanielian, 10 Loyola Entertainment Law Journal 215 (1990)

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The Constitutional Administration of the Beirut Agreement: Paradox or Possibility? by Alison E. Baur, 12 Comm/Ent, Hastings Communications and Entertainment Law Journal 245 (1989)

Mandatory Television Access for Minor Party Presidential Candidates: Revamping Section 315 of the Equal

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Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts has published Volume 13, Number 4 with articles as follows:

ARS GRATIA IRS: Artists and the Legislative Process of Tax Laws by Susan Schulak Ketcher, 13 Columbia-VLA Journal of Law & the Arts 401 (1989)

Copyright Protection in the Berne Union: Analyzing the Issues by Paul Edward Geller, 13 Columbia-VLA Journal of Law & the Arts 435 (1989)

Authors' Rights in Spain: Comments on the Intellectual Property Law of Spain by Milagros Del Corral Beltran, 13 Columbia-VLA Journal of Law & the Arts 477 (1989)

VLA Perspectives-Lessons from the Rushdie Affair, 13 Columbia-VLA Journal of Law & the Arts 505 (1989)

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Fair's Fair: A Comment on the Fair Use Doctrine by Lloyd L. Weinreb, 103 Harvard Law Review (1990)

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First Amendment Claims Against Public Broadcasters: Testing the Public's Right to a Balanced Presentation, 1989/5 Duke Law Journal 1386 (1989)

Copyright Registration: Defense Against Trademark Poachers in the Philippines, 2 Asia Law and Practice 38 (1990)

[ELR 11:11:23]