LEGAL AFFAIRS

View from the "Rear Window": A Practical Look at the Consequences of the Supreme Court's Decision in Stewart vs. Abend

by Lionel S. Sobel

In 1954, Jimmy Stewart starred (along with Grace Kelly) in the now classic motion picture "Rear Window." Under the direction of Alfred Hitchcock, Stewart portrayed a photographer laid up by a broken leg. Through the rear window of his Greenwich Village apartment, the photographer sees his neighbor (played by Raymond Burr) commit what the photographer thinks is a murder. And from there, the movie continues with what critics called a "macabre tale."

More than thirty years later, "Rear Window" became the object of a copyright infringement case that has produced a decision by the United States Supreme Court that many in the entertainment industry consider macabre in itself. Ironically, Jimmy Stewart -- an American good guy if ever there was one -- came up the loser in the case, even though, in ruling against Stewart, the Supreme Court had to brand him an "infringer," at least in a technical sense.

From time to time, a copyright decision comes along that fundamentally alters the way business must be done in the entertainment industry, and Stewart v. Abend, 110 S.Ct. 1750 (1990), is one of these. It's also a "technical" decision, so much so in fact that the legal analysis it requires, of projects both new and old, may seem to have more in common with federal income tax problems than with copyright questions. The analysis however is important, and the purpose of this article is to assist those who now must perform it.

In an effort to provide such assistance, this article looks, figuratively speaking, out the rear window opened by the Supreme Court's decision in Stewart v. Abend and: first, describes the decision itself and explains how it came about; second, identifies the particular sorts of works that are affected by the decision (not all are); third, indicates what the effects are on those works that are affected; and fourth, suggests steps that may be available to avoid or minimize the impact of the decision. Even if not macabre, the view from this rear window is not pretty, though many have to look at it.

The Stewart v. Abend Decision

The headwaters of Stewart v. Abend began as a mere trickle almost a half-century ago when author Cornell

Woolrich wrote a short story entitled "It Had to be Murder" and then published it in a 1942 issue of a now-defunct magazine called "Dime Detective." In 1945, Woolrich sold the movie rights to several of his stories, including "It Had to be Murder," to B.G. De Sylva Productions for the then- handsome sum of $9,250, where, as often happens even now, they languished unexploited for several years.

In 1953, the stream began bubbling once again when Jimmy Stewart and Alfred Hitchcock formed a production company called Patron, Inc., and acquired the movie rights to "It Had to be Murder" for $10,000. The Stewart/Hitchcock combination turned the stream to a river, and with the financial backing Paramount Pictures, "It Had to be Murder" became the movie "Rear Window."

Since Woolrich's story was first published in 1942, the story's copyright was due to be renewed 28 years later, in 1970. At the time Woolrich first sold the movie rights to his story, he agreed to renew the story's copyright and assign movie rights for the renewal term as well. This sort of provision was quite common even in the '40s. Woolrich, however, died in 1968, just two years before he could renew the story's copyright; and because he left no widow or children, the copyright was renewed by the executor of his estate, Chase Manhattan Bank, on behalf of a trust Woolrich had created for the benefit of Columbia University.

After renewing the copyright, the bank assigned it to Sheldon Abend for the sum of $650 plus 10% of all proceeds from his exploitation of the story. Abend notified Stewart, Hitchcock and MCA, who by then had become the owners of the copyright and renewal copyright in the "Rear Window" movie, that he owned the renewal copyright to "It Had to be Murder," and Abend asserted that their continued distribution of the movie infringed his copyright. They nevertheless authorized ABC to broadcast "Rear Window," and in 1974 Abend sued them for the first time, in Federal District Court in New York. Abend dismissed that suit in return for $25,000.

In 1977 something happened that made it appear as though Abend had accomplished quite a coup by settling his first suit for $25,000. In that year the Second Circuit Court of Appeals in New York decided a case called Rohauer v. Killiam Shows in which it held that a movie producer could continue to distribute a movie based on an underlying literary work during the renewal term of that work, if its author had agreed to grant movie rights for the work's renewal term, even if the author died before renewal could be claimed, and the renewal was therefore claimed by the author's surviving spouse, children or executor, as authorized by the Copyright Act of 1909. Rohauer, in other words, involved the very same facts as Abend's earlier case; it simply was between other people.

Abend, however, never accepted the correctness of the Rohauer decision. And thus, when MCA, Stewart and Hitchcock resumed distributing "Rear Window," Abend filed suit again. This time however he sued in Federal District Court in Los Angeles -- in the Ninth Circuit. The Ninth Circuit and the Second Circuit disagree with one another quite often in copyright cases, and that is what Abend was banking on when he filed his second suit. Though Abend's case was dismissed by the District Court, his persistence and strategy bore fruit in the Court of Appeals. As he hoped and predicted, the Ninth Circuit Court of Appeals disagreed with the reasoning and conclusion of the Second Circuit's Rohauer decision; and the Ninth Circuit ruled in Abend's favor. (ELR 10:9:11) To the Ninth Circuit's way of thinking, the distribution of "Rear Window" without Abend's consent infringed his renewal copyright in "It Had to be Murder."

This conflict between the Ninth and Second Circuits set the stage for review by the Supreme Court. And in a decision announced April 24th, 1990, the Supreme Court agreed with the Ninth Circuit that the distribution of "Rear Window" does indeed constitute an infringement of Abend's copyright.

Effect in a Nutshell

As a result of the Supreme Court's decision, it is an infringement of copyright to distribute (or otherwise exploit) a derivative work that is based on or incorporates a pre-1978 underlying work to which rights were obtained during its initial copyright term if the author dies before renewal, even though the author granted the producer of the derivative work rights to the underlying work for its full term of copyright "including renewals and extensions."

The phrase "derivative work" is a term of art in copyright law, not an aesthetic or critical judgment. It simply means a work that is based on (or incorporates) a preexisting work. The phrase "underlying work" simply refers to the preexisting work that is the basis for (or is incorporated into) the derivative work. In order to write about the consequences of the "Rear Window" case, it is necessary to use the phrases "derivative work" and "underlying work" repeatedly. Though they have a technical sound to them, they are used to refer to commonplace and easily recognized kinds of works. For example, movies, television programs and recordings all are "derivative works." They are based on (or incorporate) books, stories, plays and songs, all of which are "underlying works."

Types of Works

The universe of works protected by copyright is, like Gaul, divided into three parts -- at least for the purpose of a "Rear Window" analysis. The three parts are: (1) works that were created or published for the first time since 1978; (2) pre-1978 works that were in their renewal terms of copyright when their copyrights were transferred or licensed; and (3) pre-1978 works that were in their initial terms of copyright when their copyrights were transferred or licensed.

The good news about the "Rear Window" case -- to the extent there is any -- is that it does not affect all works. "Rear Window" does not have any effect on derivative works that are based: (1) on underlying works that were created or published for the first time since 1978; or (2) on pre-1978 works that were in their renewal terms of copyright when their copyrights were transferred or licensed.

Works since 1978

The reason that "Rear Window" does not affect derivative works based on underlying works that were created or published for the first time since 1978 is this.

Copyright law changed in 1978, and works created or first published since that change no longer have renewal terms at all. Instead, the copyright term of such works is the life of the author plus 50 years. [Copyright Act of 1976, 17 U.S.C. Sec. 302] Since such works no longer have renewal terms, there is no renewal term to be claimed by anyone. When authors die, their copyrights may be inherited by others. But those who inherit a deceased author's copyrights simply inherit the 50-year balance of single-term copyrights, and they do not have the right prevent (or demand additional payment for) the continued exploitation of derivative works based on the works whose copyrights they inherited.

Current copyright law does authorize the termination of transfers and licenses (to 1978 and more recent works), 35 years after they are granted. But even if a transfer or license is terminated, no "Rear Window" type problem is created, because the Copyright Act explicitly provides that derivative works previously produced may continue to be exploited without further consent from the owner of the copyright to the underly-

Thus, if a movie or television program is based on a book, story or play that was created or first published since 1978, or if a movie or television program has songs in its soundtrack that were created or first published since 1978, the "Rear Window" case will not affect that movie or television program in any way.

Pre-1978 works, generally

"Pre-1978 works" are those that were published before 1978 as well as those that were registered for copyright as unpublished works before 1978. (A work that was created, but not published or registered, before 1978 is treated like works created since 1978.)

Prior to 1978, only a few kinds works could be registered as unpublished works. One kind that could be however was dramatic works, and thus unpublished scripts for plays, movies and television programs could be registered and often were.

The fact that unpublished scripts could be registered for copyright is significant in analyzing whether any particular work was transferred during its initial term of copyright or during its renewal term -- or indeed whether the work's copyright may have expired altogether and thus lapsed into the public domain (more on this, later).

Pre-1978 renewal-term works

The reason that "Rear Window" does not affect derivative works based on underlying pre-1978 works that were in their renewal terms of copyright when their copyrights were transferred or licensed is this.

Anyone who intends to produce a derivative work based on a work that already is in its renewal term will necessarily enter into an agreement with whoever already owns the renewal-copyright. The subsequent death of the owner of the renewal-copyright (even if the owner is the author) does not entitle those who may inherit the renewal-copyright to prevent (or demand further compensation for) the exploitation of derivative works based on the work whose renewal-copyright they have inherited. "Rear Window" involved slightly but significantly different facts. In "Rear Window," the movie's producers entered into an agreement with a story author during the initial term of the story's copyright, and the author died before the copyright was renewed.

Current copyright law does authorize the termination of transfers and licenses of renewal copyrights to pre-1978 works, 28 years after the renewal term begins. But even if a transfer or license is terminated, no "Rear Window" type problem is created, because the Copyright Act explicitly provides that derivative works previously produced may continue to be exploited without further consent from the owner of the renewal copyright to the underlying work. [17 U.S.C. Sec. 304]

Thus, if a movie or television program is based on a pre-1978 book, story or play that was in its renewal term when movie or TV rights were acquired, or if a movie or television program has pre-1978 songs in its soundtrack and synchronization (and movie theater performance) licenses were obtained during the songs' renewal terms, the "Rear Window" case will not affect that movie or television program in any way.

Pre-1978 initial-term works

"Rear Window" does affect some pre-1978 works that were in their initial terms of copyright when transfers or licenses were granted to producers of derivative works. It does not affect all such works, however.

-Works for hire

"Rear Window" does not affect works for hire, at least where the employer is a corporation (as usually is the case with works for hire).

The reason that works for hire are not affected is that as a matter of copyright law, the "author" of such works is the employer rather than the person who actually created the work. This means that the right to renew copyrights to works for hire belongs to the employer, not to the employee who actually created the work. If the employer is a corporation, it will have the right to renew its copyrights, if the corporation still exists when the time to renew arrives. However, even if the corporation ceases to exist and thus stops "living" before the copyright may be renewed, a corporation will not leave behind a widow, widower, children, executors or next-of-kin. This is significant, because under the Copyright Act of 1909 (section 24), a copyright may be renewed only by the author if alive, or by a deceased author's widow, widower, children, exectutors or next-of-kin.

Thus, if a movie or television program is based on a pre-1978 script (or other work) that was written as a work for hire, or if a movie or television program has pre-1978 songs in its soundtrack that were written as works for hire, the "Rear Window" case will not affect that movie or television program in any way. It will not, because the movie or television producer will have acquired rights from the employer-author, which (if a corporation) will renew the copyright itself if it exists, and if it doesn't exist, the copyright to the underlying script or song will not be renewed at all. If the copyright is renewed by the employer-author, the following section of this article explains why there will be no "Rear Window" problem. If the copyright is not renewed, the underlying work will go into the public domain, and no "Rear Window" problem will occur for that reason.

-Author lived to renewal

In the "Rear Window" case, author Cornell Woolrich died in 1968, two years before he would have been eligible to renew the copyright to his story. Suppose however he had lived two more years, and had renewed the copyright. If that had happened, Woolrich's grant of movie rights for the renewal term of his story would have been effective, and he would not have been able to prohibit (or demand additional payment for) the continued exploitation of the movie "Rear Window." Nor would his executor, when Woolrich thereafter died.

This is so because the Supreme Court has held and repeatedly reaffirmed that an assignment by an author of his or her renewal rights before the initial copyright term expires is "valid against the world, if the author lives until the commencement of the renewal period." Fred Fisher Co. v. Witmark & Sons, 318 U.S. 643 (1943); Miller Music Corp. v. Charles N. Daniels, Inc., 362

U.S. 373 (1960); Stewart v. Abend, 110 S.Ct. 1750 (1990).

Thus, if the author of an underlying work lives until the renewal copyright may be claimed (during the 28th year after the work's first publication or registration as an unpublished work), and an application to register the renewal copyright actually is filed while the author is still alive, the "Rear Window" case will have no effect on the right of the producer of a derivative work to continue with its exploitation.

-Author died prior to renewal

If the author of an underlying work dies before the renewal copyright may be claimed, it is likely -- but still not certain -- that a "Rear Window" problem will exist.

Producers sometimes acquire renewal rights not only from authors themselves, but also from authors' spouses and children. So long as the surviving spouse and children of a deceased author are the very same people from whom renewal rights were acquired, the acquisition of renewal rights from them will be effective, even if renewal rights were acquired before the author died and before the copyright was renewed.

If however the author remarried or had more children before dying, and renewal rights were not acquired from the new spouse or children, then "Rear Window" will effect the producer's right to continue exploiting the derivative work, because the new spouse and children will have the right to claim the renewal copyright.

From this it naturally follows that if the producer of a derivative work did not acquire renewal rights from the author's spouse or children at all -- perhaps because the author had none, or perhaps because their rights simply were not made part of the deal -- there will be a "Rear Window" problem if the copyright to the deceased author's underlying work is renewed. This is in fact the precise situation that occurred in the "Rear Window" case.

Effects of "Rear Window"

The effects of the "Rear Window" decision will be felt in two ways. First, "Rear Window" will influence the sorts of works that will be used in or as the basis for new derivative works being planned for future production. Second, it will influence whether and on what terms previously produced derivative works may continue to be exploited.

-Future productions

For derivative works to be produced now and in the future, underlying works created or first published since

1978 and prior to 1962 are safe," in the "Rear Window" sense.

Works since 1978 are safe, because their copyright terms are controlled by current copyright law, and thus they do not have renewal terms at all, for the reasons explained above.

Pre-1962 works are safe to use in or as the basis for derivative works produced now or in the future, because the initial terms of pre-1962 works expired at the end of 1989 or earlier (i.e., 1961 + 28 years = 1989). Thus they now are in their renewal terms (if their copyrights were renewed) or the public domain (if their copyrights were not renewed). If they are in their renewal terms, derivative work producers will be dealing with renewal-copyright owners, and "Rear Window" problems will not arise for the reasons explained above. If they are in the public domain, they are available for use without anyone's consent.

Works first published (or registered for copyright as unpublished works) between 1962 and 1977 are "suspect," because they are in their first term of copyright and their authors may die before renewal, just as Cornell Woolrich did. This does not mean that "suspect" works should not be used at all. It simply means that the potential consequences of using them must be evaluated more carefully than before. Some suggestions follow.

By the way, the first year of this "suspect" period will become 1963 in 1991, 1964 in 1992, and so forth, as the 28-year initial term of copyright moves forward with each new year. The final year of the "suspect" period always will remain 1977, however, because works created or first published after 1977 are controlled by current law and do not have renewal terms.

-Previously produced works

In assessing the effect of "Rear Window" on previously produced works, it is useful to give separate consideration to particular businesses and relationships, because the effect differs from business-to-business and relationship-to-relationship within the entertainment industry.

--Authors and producers

The most dramatic effects caused by the "Rear Window" decision will be on agreements between authors and producers. That effect of course is precisely the effect felt by Jimmy Stewart and MCA in the "Rear Window" case itself: producers of movies and TV programs based on pre-1978 literary works whose authors die before renewal will not be able to continue distributing those movies and programs without the consent of the owners of the renewal copyrights to the underlying works. Doing so without the consent of the owners of the renewal copyrights would constitute copyright infringement.

The Supreme Court did not decide what damages a renewal-copyright owner might be entitled to recover. The damage phase of the "Rear Window" case itself has not been conducted yet. Thus, the distribution of movies and TV programs based on pre-1978 works has become a financially risky proposition, especially since there is a three-year statute of limitations on infringement claims, and a distributor could have three years' worth of its distribution profits from a movie or program put in jeopardy.

For this reason, it has become important for distributors to identify the particular movies and TV programs in their libraries that do present "Rear Window" problems. This is easier said than done, however. During the course of the "Rear Window" litigation, Sheldon Abend estimated that 600 or so movies would be affected by a decision in his favor, but the basis for his estimate was never disclosed. The number may be much greater, and in any event, determining the identity of the particular movies and programs affected is a difficult task.

While literary works may pose a "Rear Window" risk for use as the basis for new movies and television programs only if they were first published (or registered as unpublished works) between 1962 and 1977, even pre-1962 literary works present a "Rear Window" risk if they already have been used as a basis for previously produced movies and TV programs. Indeed, literary works as old as those first published (or registered) in 1912 still present risks, if they were the basis for already produced movies and programs.

This is so because the first copyright term of 1912 works expired 28-years later in 1940. If renewed, the second term would have lasted until 1968, by which time Congress was extending then-expiring copyrights a year or two at a time in anticipation of a new copyright law. Then when the current Copyright Act was passed, a 19-year "tail" was added to the second term of then valid copyrights, which would have extended the second term of a 1912 work to December 31, 1987.

Thus an infringement would occur from the distribution in 1987 of a pre-1940 movie based on a 1912 literary work whose author died before 1940, if the copyright to the underlying literary work was renewed by the author's heirs and the movie's distribution in 1987 was done without the heirs' consent. Moreover, since there is a three-year statute of limitations on copyright claims, the heirs in such a case could file their lawsuit any time up to December 31, 1990, and seek damages for all distribution done from three years before suit was filed through the end of 1987.

This demonstrates that as a practical matter, no movie or TV program still in distribution is exempt from potential "Rear Window" problems simply by virtue of its age. Thus every movie and program in a distributor's library should be analyzed to see whether it presents a risk.

--Music publishers and songwriters

"Rear Window" has no effect on agreements between music publishers and songwriters for two reasons.

First, music publishers themselves do not create derivative works, and thus music publishers have never been able to make the kinds of arguments that movie producers made (unsuccessfully) in the "Rear Window" case.

Second, music publishers had their day in the Supreme Court thirty years ago, but lost. In Miller Music Corp. v.

Charles N. Daniels, Inc., 362 U.S. 373 (1960), music publishers argued that if a songwriter assigned a renewal copyright, the assignment should be valid even if the songwriter died before the renewal could be claimed. The Supreme Court ruled otherwise however.

Thus, in a sense, music publishers have lived for thirty years with the circumstances just imposed on movie and TV producers by the "Rear Window" case.

--Book publishers and authors

"Rear Window" has no effect on agreements between book publishers and authors, for the very same reason it has no effect on music publishers' agreements with songwriters. That is, book publishers have lived for thirty years with the possibility that they could lose publishing rights to a deceased author's heirs. But this was as a result of the Miller Music case, not "Rear Window."

--Songwriters and record companies

"Rear Window" may affect the ability of record companies to continue distributing recordings of pre-1978 songs on the same terms as originally agreed to. Whether "Rear Window" actually has any such effect will depend on the terms of the licenses the record company obtained originally.

In order to make and distribute recordings, record companies must obtain licenses to the songs to be recorded. These licenses are called "mechanical licenses" in the record business, and they may be acquired in either of two ways: by direct negotiation with the owner of the copyright to a song (i.e., the songwriter or a music publisher), or by taking advantage of the compulsory license set forth in the Copyright Act itself.

Where record companies obtained mechanical licenses to pre-1978 songs directly from songwriters or music publishers, "Rear Window" has the effect of terminating those licenses if the songwriter dies before renewal. However, there will be no economic consequences of this effect, if the terms of the license required the record company to pay royalties at the "Statutory rate," because even after copyrights are renewed by the heirs of deceased songwriters, record companies may exercise their compulsory license rights under the Copyright Act and continue to pay royalties at the same rate as before.

If record companies exercised their compulsory license rights to begin with, "Rear Window" will have no economic effect on such licenses either, because record companies may simply re-exercise their compulsory license rights after renewal and continue to pay royalties at the same rate as before.

On the other hand, if record companies obtained mechanical licenses directly from songwriters or music publishers, and the agreement provided for a royalty rate of "2 cents" per record (which was the pre-1978 statutory rate), or a "3/4 statutory" rate, then "Rear Window" will have the effect of terminating these favorable royalty rates. In order to continue manufacturing and selling recordings of such songs, record companies will have to negotiate new mechanical licenses at new rates, or exercise their compulsory license rights and pay royalties at the current compulsory license rate.

--Music-publishers/songwriters and producers

"Rear Window" does affect agreements between music publishers and songwriters on the one hand, and movie and TV producers on the other. It does so, because "Rear Window" has the very same effect on soundtrack music as it has on an underlying literary work on which a movie or program is based.

That effect is this. If a movie or TV program has a pre-1978 song in its soundtrack, the rights to which were obtained during the song's initial copyright term directly from the song's then-living songwriter, or from a music publisher that acquired the song's copyright from the song's then-living songwriter, the producer's continued distribution of that movie or program will be an infringement of the song's renewal copyright if the songwriter dies before renewal.

Producers may be able to replace "Rear Window"-problem songs in a soundtrack, if they are not featured performances and are recorded on a separate track from dialogue and sound effects. So in this sense, music may present fewer problems for producers than underlying literary works. On the other hand, most movies and TV programs are based on no more than one underlying literary work but may have a dozen or more songs in their soundtracks. Determining which movies are subject to the "Rear Window" decision on account of underlying literary works is a huge job for companies with large film and TV libraries. Determining which movies are subject to "Rear Window" because of soundtrack music is an even bigger job, by an entire order of magnitude.

--Record companies and movie/TV producers

"Rear Window" probably will not have any direct effect on agreements between record companies and movie or TV producers, even though since 1972 record companies have owned copyrights in their recordings and frequently grant producers master recording licenses authorizing producers to incorporate recordings directly into movie and TV soundtracks.

The reason that "Rear Window" should not have any direct effect on such agreements is that pre-1972 sound recordings were not protected by federal copyright at all, and thus there is no sound recording copyright to be renewed by anyone for those recordings. While recordings have been protected by copyright since 1972, virtually all recordings are works for hire, and thus the "authors" of virtually all recordings are record companies rather than individual performers. Thus, record companies themselves will renew those sound recording copyrights (beginning in the year 2000), rather than individual recording artists or their heirs. And master recording licenses granted to movie and TV producers for the full term of copyright "including renewals and extensions" will effectively authorize producers to distribute their movies and programs even after those sound recording copyrights are renewed.

Though "Rear Window" probably will not have any direct effect on agreements between record companies and movie or TV producers, it will have an indirect effect on such agreements, for this reason. Producers need synchronization (and movie theater performance) rights for the underlying songs, as well as master recording recording licenses, in order to use recordings in soundtracks. Record companies do not own, and thus do not grant licenses to, the copyrights to the songs on their records. And for the reasons explained above, synch (and performance) rights to pre-1978 songs may be put in jeopardy by "Rear Window." Thus, record companies may find that master recording licenses for recordings of pre-1978 songs are less in demand as a result of "Rear Window" than they were before.

Reducing the impact

There are a number of steps that can be taken to minimize the impact of "Rear Window."

-Future productions

Producers of derivative works that are to be produced in the future can minimize the impact of the "Rear Window" decision by using underlying works that are not affected by it.

Works created or first published since 1978 or prior to 1962 are "safe" from "Rear Window" problems.

Many 1962 through 1977 works are "safe" as well. Works for hire are safe, where the employer-author was a corporation. Moreover, the standard for determining whether a pre-1978 work was created for hire is a more easily satisfied standard than that articulated by the Supreme Court in its decision last year in CCNV v. Reid (ELR 11:3:12), because that case dealt only with work for hire standards under the current Copyright Act which applies only to works created or first published since 1978. Thus it is possible that many pre-1978 songs may qualify as works for hire, even if they would not had they been created or published since 1978.

Also safe are 1962 through 1977 works by authors or songwriters who have died already, because if they have died already, renewal-term rights may be obtained from their surviving spouses and children at the outset.

Insofar as soundtrack music is concerned, 1962 through 1977 music may be used so long as it can be stripped from the soundtrack in the future should a "Rear Window" problem arise. Naturally, in such cases, producers and distributors should mark their calendars for the renewal years of such songs, so they will know when they may have to strip a song from the soundtrack if the songwriter is no longer living and the song's copyright is renewed by others.

-Previously produced works

Precautions for previously produced works are somewhat more difficult to take now, but there are some useful things that still may done.

First of course it is important to identify those derivative works still being distributed that may present "Rear Window" problems.

Movies and TV programs based on pre-1978 published books and stories are immediately suspect. Also of concern are works based on pre-1978 plays that were published or registered for copyright as unpublished works. (Public performance of a play did not "publish" it, but unpublished plays could be registered and often were.) Movies and programs based on books, stories and plays should be relatively easy to spot. Indeed, their on-screen and advertising credits often reveal such underlying sources.

Somewhat more difficult to detect, but also of potential concern, are movies based on screenplays (and TV programs based on teleplays) that were written on "spec" -- that is, not as works for hire -- the copyrights to which were transferred to producers as the first step in what became successful development deals.

These spec scripts may well have been registered for copyright as unpublished works, by the screenwriters who wrote them or by the production companies that purchased them. If so, that registration started the initial term of copyright and set the stage for a renewal copyright to be claimed 28 years later, by the screenwriter's heirs or executor if the screenwriter were not then alive, thus creating a "Rear Window" problem.

If the spec script were not registered for copyright as an unpublished work by anyone, a "Rear Window" problem is less likely. Unless the script was published or registered before 1978, its duration of copyright is controlled by the current Copyright Act, and the script will not have a renewal term for anyone to claim, let alone a deceased screenwriter's heirs or executor. There appears to be a split of authority about whether a pre-1978 script is "published" by the publication of a movie produced from it. If the publication of a movie does not "publish" the script, scripts that were not otherwise published (in print, for example) unpublished to this day, and no renewal term will ever come into existence to jeopardize the continued distribution of the movie. Many television program scripts are likely to be unpublished, because television programs themselves are not "published" by their mere broadcast, though movies are published by their release.

David Nimmer -- the current author of Nimmer on Copyright -- is of the view that publication of a movie does "publish" its underlying script; and thus pre-1978 movie releases did start the initial term of copyright of their underlying scripts. Moreover, as he pointed out in his Legal Affairs articles in these pages in September 1989 (ELR 11:4:3), there may have been a silver lining in such "publication," unanticipated at the time it was done but brought to light in the now-affirmed decision of the Court of Appeals in the "Rear Window" case. If publication of a movie constitutes a "publication" of its underlying screenplay, the screenplay's copyright must be renewed 28 years later. But one of the implications of the "Rear Window" case is that renewal of the copyright to the movie itself will not renew the copyright to the underlying screenplay if it was written on spec (i.e., not as a work for hire) and the screenwriter died during the first term. For this reason, copyrights to spec scripts that otherwise may have presented "Rear Window" problems are likely to expire, and with that, their potential for causing "Rear Window" problems will evaporate.

Once derivative works presenting potential "Rear Window" problems are identified, a strategy for each should be adopted. If the underlying work's author has died, and its copyright already has been renewed by heirs or an executor, the derivative work may be withdrawn from distribution unless and until a satisfactory license is negotiated with the owners of the renewal copyright. If the author of an underlying work has died, but it is not time to renew yet, renewal-term rights may be acquired now from the surviving spouse and children or executor who will be entitled to renew when the time comes.

If the author of an underlying work has not died yet, renewal-term rights may be acquired now from his or her current spouse and children, though such a deal will be enforceable only if the author doesn't remarry or have more children before dying.

If the author of an underlying work has not died yet, and if the original rights-acquisition agreement gives the producer the authority to renew the copyright to the author's underlying work (as such contracts often do), the producer should file the renewal application with there main Copyright Office as soon as possible after January 1st of the 28th year of the initial term. The producer should do so, because if the author is alive when the renewal application is registered, there is authority that the renewal will be effective -- along with any grants of renewal-term rights the author may have made -- even if the author dies before of the 29th year of copyright protection begins. Frederick Music Company v. Sickle), 708 F.Supp. 587 (S.D.N.Y. 1989) (ELR 11:3:14).

Unanswered questions

As often happens when a Supreme Court decision whips the law in a new and different direction, the "Rear Window" case generates many collateral questions concerning its implementation which are not answered in the Supreme Court's opinion, and possibly not elsewhere either.

Among these questions are those that may involve technical applications of otherwise well-understood principles. For example, if a pre-1978 underlying work was jointly authored, and movie rights to it were granted by both authors for the full term of copyright "including renewals and extensions," and one author dies before renewal but the other lives, will the movie's distributor have a "Rear Window" problem with the heirs or executor of the deceased author? Or will the grant of renewal-term rights by the surviving author be a sufficient basis for continued distribution of the movie without further obligation (except those set forth in the original agreement) to anyone?

Other questions left unanswered by the "Rear Window" decision are more sweeping and theoretical in nature. For example, if a movie or TV program is based on an underlying work of foreign origin -- a novel, for example, written by a European author -- and the author dies during the first 28 years after the work's publication, does the "Rear Window" case give the heirs of the European author the same renewal-term rights that an American author's heirs would have, even though the copyright law of the author's own country does not provide for renewal terms?

The flip side of this question is equally intriguing. If an American movie was based on a pre-1978 underlying work by a now-deceased American author whose heirs or executor renewed the copyright to the underlying work, does the distribution of that movie in foreign countries infringe the renewal-copyright to the underlying work? In short, would MCA's distribution of "Rear Window" in Europe without Sheldon Abend's consent infringe Abend's renewal copyright, even though the copyright law of European countries does not provide for renewal terms?

These questions -- and others readers may want to suggest by writing to the Entertainment Law Reporter -- will have to await future articles. A full exploration of all of the issues generated by the "Rear Window" case may require a mini-treatise by itself.

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[ELR 12:1:3]

RECENT CASES

Continued distribution of movies (and other derivative works) based on pre-1978 literary works is an infringement if underlying work is in its renewal copyright term and author died before renewal, Supreme Court rules in "Rear Window" case

The Supreme Court has ruled that the renewal copyright to the short story "It Had to be Murder" by the late Cornell Woolrich was infringed when MCA continued to distribute the movie "Rear Window," which was based on Woolrich's story, without the consent of Sheldon Abend, the current owner of the story's renewal copyright.

When Woolrich sold the movie rights to his 1942 story, he agreed to assign the renewal copyright to the story as well. But Woolrich died in 1958, two years before he could renew the copyright. The copyright was renewed by Woolrich's executor, as authorized by the Copyright Act of 1909, from which Abend purchased it.

In ruling as it did, the Supreme Court affirmed the decision of the Federal Court of Appeals in California which also had held that continued distribution of "Rear Window" infringed the story's renewal copyright. (ELR 10:9:11) The movie industry had relied for years on a contrary decision by a Federal Court of Appeals in New York in a 1977 decision in Rohauer v. Killiam Shows, Inc.

The Supreme Court's decision in "Rear Window" has significant implications for the entertainment industry, particularly in light of its reliance on the now discredited Rohauer decision. The "Rear Window" case and its implications are the subject of the Legal Affairs article appearing at page 3 of this issue of the Entertainment Law Reporter. (ELR 12:1:3)

Stewart v. Abend, 110 S.Ct. 1750 (1990) [ELR 12:1:12]

Syufy Enterprises again prevails in government antitrust action involving film exhibition in Las Vegas

The Entertainment Law Reporter will not engage in any rocky confrontation in discussing Federal Court of Appeals Judge Alex Kozinski's notorious opinion affirming a District Court decision which rejected the United States Department of Justice's claim that the motion picture exhibition activities of Syufy Enterprises and Raymond Syufy in the area of Las Vegas, Nevada violated the antitrust laws (ELR 11:1:13; 11:10:19).

In an opinion which, according to news reports, mentioned the titles of 204 films, Judge Kozinski first described Syufy's entry into the Las Vegas exhibition market in the early 1980s and the company's purchases of the theaters of three competitors. According to the Justice Department, the purchases constituted monopolization and/or attempted monopolization of commerce in violation of section 2 of the Sherman Act, and substantial lessening of competition by acquisition within a line of commerce in violation of section 7 of the Clayton Act. After recalling the manner in which our free enterprise system depends on competition, Judge Kozinski commented that the antitrust laws "are designed to protect the integrity of the market system by assuring that competition reigns freely."

In the instant case, the court found it "remarkable" that the accused monopolist was a "relatively tiny regional entrepreneur" while the alleged victims - Columbia Pictures, Paramount, and Twentieth Century-Fox - were "humongous national corporations with considerable market power of their own." The government apparently conceded that Syufy was a monopsonist, not a monopolist in that the company exercised its market power only against its suppliers, not against its consumers.

Judge Kozinski agreed with the District Court's finding that Syufy lacked monopoly power because the company did not have the power to exclude competition or control prices. Substantial evidence was presented that there were no barriers to entering the Las Vegas film exhibition market. Soon after Syufy completed its acquisition, Roberts Company, an exhibitor previously engaged in the "second-run" market, secured the right to distribute the first-run films of Orion. Roberts eventually operated 28 screens, and, in the late 1980s, sold its theaters to United Artists, the largest theater chain in the country.

The government argued that Syufy's effectiveness as a competitor created an anticompetitive structural barrier to entry into the market. However, the court pointed out that although Syufy had a large market share, the company was unable to maintain that share, given the competition from Roberts. Antitrust laws protect competition, not competitors, emphasized Judge Kozinski, concluding that there was no indication that competition suffered in the Las Vegas film exhibition market as a result of Syufy's challenged acquisitions.

The District Court, based on the testimony of film distributors, also correctly found that Syufy did not have the power to control prices.

Judge Kozinski observed that Syufy's entry into the Las Vegas first-run film exhibition market resulted in a "vast improvement" for film distributors and consumers alike. In a competitive market, stated the court, "buying out competitors is not merely permissible, it contributes to market stability and promotes the efficient allocation of resources ... For competitors in a free market to fear buying each other out lest they be hit with the expense and misery of an antitrust enforcement action amount to a burden only slightly less palpable than a direct governmental prohibition against such a purchase."

Federal District Court Judge Justin L. Quackenbush, sitting by designation, concurred in the court's conclusions that the District Court's findings were supported by the record and were not clearly erroneous, and that the District Court did not err in concluding that Syufy did not have monopoly power over the first-run film distributors.

Judge Quackenbush did not agree with those portions of the opinion in which the court suggested that if there are no significant barriers to entry, there can be no monopoly as a matter of law, viewing the issue of barriers to entry as "just one of the factors which should be considered by the court in determining whether monopoly power exists." Although agreeing that the issue of monopoly power often depends heavily upon market share and barriers to entry, Judge Quackenbush commented that an analysis of monopoly power also would include "consideration of the extent of the alleged monopolist's market share, the ability to maintain that share, the power to control prices, the capability of excluding competitors, and the intent of the alleged monopolist, along with the existence of barriers to entry."

Judge Quackenbush also was unwilling to concur in the court's criticism of the Justice Department's prosecution of the action against Syufy, stating that there was a reasonable basis for the initiation of the action. It was pointed out that in 1985, Syufy had completed the acquisition of all of its first-run theater competitors and had over 93 percent of the total box office receipts from first-run films, thus warranting the lawsuit. Furthermore, Syufy's prior actions, stated Judge Quackenbush, "belied a conclusion that it was a completely innocent party." The company not only had spent large amounts of money to buy up all of its competitors in Las Vegas, but, had a "track record" of monopolization, i.e., the decision in Syufy Enterprises v. American Multicinema (ELR 8:3:11), cert. denied, 479 U.S. 1031 (1987).

In a footnote comment, the court apparently had construed Judge Quackenbush's citation of American Multicinema as a suggestion on his part that such a finding of prior monopolistic action, in and of itself, justified the initiation of the action. Judge Quackenbush, in a footnote response, stated that this was not his intent, and that the citation was for the purpose of demonstrating that Syufy, who spent almost $5 million in cash in purchasing his competitors, was not a "paper tiger," as suggested by the majority. The majority also had mentioned that the finding of monopolistic action by Syufy in the San Jose market was reversed by the Ninth Circuit in American Multicinema for insufficient evidence; Judge Quackenbush disagreed, stating that the Court of

Appeals had found that there was substantial evidence to support the jury finding.

United States of America v. Syufy Enterprises, Case No. 89-15475 (9th Cir., May 9, 1990) [ELR 12:1:12]

Producer may raise breach of contract claim, along with copyright infringement claim, in federal court action alleging that Time-Life engaged in unlicensed distribution of videocassettes

When Daniel Wilson Productions entered into a distribution agreement with Time-Life Films, Inc. with respect to the films "The Great Wallendas" and "Charlie's Balloon," the parties allegedly agreed that home videocassette rights were not included in the license.

Wilson claimed that sometime after 1982, Time-Life purported to grant to its outgoing president, Austin Furst, and his corporation, Vestron Video, a license to distribute videocassettes of several films, including "The Great Wallendas" and "Charlie's Balloon," and that Vestron subsequently entered a distribution agreement with Lightning Video, Inc.

In a lawsuit against Time-Life, Wilson, in addition to stating causes of action for copyright infringement, claimed breach of the parties' 1978 contract, alleging that the distributor failed to use good faith efforts to market the films.

Federal District Court Judge Thomas P. Griesa has ruled that the court possessed subject matter jurisdiction. After reviewing relevant case law, Judge Griesa concluded that " where a complaint alleges a federally conferred right, such as a copyright, a trademark or a patent, then alleges violations of that right and requests remedies provided by federal statute, this should be enough to confer federal jurisdiction." The fact that a claim may arise in the context of a contract dispute and may present certain contract issues does not remove the claim from federal jurisdiction. Judge Griesa noted that the same result was reached in Vestron, Inc. v. Home Box Office, 839 F.2d 1380 (9th Cir. 1988; ELR 9:12:7).

Wilson's causes of action for copyright infringement arose under the Copyright Act; the cause of action for breach of contract was properly before the court under the doctrine of pendent jurisdiction; and Time-Life's motion to dismiss the complaint was denied accordingly.

Daniel Wilson Productions, Inc. v. Time-Life Films, Inc., Case No. 88Civ 7306 (S.D.N.Y., Apr. 19. 1990) [ELR 12:1:13]

CBS may proceed with breach of express warranty claim against Ziff- Davis arising from purchase of magazines, rules New York Court of Appeals

The New York Court of Appeals has reinstated a breach of express warranty claim brought by CBS against Ziff-Davis Publishing Co. in connection with CBS's purchase of the assets and businesses of twelve consumer magazines.

In November 1984, CBS agreed to pay Ziff-Davis $362,500,000 for the magazine businesses. The purchase agreement warranted that certain financial reports for the 1984 fiscal year had been prepared in accordance with generally accepted accounting principles. CBS, upon performing its own "due diligence" examination of Ziff-Davis's financial condition, discovered information causing CBS to believe that Ziff-Davis's certified financial statements and other financial reports were not prepared according to generally accepted accounting principles, and did not fairly depict the publisher's financial condition.

CBS, acknowledging that "a clear dispute" existed between the parties, closed the deal "on a mutual understanding that the decision to close and the closing, [would] not constitute a waiver of any rights or defenses either of us may have" (emphasis added by the court) under the purchase agreement.

Subsequently, CBS sued Ziff-Davis, claiming, in part, that the publisher had breached the warranties made as to the magazines' profitability. The trial court granted Ziff-Davis' motion to dismiss the breach of warranty cause of action because CBS alleged that "it did not believe that the representations set forth in ... the contract of sale were true and thus CBS did not satisfy the law in New York [which] clearly requires that this reliance be alleged in a breach of warranty action." An appellate court affirmed the trial court's decision.

New York Court of Appeals Judge Hancock first discussed the nature of the allegedly missing element of reliance. Ziff-Davis argued that CBS was required to show its belief in the truth of the representations made in the express warranty and a change of position in reliance on that belief, but since CBS indicated, prior to the closing of the contract, its lack of belief in the truth of the warranted financial information, the company could not have closed in reliance on the information.

CBS claimed that it purchased the express warranties as bargained-for contractual terms that were part of the purchase agreement, and that the warranty provisions amounted to assurances of the existence of facts upon which CBS relied in committing itself to buy the magazines. CBS characterized Ziff-Davis's assurances of these facts as "the equivalent of promises by Ziff-Davis to indemnify CBS if the assurances proved unfounded. Thus, as continuing promises to indemnify, the express contractual warranties remained in force although CBS, prior to the closing, may have considered the warranted financial information to be in error.

Judge Hancock agreed with CBS, stating that the "critical" question was not whether CBS believed in the truth of the warranted information, but whether the company relied on the express warranty as being a part of the bargained-for terms in the binding bilateral purchase contract between the parties. CBS was not merely buying certain consumer magazine businesses - it was buying businesses, noted Judge Hancock, which it believed to be of a certain value based on information provided by Ziff-Davis which Ziff-Davis warranted to be true. The publisher's motion to dismiss CBS's cause of action for breach of warranty therefore should have been denied.

Judge Bellacosa, in dissenting from the court's opinion, posed the issue as "whether a buyer may sue a seller, after consummating a business transaction, for breach of an express warranty on which the buyer chose not to rely." In Judge Bellacosa's view, the majority opinion sacrificed" predictability and reliability in commercial transactions. After CBS conducted its own investigation, the company had a contractual right to cancel the deal, according to the dissent, but made a business judgment to proceed - CBS was not entitled to claim that it did not rely on the warranties given with respect to the financial data as part of the sales agreement, close the deal, and then sue on the warranties. Judge Bellacosa stated that CBS chose to complete the acquisition at the agreed price "with its cyclopean eye wide open," and that the "traditional rule" requiring a reliance element to sue for breach of warranty should have been retained, "leav[ing] the law where it was and the parties where they put themselves."

In a footnote to the majority opinion, Judge Hancock commented that the dissent "obviously miss[ed] the point of our decision," reiterating that the court did not hold that no reliance is required, but that the required reliance may be established, if, as in the instant case, the express warranties are bargained-for terms of the seller.

CBS, Inc. v. Ziff-Davis Publishing Co., New York Law Journal, p.22, col.2 (N.Y., Apr. 3, 1990) [ELR 12:1:14]

Boston Symphony Orchestra wins claim against insurer in Vanessa Redgrave dispute, but court finds that insurer did not engage in unfair claims settlement practices

Having concluded its less-than-harmonious encounter with Vanessa Redgrave (see ELR 10:10:17), the Boston Symphony Orchestra sued the Commercial Union Insurance Company and American Employers Insurance Company alleging that the companies wrongfully failed to defend the orchestra in the Redgrave action, and that the companies engaged in unfair claims settlement practices in violation of Massachusetts law.

A trial court judge granted the orchestra's motion for summary judgment with respect to the first claim, and granted the companies' motion for summary judgment on the unfair claims settlement cause of action.

On appeal, Judge Nolan observed that the insurance company, four days after receiving a copy of Redgrave's complaint, disclaimed coverage and declined to provide a defense for the orchestra. The orchestra's insurance policy provided coverage for injuries "arising out of ... the publication or utterance of a libel or slander or of other defamatory [or] disparaging material." The policy also obligated the insurance company to defend any action brought against the orchestra seeking damages on account of a covered injury.

An insurance company's duty to defend, stated Judge Nolan is "antecedent to, and independent of, the duty to indemnify...[and] is based on the facts alleged in the complaint and those facts which are known by the insurer." Commercial Union knew from the complaint that Redgrave sought consequential damages for the orchestra's alleged breach of its contract. Redgrave further alleged that the orchestra's purported breach "led others to refrain from hiring [her] for professional engagements;" a fair interpretation of this allegation, in the court's view, was that the orchestra's cancellation of the production in which Redgrave was scheduled to appear was a statement about Redgrave which damaged her reputation and caused others not to hire her.

Commercial Union had agreed to defend the orchestra against claims for injury arising out of the publication of "other defamatory [or] disparaging material" (emphasis added by Judge Nolan); this language served to extend the coverage of the policy beyond actions for libel or slander, and Redgrave's claim thus was within the coverage provided by Commercial Union's policy.

Judge Nolan then found that the insurance company did not make any unreasonably low settlement offers; that there was no evidence of bad faith or "ulterior motives" in Commercial Union's disclaimer of liability - the company relied upon a plausible, although incorrect, interpretation of its policy. In all, summary judgment was properly entered on the orchestra's claims against the insurer under state law.

Boston Symphony Orchestra, Inc. v. Commercial Union Insurance Company, 545 N.E.2d 1156 (Mass.Sup. Judcl.Ct. 1989) [ELR 12:1:15]

Publisher of Cliff's Notes obtains preliminary injunction barring Doubleday from distributing purported parody, "Spy Notes"

Cliff's Notes, the publisher of a line of paperback study guides and other works bearing the company's distinctive black and yellow cover, has obtained a preliminary injunction barring Bantam Doubleday Dell Publishing Group from publishing a similar yellow and black diagonal striped design on the cover of the publication "Spy Notes."

Cliff's cover design, since 1958, has consisted of a layout of alternating yellow and black diagonal stripes arranged in combination with other graphic elements; in 1986, the company registered a trademark in the design.

In the spring of 1986, Doubleday began publishing the monthly magazine "Spy," and in 1988, Spy begat "Spy Notes," a "review" of certain "urban novels" of the 1980s. Doubleday admitted that the book "sought to evoke the look and feel of the 'Cliff's Notes' cover by copying some of its prominent features..." The format of Spy Notes was identical to the format of Cliff's study guides.

Federal District Court Judge Shirley Wohl Kram noted that although trademarks may be parodied, the court did not agree with Doubleday that the First Amendment "gives the parodist unbridled freedom to use a registered trademark as part of a parody or satire." Spy Notes was "unquestionably" a form of artistic expression, stated Judge Kram, but also was a commercial work, and, as such, was subject to a trademark infringement claim involving alleged consumer deception.

In Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989; ELR 10:4:13), a case cited by Doubleday, it was found, as described by Judge Kram, that the title "Fred and Ginger" had "artistic relevance to the content of the film and was not explicitly misleading." In contrast to Rogers', both Cliff's Notes and Spy Notes were artistic works entitled to First Amendment protection. Judge Kram declined to rely on Rogers because to do so would in effect create per se First Amendment protection for any parody. But the Federal Court of Appeals in Rogers specifically found that it would be inappropriate to hold the Lanham Act inapplicable to all titles that could be considered artistic expression. After careful consideration, Judge Kram determined that it was essential for the court to consider the issue of consumer confusion.

The court proceeded to find that Cliff's mark was highly distinctive and particularly strong; that Spy Notes' cover design and the Cliff's Notes cover were similar "to a degree that would cause consumer confusion;" that the two products were in the same general medium and that there existed "competitive proximity" between them; and that consumers would likely believe that Spy Notes was a Cliff's Notes satire of the three novels listed on its cover, or possibly, a satire of Spy Magazine.

Judge Kram then questioned whether Spy Notes actually qualified as a parody - although the Spy Notes cover stated that the work was a satire, and included certain minor changes from the Cliff's cover design, it was not clear to the court what was being satirized. A consumer, stated Judge Kram, might reasonably conclude that only the novels were being satirized, or that Cliff's was satirizing Spy; the fine print disclaimer on the back of the title page was not sufficient. The use of the

Spy name also did not in and of itself reduce consumer confusion, since consumers, again, could believe that

Cliff's, or that Cliff's licensed Spy. In all, the evidence indicated "to the highest degree of certainty" that Doubleday intentionally copied the Cliff's cover "with an eye to promoting its own product," and that the use of the distinctive cover design would lead consumers to believe that Cliff's was associated with the product.

The court concluded that there would be a very strong likelihood of confusion if Doubleday were allowed to market the proposed work. The Spy Notes' cover was "seriously or explicitly misleading" in that consumers would believe that Cliff's endorsed the product. Thus, upon finding that Cliff's demonstrated irreparable injury and a substantial likelihood of success on the merits, the court granted a permanent injunction barring Doubleday from distributing Spy Notes with the challenged cover design. Judge Kram pointed out that the court did not reach Cliff's anti-dilution claim, but that the analysis of such a claim would be "markedly different" since consumer confusion generally is not an issue, and First Amendment protections would likely weigh more heavily in Doubleday's favor.

Cliff's Notes, Inc, Bantam Doubleday Dell Publishing Group, Inc., 718 F.Supp. 1159 (S.D.N.Y. 1989) [ELR 12:1:15]

Florida Supreme Court finds that soft drink manufacturer was not liable under state law for injuries suffered by young man attempting to duplicate stunt portrayed in commercial

In response to a certified question of a Federal Court of Appeals, the Supreme Court of Florida has held that PepsiCo, Inc. was not liable for the unfortunate injuries incurred by a fourteen year old boy who attempted to duplicate a stunt portrayed in a television commercial for "Mountain Dew."

Michael Sakon's action originated in a Florida state court, but was transferred on diversity jurisdiction to a Federal District Court in Florida. The court granted PepsiCo's motion to dismiss with prejudice.

On appeal, the court set forth a statement of alleged facts in which it was noted, in part, that PepsiCo's commercial for Mountain Dew soda portrayed young people riding their bicycles down a path and up a ramp, placed on an embankment over water, and landing their bicycles safely in the water. Sakon, purportedly after watching the commercial, tried to perform the stunt by riding his bicycle over a ramp built on an embankment about ten to twelve feet above the water. However, the water in the creek was only three feet deep, and Sakon came over the handlebars, landed head first in the creek, and broke his neck in the fall.

In its per curiam opinion, the Florida Supreme Court first refused to find that the First Amendment prohibits states from recognizing a cause of action for false, deceptive, or misleading advertising.

However, the court found that PepsiCo was not liable under the alleged facts - the commercial was not directed toward encouraging individuals to engage in the activity portrayed; PepsiCo breached no duty to Sakon; and the youth's accident was not the foreseeable consequence of the company's advertisement. The commercial did not constitute false, misleading or deceptive advertising so as to fall within the scope of the Florida laws on deceptive and unfair trade practices, stated the court.

In the absence of a breach of statutory duty, or any common law basis for Sakon's claim, the court, based upon the facts, "qualifiedly" responded in the negative to the certified question "Whether the law of the State of Florida recognizes a duty owed by a television advertiser to its targeted audience of young viewers when that advertiser has broadcast, without adequate warnings, a commercial depicting a dangerous activity in a manner likely to induce a young viewer to imitate the activity," and remanded the matter to the Court of Appeals.

Sakon v. Pepsico, Inc., 553 S.2d 163 (Fla. 1989) [ELR 12:1:16]

New York Court of Appeals upholds San Diego's right to 1988 America's Cup trophy

The New York Court of Appeals has upheld an appellate court ruling (ELR 11:6:19) that the San Diego Yacht Club's twin-hulled catamaran, the Stars and Stripes, was an eligible vessel in the 1988 America's Cup race, and that San Diego, as the winner of two races against the Mercury Bay Boating Club's vessel, the New Zealand, was the rightful holder of the America's Cup. The court agreed that San Diego did not breach any fiduciary duty in racing a catamaran against Mercury Bay's yacht.

Judge Fritz W. Alexander 2d first reviewed, as had appellate court Judge Joseph P. Sullivan, the history of the prestigious trophy, and the relevant terms of the Deed of Gift. Judge Alexander observed that nothing in the deed, other than the length limits applicable to all competing vessels, restricted the design of the defending club's vessel, nor were the competing vessels expressly limited to monohulls. The defending vessels were not even required to be substantially similar.

The court then discussed the course of the litigation between the San Diego and New Zealand clubs, and stated that the "gravamen" of Mercury Bay's complaint apparently was that a race between a multihull catamaran and a monohull yacht was inherently "unfair," whether or not the donors intended to permit such a race. According to Mercury Bay, fairness would be measured by "standards of sportsmanship as determined by reference to practices which are presently the custom in sporting activities generally and yacht racing in particular."

Judge Alexander remarked that the question of whether particular conduct is "sporting" or "fair" in the context of a particular sporting event, is wholly distinct from the question of whether such conduct is legal. The court also pointed out that the dispute over the eligibility of the chosen vessels could have been determined by an international jury comprised of racing judges certified by the International Yacht Racing Union, but that Mercury Bay "deliberately chose to keep the issue from these yachting experts, who were of course, best suited to resolve it." Mercury Bay, by seeking relief in a judicial forum, thus was limited to a resolution of only the legal issues presented.

In examining the Deed of Gift, Judge Alexander found that the donors did not express an intention to prohibit the use of multihull vessels or to require the defender of the Cup to race a vessel of the same type as the vessel to be used by the challenger. The deed provisions with respect to the nature of the racing vessels were unambiguous, stated Judge Alexander, who not only questioned the dissent's reliance upon extrinsic evidence in construing the terms of the deed, but considered improper the dissent's use of such evidence "to impute a different meaning to the terms expressed." (In a footnote comment, Judge Alexander pointed out that the extrinsic evidence relied upon by the dissent was "neither unassailably consistent nor dispositive and should not be read to contradict the plain language of the trust instrument itself.")

In all, San Diego fully complied with the terms and spirit of the trust instrument, and fulfilled its fiduciary obligations by reasonably trying to come to an agreement on the terms of Mercury Bay's proposed match; when that failed, San Diego "faithfully" complied with the challenge provisions in the deed, stated the court, in affirming the appellate court's decision.

Chief Judge Sol Wachtler, in a concurring opinion, agreed that just as nothing in the Deed of Gift prohibited Mercury Bay's "unorthodox" challenge, nothing in the instrument prohibited San Diego's "unorthodox" defense, and cautioned that the dissent's position might encourage the use of the courts to resolve future disputes concerning sporting competitions.

In dissent, Judges Stewart F. Hancock Jr. and Vito J. Titone stated that San Diego never intended to enter a fair match with New Zealand; that the donors of the trophy never conceived of a catamaran as a vessel that might be entered by either a challenger or defender in the America's Cup competition; and that it was "unthinkable" that the donors could ever have intended that the trophy holder and defender would construe the deed "for the express purpose of creating a mismatch to retain the trophy, thereby subverting the very purpose of their gift in trust."

Judge Hancock, after noting that the challenge by New Zealand was "unquestionably proper in every respect," stated that there was no support for the argument that the dispute over the interpretation of the deed should have been referred to an international jury - the issue raised in the case concerned the fundamental nature of the competition and required the judicial construction of a trust instrument. The dissent then discussed the responsibilities of the holder and defender of the America's Cup under the deed of gift - a deed, rather than a business contract made between two parties at arm's length - and expressed its disagreement with the majority on the dual role of the America's Cup holder as first a trustee and then a competitor. San Diego, in following an "overly literal" construction of the deed of gift, did so for its own interest and contrary to the interest of the beneficiaries in violation of San Diego's duty as trustee under the deed, concluded Judge Hancock.

Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, Case No. 52, New York Law Journal, p. 4, col. 4 (N.Y., Apr. 26, 1990) [ELR 12:1:17]

Briefly Noted:

"Dungeons & Dragons."

A Federal District Court in Kentucky has rejected a wrongful death action brought against TSR, Inc., the publisher and manufacturer of the game "Dungeons & Dragons." Sheila Watters stated that her son, Johnny Burnett, became totally absorbed by the fictional medieval world of the game and that as a result of his participation in the game, Burnett was driven to commit suicide. Watters claimed that TSR breached its duty to her son by negligently publishing and distributing the game materials.

Chief Judge Johnstone noted that the game material was within the class of publication which generally is protected by the First Amendment. Imposing liability upon the manufacturer of a "role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms," and the court found that TSR was not liable based upon the content of the game.

Furthermore, the game material did not fall into one of the unprotected classes of speech. Watters alleged that the suicide occurred after Burnett had played the game for five years - the rationale for denying First Amendment protection applicable in cases of obscenity, fighting words, libel and incitement to violence, was absent, and the court granted TSR's motion for summary judgment.

Watters v. TSR, Inc. 715 F.Supp. 819 (W.D.Ky. 1989) [ELR 12:1:18]

Libel.

A Federal District Court in California has found that Globe International and Peter Rigby were protected by the neutral reportage privilege in a libel action brought by actor Burt Ward. The allegedly defamatory statements were made by other parties in the action, including News Group International, Ltd. Globe republished a portion of an article from "News of the World" in "an accurate and neutral manner;" published Ward's denial of the stories; and emphasized the legitimate business success of Ward and the actor's extensive charity work. The republication in the context of published denials and other information was not defamatory, and the court granted Globe and Rigby's motion for summary judgment.

Federal District Court Judge James M. Ideman also noted that Globe and Rigby were entitled to summary judgment since they truthfully related the statements quoted from the News of the World article, and truthfully published the denial and information about Ward's life, post-"Batman."

Ward v. News Group International, Ltd., Case No. CV-88-3340 (C.D., Feb.22, 1990) [ELR 12:1:18]

Copyright Infringement/Jurisdiction.

A Federal District Court in California has ruled that Kimel Broadcast Group, Inc., a Vermont corporation, was subject to jurisdiction in California in connection with an action for copyright infringement and breach of contract brought by Advideo, Inc., a California corporation.

Kimel agreed to purchase Advideo's video tapes and workbooks for educating Kimel's sales staff; the contract provided that any legal disputes between the parties would be resolved in accordance with California law. Advideo claimed that Kimel used the sales materials, without authorization, at a radio station located in Saratoga Springs, New York.

Judge D. Lowell Jensen stated that although the mere signing of a contract with an out-of-state party does not confer jurisdiction in that party's home state, the contract signed by Kimel contained a governing law provision. The provision, along with certain other factors, indicated to the court that Kimel "purposefully availed itself of the benefits and protections of California's laws," and had reason to anticipate "being haled into court in California," particularly with respect to a claim arising from a forum-related activity.

Judge Jensen considered the convenience and fairness to the parties of litigating the dispute in California and elsewhere, and concluded by denying Kimel's motion to transfer venue to the Northern District of New York.

Advideo, Inc. v. Kimel Broadcast Group, Inc., 727 F.Supp. 1337 (N.D.Ca. 1989) [ELR 12:1:19]

Football Tickets.

Shortly after the 1989-90 football season began, a season ticket holder notified the New York Jets football team that his tickets were lost. The team allows ticket holders who lose or misplace their tickets an opportunity to purchase a new season ticket subscription for the same designated seats. There is no refund or replacement for the lost tickets; if the tickets are later found by the holder, the team provides a refund for the unused tickets.

Ganey purchased two of his three season tickets, but then sued the Jets for double billing and unjust enrichment.

A New York trial court has rejected Ganey's claims. The court found that the transactions between the parties constituted separate and distinct contracts; that Ganey's own conduct caused his inability to benefit from the original purchase; and that the tickets state "Tickets cannot be replaced if lost, stolen or destroyed." Although the team sold tickets twice to Ganey for the same seasonal seats, the second sale was made at Ganey's request.

The court noted that the Jets' policy was instituted, in part, to reduce security concerns, and was "a necessary precaution to insure the general safety and welfare" of spectators; the team's earlier policy of free replacement tickets had resulted in many instances of individuals gaining improper entry into the stadium.

Ganey v. New York Jets Football Club, 550 N.Y.S.2d 566 (N.Y.City Civ.Ct. 1990) [ELR 12:1:19]

Tax/Racetrack Revenue.

The Ohio Supreme Court has ruled that a racetrack operator was liable for taxes on the combined total of the revenue derived from betting on races at the taxpayer's track and the revenue from betting on races conducted at other tracks which were simulcasted to the patrons of the taxpayer's track. A state statute provided that a separate accounting was required for the revenue from the simulcast races, and the racetrack operator claimed that combining the betting revenue would result in a higher tax. The court agreed with the Tax Commissioner's conclusion that the combined revenue from all forms of racing provided the basis for assessing the horse racing tax.

Grandview Raceway v. Limbach, 547 N.E.2d 971 (Ohio 1989) [ELR 12:1:19]

Previously Reported:

The following cases, which were reported in previous issues of the Entertainment Law Reporter, have been published: Pavelic & LeFlore v. Marvel Entertainment Group, 110 S.Ct.Rptr. 456 (11:11:14); Record Club of America, Inc. v. United Artists Records, Inc., 890 F.2d 1264 (11:8:16).

The United States Supreme Court has let stand a Federal Court of Appeals decision rejecting a copyright infringement action against Shirley MacLaine in connection with the actress's book "Out on a Limb" (ELR 10:12:15).

The decision in Coan v. Estate of Chapin (11:9:16) has been published at 549 N.Y.S.2d 16; according to news reports, Sandy Chapin, the widow of singer Harry Chapin, has agreed to pay writer Peter Coan $65,000 in order to settle a lawsuit claiming that representatives of Chapin's estate tortiously interfered with Coan's contract with Pedigree Books. [ELR 12:1:19]

IN THE NEWS

Record industry voluntarily adopts standard warning label for albums containing explicit lyrics

The record industry has adopted a uniform warning label to identify albums with explicit lyrics.

The Recording Industry Association of America has announced that record companies and their individual artists may choose to affix a black-and-white sticker reading "PARENTAL ADVISORY -EXPLICIT LYRICS" in the lower right-hand front corner of the permanent packaging of albums, cassettes, and compact discs containing potentially objectionable lyrics dealing with sex, violence, suicide, drug abuse, bigotry or satanic worship. "Stickered" merchandise will reach retail music stores in July 1990. [June 1990] [ELR 12:1:20]

Tom Waits obtains jury verdict of $2.5 million in "sound-alike" action against Frito-Lay and advertising agency

A Federal District Court jury in Los Angeles has awarded Tom Waits some $2.5 million damages in the singer's action against Frito-Lay and advertising agency Tracy-Locke, Inc. for imitating Waits' voice in a radio commercial for Salsa Rio Dorito Chips. The jury award included $100,000 for the fair market value of Waits' voice; $200,000 for injury (as described in a news report) to the singer's "peace, happiness and feelings;" $75,000 for injury to Waits' good will; $100,000 in compensatory damages under the Lanham Act; and punitive damages of $500,000 against Frito-Lay and $1.5 million against Tracy-Locke. [June 1990] [ELR 12:1:20]

Los Angeles jury rejects negligence claims against DeLaurentiis companies in action arising from stuntman's death

In November 1986, stuntman Dar Robinson tragically died after his motorcycle went off the road in Arizona while Robinson was performing high-speed stunts for the Dino DeLaurentiis film "Million Dollar Mystery." Robinson reached a hospital, via a station wagon, about two hours after his accident; there was no ambulance or helicopter at the remote location.

Robinson's widow brought a lawsuit alleging negligence against Dino DeLaurentiis Film Partners, DeLaurentiis Entertainment Group, and Million Dollar Mystery Productions Ltd.

A Los Angeles trial court first found that Robinson was an employee of Productions Ltd., the producer of the film. The only available recourse against Productions Ltd. thus was through a workers compensation claim.

The jury then determined that the DeLaurentiis parties were not negligent in connection with the stuntman's death. [June 1990] [ELR 12:1:20]

WASHINGTON MONITOR

Marketer of program length "infomercials" will pay $1.5 million to consumers to settle Federal Trade Commission proceeding

Twin Star Productions of Arizona has agreed to pay $1.5 million in consumer reimbursement to settle an enforcement action brought by the Federal Trade Commission in connection with the company's broadcast of thirty minute programs known as "infomercials;" Twin Star also agreed to halt the sale of certain products.

One program, hosted by actor Lyle Waggoner, featured Y-Bron, a purported cure for male impotence. The product Foliplexx, a baldness cure, was presented via a news-show format, and Twin Star, via "The Michael Reagan Show" advertised Diet Patch, a weight loss product.

The Commission claimed that the marketer's product claims were "false, misleading and deceptive;" emphasized that advertisers must distinguish genuine television programs from paid commercials in order to avoid consumer confusion; and noted that the products in issue had not been approved by the Food and Drug Administration.

According to news reports, Twin Star also settled a proceeding brought by the Texas Attorney General by agreeing to clearly label future infomercials as paid advertisements, and by paying $95,000 to the state as reimbursement for investigative costs. [June 1990] [ELR 12:1:21]

Federal Communications Commission adopts several proposals, including limit on settlement payments in license renewal proceedings

The Federal Communications Commission has adopted a proposal whereby broadcast licensees facing renewal challenges may limit any settlement payments to license applicants to the verifiable expenses incurred by the applicants. Licensees had claimed that renewal challenges via the "petition to deny" process often were raised by parties seeking substantial settlement payments in exchange for withdrawing their applications; the proposal will restrict "windfall profits" to such parties.

The Commission also sought comments on a proposal to adopt limits on payments among competing applicants for new broadcast stations; rejected a proposal to award radio and television licenses through a lottery system; and announced plans to complete most comparative renewal hearings within a year.

And the Commission announced that it will consider a broader range of conduct in reviewing the character qualifications of broadcast license owners and applicants, including all felony convictions, some misdemeanors, and violations of antitrust and anti-competitive laws; consent decrees will not be considered relevant to a licensee's qualifications. [June 1990] [ELR 12:1:21]

Federal Communications Commission grants Fox Broadcasting one-year waiver of financial interest and syndication rules

The Federal Communications Commission has granted Fox Broadcasting a one-year waiver of the Commission's financial interest and syndication rules. Under the rules, a network broadcasting more than 15 hours of programming per week may not participate in the television syndication business.

Fox sought the waiver in order to accommodate the network's proposed expansion of broadcasting from nine hours to 18 1/2 hours. In the absence of a waiver, Fox, Inc. would have been required to divest itself of interests in the syndication rights in television shows such as "A Current Affair," "Mr. Belvedere," and "MASH."

Fox remains subject to the Commission's prohibition on acquiring any financial interest or syndication rights in new programs licensed for exhibition on Fox. [June 1990] [ELR 12:1:21]

DEPARTMENTS

In the Law Reviews:

Loyola Law School of Los Angeles has published its tenth anniversary issue of the Loyola Entertainment Law

Journal, Volume 10, Number 2 with the following articles:

The Truth Defense: Lessons Learned from Westmoreland v. CBS by Alexander Alben, 10 Loyola of Los Angeles Entertainment Law Journal 397 (1990)

Television Violence: Social Science vs. the Law by Emily Campbell, 10 Loyola of Los Angeles Entertainment Law Journal 413 (1990)

Developments in the Law: Title Protection by Whitney Hartford Conant, Lisa E. Socransky, Cynthia B. Glasser and Martha M. Early, 10 Loyola of Los Angeles Entertainment Law Journal 467 (1990)

Admissions Tax on Movie Theaters Infringes Freedom of Speech: A Novel Argument That Has Worked-So Far by Robert A. Willner, 10 Loyola of Los Angeles Entertainment Law Journal 555 (1990)

Billionaire Boys' Club: Billionaires by Crime? by Lisa Karen Gamer, 10 Loyola of Los Angeles Entertainment Law Journal 573 (1990)

Fair Use in Jackson v. MPI Home Video: Why Bother? by Timothy Kevane, 10 Loyola of Los Angeles Entertainment Law Journal 595 (1990)

Emasculating the Defense in Obscenity Cases: The Exclusion of Expert Testimony and Survey Evidence on Community Standards by Darlene Sordillo, 10 Loyola of Los Angeles Entertainment Law Journal 619 (1990)

Missouri Statute Attacks "Violent" Videos: Are First Amendment Rights in Danger? by Kenneth D. Rozell, 10 Loyola of Los Angeles Entertainment Law Journal 655 (1990)

Obscenity Decisions Based on Procedural Mechanisms Are Patently Offensive by Denise Z. Kabakow, 10 Loyola of Los Angeles Entertainment Law Journal 679 (1990)

Maintaining the Home Field Advantage: Rose vs. Federal Court by Kimberly G. Winer, 10 Loyola of Los Angeles Entertainment Law Journal 695 (1990)

A Famous Title is Worth 1,000 Publicity Stunts: Does the Owner of the Motion Picture Copyright to the Amityville Horror Own the Title? by Vincent Yanniello, 10 Loyola of Los Angeles Entertainment Law Journal 715 1990)

Copyright Protection in Japan by Mitsue Dairaku, 2 Asian Business Law Letter 6 (1990)(published by Japan Legal Publishers Inc., PO Box 74, Kojimachi, Tokyo 102-91 Japan)

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Independent Motion Picture Financing: Unregistered Limited Partnership Offerings, 4 Brigham Young University Law Review 1287 (1989)

The Unconstitutionality of State Motion Picture Film Lien Laws (Or How Spike Lee Almost Lost It) by Scott M. Martin and Peter W. Smith, 39 The American University Law Review 59 (1989)

Telecommunications Law and Policy in the European Community by Reinhard Schulte-Braucks, 13 Fordham International Law Journal 237 (1989-1990)

Work for Hire Doctrine after CCNV v. Reid by Molly Richard, 17 Barrister Magazine 52 (1990)

Copyright and Eleventh Amendment Immunity by Hamid R. Kashani, 17 Barrister Magazine 54 (1990)

Communications and the Law, Volume 12 has been published by Meckler Publishing, 11 Ferry Lane West, Westport, CT 06880 with the following articles:

The Perils of Error Analysis in Defamation Law by Keith Burgess-Jackson, 12 Communications and the Law 3 (1990)

Telephone-Cable Cross-Ownership: The Push for Video Common Carriage by Andrew M. Calabrese, 12 Communications and the Law 19 (1990)

Reagan Judges: Communication Law at Risk? by Paul E. Kostyu, 12 Communications and the Law 37 (1990)

Politics, Polls and the Press: What Are They Doing to the Ballot? by Robert D. Sloane, 12 Communications and the Law 55 (1990)

Illegal Procedure: The National Football Players Union's Improper Use of Antitrust Litigation for Purposes of Collective Bargaining by Neil K. Roman, 67 Denver University Law Review Ill (1990)

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Modern-Day Sirens: Rock Lyrics and the First Amendment by Peter Alan Block, 63 Southern California Law Review 777 (1990)

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Assessing the Wisdom of the Business Judgment Rule in Corporate Control Contests: Is It Time to Make Shareholders' Interests Paramount? by Carol Seidler, 23 Loyola of Los Angeles Law Review 919 (1990)

Kentucky Law Journal has published an Equine Law Symposium in its Volume 78 with the following articles:

Thoroughbred Racing-Getting Back on Track by Thomas H. Meeker, 78 Kentucky Law Journal 435 (1989-90)

Protecting Security Interests in Equine Collateral by Richard A. Vance, 78 Kentucky Law Journal 447 (1989-90)

Practice and Procedure Before Racing Commissions by Jewel N. Klein and Ray H. Garrison, 78 Kentucky Law Journal 477 (1989-90)

The Sale of Horses and Horse Interests: A Transactional Approach by Robert S. Miller, 78 Kentucky Law Journal 517 (1989-90)

Sales and Use Tax Planning for the Horse Industry by Richard W. Craigo, 78 Kentucky Law Journal 601 (1989-90)

The Priority Race: Winner Takes the Horse by R. David Lester and David E. Fleenor, 78 Kentucky Law Journal 615 (1989-90)

Thoroughbred Certificate Law: A Proposal by Cary Robertson, 78 Kentucky Law Journal 659 (1989-90)

Museum Collections at Risk: Standards of Diligence for Protecting Your Monet by Deborah Hoover, 20 The Journal of Arts Management and Law 37 (1990)

Royalty Rate Economics by Russell L. Parr, 12 European Intellectual Property Review 133 (1990) (ESC

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[ELR 12:1:22]