BUSINESS AFFAIRS

Recording Artist Royalty Calculations: Why Gold Records Don't Always Yield Fortunes (Second Edition)*

by Lionel S. Sobel

Every industry has a bench mark for success. In the record business, that bench mark is the "Gold Record." Awarded by the Recording Industry Association of America to albums that sell 500,000 copies, Gold Records mean fame and fortune for their artists.

Or do they?

The answer (like the answer to so many questions in the entertainment business) is "yes". . . and "no." Yes, a Gold Record means fame. But does it always mean fortune? The answer to this question--at least insofar as recording artists are concerned--may be "no." And the explanation for this apparent anomaly has nothing to do with "creative," unethical or fraudulent accounting practices on the part of record companies. The explanation is found in the royalty provisions of recording contracts, many of which are "customary" in the industry.

What follows is an explanation for how a recording artist may be entitled to no royalties at all, even though his or her album ships gold."

The following explanation requires some introductory caveats. First, the hypothetical on which this explanation is based is just that--a hypothetical. Like all good law school problems, the facts of the "hypo" are intended to be realistic. But they are not the facts of any actual case, and (admittedly) they have been selected to illustrate certain points clearly (and even dramatically).

Second, the hypo includes--among its assumed facts--several contract provisions, all of which have a critical bearing on the outcome of royalty calculations. These provisions are believed to mirror provisions which appear in the contracts used by several actual record companies. But the provisions used in the hypo are only "samples." There is no industry-wide " standard" contract, and the provisions described below do not appear in all record company contracts.

Further, even contracts which do contain the provisions on which this article is based are printed on paper; they are not carved in stone. In other words, everything is negotiable. The outcome of negotiations over these provisions, or any others, depends on how badly the artist wants the deal as compared to how badly the record company wants it. As always, relative "clout" (as well as negotiator skill) will determine the exact language of any record contract's actual royalty provisions.

The hypothetical

Here is the hypothetical.

Ann Artiste signed her first-ever record contract with XYZ Records in the spring of 1989. The contract gave her a $150,000 " recording fund" from which her recording costs, including an advance to the album producer, were to be paid; if her recording costs came to less than that, the balance would go to her as an advance against her royalties. Artiste completed recording her first album by the fall of 1989, and copies of it began shipping in January 1990. XYZ Records was delighted with the album, and Artiste was thrilled when the album shipped "gold." However, when she received her first royalty statement, for the period from January through June 1990, her thrill turned to bitterness, because the statement showed that she was not entitled to any royalties whatsoever--that in fact the album was still seriously "in the hole" to the tune of $111,837!

The statement indicated that 500,000 albums were shipped, half of them audiocassette tapes and the other half compact discs. The statement also showed that 6,000 of the albums (3,000 tapes and 3,000 CD's) were given away free to radio stations, critics and movie producers. The balance were shipped to record stores and distributors, 2 marked "free" for every 10 that were billed.

The recording costs for the album had come to $ 110,000, and her producer received a $30,000 advance against his royalties. This meant that $10,000 was left in the "recording fund" when the album was completed; and Artiste received that $10,000 herself as an advance against her own royalties.

XYZ's suggested retail price is $9.98 for tapes and $15.98 for CD's. Artiste's contract with XYZ provides that she is to receive an " all in" royalty of 14% of the album's suggested retail price. However, because this is an "all in" rate, the album producer's royalty is paid out of Artiste's 14%. In this hypothetical, the producer's royalty is 3% of suggested retail, thus reducing Artiste's royalty to an effective rate of 11%. (Royalty rates often escalate when sales exceed 500,000 units; but such escalations did not come into play on Artiste's first statement, because to that point, only 500,000 units had been shipped.) Moreover, Artiste's 14% rate applies only in connection with albums sold in tape form, because in this hypothetical, her contract provides that "the royalty for albums sold in compact disc form shall be 75% of the otherwise applicable rate." Thus, Artiste's royalty rate for CD versions of her album is only 10.5%, less the producer's 2.25% (i.e., 75% of 3%, assuming the producer's contract has a similar rate reduction for CD's), for an effective CD rate of 8.25%.

Artiste's contract further provides that royalties are not payable at all with respect to records given away "to disc jockeys, radio and television stations, motion picture companies, distributors, sub-distributors, dealers, consumers, employees, publishers, reviewers, critics or others." Moreover, the contract provides that royalties will be paid only on 90% of those records actually sold.

The contract also authorizes a number of deductions. Recording costs and royalty advances are deductible from royalties. XYZ also is authorized to deduct a "packaging charge" of 20% of the suggested retail price of tapes and 25% of the suggested retail price of CD's.

The contract further provides that "the combined mechanical license rates payable by XYZ to music publishers for all selections embodied in an album shall not exceed 3/4's of the then-current statutory mechanical license fee multiplied by 10 for each album sold at XYZ's invoiced price." The contract also provides that "Artiste agrees to indemnify and hold XYZ harmless from mechanical license fees in excess of the amounts specified, and if XYZ is required to pay such excess, such payments shall be a direct debt from Artiste to XYZ which XYZ may recover from royalties otherwise payable to Artiste."

Artiste's contract also provides that if videos are produced, XYZ would pay the cost of producing those videos, but the amount paid would be treated as an advance against Artiste's royalties. One video of a song on the album was produced, at a cost of $75,000.

Finally, the contract provides that "In computing the number of records sold, XYZ shall have the right to deduct returns and credits of any nature and to withhold reasonable reserves therefor from payments otherwise due Artiste," though "Such reserves which are withheld by XYZ shall not exceed 50% of payments otherwise due Artiste in connection with such records." The statement showed that XYZ withheld $125,000 in reserves.

Royalty calculations based on hypothetical contract

Here is how Artiste's royalties were calculated by XYZ.

Number of albums

First, XYZ calculated the number of albums on which Artiste was entitled to receive royalties.

500,000	tapes and CD's shipped
- 6,000	tapes and CD's given free to D.J.'s
494,000	shipped, 2 free with every 10
x 10/12	to determine number actually "sold"
411,666	sold (205,833 tapes; 205,833 CD's)

x 90%	to calculate number on which royalties are payable
370,500	on which royalties payable (185,250 tapes; 185,250 CD's)

Gross royalties

Next, XYZ calculated the gross royalties earned. This had to be done separately for tapes and CD's, because the royalty rates and packaging deductions applicable to each are different.

Tape royalties:

\$ 9.98	suggested retail price
- 2.00	packaging deduction of 20%
\$ 7.98	on which royalties are payable

$ 7.98	on which royalties are payable
x 14%	royalty rate
$ 1.117	royalty per tape sold

185,250	tapes sold
x $1.117	royalty per tape
$206,924	gross tape royalties

CD royalties:

$ 15.98	suggested retail price
- 4.00	packaging deduction of 25%
$ 11.98	on which royalties are payable

$ 11.98	on which royalties are payable
x 10.5%	royalty rate for CD's
$ 1,258	royalty per CD sold

185,250	CD's sold
x $1.258	royalty per CD
$ 233,045	gross CD royalties

Total gross royalties:

$ 206,924	gross tape royalties
$ 233,045	gross CD royalties
$ 439,969	total gross royalties

Deductions

Next, XYZ calculated the deductions it was permitted to take from the total gross royalties Artiste's album had earned. The easiest deductions to determine were the $110,000 in recording costs XYZ paid in connection with the production of the masters of the songs that are on the album; the $30,000 advance to the album producer; the $10,000 balance (of the $150,000 recording fund) that Artiste received as an advance against her royalties; and the $75,000 cost of producing the video. These amounts were deductible in full.

XYZ also was entitled to deduct "excess" mechanical license fees. The relevant contract clause provided that XYZ would have to pay no more than 3/4's of the then-current statutory mechanical license fee multiplied by 10 for each album sold at XYZ's invoiced price, and that any excess could be deducted from Artiste's royalties. The tape version of Artiste's album had 10 songs on it; and the CD version had those 10 songs plus 2 additional "bonus tracks."

Since all of these songs were written by someone other than Artiste, XYZ in fact had to pay mechanical license fees for all 10 songs on the tape and all 12 songs on the CD. Moreover, section 115 of the Copyright Act requires mechanical license fees to be paid "for every phonorecord made and distributed in accordance with the license"--including records that are given away free. Since January 1, 1990, the statutory mechanical license fee has been 5.7 cents per song, per record. This means that XYZ had to pay mechanical license fees, at the rate of 5.7 cents per song per album, for all 500,000 copies of the album that were shipped--not merely for those that were "sold." The total amount of these fees came to $313,500, calculated like this.

Tapes:

$ .057	license fee per song
x10	songs per tape
$ 0.57	license fee per tape

250,000	tapes shipped
x $0.57	license fees per tape
$142,500	total tape license fees

CD's:

$ .057	license fee per song
x l2	songs per CD
$ .684	license fees per tape

250,000	CD's shipped
x $0.684	license fees per CD
$171,000	total CD license fees

Total mechanical license fees:

$ 142,500	tape license fees
+ 171,000	CD license fees
$ 313,500	total mechanical license fees

By contract, however, Artiste agreed that XYZ would not have to pay more than $175,987, calculated like this:

$ .057	statutory license fee per song
x 3/4	to reflect agreed 3/4's rate
$.04275	agreed 3/4's rate per song
x 10	maximum number of songs/album on which fees payable
$ 0.4275	agreed maximum license fees/album
x411,666	albums "sold"
$175,987	maximum mechanical license fees payable by XYZ

Since Artiste did not write any of the songs on her album, her agreement that XYZ would not have to pay more than 3/4's of the statutory rate on albums "sold at XYZ's invoice price" could not bind the owners of the copyrights to those songs. As a result, XYZ had to pay $137,513 in "excess" mechanicals:

$ 313,500	mechanical license fees actually paid
- 175,987	maximum fees payable by agreement
$ 137,513	"excess" mechanicals paid by XYZ

This amount also was deductible from Artiste's gross royalties. Since Artiste's royalty rate was an "all in rate," XYZ was entitled to deduct the producer's royalties as well. In this hypothetical, the royalty provisions of the producer's contract are identical to those in Artiste's contract, except that his rates are net (i.e., not "all in") and are 3% for tapes and 2.25% (75% of 3%) for CD's.

The producer's royalties came to $94,293, calculated like this:

Tape royalties:

$ 9.98	suggested retail price
- 2.00	packaging deduction of 20%
$ 7.98	on which royalties are payable
$ 7.98	on which royalties are payable
x 3%	royalty rate
$0.239	royalty per tape sold
185,250	tapes sold
x$0.239	royalty per tape
$44,275	gross tape royalties

CD royalties:

$15.98	suggested retail price
- 4.00	packaging deduction of 25%
$11.98	on which royalties are payable
$11.98	on which royalties are payable
x2.25%	royalty rate for CD's
$0.270	royalty per CD sold
185,250	CD's sold
x$0.270	royalty per CD
$50,018	gross CD royalties

Total gross royalties:

$ 44,275	gross tape royalties
$ 50,018	gross CD royalties
$ 94,293	total gross royalties

Since the producer received a $30,000 advance against his royalties, only an additional $64,293 was payable to him on account of album sales.

Finally, XYZ decided to withhold and deduct $125,000 in reserves against possible returns, concluding that $125,000 was far less than 50% of the $439,969 in royalties that "otherwise" would have been due Artiste, had XYZ not been entitled to deduct recording costs, advances, video costs, excess mechanicals and producer royalties.

XYZ therefore totaled its deductions as follows:

$110,000	recording costs
30,000	advance to producer
10,000	advance to Artiste
75,000	video production costs
137,513	excess mechanicals
64,293	royalties payable to producer
125,000	reserve against possible returns
$551,806	total deductions

Royalties payable

From here, it was a simple matter to calculate that no royalties were actually payable to Artiste, at that time, because her "gold album" was still substantially "in the red":

$ 439,969	total gross royalties
- 551,806	total deductions
($111,837)	

Of course, Artiste has not really done as badly as it appears at first. She did receive $10,000 in royalties in advance. And the $125,000 reserve for returns is only that--a reserve. Her recording contract provides that the reserve must be "liquidated" by XYZ within two accounting periods following the period for which the reserve was withheld. Since the contract also provides XYZ will render accountings twice a year, XYZ will have to credit Artiste's account with that $125,000 in one year, if there are no returns; and that by itself would result in an additional royalty check to her of $13,163 (i.e., $125,000 - 111,837 = $13,163).

Alternative interpretation of reserves

Moreover, it is possible that in withholding $125,000 as a reserve for returns, XYZ actually withheld more than it was contractually entitled to withhold. XYZ interpreted an ambiguous contract provision in its favor. An alternative interpretation would have entitled Artiste to $6,582 in additional royalties, immediately.

Here, word-for-word, is the ambiguous provision: "In computing the number of records sold, XYZ shall have the right to deduct returns and credits of any nature and to withhold reasonable reserves therefor from payments otherwise due Artist. Such reserves which are withheld by XYZ shall not exceed fifty percent (50%) of payments otherwise due Artist in connection with such records." (This clause is quoted from a sample contract appended to an article written by Jay Cooper, of Cooper Epstein & Hurewitz, entitled "Recording Contract Negotiation: A Perspective," 1 Loyola Entertainment Law Journal 43, 65 (1981).)

Note that this provision does not indicate whether the payments that would "otherwise" be due are the full amount of royalties earned before deductions are taken for recording and video costs, advances, excess mechanicals and producer royalties; or whether the amount " otherwise" due is the amount that would have been paid after such deductions are taken. If XYZ had interpreted the provision in the second manner, the calculation would have looked like this:

$ 439,969	total gross royalties
- 110,000	recording costs
- 30,000	advance to producer
- 10,000	advance to Artiste
- 75,000	video production costs
- 137,513	excess mechanicals
- 64,293	royalties payable to producer
$ 13,163	royalties "otherwise" payable

$13,163	royalties "otherwise" payable
x 50%	maximum reserve percentage
$ 6,581	maximum dollar amount of reserve

$13,163	royalties "otherwise" payable
- 6,581	maximum dollar amount of reserve
$ 6,582	royalty actually payable to Artiste

XYZ did not interpret the reserve provision in this fashion, because from its perspective a $6,582 reserve for a first album by a new recording artist would be wholly inadequate, given the very real possibility that several months after the album shipped "gold," tens of thousands, or even hundreds of thousands, of albums could be returned by record stores. Indeed, given the amount of record piracy that has occurred from time-to-time, horror stories have been told about albums that shipped "gold" and returned "platinum"!

There is a third possible interpretation of the reserve provision as well. Since the provision begins with the phrase, "In computing the number of records sold," it appears as though the reserve could reduce (by a "reasonable" number) the number of records sold, with the dollar amount of the reserve then being limited to 50% of the payments "otherwise" due in connection with "such records," meaning in connection with the reasonable number of records reserved.

Although this interpretation complies most closely with the literal language of the provision, it is unlikely that either Artiste or XYZ Records would have intended this interpretation. From Artiste's point of view, the difficulty with this interpretation is that it imposes no numerical limit on the "reasonable" number of records held in reserve, thus making illusory the 50% limit on the dollar amount of the reserve. From XYZ's point of view, this interpretation allows XYZ to withhold only half the royalties that would be payable on a "reasonable" number of records that may actually be returned, though no royalties at all are payable in connection with records that are in fact returned.

Thus, depending upon which interpretation of the reserve provision is settled upon, Artiste may be entitled to nothing immediately, but an additional $13,163 in one year, for a total of $23,163 (the $10,000 advance plus the additional $13,163); or $6,582 immediately, and an additional $6,581 in one year, again for a total of $23,163 (the $10,000 advance, plus the $6,582 royalty, plus the additional $6,581 in a year). Still, $23,163 is substantially less than the amount most people suppose is the prize for recording a "gold record."

Effects of contract modifications

This is not meant to suggest that "gold records" never produce substantial royalties. In fact, even in this hypothetical, Artiste's royalties would have been dramatically more significant, had small changes been negotiated in just four provisions of her contract with XYZ.

Negotiable modifications

First, historically, record companies paid royalties on 90% (rather than 100%) of records sold, because records used to be brittle and broke in shipment. Since record stores did not pay for broken records, record companies did not want to pay royalties for them either. A 10% breakage factor became customary between record companies on the one hand and stores and recording artists on the other. Today, however, records do not break in shipment, and some record companies do pay royalties on 100% of all records "sold." Assume that

XYZ had been asked, and had agreed, to pay Artiste on 100% of her albums sold (rather than on 90%).

Second, with respect to free goods, record companies customarily shipped 3 free singles and 2 free albums with every 10 singles and albums sold to record stores. On the other hand, some record companies have reduced or even eliminated the number of free goods they ship. Assume that XYZ had been asked, and had agreed, to reduce the number of free albums it ships from the customary "2 on 10" to "15 on 100."

Third, the deductibility of video production expenses often is a subject of negotiation. From the record company's point of view, those expenses are equivalent to recording costs, which are fully deductible by record companies in calculating artist royalties, and thus ought to be fully deductible as well. From the recording artist's point of view, video production expenses are equivalent to advertising and promotional expenses which are not deducted by record companies in calculating artist royalties. Assume that in this hypothetical, the issue of video production expenses had been raised in negotiation, and assume those negotiations had resulted in a compromise that permitted XYZ to deduct 50% (rather than 100%) of Artiste's video production expenses.

Fourth, assume that the "excess mechanicals" provision of Artiste's contract had been modified in three small ways. Assume that XYZ had been asked, and had agreed, to pay mechanicals on all albums "distributed" (rather than only on albums "sold"). Assume that XYZ had been asked, and had agreed, that the 3/4's rate limitation would apply only to "controlled compositions" (i.e., those written or otherwise owned by Artiste herself). And assume that XYZ had been asked, and had agreed, to pay the mechanicals on CD "bonus tracks."

New royalty calculations

If these changes had been made, Artiste's royalty calculation would have looked like this:

Artiste's gross royalties:

500,000	tapes and CD's shipped
- 6,000	tapes and CD's give free to D.J.'s
494,000	shipped, 15 free with every 100 sold
xl00/115	to determine number actual "sold"
429,566	sold and on which royalties payable (214,783 tapes; 214,783 CD's)

$ 9.98	suggested retail price of tapes
- 2.00	packaging deduction of 20%
$ 7.98	on which tape royalties are payable
x 14%	royalty rate
$ 1.117	royalty per tape sold
x2l4,783	tapes sold
$239,913	gross tape royalties

$ 15.98	suggested retail price of CD's
- 4.00	packaging deduction of 25%
$ 11.98	on which CD royalties are payable
x 10.5%	royalty rate for CD's
$ 1.258	royalty per CD sold
x 2l4,783	CD's sold
$270,197	gross CD royalties

$239,913	gross tape royalties
$270,197	gross CD royalties
$510,110	total gross royalties

Producer's royalties:

214,783	tapes sold
x $0.239	royalty per tape
$ 51,333	gross tape royalties

214,783	CD's sold
x $0.270	royalty per CD
$ 57,991	gross CD royalties

$ 51,333	gross tape royalties
$ 57,991	gross CD royalties
$109,324	total gross royalties

Since the producer received a $30,000 advance against his royalties, only an additional $79,324 was payable to him on account of album sales.

Deductions:

$ 110,000	recording costs
30,000	advance to producer
10,000	advance to Artiste
37,500	video production costs
0	excess mechanicals
79,324	royalties payable to producer
125,000	reserve against possible returns
$391,824	total deductions

Royalties payable to Artiste:

$510,110	gross royalties
- 391,824	deductions
$118,286	royalties payable

In this example, XYZ again deducted $125,000 as a reserve against possible returns, on the theory that $125,000 is substantially less than 50% of the $510,110 that "otherwise" would have been payable if no deductions at all were permitted. If instead, the reserve provision of the contract is interpreted to mean that deductions (other than the reserve) must be taken in calculating the amount that "otherwise" would be payable, and only 50% of that amount may be held in reserve, the figures would look like this:

$510,110	gross royalties
- 266,824	deductions (without reserve)
$243,286	royalty "otherwise" payable
x 50%	limit on allowable reserve
$121,643	maximum allowable reserve

$243,286	royalty "otherwise" payable
- 121,643	maximum allowable reserve
$121,643	royalty payable

Thus, by virtue of small changes in four contract provisions, Artiste's royalties leap from zero to $118,286 or even $121,643--serious spendable amounts by almost everyone's standards.

* This is a revised and updated version of an article that first appeared in the May 1985 issue of the Entertainment Law Reporter (ELR 6:12:3). Whitney C.

Broussard, of the Loyola Law School Class of 1992, contributed significantly to this version of the article, especially in connection with revising the hypothetical and the calculations based on it.

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[ELR 12:5:3]

RECENT CASES

Writer may proceed with copyright infringement claim involving "The Equalizer"; 9th Circuit reverses summary judgment won by series' producers

Writer-producer Lou Shaw may proceed with a copyright infringement action against various parties involved with "The Equalizer" television series, a Federal Court of Appeals has ruled.

In February 1978, as described by Judge Arthur L. Alarcon, Shaw entered into an option contract with Richard Lindheim, a programming executive with NBC Television; the contract granted NBC an option to develop "The Equalizer," a pilot script created by Shaw, into a television series. NBC subsequently declined to produce Shaw's script and all rights reverted to the author.

Lindheim left NBC in 1979 and began working for Universal Television. In 1981, Lindheim wrote a television series treatment entitled "The Equalizer." In 1982, Michael Sloan expanded the treatment, and the revised work became the pilot script for a television series which was broadcast on CBS beginning in 1985.

When Shaw sued Lindheim, Sloan, Universal City Studios, CBS and MCA Television, a Federal District Court granted the Lindheim parties' motion for summary judgment with respect to the copyright and Lanham Act claims on the ground that there was no substantial similarity between the works as a matter of law.

In reversing the District Court's decision, Judge Alarcon reviewed the court's application of the two part test set forth in Sid and Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). In Judge Alarcon's view, the District Court's decision to grant summary judgment "solely on its subjective assessment under Krofft's intrinsic test conflicts with the prescriptions of Krofft." Judge Alarcon held that if it were found that Shaw demonstrated a triable issue of fact under the extrinsic test - the measurable, objective elements that constitute a literary work's expression - it was improper for the District Court to find that there was no substantial similarity as a matter of law. "To conclude otherwise," stated Judge Alarcon, "would allow a court to base a grant of summary judgment on a purely subjective determination of similarity."

In nonliterary situations, when a work embodies an idea, such as a stuffed animal produced by a toymaker, courts may make the required determination of similarity on a motion for summary judgment, observed Judge Alarcon. However, undertaking subjective comparisons of literary works that are objectively similar in their expression of ideas must be left to the trier of fact.

Judge Alarcon proceeded to consider whether Shaw raised a triable issue of fact under Krofft's extrinsic test. First, although noting that access was not an issue before the District Court, Judge Alarcon pointed out that access to Shaw's script was relevant in determining substantial similarity, and that the Lindheim parties admitted such access.

The court also found the following factors significant: the two works had identical titles; the theme of both works extended beyond the basic idea of a lone man working outside the system; many of the events in the two works were substantially similar; both works were "fast-paced, [had] ominous and cynical moods ... lightened by the Equalizer's victory, and [were] set in large cities;" and, as noted by the District Court, there were striking similarities in both the dialogue and the characters of the works, such as the fact that the lead characters were well-dressed, wealthy, and had expensive tastes. In all, the totality of the similarities between the characters went beyond the "necessities" of the theme and "belie[d] any claim of literary accident."

The similarities between the principal characters and among the other common characters indicated copying of "more than a general theme or plot idea" and supported the District Court's finding that Shaw had raised a triable issue of fact regarding substantial similarity under the extrinsic test. Therefore, Shaw presented a triable issue of fact regarding substantial similarity, ruled Judge Alarcon in remanding the case - a reasonable trier of fact could find that the similarity between Shaw's script and the Lindheim parties pilot was not so general as to be beyond the protections of copyright law.

The court concluded by expressing reluctance to expand the scope of section 43(a) of the Lanham Act to the situation raised by Shaw, stating that Shaw's claim was not consistent with the Lanham Act's purpose of preventing individuals from misleading the public by placing their competitor's work forward as their own. Notwithstanding the similarities between Shaw's script and the Lindheim parties pilot, the court found that the likelihood that the two works would be confused was minimal; the dismissal of the Lanham Act claim was upheld accordingly.

A petition for rehearing en banc has been filed by the defendants and is pending before the Circuit Court of Appeals.

Shaw v. Lindheim, 908 F.2d 531 (9th Cir.1990) [ELR 12:5:10]

Dispute between Paramount Pictures and Ralph Andrews Productions over ownership of television game show requires further findings on whether Paramount justifiably relied on representations of producer from whom it acquired rights

From 1980 through 1986, Ralph Andrews Productions had an exclusive agreement with Columbia Pictures Television whereby all projects developed by the company would first be presented to Columbia. If the studio passed on the project, the producer had the right to take the project elsewhere. In the early 1980s, Ralph Andrews Productions employed Gary Bernstein to develop new concepts for television shows. The company developed a game show entitled "Anything for Money," but Columbia rejected the concept. In mid-1983, Andrews asked Bernstein to present the concept to Paramount. When a Paramount representative asked about the rights to the program, Bernstein apparently stated that he and his partner (rather than Ralph Andrews Productions) owned the rights. In October 1983, Paramount hired Bernstein, Larry Hovis and another independent producer to produce a pilot for the game show. Eventually, the Bernstein group produced 150 shows which were broadcast between September 1984 and August 1985.

When Ralph Andrews Productions filed a lawsuit, a Los Angeles trial court granted Paramount's motion for summary judgment.

In reversing the trial court's decision, Judge, Ashby observed that in the instant circumstances, "uncertainty as to ownership was a concern." Andrews had drafted a letter notifying Twentieth Century Fox that Columbia had passed on the project, and Paramount's representative also had inquired about the rights and requested a letter verifying that Columbia was not interested in the project. However, the record did not show that Paramount received the requested verification or that the company's legal department obtained clearance for the project. Further inquiry by Paramount was likely to have revealed that the concept was held by Andrews, noted Judge Ashby. Having been informed that Columbia had potential rights to the idea, stated the court, "Paramount had facts which a jury could determine would have made a reasonable person suspicious. A further inquiry could have lead to the ultimate facts, i.e. [Andrews'] ownership."

The record also failed to explain Paramount's usual procedures for obtaining clearances, industry standards for providing clearances, or if such procedures were followed in this case.

It also was observed that Paramount's representative was not unsophisticated in the type of business transaction at issue, and was explicitly given information which indicated another entity may have had rights to the concept. The court declined to find on the basis of the record that Paramount justifiably relied on Bernstein's statements, and found that triable issues of fact were raised as to whether Paramount was defrauded or had sufficient facts to raise suspicion that further inquiry was required.

The court concluded by commenting that because the alleged misappropriation began prior to January 1, 1985, Paramount's liability for any continuing misappropriation would be based upon the law in effect at that time. In order to determine such liability, the court would likely consider, among other factors, whether Paramount paid value in good faith to acquire the concept and whether the company changed its position such that imposing liability would be inequitable.

Ralph Andrews Productions, Inc. v. Paramount Pictures Corporation, Case No.B040944 (Ca.Ct.App., July 27, 1990) [ELR 12:5:11]

Writer loses copyright infringement action against producers of "Frank's Place," because series was not substantially similar to writer's pilot script

A Federal District Court in New York has ruled that no reasonable jury could find substantial similarity between the television series "Frank's Place" and Walter Jones' pilot script for a proposed series of radio plays entitled "Peachtree Street."

After describing the two works, Judge Cedarbaum noted that "Frank's Place" did not use any dialogue or the name of any character appearing in Jones' script. Although Jones argued that one of his characters, "Sister Sadie," was a copyrightable character, Judge Cedarbaum found that Sister Sadie, the "conjure lady," was too undeveloped in the pilot script of "Peachtree Street" to be more than a stock character.

Jones' claim of similar story lines between the two works also was rejected, as was an argument that the general nature and "feel" of the works was substantially similar. "Peachtree Street" was "an undeveloped work with sketchy characterization and limited dialogue," declared the court in granting summary judgment to the "Frank's Place" parties with respect to Jones' copyright infringement claim.

The court also rejected Jones' claim alleging that the failure to identify him as the source of "Frank's Place" constituted false designation of origin in violation of the Lanham Act.

Jones v. CBS Inc.733 F.Supp. 748 (S.D.N.Y. 1990) [ELR 12:5:11]

"Fat Boys" rap group may proceed with copyright and trademark infringement claims against Miller Brewing Co. and Joe Piscopo

In 1987, Miller Brewing Co., Inc. broadcast a television commercial featuring three look-alikes of the members of the musical group "Fat Boys;" the look-alikes in the commercial, performing in the style of the rap group, acted as background singers for actor Joe Piscopo.

Miller allegedly had asked the members of the Fat Boys to appear in the commercial, but Mark Morales, Darren Robinson and Damon Wimbley declined the request. Tin Pan Apple, the owner of the group's service mark and copyrights, eventually sued Miller for copyright infringement, unfair competition and violating the New York Civil Rights Law.

Federal District Court Judge Charles Haight rejected Miller's claim that the commercial was a fair use parody, finding that the work was entirely for profit. Even if the concept of parody were "impermissibly stretched" to include the commercial, stated the court, the fair use doctrine would not apply because the commercial did not build upon the original work or contain elements "contributing something new for humorous effect or commentary."

Furthermore, in view of the group's refusal to appear in the commercial, Judge Haight declared that finders of fact might decide that Miller acted with "bad faith and evasive motive." Accepting as true, for purposes of the motion, Tin Pan Apple's allegations that the commercial infringed both copyrighted compositions and copyrighted sound recordings, the court denied Miller's motion to dismiss the copyright claims.

Miller's motion to dismiss the Fat Boys' trademark claims was denied. The court again declined to recognize Miller's commercial as parody and again noted the group's refusal to appear in the commercial. Miller's subsequent use of the look-alike performers was "bad faith raised to a higher power," commented Judge Haight.

The court next found that the Fat Boys group stated a viable claim under sections 50/51 of the New York Civil Rights Law. Although the record before the court did not include any photographs, videos or other depictions of the individual members of the group, the court accepted, again for purposes of Miller's motion for dismissal, the group's allegations of the look-alike performer's physical similarity.

Judge Haight refused to hold that the use of sound-alikes of the Fat Boys' voices violated sections 50151, stating that extending the statute to the sense of sound was a legislative matter. However, while refusing to recognize the sound-alike claim as a separate cause of action under the Civil Rights Law, the court declared that it would consider the alleged similarity of sound in combination with the purported similarity of appearance.

The court concluded by rejecting the group's defamation claim.

Tin Pan Apple, Inc. v. Miller Brewing Co., Inc., 737 F.Supp. 826 (S.D.N.Y. 1990) [ELR 12:5:12]

Film company protects copyrighted works from creditor's claim because creditor did not record security agreement with Copyright Office

Security interests in copyrighted materials can be perfected only by an appropriate filing with the United States Copyright Office, a Federal District Court in California has ruled.

As described by Federal Court of Appeals Judge Kozinski, sitting by designation, National Peregrine, Inc. was a Chapter 11 debtor in possession whose principal assets were a library of copyrights, distribution fights and licenses to about 145 films.

In June 1985, Capitol Federal Savings and Loan Association of Denver extended to National Peregrine's predecessor by merger a six million dollar line of credit; the line of credit was secured by the film library. The security agreement and the UCC-1 financing statements filed by Capitol Federal described the collateral as "[a]ll inventory consisting of films and all accounts, contract rights, chattel paper, general intangibles, instruments, equipment, and documents related to such inventory, now owned or hereafter acquired by Debtor." The bank filed the UCC-1 financing statements in California, Colorado and Utah, but did not record its security interest in the United States Copyright Office.

National Peregrine filed a voluntary petition for bankruptcy in January 1989. The company, in a lawsuit against Capitol Federal, claimed that the bank's security interest in the copyrights and in the accounts receivable arising from the distribution of the films were unperfected because of the failure to record the security interest with the Copyright Office. Thus, argued National Peregrine, as the debtor in possession, the company had a judicial lien on all assets in the bankruptcy estate, including the copyrights and receivables.

The bankruptcy court granted partial summary judgment to Capitol Federal.

In reversing the bankruptcy court's ruling, Judge Kozinski pointed out that the recording provisions of section 205(a) of the Copyright Act extend to agreements granting a creditor a security interest in a copyright. And "the comprehensive scope of the federal Copyright Act's recording provisions, along with the unique federal interests they implicate, support the view that federal law preempts state methods of perfecting security interests in copyrights and related accounts receivable."

Potential creditors would encounter considerable uncertainty and attendant delay if parallel recording schemes were available, stated the court, particularly given the lack of a fixed situs for a copyright. Furthermore, the Copyright Act and Article Nine set forth different systems for determining priority between conflicting transferees. A recordation system must advise interested parties of all encumbrances in a single, precisely defined manner. The existence of state recordation systems "would surely interfere with the effectiveness of the federal recordation scheme," in Judge Kozinski's view, and such state systems pertaining to interests in copyrights therefore were preempted by the Copyright Act.

The court determined that the provisions of Article Nine itself supported the position that recording in the Copyright Office, rather than filing a financing statement under Article Nine was the proper method for perfecting a security interest in a copyright. Thus, Capitol Federal's security interest in the copyrights of the films in National Peregrine's library and the receivables from such works was unperfected.

Judge Kozinski then found that transfers of an interest in a copyright included transfers by operation of law. National Peregrine, the debtor in possession and "hypothetical lien creditor," was deemed to have taken its interest in good faith, for valuable consideration, and without notice; Capitol Federal's unperfected security interest was "trumped" by National Peregrine's hypothetical judicial lien and the company therefore was entitled to avoid Capitol Federal's interest and preserve the property in issue for the benefit of the bankruptcy estate.

The matter was remanded for a determination of which films in National Peregrine's library were the subject of valid copyrights. The court stated that it then would determine the status of Capitol Federal's security interest in the films and in the debtor's other property.

National Peregrine, Inc. v. Capitol Federal Savings and Loan Association of Denver, Case No. CV 90-1083 (C.D.Ca., June 28, 1990) [ELR 12:5:12]

Salvatore Pisello's conviction of tax evasion in connection with payments from record companies is upheld

In June 1989, a Federal Court of Appeals upheld Salvatore James Pisello's conviction of two counts of tax evasion.

As described by Judge Joseph Sneed, MCA Records, in June 1984, gave Pisello $30,000 to review the feasibility of establishing a "Latin record label." The court noted several factors that made the payment "look like a loan." In January 1985, MCA paid Pisello an additional $50,000. In 1984, Pisello also received about $156,000 from Sugar Hills Records, Ltd.; Pisello attempted to persuade MCA to distribute Sugar Hill's records and to purchase Sugar Hill's catalog of master recordings; in this instance, stated Judge Sneed, although several factors indicated that Sugar Hill's payments to Pisello resembled loans, the payments may have been advances against a possible commission for Pisello if MCA purchased the catalog. From 1983 to 1985, Betaco Enterprises also made an unspecified number of payments to Pisello in connection with the company's efforts to do business with MCA.

Pisello purportedly did not report all of the money, about $300,000, that he received in the above-noted transactions, as well as in other transactions, as income for 1983 and 1984, and he failed to file a tax return for 1985. The District Court ruled that Pisello had attempted to commit tax evasion for the years 1984 and 1985 by failing to pay the tax due on the income received from Sugar Hill, Betaco and MCA, finding that the payments to Pisello constituted compensation, rather than loans. The court sentenced Pisello to four years of imprisonment on one count of the indictment and to three years of probation on the second count.

Judge Sneed, after careful review, concluded that the District Court did not, as claimed by Pisello, amend the indictment; did not place the burden of proof on Pisello; and correctly determined that the tax evasion was willful.

United States of America v. Pisello, 877 F.2d 762 (9th Cir. 1989) [ELR 12:5:13]

Disallowance of actor's home office expense deduction is upheld

Alfred W. Hamacher, a professional actor, was not entitled to a home office deduction under section 280A(c) of the Internal Revenue Code, the Tax Court has ruled.

In 1983 and 1984, the Alliance Theatre in Atlanta, Georgia employed Hamacher as an independent contract actor to perform in various plays; Hamacher also was the salaried administrator of the theater's acting school. The actor used his home office to receive calls regarding acting roles, to prepare for auditions, and to rehearse parts for commercials, as well as to develop the school's curriculum and complete other administrative work.

Hamacher claimed a "workshop/storage" deduction in the amount of about $1,000 on his 1983 and 1984 income tax returns. The commissioner disallowed the deductions because Hamacher did not show that the office was used exclusively on a regular basis as the actor's principal place of 'business and that as an employee, he maintained the office for the convenience of his employer.

The Tax Court agreed with the Commissioner, finding that the evidence did not support Hamacher's claim that the home office was used for the convenience of the acting school. The employer did not require or expect

Hamacher to do any of his work at his home; provided him with an office on the theater premises; and apparently was unaware of the existence of Hamacher's home office or that the actor was using the office to do school-related work. The court noted that "many people engaged in businesses and professions may find it helpful to take work home with them, but that does not automatically establish that the home office is maintained for the convenience of their employer."

Hamacher's use of the home office in connection with his employment by the acting school thus was a personal use and did not comply with section 280A(c)(1), concluded the court. Since the exclusivity requirement of the statute was not met, the Commissioner properly disallowed the home office deductions not only with respect to Hamacher's administrative employment, but also with respect to his activities as an independent contractor.

Hamacher v. Commissioner, 94 T.C. No. 21 (1990) [ELR 12:5:14]

Directors Guild pierces corporate veil of film production company and may recover arbitration award from principal investor and his business

In November 1986, the Directors Guild filed a demand for arbitration on behalf of five of its members who had worked on the film "Single Room." The arbitration sought from Garrison Productions the unpaid salaries for services performed by those members, as well as related payments to the DGA-Producer Pension, Health and Welfare Trust Plans.

The arbitrator awarded full relief to the guild. When the production company failed to pay the arbitration award, the guild brought an action against Garrison Productions, principal shareholder Morton L. Ginsberg, and MLG Properties, Inc. for the amount of the award.

A Federal District Court in New York has agreed with the guild that Ginsberg was personally liable for paying the award and that MLG was liable as the parent corporation. After reviewing the New York standards for piercing the corporate veil and holding a shareholder liable for the acts of a corporation, Judge Robert P. Patterson, Jr. stated that Ginsberg "dominated and controlled Productions." According to the court, the guild members believed that Ginsberg controlled the financing of the production and performed their services in reliance on Ginsberg's continued participation.

The court also pointed out that Ginsberg, initially a fifty percent shareholder of the corporation, eventually became the sole shareholder, provided over ninety-nine percent of the cash contributions to capitalize the corporation, and had greater control of the corporation than any ordinary "angel" of a project would have. Although Sandye Garrison was the president of the corporation, signed all contracts, hired and fired all actors and employees, and arranged to acquire properties for production, "all such arrangements were subject to the funds being advanced and authorized to be advanced by Ginsberg." Ginsberg controlled the corporation's ability to meet its obligations, and, in particular, controlled the payment of wages with respect to the "Single Room" production.

Furthermore, the evidence indicated to the court that Ginsberg did not regard Garrison Productions and MLG Properties as two separate and distinct corporations, that he considered "Single Room" to be as much a project of MLG as of the production company, that Ginsberg and MLG operated the company " with little regard for corporate formalities," and that Ginsberg used his domination of Garrison Productions for his personal interests. There was a "clear inference" for Judge Patterson that Ginsberg and MLG deliberately undercapitalized the production company, and carrying on a business without substantial capital and leaving the corporation without substantial assets to meet its debts can justify piercing the corporate veil. The court pointed out that "when Ginsberg decided not to pay a creditor, the corporation itself was unable to make the payment." Allowing the guild members to recover from Ginsberg and MLG on the basis of the arbitration award would achieve an equitable result, concluded the court.

As an alternative holding, the court found that Ginsberg was liable under section 17-203 of the Directors Guild Basic Agreement, which states that the agreement is binding upon those who are assigned or purchase "a substantial part of the business of the employer."

Directors Guild of America, Inc. v. Garrison Productions, Inc., 733 F.Supp. 755 (S.D.N.Y. 1990) [ELR 12:5:14]

ABC obtains affirmance of summary judgment in Los Angeles judge's libel and invasion of privacy action

In 1983, KABC-TV in Los Angeles presented a series of television news reports concerning the results of an opinion poll conducted by the station. The poll asked local attorneys their opinions on the performance of Los Angeles Superior Court criminal law judges. KABC reported that David Aisenson, then a superior court judge, had received the lowest ratings of all the judges in the poll.

Judge Aisenson, who, according to news reports, has since retired, brought an action for libel, alleging, in part, that the reports falsely implied that he was dishonest, immoral or otherwise unfit for his profession.

In upholding a trial court decision granting the ABC parties' motion for summary judgment, appellate court Judge Boren noted that the opinions reflected in the poll were protected "regardless of whether they [were] well founded or utterly wrong." KABC presented the opinions of the attorneys as facts, not as editorial comment or criticism, noted the court, and "merely making unflattering factual statements about someone, without more, does not give rise to a cause of action for defamation." There was no evidence that KABC broadcast false statements of fact.

Even assuming that the statements in the news report were false, Judge Aisenson did not produce clear and convincing evidence that the ABC parties made the statements with actual malice.

The court also rejected Judge Aisenson's causes of action for invasion of privacy arising from a videotape taken by KABC of the judge as he walked down a driveway to his car. Judge Aisenson had refused to permit a camera inside his courtroom and declined to be interviewed. There was no evidence that the station's method of newsgathering "exceeded the public's interest in seeing a current videotape picture of an elected official." The camera crew did not physically encroach on the judge's property and any invasion of privacy which took place was "extremely de minimus," concluded the court.

Aisenson v. American Broadcasting Company, Inc., 269 Cal.Rptr. 379 (Ca.Ct.App. 1990) [ELR 12:5:15]

Factual issues raised in dispute between publisher of weight control book and distributor of "Optifast" program precluded summary judgment on copyright issues, but court dismisses trademark infringement claims

In 1977, Bull Publishing Company entered an agreement with Dr. Joyce Nash and Dr. Linda Ormiston; the authors wrote the book "Taking Charge of Your Weight and Well-Being," and granted the copyright in the work to the publisher.

When Sandoz Nutrition Corporation, the distributor of the "Optifast" weight control program, hired Doremus & Company to prepare material for a lecture series and manual, the public relations firm requested, but never received, Bull's permission to use portions of "Taking Charge." Nevertheless, Doremus included in the manual a questionnaire entitled "How Do You Score on Your Body Image;" a "Food Exchange Plan;" a chapter entitled "Managing Special Situations;" text on "How the Body Utilizes Food;" text on "Dietary Recommendations;" and the title "Taking Care of Your Weight and Well-Being."

Sandoz admitted the unauthorized use of portions of "Taking Charge," but argued that Bull lacked standing to sue for copyright infringement because the publisher did not hold a valid copyright in the text copied by Sandoz. It was noted that between 1976 and 1978, Nash and Ormiston had taught several courses related to weight reduction. The authors distributed student manuals to the course participants and to public health employees; the manuals were the basis for the text of "Taking Charge." According to Sandoz, the material in issue was not covered by Bull's copyright because such material existed prior to the writing of "Taking Charge."

Federal District Court Judge D. Lowell Jensen first found that "each time Nash and Ormiston created a new version of their student manuals and embodied it in a reproducible form they created a separate work." Under the Copyright Act of 1976, it was irrelevant whether or not that work was published, stated the court, in finding that "Taking Charge" was a derivative work comprised of portions of the earlier works.

Under the Act, a derivative work is "a work based upon one or more preexisting works, such as a[n]...abridgement, condensation or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations or other modifications which as a whole, represented an original work of authorship, is a 'derivative work.'"

Judge Jensen noted that "Taking Charge" included both rewritten portions of the student manuals and sections that were identical to the text of the manuals. The fact that the book also contained a large amount of text that did not appear in the earlier works did not prevent the book from being a derivative work. The court then determined that the authors intended to convey to Bull Publishing both the copyright to the book and the copyrights to the underlying student manuals.

Sandoz argued that the distribution of student manuals between 1976 and 1978 placed those works in the public domain, thereby invalidating Bull Publishing's copyright claim. The court found that genuine issues of material fact existed as to whether the distribution of the manuals constituted a "limited" or "general" publication. In particular, Judge Jensen questioned the evidence concerning whether or not students were granted reproduction or distribution rights when provided with a copy of Nash and Ormiston's work. Furthermore, the record before the court was not sufficient to establish whether the proper copyright notice was affixed to the student manuals prior to distribution; the parties' motions for summary judgment were denied accordingly with respect to Bull Publishing's copyright claims.

In turning to the publisher's unfair competition causes of action, Judge Jensen characterized Bull's claim as one for "reverse passing off." The publisher challenged the unacknowledged use of about fifteen pages of text in a work displaying Sandoz's copyright notice.

The court found that the claim under section 17203 of the California Business and Professions Code was preempted by the Copyright Act since Bull's state law unfair competition claim duplicated the rights protected by section 106 of the Act.

Also rejected was a claim for violation of section 43(a) of the Lanham Act. The publisher's claim, stated Judge Jensen, was "not consistent with the purpose behind section 43(a) of preventing individuals from misleading the public by placing their competitors' work forward as their own." In this case, the likelihood of confusion between "Taking Charge" and the Sandoz manual was minimal, and the court expressed reluctance to expand the scope of section 43(a) action to cases in which the Copyright Act provides an adequate remedy. Judge Jensen granted Sandoz's motion for summary judgment and Doremus' motion to dismiss.

Bull Publishing Company v. Sandoz Nutrition Corporation, Case No. C87-4723 (N.D.Ca., 1990) [ELR 12:5:15]

Art gallery obtains preliminary injunction barring public officials from interfering with Robert Mapplethorpe exhibit

In early April 1990, the Contemporary Arts Center of Cincinnati, Ohio opened an exhibit of photographs by Robert Mapplethorpe. The county prosecuting attorney and sheriff and the police chief of Cincinnati claimed that about seven of the 175 photographs in the exhibit were obscene under Ohio law.

A county grand jury indicted Dennis Barrie and the Center on charges of pandering obscenity and the illegal use of minors in nudity oriented material, but the Center parties were not arraigned and there was no judicial determination in connection with the indictments. However, Cincinnati police officers, acting under a search warrant issued by a county judge, entered the Center premises and videotaped each photograph on display.

Federal District Court Judge Carl B. Rubin first noted that the First Amendment of the Constitution of the United States prohibits the abridgement of free speech, and that there may not be a seizure of allegedly obscene material until there has been a judicial determination, based on a community standards test, of whether the challenged material is obscene.

In view of the pending state court proceeding, Judge Rubin issued a preliminary injunction barring the public officials from interfering with the Mapplethorpe exhibit prior to a judicial determination of obscenity.

Contemporary Arts Center v. Ney, 735 F.Supp. 743 (S.D.Ohio 1990) [ELR 12:5:16]

Louisiana Supreme Court invalidates mandatory workers' compensation provision in race track's contract for jockeys

The Louisiana Supreme Court, reversing an appellate court decision (ELR 11:2:15), has found that a race track's contract for jockeys seeking to participate in race meetings was invalid. The Fair Grounds Corporation required jockeys who raced at its track to sign a contract whereby the track would pay workers' compensation benefits to an injured jockey in exchange for the jockey's waiver of the right to sue the track for its negligence. The jockeys were independent contractors and the track ordinarily would have had no obligation to pay workers' compensation benefits.

The Louisiana State Racing Commission had found that the contract was "a valid exercise of the Fair Grounds' proprietary rights." A trial court subsequently ruled on behalf of the jockeys, but the appellate court agreed with the Commission.

The Supreme Court declared that the contract violated the jockeys' rights as licensed permitees of the Louisiana State Racing Commission, and that excluding jockeys for failing to sign the contract exceeded the scope of the authority given to private parties engaged in conducting racing, and was not a valid exercise of the track's reserved proprietary rights.

Furthermore, because of the superior bargaining strength of the track and the "economic vulnerability" of the jockeys, the court found it reasonable to conclude that the jockeys would have felt that they were forced into signing the contract at issue. "The fear of economic deprivation was sufficient to meet the level of duress required to vitiate consent," concluded the court in finding that the contract was not a bargained for agreement due to lack of mutual consent.

Wolf v. Louisiana State Racing Commission, 545 S.2d 976 (La. 1989) [ELR 12:5:17]

Briefly Noted:

Libel/Restaurant Review.

A radio talk show host's critical comments about a local restaurant did not support causes of action for libel or invasion of privacy, a Georgia appellate court has ruled, but the restaurant owner may proceed with a claim for intentional infliction of emotional distress. Although the broadcaster's statements about the restaurant's food and service were constitutionally protected expressions of opinion, the court noted that a factfinder might reasonably conclude that certain other remarks, including those encouraging listeners to confront the manager of the restaurant with insulting words and gestures, were likely to provoke an imminent breach of the peace. The challenged statements also might be found sufficiently "outrageous and egregious" to support an award of damages for intentional infliction of emotional distress, and the trial court's judgment with respect to this claim was reversed accordingly.

The dissenting judges would have found that all of the broadcaster's comments were constitutionally protected, and were not actionable as fighting words or as threats sufficient to support a claim for intentional infliction of emotional distress. Listeners to the program, stated the dissent, could not reasonably have interpreted the challenged statements as an imminent direction to assault the restaurant manager - the language used was "simply hyperbole or a mocking exaggeration" of the broadcaster's negative opinion of the restaurant. The comments, "while obnoxious, could not reasonably be interpreted as fighting words. And the mere fact that they were offensive, without creating a clear and present danger of physical harm, does not strip them of their constitutional protection."

A rehearing and certiorari were denied.

S & W Seafoods Company v. Jacor Broadcasting of Atlanta, 390 S.E.2d 228 (Ga.App. 1989) [ELR 12:5:17]

Employment Relationship.

Captain Kishka, Inc. provides musical talent for events such as receptions and parties. The New York State Unemployment Insurance Appeal Board found that the company's relationship with performers was that of employer-employee rather than that of a contractor with independent contractors.

A New York appellate court has affirmed the Board's decision assessing unemployment insurance contributions against Captain Kishka. The court noted that the company negotiates the terms of the engagement, schedules musical talents, provides instructions to subleaders, and assigns any additional performers necessary for the group's engagement. While working on assignment, each group is identified as part of Hank Lane Music (which is associated with Captain Kishka and its principal, Hank Lane). The subleader of the group collects any balance due from the client. Kishka would pay the performers individually, without any withholding, based upon hours worked and the local union scale; the company did provide workers' compensation insurance coverage. Judge Weiss stated that while other evidence in the record could support a different result, the above-noted factors supported a finding of an employer- employee relationship.

In the Matter of Captain Kishka, Inc., 551 N.Y.S.2d 631 (N.Y. Appp. 1990) [ELR 12:5:18]

Libel.

A Federal District Court in Virginia has dismissed a libel action brought by Eric M. Freedlander against Edens Broadcasting, Inc., the owner of Richmond radio station WRVQ-94 FM. Freedlander complained that the lyrics of a song broadcast by the station in November 1988 which referred to him as a "money jockey" implied that he had committed a criminal offense. The court first found that the song was not defamatory as a matter of law - the lyrics did not suggest the commission of an offense punishable by imprisonment and did not impute to Freedlander any criminal offense involving moral turpitude. It also did not appear to the court that the song had any defamatory meaning when read in the context of certain newspaper reports of Freedlander's financial difficulties. In all, the song did not contain false statements of fact and the radio station was not negligent in broadcasting the work.

Judge Richard L. Williams then observed that "even the most careless reader" would have been aware of the nonsensical nature of the lyrics, and of the fact that the song allegedly was played during the station's morning comedy and music show.

The court concluded by finding that Freedlander was a public figure, and that even if the song were capable of a defamatory meaning, Freedlander would not be able to prove by clear and convincing evidence that the song was published with malice.

Freedlander v. Edens Broadcasting, Inc., 734 F.Supp. 221 (E.D.Va. 1990) [ELR 12:5:18]

Tax/Game Receipts.

Manchester Music Co., the owner of an amusement machine business, was not required to file information returns under section 6041(a) of the Internal Revenue Code in connection with the revenue divided by Manchester and the proprietors of the establishments where the machines were located, a Federal District Court in New Hampshire has ruled. Manchester Music provided video games, pin ball machines and juke boxes to various stores; the store owners agreed to divide equally with Manchester all receipts resulting from the operation of the machines. The Internal Revenue Service argued that the division of revenue constituted "payments" by Manchester Music to the store owners. The court rejected this argument, stating that the agreements essentially were independent joint ventures in which the parties shared the profits as well as the expenses, that the purported "transfer" of half of the revenue was not a payment under the statute, and that Manchester was entitled to a refund of penalties paid in the amount of about $800.

Manchester Music Company, Inc. v. United States of America, 733 F.Supp. 473 (D.N.Hampshire 1990) [ELR 12:5:18]

Copyright Infringement/"E.T." Theme.

A Federal Court of Appeals, in an opinion marked "Not for Publication," has upheld a Federal District Court jury verdict finding that composer John Williams' "Theme from E.T." did not infringe Leslie T. Baxter's song "Joy" (see ELR 10:5:19; 8:10:12).

The jury apparently decided that the portion of one of the themes of "Joy" that was substantially similar to the allegedly infringing piece was not original material protected by copyright.

Baxter v. MCA, Inc., Case No. 88- 6660 (9th Cir., July 2, 1990) [ELR 12:5:18]

IN THE NEWS

Judas Priest musical group is not liable in "suicide-by-subliminal- message" action

A Reno, Nevada trial court judge has ruled that the musical group Judas Priest was not liable for the deaths of Raymond Belknap and James Vance. Judge Jerry Carr Whitehead stated that a subliminal message, consisting of the words "do it," apparently existed on the group's "Stained Class" album, but that the words were the result of a chance combination of sounds. The members of the group did not intentionally place any messages on the album and it was not shown that the messages, even if perceived, were responsible for the 1985 suicide of Belknap and the suicide attempt by Vance, who died, due in part to injuries suffered in the suicide attempt, three years later.

The families of the young men had brought a wrongful death action against Judas Priest and CBS Records. In 1988, the Nevada Supreme Court ruled that the members of the group were subject to jurisdiction in the state (ELR 10:10:19). In August 1989, Judge Whitehead ruled that the First Amendment did not protect subliminal messages and denied the Judas Priest parties' motion for summary judgment (Vance v. Judas Priest, 16 Med.L.Rptr. 2241).

The Entertainment Law Reporter will review the court's decision further when Judge Whitehead's opinion is published. It should be noted that in a collateral order, Judge Whitehead ordered CBS to pay $40,000 to the attorneys for the families of the young men; the court, according to news reports, found that CBS did not properly comply with various discovery orders. [Oct. 1990] [ELR 12:5:19]

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2 Live Crew musician and Lucasfilm settle dispute over use of the name Luke Skyywalker"

Luther Campbell, a member of the rap group 2 Live Crew, has agreed to stop using the stage name "Luke Skyywalker." As reported at ELR 12:2:19, Lucasfilm Ltd. obtained a preliminary injunction barring Campbell from using the name, claiming trademark infringement. Lucasfilm owns the trademark "Luke Skywalker," the name of a character in the "Star Wars" movies. It has been reported that Campbell, who admitted no wrongdoing, also agreed not to distribute records or wear clothing bearing the name in issue or any name "similarly confusing," and that the musician would make a cash payment, in an unspecified amount, to Lucasfilm. [Oct. 1990] [ELR 12:5:19]

CBS Records' copyright infringement claim against Tom Scholz of "Boston" musical group is dismissed

A Federal District Court in New York has dismissed CBS Records' copyright infringement claim against Tom Scholz, the leader of the musical group "Boston."

The litigation between the parties 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 awarding Boston more than $3 million in deferred royalties held by the record company were reported at ELR 10:3:10. The determination of a Federal District Court jury that Scholz did not breach a contract with CBS Records when he did not deliver a record album to CBS within five years was reported at ELR 11:11:6.

Chief Judge Charles Brieant, according to news reports, held that CBS had no copyright interest in Scholz's tapes. [Oct. 1990] [ELR 12:5:19]

Federal District Court in Los Angeles dismisses all charges against record promoter Joseph Isgro and two other parties

Federal District Court Judge James M. Ideman has dismissed with prejudice a 57 count indictment against independent record promoter Joseph Isgro, Raymond Anderson and Jeffrey Monka.

Isgro was charged with RICO violations, mail fraud, tax fraud, payola, conspiracy and obstruction of justice in connection with an alleged scheme to bribe radio station employees to place certain songs on the station's weekly play lists. Anderson, a former vice president of Columbia Records, was charged with accepting kickbacks for hiring Isgro to promote the company's songs. Anderson and Monka also were charged with filing false tax returns to conceal payments they purportedly received from Isgro. Isgro, Anderson and Monka pleaded not guilty to all charges.

Judge Ideman, ruling from the bench, found that the Justice Department had engaged in "outrageous government misconduct" in intentionally withholding exculpatory information from the defense and from a Los Angeles grand jury. The government's main witness, Dennis DiRicco, had been tried in early 1989 on money laundering, tax and obstruction charges; the exculpatory material was contained in the trial transcript. According to Judge Ideman, DiRicco had denied any wrongdoing and denied conspiring with Isgro or anyone else to commit any crime. A jury acquitted DiRicco on eight of ten counts. DiRicco was convicted on tax fraud and obstruction of justice charges, but upon agreeing to testify in the payola case, received no prison sentence.

Judge Ideman noted that the Justice Department's Senior Counsel for Litigation William S. Lynch had possessed a copy of the DiRicco trial transcript since April 1989, but did not provide it to the defense or to the grand jury. Federal attorneys repeatedly denied that they knew about the earlier testimony when questioned by the judge and defense attorneys. It has been reported that DiRicco frequently contradicted the testimony contained in the trial transcript when testifying to the Los Angeles grand jury on matters directly relating to Isgro, Monka and Anderson. DiRicco apparently testified that he sent "huge sums of laundered cash to Isgro," and implicated Monka and Anderson in the scheme to disguise the transfer of funds.

The court also criticized the conduct of the Justice Department Organized Crime Strike Force; Attorney General Dick Thornburgh has ordered the strike force disbanded. [Oct. 1990] [ELR 12:5:19]

Arbitrator orders Major League Baseball team owners to pay $102.5 million to players in lost salaries for 1987 and 1988

Arbitrator George Nicolau, after finding, in three separate cases, that the Major League Baseball Team owners acted in collusion to restrict free agent player movement and salaries after the 1987 season (see ELR 12:3:19; 10:8:19; 10:5:19; 9:5:19), has ordered the owners to pay players $102.5 million in lost salaries for the 1987 and 1988 seasons. Another arbitrator, Thomas Roberts, previously had awarded $10.5 million in damages for lost 1986 salaries. Further hearings are planned with respect to damages for lost player salaries for the 1989 and 1990 seasons. [Oct. 1990] [ELR 12:5:20]

Order restraining distribution of book about Israeli intelligence service is reversed

St. Martin's Press may distribute the book "By Way of Deception," co-written by a former agent of the Mossad intelligence service, a New York appellate court has ruled.

The Israeli government had obtained a trial court order barring the publication of the book, co-written by Victor Ostrovsky and Claire Hoy, pending a judicial review of the government's request for a preliminary injunction. The Israeli government claimed, according to news reports, that the publication of the book could "endanger the lives of various people in the employ of the State of Israel." It also was argued that the former agent, Ostrovsky, may have breached an agreement not to divulge classified information.

The appellate court, in an unsigned order, granted the publisher's motion to dissolve the temporary restraining order, stating that the Israeli government had not sufficiently supported its claim that the safety of intelligence agents would be endangered by the publication of the book, or that irreparable injury would occur. The court also apparently noted that the book already had been distributed to about 1,500 wholesalers and to many book reviewers in the United States, so that injunctive relief was likely to be ineffective. [Oct. 1990] [ELR 12:5:20]

San Francisco 49ers must pay $500,000 fine for violating NFL ownership rules

Football Commissioner Paul Tagliabue has fined the San Francisco 49ers $500,000 for violating the National Football League's corporate ownership policy. The violations occurred in December 1986 when the 49ers owner, Edward DeBartolo Jr., made the team a subsidiary of the DeBartolo Corp.; DeBartolo failed to notify other owners and did not obtain permission from the NFL. DeBartolo's action also meant that the 49ers were a part of the same corporation that owns the Pittsburgh Penguins of the National Hockey League, and NFL rules prohibit a team from having an interest in another professional sports team.

Tagliabue, according to news reports, did not find that the transfer of ownership resulted in a competitive advantage that would warrant restricting the team's future draft picks. [Oct. 1990] [ELR 12:5:20]

California, Louisiana, Rhode Island and Arizona strengthen anti-piracy laws

California Governor George Deukmejian has signed a new antipiracy bill. As of January 1991, the piracy of 100 illegal videocassettes (rather than 1000) will be a felony offense subject to penalties of a maximum of five years in prison and a $250,000 fine.

With respect to sound recordings, the Recording Industry Association of America has announced that "true name and address" statutes have been passed in New York, Louisiana and Rhode Island. In New York, the penalty for the illegal copying of recordings has been increased to a felony; the statute specifically includes video recordings as well as sound recordings.

Louisiana Governor Buddy Roemer signed legislation making the unauthorized copying of video and sound recordings a felony. And Rhode Island has strengthened the forfeiture provisions of its anti-piracy legislation.

Arizona has increased to a felony the penalty for the unlawful copying or sale of 1,000 or more articles containing sound recordings or 100 or more articles containing audio visual recordings. The failure to identify the true name and address of the manufacturer of a video or audio cassette, and the unauthorized sale or copying of live performances also will be felony offenses. [Oct. 1990] [ELR 12:5:21]

Motion Picture Association of America announces new NC-17 rating

The Motion Picture Association of America has replaced its "X" rating for films with the rating "NC-17 - No Children Under 17 Admitted." The rating will be applied to films with adult themes or content. The Association also has announced that it will provide an explanation as to why a film has received an "R" rating; the "R" rating restricts children under 17 from attending films without a parent or guardian. [Oct. 1990] [ELR 12:5:21]

Federal Communications Commission rules that 24-hour ban on "indecent" broadcasts is constitutional

The Federal Communications Commission has ruled that a twenty-four hour ban on "indecent" radio and television broadcasts is constitutional. According to news reports, the Commission based the ruling on findings that children, defined as individuals who are seventeen or younger, are in the broadcast audience at all times of the day and night. A Commission staff report concluded that the twenty-four hour prohibition, adopted in response to legislation passed by Congress in 1988, was a sufficiently narrow means of preventing access to indecent broadcasts by children.

The Commission, for purposes of broadcasting, has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." [Oct. 1990] [ELR 12:5:21]

Paramount Communications' "Hard Copy" program is exempt from FCC's equal time requirement

The Federal Communications Commission has ruled that the television program ""Hard Copy" is a "bona fide newscast" and is not required to provide equal time to political candidates.

Paramount Communications had requested an exemption from the equal time requirement, arguing that the stories covered by the program are selected on the basis of newsworthiness. [Oct. 1990] [ELR 12:5:21]

DEPARTMENTS

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