LEGAL AFFAIRS

The Basics of Bankruptcy Preferences in the Entertainment Industry

by Bennett J. Yankowitz

It is no secret that bankruptcy filings are on the rise both in the entertainment industry and in the country as a whole. Entertainment companies and the firms that finance them must be familiar with the workings of the federal bankruptcy laws, which will affect the structure of loans and other financing transactions, work-outs of troubled transactions, and the strategies of borrowers and lenders in the critical days leading up to a bankruptcy filing.

This article provides an introduction to preferences under the federal Bankruptcy Code for the entertainment industry. Most businessmen intuitively understand the concept of a preference: a transfer of money to a creditor on the eve of bankruptcy that depletes the assets remaining to pay other creditors. However, the rules governing preferences can be subtle and complex. The courts have found preferences in situations, such as shareholder guarantees and the use of letters of credit to support unsecured debt, that have left even the experts scratching their heads. Troubled companies are also beginning to use these rules as part of their business strategies, in some cases even timing their bankruptcy filings to defeat what their lenders thought were fully secured loans.

This article discusses a series of examples that illustrate both the basics of preferences and the more advanced situations now being addressed by the courts. It

is intended not as a legal treatise for lawyers, but as a working introduction for the businessman.

The Elements of a Preference

When a company files for protection under the federal Bankruptcy Code, a trustee is appointed to represent the bankruptcy estate. If it is filing under Chapter 11, where most business reorganizations take place, the debtor usually serves as its own trustee, and is known as the "debtor in possession." n1 The Code gives the trustee or debtor in possession the authority to void
various types of transactions between the debtor and other persons that occurred prior to the filing. One of the most important of these powers is the ability to void all "preferences."

The elements of a preference, as set forth in Section 547 of the federal Bankruptcy Code, n2 are the following:

1. A transfer of an interest in property of the bankruptcy debtor,
2. To or for the benefit of a creditor,
3. For or on account of an antecedent debt owed by the debtor before the transfer was made,
4. Made while the debtor is insolvent,
5. Made within 90 days before the bankruptcy filing (or, if the creditor is an "insider," within one year before the filing),
6. That enables the creditor to receive more than it would have received in a Chapter 7 bankruptcy liquidation had the transfer not occurred.

While these elements will be discussed in detail in the specific examples to come later in this article, a few general points can be made now. First, whether the preference period in element no. 5 begins 90 days or one year before the bankruptcy filing depends on whether the creditor is an "insider." In the case of a bankruptcy debtor that is a corporation, its insiders will include all officers and directors of the debtor, all persons "in control" of the debtor, such as significant shareholders, and certain close relatives of these persons.

Second, under element no. 4, the debtor must have been "insolvent" when the alleged preference was made, although the debtor will be presumed under the Bankruptcy Code to be insolvent on and during the 90 days immediately preceding the filing date. n3 In this context, "insolvent" means that the debtor's debts are greater than all of its property at fair valuation. n4 Determining in a given case whether the debtor was insolvent during the

preference period is often a complicated matter, requiring detailed factual analysis and, frequently, third-party solvency evaluations, appraisals, expert testimony, and the like. Because of the presumption of insolvency in the 90 days leading up to the filing, and because the majority of debtors will in fact be insolvent during the preference period, in the examples that follow it is always assumed that, at the time the transfer is made, the debtor was insolvent.

Third, the Bankruptcy Code contains several exceptions to the preference test:

(a) A transfer is not a preference if it is a contemporaneous exchange of property of the debtor for new value given to the debtor and was intended as such. n5 Intuitively, if the debtor makes a payment or transfers property to a creditor on the eve of bankruptcy but receives something of value in return, the other unsecured

creditors should not be injured. There is no requirement that the value of what is received by the debtor be equal to the value of what is given to the creditor. However, if the debtor were to receive something of significantly less value, the transaction probably could be attacked as a fraudulent conveyance under the Bankruptcy Code and similar provisions of state law.

(b) A payment will not be a preference if it is made on a debt that was incurred in the ordinary course of business of the debtor and the creditor, is made in the ordinary course of business, and is made according to ordinary business terms. n6

(c) The Code contains an "enabling loan" exception, n7 which covers purchase money security interests that secure new value given to enable the debtor to acquire property if the security interest is perfected within 10 days after the debtor receives possession of the property. This provision tracks a similar provision in the

Uniform Commercial Code that provides under state law for the creation and perfection of purchase money security interests in personal property.

(d) There is a limited exception for a creditor who, after receiving property from the debtor, at a later time gives new value on an unsecured basis. n8 The idea here is that to the extent a preferred creditor later gives back something of value to the debtor, he has returned part of the preference to the bankruptcy estate.

(e) Special rules apply for floating security interests in inventory and receivables, n9 which are discussed below in Example 7.

It is useful to distinguish between "direct" and "indirect" preferences. Direct preferences are those that involve transfers of property from the debtor directly to a creditor, and are the types of transactions one normally thinks of when discussing preferences. An indirect

preference occurs when the creditor does not directly receive a transfer of property from the debtor, but is somehow benefited by a transaction between the debtor and a third party. These also constitute preferences because of element no. 2 of the preference definition, which speaks of a transfer of the debtor's property "to or for the benefit of" a creditor. The several controversial preference cases that are the current bane of lenders, such as shareholder and other insider guarantees, preexisting debts secured by letters of credit, and assumption-of-liability transactions, invariably seem to involve indirect preferences.

Direct Preferences

The first group of Examples discuss the types of direct preferences that will most concern entertainment companies and their lenders.

The Plain Vanilla Preference. We begin with the most basic type of preference:

Example 1: On January 1, Debtor Corp., a motion picture production company, makes a payment to one of its suppliers for film stock that it purchased on open account; it also makes a regularly scheduled payment of principal and interest on an eight-month revolving line of credit payable to its local bank. On March 1, Debtor Corp. files a petition for relief under Chapter 11 of Bankruptcy Code with debts far exceeding its assets.

This is an example of the most basic type of direct preference: a payment to an unsecured creditor on the eve of bankruptcy. In each instance in the example, the creditor receives property of the debtor (in this case, money) on account of an antecedent debt at a time that

the debtor is insolvent (or is presumed to be insolvent) to the detriment of other unsecured creditors, who will probably receive only a fraction of their debts in a bankruptcy liquidation. There should be little question that all of the elements of preference are in fact present.

However, the film supplier may not be required to return its January 1 payment to the bankruptcy estate, while the bank very likely will. This is because of the "ordinary course of business" exception, which will protect the film supplier if it can establish that the sale of the film and Debtor Corp.'s subsequent payment for the film were in the ordinary course of both its and Debtor Corp.'s business. Unfortunately, the exception may not be available to help the bank. Most courts that have examined the question have held that payments on long term debts are not within the scope of the ordinary course of business exception. (The Ninth Circuit Court of Appeals had gone even further when it held in the

ZZZZ Best case that payments on a revolving bank line of credit with a maturity under one year were not in the ordinary course of business for preference purposes; but that ruling has just been reversed by the United States Supreme Court. n10)

Collateralizing the Unsecured Loan. The next two examples examine element no. 1 of the preference test--what constitutes a "transfer" of property of the debtor:

Example 2: Debtor Corp. has for several years had an unsecured credit line with B Bank. Debtor Corp.'s financial condition has been steadily worsening. In order to avoid having the bank call the loan, on July 1 it agrees to give the Bank a security interest in all of its accounts, inventory, and film rights. On September 1, Debtor Corp. files under Chapter 11.

This is the other classic example of a preference. Element no. 1 calls for a transfer of an interest in property of the debtor. The term "transfer" is defined very broadly in the Bankruptcy Code, and includes the giving of a lien or security interest. n11 Debtor Corp.'s granting of the security interest to B Bank within the 90-day preference period thus constituted the transfer of an interest in property of Debtor Corp., and may be recovered by the bankruptcy estate as a preference. Note that this analysis assumes that element no. 3 of the preference definition is satisfied: that the transfer is made on account of an antecedent debt. If Debtor Corp. had entered into a new credit agreement regarding a new extension of credit with B Bank or anyone else, and had simultaneously granted a security interest to secure the new loan, the antecedent debt element would not have been present.

In Example 2, B Bank might try to argue that it did not receive a preference because it was protected by the contemporaneous exchange exception--that is, it received its security interest in exchange for giving new value to the debtor in the form of an agreement not to call the loan and to continue to allow credit to be extended. However, the courts have not been sympathetic to this type of argument, and have almost uniformly held that the security interest granted was on account of an antecedent debt. n12

The Earmarking Rule. Transactions that seem like transfers of the debtor's property sometimes are not treated that way:

Example 3: On January 1, 1985, Debtor Corp., a television production company, acquired the licenses to several television properties, paying part of the purchase

price to Seller Corp. by means of an unsecured promissory note maturing on January 1, 1995. On March 1, 1990, to take advantage of lower interest rates, Debtor Corp. arranges with B Bank for an unsecured revolving line of credit, on the condition that the Seller Corp. note be paid off. On April 1, 1990 Debtor Corp. draws on the line of credit and pays the outstanding balance of the Seller Corp. note. On May 1, Debtor Corp. files for Chapter 11.

The payment to Seller Corp. seems similar to the payment in Example 1 to the bank on its revolving loan. In fact, since the entire amount of Seller Corp.'s note was prepaid in full, the payment seems to be even less in the ordinary course of business than in the first example. However, the courts have held in similar situations that the payment from Debtor Corp. to Seller Corp. is not a preference because it is not a transfer of property of the

debtor. The courts look at the overall transaction as the substitution of one unsecured creditor--B Bank--for another--S Corp.--which does not prejudice the interests of the other unsecured creditors of Debtor Corp. This is known as the "earmarking" theory: the funds available under the lender's loan are earmarked for (that is, received by the debtor with the express purpose of paying off) another unsecured creditor. The situation is functionally equivalent to the sale of an unsecured debt from one creditor to another, with the debtor merely acting as a conduit for the sales proceeds. n13

Insider Preferences. The next example illustrates the basic insider preference:

Example 4: Sam, Joe, and Ellen set up a production company to produce a feature-length motion picture. Each contributes $100,000, taking back one-third of the

stock of the company and a promissory note for $50,000. Joe and Ellen will actively oversee the production of the motion picture, and will take the titles of president and executive vice president/treasurer, respectfully. Sam considers himself to be a passive investor, and wants nothing to do with the management of the company. However, he, along with Joe and Ellen, will be on the board of directors of the corporation. The costs of the production turn out to be higher than expected, and sales to distributors do not come as easy as the principals had hoped. On January 1, 1989, the production company pays $20,000 on each of the notes. Things do not improve and, nine months later, the company is forced to file under Chapter 11.

This example of poor bankruptcy planning illustrates the operation of the one-year preference period for insiders. All three principals are directors of the debtor and are thus "insiders." It does not matter that Sam is

not an officer or that he considers himself to be a passive investor--when he agreed to serve on the board of directors, he became an insider. n14 This is an example of the value of bankruptcy planning, because if the principals could have delayed the bankruptcy filing for another three months, they would have been beyond the one-year preference period.

While the courts generally permit this type of manipulation of the preference period, there may be other ways to recapture an insider payment that is made more than one year before the filing. For instance, because of the control that the three shareholders have over the debtor, the bankruptcy court may decide to subordinate the remainder of their claims to other unsecured creditors to compensate for what it perceives as improper conduct in making payments on the notes at a time when the debtor may have been insolvent. n15 Alternatively, the court may deem the funds invested through the notes to be

equity, and therefore treat them as such in the bankruptcy proceedings.

The Undersecured Creditor. The preceding examples have all dealt with unsecured creditors; the next few examples show how secured creditors can also have preference problems:

Example 5: B Bank loans Debtor Corp., a TV production company, $1,000,000 secured by Debtor Corp.'s receivables from the syndication of its library of television series, as well as by a lien on the television properties themselves, which it values at $1,500,000. On June 1, in response to pressure from B Bank, which is concerned about Debtor Corp.'s deteriorating financial condition, Debtor Corp. pays down the B Bank loan by $200,000. On July 1, Debtor Corp. files under Chapter

11. On June 1 Debtor Corp. had $120,000 in receivables and the library had an actual market value of $800,000.

B Bank clearly received a transfer of property--the $200,000--from Debtor Corp. within the 90-day preference period. The issue here is element no. 6 of the preference definition: did B Bank receive more than it would have received in a liquidation of Debtor Corp. under Chapter 7? It is this element that normally protects the fully secured creditor, because in a liquidation, he will be able to satisfy the full amount of his debt out of his collateral, so that any payments he receives during the preference period do not represent amounts that would otherwise be available to unsecured debtors in a liquidation. In Example 5, however, the secured creditor is undersecured by $80,000 before it receives the $200,000 payment on June 1. Whether any part of the $200,000 payment constitutes a preference depends on whether

the payment must be first credited against the unsecured portion of the debt or the secured portion. Unfortunately for B Bank, the courts almost always hold that payments must be credited first to the unsecured portion. n16 Thus, B Bank will be required to return $80,000 to the bankruptcy estate; the remaining $120,000 that it received will be credited to its secured claim and thus will not constitute a preference.

After-Acquired Property. Modern commercial law, as codified in the Uniform Commercial Code, permits lenders to take a "floating" security interest in collateral. Thus, a creditor might take a security interest in the Debtor's receivables or equipment that automatically extends to new collateral as it is acquired from time to time by the Debtor. Unfortunately, as the next example illustrates, the Bankruptcy Code often requires a different result.

Example 6: On January 1, 1985, D Corp. purchases an independent film editing facility from the Seller Corp., paying part of the purchase price with a $1 million note. The note is secured by "all of Debtor Corp.'s equipment, whether now owned or hereafter acquired." On June 1, 1989, Debtor Corp. acquires a film editing machine from a third party. On July 1, 1989, Debtor Corp. files under Chapter 11.

Assuming that Seller Corp. had perfected its security interest in Debtor Corp.'s equipment in 1985, there should be little question that Seller Corp.'s security interest extended to the editing machine acquired a month before the bankruptcy filing. Under the Uniform Commercial Code, this is certainly correct, and follows directly from the rules establishing the floating security interest. However, even though the security interest in the new equipment may be valid and perfected, the

transfer of the security interest to the secured party may still constitute a preference. Unfortunately for Seller Corp., the Bankruptcy Code provides that a transfer is not made until the debtor has acquired rights in the property transferred. n17 Thus, for purposes of the preference rules, a security interest in the editing machine was "transferred" to Seller Corp. when Debtor Corp. acquired the machine on June 1, 1989, which was less than 90 days prior to the bankruptcy filing. And since this transfer was on account of an antecedent debt (the 1985 note), it constitutes a preference. Thus, the security interest will be defeated in bankruptcy and will not extend to the new piece of equipment.

The situation would have been different if we were dealing with a lender who advanced funds to Debtor Corp. to acquire the new piece of equipment. In this case, the purchase money security interest exemption

would probably be available to protect the lender's security interest.

Inventory and Receivables Lenders. Inventory and receivables lenders would face complicated problems under the preference rules, particularly the time-of-transfer rule discussed in the previous example, if not for the special exemption mentioned in the first section of this article. A modern inventory and receivables financing invariably makes use of the floating security interest: the security interest is made to continually extend to new inventory as it is purchased or produced and to new accounts as they are generated day to day in the debtor's business. Furthermore, accounts and inventory will frequently secure revolving lines of credit that permit drawings tied to a borrowing base, thereby permitting a pre-determined percentage of eligible accounts and inventory to be financed. Thus, there are typically

numerous borrowings and repayments, as well as the daily creation and extinguishment of individual items of inventory and accounts. Without special rules, analyzing preferences would be most difficult.

Example 7: Debtor Corp. manufactures and distributes videotapes and laser discs under licenses from the copyright holders. B Bank extends a revolving line of credit secured by Debtor Corp.'s inventory and accounts, which it values at $1,000,000. On January 1, Debtor Corp.'s outstandings under the loan agreement are $700,000; however, because of competitive pressures in the video business, which have forced prices down substantially, and because of the pending bankruptcy of some of Debtor Corp.'s largest customers, B Bank has considerably overvalued Debtor Corp.'s inventory and accounts. In fact, on January 1, D's inventory is worth $300,000 and its accounts stand at $350,000. On

March 31, Debtor Corp. files under Chapter 11. In the meantime, Debtor Corp. had paid down the B Bank line by $75,000.

As mentioned above, special rules apply to accounts and inventory financings. n18 In general, a preference exists only if the creditor is undersecured on the 90th day preceding the bankruptcy filing (or on the day within the preference period when the creditor first gives new value) and the amount of the deficiency decreases between such date and the date of the filing. In this example, on January 1, 90 days before the bankruptcy filing, B Bank's outstandings exceeded the value of its collateral by $50,000. On the date of filing, the outstandings were $625,000 and the collateral was worth $650,000, meaning that B Bank had become fully secured. Thus, its entire $50,000 "deficiency" was eliminated in the 90-day preference period. It is this $50,000

that constitutes a preference, and which must be turned over to the bankruptcy estate.

The Time-of-Transfer Rules. Another thing that gets secured creditors into trouble is the failure to timely perfect their security interests. The following example summarizes two actual situations that recently involved major banks with loans to major entertainment companies.

Example 8: On April 1, B Bank makes a loan to Debtor Corp., a motion picture studio, secured by its film library. C Bank makes a loan to Debtor Corp. on the same date, which is to be secured by a deed of trust on Debtor Corp.'s real estate. B Bank perfects its security interest in the library by filing a UCC-1 financing statement with the Secretary of State. The C Bank loan has been scheduled to close on the last day of week-

long trip to Los Angeles by C Bank's executive vice president. However, because of last minute changes to the documents, delays in resolving some problems on the title report, and other minor problems, the final loan documents are not ready in time. C Bank and Debtor Corp. therefore sign a short letter agreement, with the understanding that the final documentation will be completed and put into place as soon as possible. C Bank funds the loan and the executive vice president continues on to Hawaii for a two-week vacation. The final documentation is ultimately prepared and signed, and the deed of trust is recorded on April 15. On July 12, Debtor Corp. files under Chapter 11.

Both B Bank and C Bank may be surprised to discover that they have received preferences, even though they obtained their security interests at the same time that they extended new credit to Debtor Corp., negating

element no. 3--that the transfer be made on account of an antecedent debt. The problem here, however, is the special rules in the Bankruptcy Code for determining when a "transfer" takes place. Let's take the case of C Bank first.

The rule with respect to transfers is that they are deemed made at the time they take effect between the transferor and the transferee, if the transfer is perfected at or within 10 days after such time. n19 If the transfer is perfected more than 10 days after it takes effect between the parties, it is then deemed to occur, for the purposes of the preference test, when it is actually perfected. n20 In Example 7, the transfer consists of the granting of the deed of trust in Debtor Corp.'s real property to C Bank. Since the security interest was not perfected within 10 days of the April 1 grant, the "transfer" of property of the debtor is deemed to occur on the date of perfection--in this case April 15.

This has two crucial consequences. First, the date on which the transfer is made (April 15) is now different from the date on which the loan was made (April 1), meaning that what should have been a simultaneous transfer of a security interest in exchange for giving new value in the form of a loan has become a transfer on account of an antecedent debt. In this instance, the courts will not allow the creditor to cure the transaction under the "contemporaneous exchange" exception. n21 Second, if the transfer is deemed to have occurred on April 15, it will have occurred within the 90-day preference period, even though the funding of the loan was beyond the 90-day period by almost two weeks. The result: C Bank's deed of trust is a preference, and must be reconveyed to the bankruptcy estate.

B Bank fairs no better. True, it filed a UCC-1 financing statement within the 10-day period, so its security interest should not have been on account of an antecedent

debt. However, while a UCC-1 financing statement is sufficient to perfect a security interest in tangible property, such as the film negatives and their canisters, under the recent Peregrine Entertainment n22 case, a security interest in copyrights must be registered with the United States Copyright Office in order to be perfected. So B Bank's security interest in the copyrights to the library properties was unperfected when its loan was made on April 1 and was still unperfected when Debtor Corp. filed for bankruptcy. The Bankruptcy Code provides that if a transfer is not perfected at the later of the commencement of the bankruptcy case or 10 days after the transfer takes effect between the transferor and the transferee, it is deemed to take place immediately before the date of the filing of the petition. n23 Thus, the "transfer" of the security interest in the copyrights to B Bank is deemed to occur immediately before the Chapter 11 filing, which by definition is always within the

90-day preference period. As with C Bank, the antecedent debt element of the preference definition will now raise its head, leaving B Bank with an unsecured loan. n24

Indirect Preferences

The examples discussed so far all have one thing in common: the "transfer" under consideration, whether the payment of money, the granting of a security interest, or otherwise, was made by the bankruptcy debtor directly to the preferred creditor. We turn now to the indirect preference, whereby the debtor makes a transfer to a third party that indirectly benefits the creditor.

Insider Guaranties. Take the following example of an all too common occurrence:

Example 9: Joel, a successful independent motion picture producer, sets up Debtor Corp. to be the vehicle for his next production. Through Debtor Corp., he acquires the rights to a screenplay, hires a director and a star, and negotiates a distribution agreement with a major motion picture studio. He then obtains a negative pick-up loan from B Bank, which takes a security interest in the rights to the screenplay and the rights under the distribution agreement. As additional support for the loan, B Bank insists on obtaining Joel's personal guarantee. Unfortunately, the production goes way over budget and the distributor refuses to pick up the film because of the failure to meet several conditions under the distribution agreement. Meanwhile, the completion bond issuer for the production has been taken over by the state insurance regulators, who refuse to perform under the bond. The production company is forced to file under Chapter 11.

The facts in this example parallel those in the infamous Deprizio case, n25 in which the Seventh Circuit Court of Appeals held that the bankruptcy estate could recover any payments made to the lender within the one-year period preceeding the bankruptcy filing. Not surprisingly, this case sent shock waves through the financial community. The court's reasoning was along the following lines: Joel, as the shareholder of Debtor Corp., is an insider. Furthermore, if he were ever called to make a payment on his guarantee, he would have a right to proceed against Debtor Corp. for reimbursement of the amounts he paid to B Bank as the guarantor. This right of "subrogation" against Debtor Corp. makes Joel an unsecured creditor of Debtor Corp. We then turn to element no. 1 of the preference definition, which requires a transfer "to or for the benefit of" a creditor. Every time B Bank receives a payment on its debt, Joel is benefited because it reduces his exposure on the guarantee and

thus his subrogation claim on Debtor Corp. Therefore, the payments on the B Bank loan benefit an insider, and are recoverable if made within the one-year insider preference period. The next question is whether the bankruptcy estate may recover this "transfer" from the Bank. Section 550 of the Bankruptcy Code, n26 which we have not previously examined, provides that a preference may be recovered either from the initial transferee or the entity for whose benefit such transfer was made. Thus, the "transfer" for the benefit of Joel, in the amount of the payments made to B Bank, may be recovered from either B Bank or Joel.

Deprizio is no doubt a controversial case, and is still not uniformly followed by all federal courts. n27 Nevertheless, it has enough of a following that it should give pause to any lender whose practice has been routinely to take shareholder or other affiliate guarantees. Can transactions such as the one in this example be structured to

avoid the Deprizio result? Financial attorneys now generally use one or more of the following structures to attempt to get around Deprizio, although it must be cautioned that none has yet passed the muster of the federal courts. First, it is now common to require an insider guarantor to waive its right of subrogation against the debtor. This arguably changes the Deprizio analysis because the guarantor is no longer a creditor of the debtor, and thus does not receive a "transfer" when the guaranteed debt is paid down. Second, some banks allow the guarantor to subordinate his subrogation rights to all other unsecured creditors or to treat any amount to become owing under the right to subrogation as a capital contribution to the borrower's equity. While this means that the guarantor is still a creditor (in the subordination case), it ensures that in a Chapter 7 liquidation, he will receive no more than he would have had the bank payments on the guaranteed debt not been made. The third

alternative is to have the borrower fully secure the guarantor's right of subrogation. This way, although a payment to the lender will still benefit the guarantor, he will now be a secured creditor, and thus the benefit will not constitute a preference because it will not change the amount that he is entitled to receive in the event of a liquidation of the borrower. However, in most cases, it will be just as easy to fully secure the lender, which should protect him against all preference claims, Deprizio-style or otherwise.

Assumption of Liabilities in a Sale-of-Assets Transaction. Another way in which companies get in trouble with indirect preferences is when liabilities are assumed in connection with the purchase of assets:

Example 10: Debtor Corp. has operated a small television station for several years, losing money

consistently. It enters into an assets sales agreement whereby it agrees to sell the television station to Buyer Corp. for cash and the assumption of certain unsecured liabilities, including notes payable to the person from whom Debtor Corp. originally purchased the station. Buyer Corp., which is larger and more liquid, pays off the assumed liabilities shortly after the asset sale is closed. Eighty-nine days after the closing, Debtor Corp. files under Chapter 11.

The unsecured creditors whose liabilities were assumed will probably be surprised to learn that they received preferences when their debts were paid off by Buyer Corp. In this case, the courts tend to view the transaction as the substitution of a secured creditor (in this case, Buyer Corp., which has the "security" of the purchased assets) for the unsecured liabilities being assumed. n28 In addition, the remaining unsecured

creditors of Debtor Corp. are harmed by the transaction, in that a valuable asset is transferred out of the estate and used to pay off the assumed unsecured liabilities. The payments received by the holders of the assumed liabilities thus constitute preferences, which must be returned to the debtor's estate.

Letters of Credit. Yet another situation in which indirect transfers can lead to surprising results is when a letter of credit is given to an unsecured creditor on account of a preexisting debt:

Example 11: Debtor Corp. is a small motion picture production company. In connection with the filming of its next project, a low-budget horror movie, it rents various items of equipment from Leasing Corp. Leasing Corp. and Debtor Corp. enter into an equipment lease on Leasing Corp.'s standard forms. As filming proceeds,

Leasing Corp. grows nervous that Debtor Corp. will not be able to make its lease payments. Debtor Corp. offers to pledge a $20,000 certificate of deposit to Leasing Corp. to secure its lease payments, but Leasing Corp.'s attorneys advise against this arrangement, pointing out that taking collateral for an antecedent debt, such as Debtor Corp.'s obligation under the lease, would constitute a preference if Debtor Corp. were to file for bankruptcy within the ensuing 90 days. They suggest instead that Debtor Corp. obtain a letter of credit from a local bank to support the lease obligations, which Debtor Corp. agrees to do. However, the bank will not issue the letter of credit unless Debtor Corp.'s reimbursement obligation is secured by a pledge of the certificate of deposit. Debtor Corp. agrees and the bank issues the letter of credit. Two months later, Debtor Corp. files under Chapter 11.

Leasing Corp.'s attorneys were correct in assuming that the pledge of the certificate of deposit directly to Leasing Corp. would constitute a transfer on account of an antecedent debt, and thus expose Leasing Corp. to a preference attack if Debtor Corp. filed within the ensuing 90 days. Unfortunately, they were incorrect in assuming that a bank letter of credit would change matters. In two well known cases, In re Air Conditioning of Stewart, Inc. n29 and In re Compton Corp., n30 two different federal Circuit Courts of Appeals each held that when a creditor in the position of Leasing Corp. draws on its letter of credit, it receives a preference to the extent of the value of the collateral that becomes subject to the bank's reimbursement obligation. The courts have been careful to emphasize that the bank does not receive a preference in this instance, since it gives new value (i.e., it issues the letter of credit) when it obtains its security interest. However a letter of credit

drawing has the effect of transferring the collateral from the debtor to the bank, to the benefit of the letter of credit beneficiary, who presumably could not have received the letter of credit had the reimbursement obligation to the bank not been collateralized. Furthermore, Section 550 once again allows the "transferred" property--in this case the value of the bank's collateral, to be recovered from the entity who benefits from the transfer--the letter of credit beneficiary.

The courts have consistently held in this situation that the preferential transfer occurs at the time the collateral is granted to the issuing bank (i.e., when the letter of credit is opened), not when the letter of credit is drawn upon. n31 So, in the example, the transfer is deemed to have occurred when the certificate of deposit was pledged to B Bank. Because this occurred within the 90-day preference period, it is recoverable against

Leasing Corp., which was benefitted by the transfer, even if the letter of credit had not been drawn upon.

Conclusion

The risks of preferences should always be taken into account when a lender structures a loan. Even secured lenders must take care to avoid preference liability, which can occur if they are undersecured or if their liens are not properly or timely perfected. Shareholder and other affiliate guaranties also require special attention.

Preference analysis is important in the workout phase of a loan, especially if the lender is offered new or additional collateral for its loan or a letter of credit or other third party security. Finally, any company that is considering a bankruptcy filing should not hesitate to use the preference rules as a weapon. For instance, a bankruptcy filing may be timed to bring an insider within the

one-year preference period, or to defeat a secured creditor's lien if the lien was not perfected within the 10-day period. A well timed bankruptcy filing can lead to a substantial preference recovery not only for the benefit of the unsecured creditors of the estate.

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Notes

1. 11 U.S.C. sec. 1107(a).
2. 11 U.S.C. sec. 547.
3. 11 U.S.C. sec. 547(f).
4. 11 U.S.C. sec. 101(32)(A).

5. 11 U.S.C. sec. 547(c)(1).
6. 11 U.S.C. sec. 547(c)(2).
7. 11 U.S.C. sec. 547(c)(3).
8. 11 U.S.C. sec. 547(c)(4).
9. 11 U.S.C. sec. 547(c)(5).
10. Wolas v. Union Bank (In re ZZZZ Best Co., Inc.), 921 F.2d 968 (9th Cir. 1990), cert. granted, 111 S.Ct. 2009 (1991), reversed, ___ S.Ct. ___ (Dec. 11, 1991).
11. 11 U.S.C. sec. 101(58).
12. This is because the term "new value" is not defined broadly enough to cover this type of transaction: "`[N]ew value' means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation." 11 U.S.C.

sec. 547(a)(2). See In re Energy Cooperative, Inc., 814 F.2d 1226 (7th Cir. 1987), cert. denied, 108 S.Ct. 294 (1987).

13. E.g., Coral Petroleum Inc. v. Banque Paribas-London, 797 F.2d 1351 (5th Cir. 1986); McCluskey v. National Bank of Waterloo (In re Baklen Enters. Ltd.), 859 F.2d 561 (8th Cir. 1988); Sun Valley, Inc. v. Silverman (In re Sun Railings, Inc.), 5 Bankr. 538 (Bankr. S.D. Fla. 1980).

14. 11 U.S.C. sec. 101(3)(B)(i).

15. 11 U.S.C. sec. 510(c).

16. E.g., Parker v. Yukon Nat'l Bank, 866 F.2d 355 (10th Cir. 1989); Barash v. Public Fin. Corp., 658 F.2d 504 (7th Cir. 1981).

17. 11 U.S.C. sec. 547(e)(3).

18. 11 U.S.C. sec. 547(c)(5).

19. 11 U.S.C. sec. 547(e)(2)(A).

20. 11 U.S.C. sec. 547(e)(2)(B).

21. E.g., Grover v. Gulino (In re Gulino), 779 F.2d 546 (9th Cir. 1985).

22. In re Peregrine Entertainment, Ltd., 116 Bankr. 194 (C.D. Cal. 1990).

23. 11 U.S.C. sec. 547(e)(2)(C).

24. There are additional ways in which B Bank's security interest can be defeated. For instance, under Section 544(a) of the Bankruptcy Code, 11 U.S.C. sec. 544(a), the trustee or debtor in possession has the rights of a lien creditor whose lien attached at the time of the bankruptcy filing. And under state law, a lien creditor usually defeats the holder of an unperfected security interest. See UCC sec. 9-301(1)(b).

25. Levit v. Ingersoll Rand Fin. Corp. (In re Deprizio Construction Co.), 874 F.2d 1186 (7th Cir. 1989). Two other Circuit Courts of Appeal have since followed Deprizio. Ray v. City Bank and Trust Co. (In re C-L Cartage Co.), 899 F.2d 1490 (6th Cir. 1990); Manufacturers

Leasing Corp. v. Lowrey (In re Robinsons Bros. Drilling, Inc.), 892 F.2d 850 (10th Cir. 1989).

26. 11 U.S.C. sec. 550.

27. E.g., T.B. Westex Foods, Inc. v. Alaska Continental Bank (In re T.B. Westex Foods, Inc.), 96 Bankr. 77 (Bankr. W.D. Tex. 1989); In re Rubin Brothers Footwear, Inc., 119 Bankr. 416 (Bankr. S.D.N.Y. 1990); In re Arundel Housing Components, Inc., 126 Bankr. 216 (Bankr. D. Md. 1991).

28. Palmer v. Radio Corporation of America, 453 F.2d 1133 (5th Cir. 1971); In re Conrad Corp., 806 F.2d 610 (5th Cir. 1986); Aulick v. Largent, 295 F.2d 41 (4th Cir. 1961).

29. American Bank of Martin County v. Leasing Service Corporation (In re Air Conditioning of Stuart, Inc.), 845 F.2d 293 (11th Cir. 1988).

30. Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.), 831 F.2d 586 (5th Cir. 1987).

31. Id. at 591.
[ELR 13:7:3]

RECENT CASES

Decision that author of play about Jackie "Moms" Mabley is sole owner of copyright to play is affirmed; actress was not "joint author," because her ideas and research were not copyrightable contributions

In an important case that tests the meaning of "joint author" for copyright ownership purposes, a Federal District Court granted summary judgment to Alice Childress, the author of the play "Moms," in the playwright's copyright infringement action against actress Clarice Taylor. (ELR 12:10:5)

A Federal Court of Appeals has affirmed the District Court's judgment. Judge Newman noted that Taylor had suggested that Childress write a play based on black performer Jackie "Moms" Mabley, had provided Childress with research material, and discussed the inclusion of scenes and characters in the play. However, observed Judge Newman, "Childress was responsible for the actual structure of the play and the dialogue."

When Taylor and Childress failed to agree on contract terms, Taylor hired writer Ben Caldwell, provided him with a copy of the Childress script, and told Caldwell to write another play featuring "Moms" Mabley. Caldwell's play was produced in 1987. Apparently, at least one advertisement for Caldwell's play quoted reviews referring to Childress's play.

In response to Childress's lawsuit, Taylor claimed that she was a joint author of the play. The District Court rejected Taylor's claim, finding that there was insufficient

evidence on which a reasonable trier of fact could find that Childress intended, at the time the work was created, to have her contribution be merged "into inseparable or interdependent parts of a unitary whole." It also was found that copyright law requires the contributions of both authors to be independently copyrightable and that Taylor's ideas and research were not copyrightable.

Judge Newman, after expressing certain reservations, decided to follow case law and the position taken by the Register of Copyrights that would require the copyrightability of each author's contribution to a work. "The insistence on copyrightable contributions by all putative joint authors," stated Judge Newman, "might serve to prevent some spurious claims by those who might otherwise try to share the fruits of the efforts of a sole author of a copyrightable work, even though a claim of having contributed copyrightable material could be asserted by those so inclined." The court pointed out that it seemed

"more consistent with the spirit of copyright law to oblige all joint authors to make copyrightable contributions, leaving those with noncopyrightable contributions to protect their rights through contract."

In the instant matter, the District Court, in Judge Newman's view, properly required the parties to "entertain in their minds the concept of joint authorship, whether or not they understood precisely the legal consequences of that relationship." Emphasizing that joint authorship entitles co-authors to equal undivided interests in the work, such equal sharing of rights "should be reserved for relationships in which all participants fully intend to be joint authors." The District Court applied the correct standard for determining joint authorship, and also correctly found that Childress was entitled to summary judgment.

Judge Newman stated that it was not necessary to determine whether the court agreed with the District Court

that Taylor's contributions were not independently copyrightable since, even if they were protectable as expression or as an original selection of facts, there was no evidence from which a trier of fact could infer that Childress had the state of mind required for joint authorship. There was no showing that Childress "ever contemplated, much less would have accepted, crediting the play as "written by Alice Childress and Clarice Taylor." The District Court also properly referred to the Childress's "emphatic rejection" of attempts by Taylor's agent to negotiate a co-ownership agreement and Taylor's acquiescence in the rejection. In all, Taylor's claim of co-authorship was properly rejected, and the judgment of the District Court granting summary judgment for Childress on her copyright and unfair competition claims was affirmed.

Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991) [ELR 13:7:11]

Gabriel Garcia Marquez and producer did not enter binding agreement concerning film rights to "Love in the Time of Cholera"

During the course of negotiating for the film rights to "Love in the Time of Cholera" by Gabriel Garcia Marquez, producer Richard Roth, in November 1988, proposed to pay the author various fees for obtaining certain rights. In January 1989, Roth offered to increase the payment for a two year option in the work from $200,000 to $400,000. Garcia Marquez's agent countersigned the letter offer, and stated, among other comments: "...I am happy that this deal is finally concluded,"

and "I shall await the formal agreement at your earliest convenience."

When Roth subsequently transmitted a 25 page formal agreement, the agent noted the omission of clauses referring to the author's previously-discussed conditions for selling the film rights - a Latin American director and shooting site in Brazil. Garcia Marquez never signed the formal agreement, and Roth did not pay any money to the author.

Roth filed an action for declaratory relief to determine the status of his rights to produce the film. A Federal District Court in California found that the court had personal jurisdiction over Garcia Marquez and his agent, but granted their motion to dismiss for failure to state a claim.

A Federal Court of Appeals first agreed that the District Court properly exercised jurisdiction over the nonresident Garcia Marquez parties. Although the parties

had barely a minimal physical presence in the forum, Judge Dorothy W. Nelson pointed out that the proposed contract concerned a film, "most of the work for which would have been performed in California." Although the film, in accordance with Garcia Marquez's request, most likely would have been shot in Brazil, all of the editing, production work, and advertising would have occurred in California. Thus, the subject of the agreement "would have continuing and extensive involvement with the forum."

Judge Nelson then pointed out that Roth's claim arose out of the above-mentioned letters, which were executed in the forum. After reviewing several other factors, the court found that the Garcia Marquez parties did not present a compelling case that the exercise of jurisdiction would be unreasonable.

The court then found that Garcia Marquez's signature was required in order for the parties' agreement to be

binding. And Judge Nelson stated that even if the author's signature was not a condition precedent, the Roth letters did not set out the essential terms of the parties' agreement. The letters specified the prices for option rights and the extension of rights, the payments for video and television releases of the film, and the percentage of net profits, but, again, did not mention the site and director of the film. The agent also had questioned the assignability and scope of the rights being transferred to Roth. In all, no contract existed between the parties, and the court therefore affirmed the dismissal of the action and denial of leave to amend.

Roth v. Garcia Marquez, 942 F.2d 617 (9th Cir. 1991) [ELR 13:7:11]

MTV fails to obtain injunction barring sale of Hanna-Barbera cartoons to Turner Broadcasting

In October 1991, Hanna-Barbera Productions, owned by Great American Communications Co., agreed to sell its production studio and cartoon library of 3,000 half-hour segments of animated shows to Turner Broadcasting System and a joint venture partner for $320 million. As part of the agreement, according to news reports, Turner bought the syndication rights to the animated shows from Worldvision Enterprises, a subsidiary of Spelling Entertainment. Spelling Entertainment also is owned by Great American Communications.

MTV Networks, the parent company of Nickelodeon, claimed that Worldvision, in April 1991, had agreed to grant an exclusive three year exhibition license to MTV, and that the parties had memorialized the $5 million oral agreement in two letters.

MTV sought a declaration of the validity of the license, an injunction preventing any interference with the license, and specific performance of the license agreement. MTV alleged, in part, that Nickelodeon would be irreparably harmed by the loss of the animated series from its program schedule.

A New York trial court has refused to grant MTV's request for a preliminary injunction. Judge Beatrice Shainswit noted that an April 1991 MTV letter to Worldvision set forth a payment schedule whereby ten percent of the total license fee for the animated series would be paid "upon execution of a long-form agreement." In August 1991, Worldvision sent MTV two letters to "confirm our acceptance of your order" relating to the Hanna-Barbera works. The letters reiterated the terms previously reached, including the ten percent payment due upon execution of the long-form contract.

MTV argued that the August letters memorialized the substance of an already concluded oral agreement. Judge Shainswit, although noting that there is no requirement in law that an agreement, such as the one in dispute, must be memorialized by the execution of a formal writing, stated that MTV did not refute the "clear evidence...that the parties did not intend to be bound until a long-form agreement had been reached." In addition to making the agreement subject to the execution of a long form agreement, MTV denied all responsibility under the agreement for claims which might be brought against the company should the parties fail to reach a long form contract. It also was observed that MTV apparently sought to make the Worldvision agreement contingent on a pending merchandising license agreement with Hanna-Barbera.

MTV claimed that it had entered into at least three prior oral agreements with Worldvision for the licensing

of animated programming, and that the agreements were memorialized, as a formality only, in long form contracts often executed after performance began under the oral agreements. Judge Shainswit stated that, unlike the situation before the court, the previous agreements resulted in the execution of formal contracts, and that the confirmatory letters sent with respect to the earlier contracts did not refer to the agreements being "subject to" a later written contract or to payment due upon execution of a long form agreement. Judge Shainswit found that it was not necessary to consider Worldvision's claim that the parties had not determined the material terms of the contract; the court did note that Worldvision and MTV continued to negotiate various terms until Worldvision refused to continue the negotiations, thus indicating that final execution of the agreement "was to be deferred until complete agreement had been reached..."

The court rejected MTV's claim that Worldvision breached an implied covenant to negotiate in good faith, again noting the absence of a contractual relationship.

In turning to the question of whether MTV would sustain irreparable harm in the event of losing the exclusive license in issue, the court considered MTV's claim that the Hanna-Barbera programs, especially "The Jetsons," were "unique and special." Judge Shainswit stated that there did not appear to be any reason why it would be impossible to determine the loss of profits which would result from MTV's inability to exhibit the subject programs. The loss of the "name" value of the programming in issue was hypothetical - there was no showing that the loss of the property would leave Nickelodeon unable to supply its customers with programming.

MTV did not show a likelihood of success on the merits, or that it would sustain irreparable harm, and preliminary injunctive relief was denied accordingly.

MTV Networks v. Worldvision Enterprises, Inc., New York Law Journal, p. 25, col. 3 (N.Y.Cnty., Nov. 14, 1991) [ELR 13:7:12]

Canadian appeals court upholds allocation of Canadian cable TV royalties between ABC and the NFL; also rules that sports leagues may not claim copyright in the play of their games, and affirms other issues ruled on by Copyright Board

Not all sports referees wear striped uniforms and blow whistles. Just recently, a staid and quite dignified federal court of appeals in Canada was called upon to sort out a dispute between American professional sports leagues on the one hand and television networks on the other. The dispute arose in an arcane and complex context; it

involved the question of how copyright royalties paid by Canadian cable TV systems (for the privilege of retransmitting over-the-air broadcast signals) should be allocated between sports leagues and TV networks, and especially between the NFL and ABC.

The dispute arose in the first place only because of a fairly recent change in Canadian copyright law. Prior to 1990, Canadian cable retransmission of broadcast signals was not an infringing activity -- even when those signals originated in the United States and even when the retransmission was done without the consent of the owners of the copyrights to the retransmitted programs -- and thus cable systems paid no royalties for doing so. However, in response to its obligations under the Canada-U.S. Free Trade Agreement, Canada amended its copyright law to require cable systems to pay royalties on retransmitted broadcast signals, effective 1990.

The task of determining the amount of those royalties, and their allocation among copyright owners whose programs are retransmitted, was given to the Copyright Board of Canada. In October 1990, the Board issued its first ruling on the amount to be paid and on its allocation among copyright owners. [ELR 12:7:21] Appeals immediately followed, on a variety of issues.

The NFL and ABC collided over which of them was entitled to the royalties from the Canadian cable retransmission of ABC telecasts of NFL games. This question turned on the proper interpretation of a clause in the NFL-ABC contract which the court characterized as "not a model of precision." The clause first provided that ABC would videotape each telecast and deliver tapes to the NFL, and then said: "Network hereby assigns to League those protectible copyright elements in the telecast of each game necessary to enable League to sue to prevent threatened infringement or for

damages....League by this assignment does not acquire the right to exploit the videotaped recordings in any media without Network's prior consent."

The NFL argued that this clause assigned to it the copyrights in ABC telecasts of NFL games, and thus it should receive the cable royalties earned by retransmission of those telecasts. However, as far as the court was concerned, "it is not clear from the wording that there has been an assignment of retransmission rights"; and the court therefore considered parol evidence. From the testimony, the court concluded that the purpose of the assignment clause "was merely to permit the league, in order to ensure better attendance at home games, to sue local bars that showed the games to their patrons." The court thus agreed with ABC that it had not assigned retransmission rights to the NFL, and the court agreed with the Copyright Board that as between ABC and the NFL, ABC was entitled to the cable royalties.

The NFL, joined by the National Basketball Association, the National Hockey League, and the Canadian Football League, also made another argument for a larger share of the cable royalty pool. This argument was that games themselves are copyrightable works under Canadian law, separate and distinct from broadcasts of those games; and thus leagues should receive a portion of the amount allocated to the owners of retransmitted sporting events. Such an argument would not have been tenable under United States copyright law, because under U.S. law only works that have been tangibly "fixed" are elegible for copyright protection. Canadian copyright law, however, does not require all works to be fixed to be protectible. Works of choreography, for example, are protectible in Canada even if not tangibly fixed.

The court, however, rejected the analogy between sporting events and choreography "because, unlike a

dance, a sporting event is for the most part a random series of events." The court acknowledged that "coaches plan plays which the team seeks to follow." But the court also noted that "the opposing team tries to thwart" the planned plays, and "what transpires on the field is usually not what is planned, but something that is totally unpredictable." To the court, the choreography analogy failed because "No one bets on the outcome of a performance of Swan Lake. Ballet is, therefore, copyrightable, but team sports events, despite the high degree of planning now involved in them, are not."

On issues unrelated to sports, the court affirmed: the Board's decision that the schedule of programs broadcast during the day is not a copyrightable compilation; the Board's allocation of royalties to music publishers, songwriters and performers; and the Board's rulings on certain other issues.

FWS Joint Sports Claimants v. Canada Copyright Board, 81 Dominion Law Reports (4th) 412 (Fed.Ct.App. 1991) [ELR 13:7:13]

Copyright owners of network programs may share satellite carrier copyright royalty fund

In April, 1991, the Copyright Royalty Tribunal determined that copyright owners of network programs were entitled to share in the satellite carrier royalty fund.

Satellite carriers may retransmit broadcast signals to home satellite dish owners as long as the carriers pay a royalty to the Copyright Office; the Copyright Royalty Tribunal then distributes the royalties to the proper copyright owners. The royalty rate set by Congress in section 119 of the Copyright Act was twelve cents per signal per subscriber per month for superstations and

three cents per signal per subscriber per month for network stations.

Program suppliers, including producers and/or syndicators of television series, specials and films, supported by ASCAP, BMI, the U.S. Commercial Television Broadcast Claimant Group and SESAC, claimed that network program owners were not entitled to share in the fund.

The Tribunal declared that section 119 was "clear on its face," and that copyright owners of network programs therefore were entitled to participate and prove their entitlement in the distribution of the satellite carrier royalty fund.

1989 Satellite Carrier Royalty Distribution Proceeding, Copyright Royalty Tribunal (Docket No. 91-1-89SCD, April 30, 1991) [ELR 13:7:14]

Retail shoe stores' music broadcasts are within "homestyle exception" to Copyright Act, rules Federal District Court

A Federal District Court in Missouri has ruled that the employee radio policy of Edison Brothers Stores was within the "homestyle exception" to the Copyright Act and that Edison was not required to obtain a license from Broadcast Music, Inc. "for the playing of music on consumer radio equipment by employees." It was noted that Edison, the owner and operator of about 2,500 retail stores, provided each store with one radio receiver unit and two portable box speakers; the stores ranged in size from about 850 to about 1200 square feet of selling space. Edison prohibited its employees from playing tapes, cassettes, or compact discs in the stores.

In finding that Edison met the elements of section 110(5), Judge Nangle first noted that each store used

one radio receiver at a time. BMI had argued that the court should consider the total number of radios operated by Edison nationwide, rather than the number of radios per store, but the court stated that the homestyle exception should be applied on a store-by-store basis "to see whether each store is operating one set of simple radio equipment without extensive augmentation. It does not matter whether the owner repeats this compliance process for two or more stores."

Edison strictly enforced its radio policy requiring the use of simple, low grade radio-only receivers, apparently attempting to "focus on simplicity," according to the court. And the company did not rebroadcast or secondarily broadcast the radio transmissions to the public.

Judge Nangle stated that Edison's size or financial strength did not disqualify the company's stores from the homestyle exception, and concluded by finding that the

Berne Convention had no impact on the application of section 110(5).

Edison Brothers Stores, Inc. v. Broadcast Music, Inc., 760 F.Supp. 767 (E.D.Mo. 1991) [ELR 13:7:14]

NBC may withhold winnings from game show contestant who failed to disclose previous contest appearances

NBC policy imposes a three game show maximum on individuals seeking to appear as game show contestants. Dennis Winston, a prospective contestant on "Sale of the Century," signed a contract providing that Winston understood that NBC reserved the right to require him to forfeit all prizes if any of the representations made in the contract were false. Winston stated that he had appeared

on the NBC show "Split Second" in 1973 and on the show "3 For the Money" in 1975; Winston did not disclose the fact that he also appeared on the show "Double Dare" in 1977.

Winston claimed that there were irregularities in the taping of "3 For the Money," and that he had asked NBC not to consider his appearance on that show in determining his eligibility to appear on "Sale of the Century." NBC rejected the request.

After taping Winston's segments for "Sale of the Century," NBC learned about the "Double Dare" appearance, and proceeded to disqualify Winston from receiving about $84,000 in prizes, including a cash component of $74,000.

When Winston sued NBC, alleging various causes of action, a trial court granted summary judgment to NBC. A California appellate court has upheld the trial court's decision, stating that there were no triable issues of fact

which would preclude NBC from enforcing the forfeiture provision in Winston's contract. Judge Danielson also rejected the argument that the forfeiture provision was unconscionable and was an unenforceable contract of adhesion.

Winston v. National Broadcasting Company, Inc., 282 Cal.Rptr. 498 (CaL.App. 1991) [ELR 13:7:15]

Action challenging MTV's "call-in" contests is remanded to state court

Rita Boyle claimed, on behalf of the general public, that MTV Networks, Inc., AT & T, Inc., and Pacific Bell, Inc. participated in games of chance in violation of the California Penal Code. According to Boyle, MTV conducted lotteries via two nationwide television

channels and AT & T provided 900 telephone service for call-in entries to the lotteries. Boyle sought to obtain restitution to callers billed for calls from California and to enjoin MTV from engaging in the complained-of contests unless the network provided equal publicity about the free mail-in method of entering the contests, provided something of value for phone-in entries, and provided publicity about the minimum age requirement for entering the contests.

The MTV parties removed the action from a trial court to a Federal District Court. However, the District Court granted Boyle's motion to remand the matter to state court. Judge Fern M. Smith found that the court lacked subject matter jurisdiction.

The court pointed out that there was no diversity of citizenship; that the amount in controversy was not satisfied; and that Boyle's complaint did not state a claim "arising under" federal law - the "well-pleaded"

complaint did not allege a federal claim, Boyle did not have standing to sue in federal court, and federal law did not completely preempt state law in this area.

Complying with state law would mean violating federal law prohibiting discrimination under the Federal Communications Act, argued the MTV parties. But the argument arose only as a defense to Boyle's state law causes of action alleging unfair business practices based on illegal gambling, not on any discriminatory conduct by the MTV parties, noted the court. In all, neither the federal statute or federal common law completely preempted the California statutes in issue. Judge Smith pointed out that the question of whether federal law would apply was separate from the question of whether removal was appropriate - state courts "are equally competent to apply federal law."

The court denied AT & T's application for to stay the court's order granting remand.

Boyle v. MTV Networks, Inc., 766 F.Supp. 809 (N.D.Ca. 1991) [ELR 13:7:15]

United States Supreme Court lets stand decision denying Hispanic groups' action challenging television station license renewals

Spanish International Communications Corporation and Bahia de San Francisco (collectively Spanish International) held six television licenses. In 1986, an administrative law judge found that Spanish International's relations with certain Mexican interests violated a Communications Act provision forbidding alien ownership of broadcast stations. Spanish International agreed that upon the renewal of the company's licenses, it would sell the stations to Hallmark Cards, Inc. The

Commission approved the settlement and conditionally renewed Spanish International's licenses.

Hispanic Broadcasting Systems, Inc. and Hispanic Broadcasting Limited Partnership applied for the licenses, but the applications were rejected as untimely. The Hispanic Broadcasting parties argued that the renewal and transfer of the licenses violated the Commission policy which prohibits any licensee from transferring a broadcast station at full value while a proceeding that might lead to license forfeiture is pending.

A Federal Court of Appeals held that the Hispanic Broadcasting parties were not entitled to judicial review of the Commission's decision because they did not follow, in a timely manner, the administrative procedures required of prospective applicants.

The court also found that several other parties, identified as dissatisfied viewers, did not have standing to sue

because they were not the intended beneficiaries of the prohibition against alien ownership.

Chief Judge Mikva, in dissent, expressed the view that the majority's position had "no precedent in the wholly sensible doctrine of administrative exhaustion...;" Judge Mikva would have granted judicial review of the Commission's orders.

The United States Supreme Court has let stand the court's ruling.

Coalition for the Preservation of Hispanic Broadcasting v. Federal Communications Commission, 931 F.2d 73 (D.C.Cir. 1991) [ELR 13:7:16]

United States Supreme Court lets stand decisions upholding dismissal of antitrust and constitutional claims brought by cable franchisees challenging competing government-run cable systems

In December 1983, Paragould Cablevision entered into a nonexclusive ten year cable television franchise agreement with the city of Paragould, Arkansas.

In June 1986, city voters approved an ordinance authorizing the Light and Water Commission to construct and operate a municipally owned cable television system. Subsequently, the voters authorized the issuance of municipal bonds to finance the system.

When Paragould Cablevision sued the city and associated parties, a Federal District Court dismissed the company's federal antitrust and constitutional claims for failure to state a cause of action, and declined to

exercise pendent jurisdiction over Cablevision's contract claims.

In upholding the District Court's decision, Federal Court of Appeals Senior Judge Heaney noted that Cablevision agreed that Arkansas law permitted Paragould and the commission to enter the cable television business. But Cablevision claimed that in granting cable rights to the commission, Paragould engaged in "monopoly leveraging." According to Cablevision, the commission might exploit its monopoly status in supplying utilities to drive Cablevision out of the Paragould cable television market. Cablevision argued that it did not have the ability to engage in the monopoly leveraging purportedly available to the commission, and thereby faced a de facto limitation imposed by Paragould - a limitation on private competition in violation of antitrust law.

Judge Heaney upheld the District Court's conclusion that the relevant statutes authorized Paragould to develop its own cable system, despite the "anticompetitive implications" of the city's conduct. Arkansas authorized municipalities to enter into the cable television business, and did not restrict the use of various governmental resources. Although the commission would benefit by, in part, reduced overhead costs, "sufficient state policy to displace competition" existed, noted the court, "since the challenged anticompetitive restraint is a necessary and reasonable consequence of Paragould's statutorily authorized entry into the cable television business." Therefore, the state action immunity was available to Paragould and the commission with respect to their development of a cable television system.

Judge Heaney also upheld the dismissal of Cablevision's First and Fourteenth Amendment claims, and the

District Court's refusal to exercise jurisdiction over the state contract claims.

The United States Supreme Court declined to review the decision, and also has let stand a Federal Court of Appeals decision (ELR 13:2:19) rejecting Warner Cable Communications' action challenging the decision by the city of Niceville, Florida to operate a cable television system.

The Federal Court of Appeals, in affirming a District Court decision granting summary judgment to Niceville, found that Warner Cable, the holder of a nonexclusive cable franchise, did not have a protected First Amendment interest even if the proposed city-owned system allegedly "prevented" the cable operator from communicating its message by making the delivery of the message economically unfeasible. The city ordinance did not interfere with Warner's programming

decisions and editorial policies, and did not restrict the company's access to its audience, stated the court.

In May 1991, a Florida appellate court ruled that Warner was entitled to present various claims with respect to the city's operation of a cable television system, but was barred from raising the issue of whether the city had the authority to issue the subject revenue bonds.

Paragould Cablevision, Inc. v. City of Paragould, Arkansas, 930 F.2d 1310 (8th Cir. 1991); Warner Cable Communications, Inc. v. City of Niceville, 581 S.2d 1352 (Fla.App. 1991) [ELR 13:7:16]

Briefly Noted:

Trademark Infringement/Elvis Presley Estate.

When Elvis Presley Enterprises, the assignee of state and federal trademarks, service marks, copyrights and publicity rights of the estate of Elvis Presley, sued Elvisly Yours, Inc., Elvisly Yours, Ltd., and Sid Shaw (collectively referred to by the court as "Shaw"), a Federal District Court granted summary judgment in favor of Enterprises on the claims of federal and state trademark violations and violations of Tennessee common law and statutory rights of publicity.

On appeal, Shaw argued that the District Court had erred by limiting Shaw's discovery, thereby preventing him from obtaining evidence regarding the equitable defenses of laches and acquiescence.

A Federal Court of Appeals upheld the District Court's decision, finding that the court did not abuse its discretion in limiting discovery. However, the court remanded the matter to the District Court with instructions to modify the scope of a permanent injunction entered against

Shaw; the original injunction was too broad in that it might extend to activities that would not violate Enterprises' legitimate trademark and publicity rights, such as if Shaw wrote a magazine article or book about Elvis Presley or distributed properly licensed products. And the injunction should be limited to the United States and its possessions, concluded the court.

Elvis Presley Enterprises v. Elvisly Yours, Inc., 936 F.2d 889 (6th Cir. 1991) [ELR 13:7:17]

Domestic Relations/Roy Scheider Matter.

Roy Scheider and his former wife were divorced in January 1989. The parties had entered a property settlement agreement in 1984 whereby Scheider agreed to pay his former wife $100,000 per year; the amount

increased under specified conditions. The agreement also stated that if the wife's gross income in a calendar year exceeded $50,000, then the amount of support and maintenance due in the next succeeding calendar year would be reduced by an amount equal to the amount by which the wife's gross income exceeded $50,000.

Scheider argued that the maintenance paid to his former wife should be included in computing the adjusted gross income for the purpose of determining any currently due maintenance payment.

A New York trial court has rejected Scheider's argument, stating that the escalation clauses in issue were intended to provide for additional maintenance to be paid if the actor earned additional income, as reduced by any income earned by the former wife. "Any other construction strains credulity," declared Judge Gangel-Jacob, for allowing Scheider to include past maintenance in gross income calculations would nullify any benefit intended

to have been afforded by the support provisions of the agreement. The court also found that Scheider was required to continue to pay all expenses and carrying charges on certain Putnam Valley property.

Scheider v. Scheider, New York Law Journal, p. 31, col. 3 (N.Y. Cnty., Oct. 15, 1991) [ELR 13:7:17]

Hockey Team Posters.

In 1989, a New York trial court ruled that Volkswagen of America and the company's advertising agency were entitled to proceed with breach of contract and breach of warranty claims against the Amateur Hockey Association of the United States in a dispute involving the right to distribute posters of the 1980 United States Olympic Hockey Team (ELR 11:9:15).

A New York appellate court has found that the trial court did not err in denying the Association's motion for summary judgment. Prior rulings on the dispute in Michigan courts did not preclude the instant action, stated the court, and triable issues of fact were raised as to whether Volkswagen's right to distribute "print commercial materials" extended to poster-sized prints of the hockey team.

Harvey v. Amateur Hockey Association of the United States, 567 N.Y.S.2d 44 (N.Y.App. 1991) [ELR 13:7:17]

Athletic Coach Consultant Contract.

The Atlanta Journal, under the Georgia Open Records Act, sought to obtain documents pertaining to the

athletically related outside income of three Georgia Tech athletic coaches. The trial court ordered the production of certain documents, holding that both a consultant appearance contract and a consultant contract between one of the coaches and Nike were public records.

The Georgia Supreme Court affirmed the finding that the consultant contract was governed by the Open Records Act, but held that the consultant appearance contract related to a private activity and was not subject to disclosure.

Cremins v. Atlanta Journal, 405 S.E.2d 675 (Ga. 1991) [ELR 13:7:18]

Athlete Injury.

Tim Fox, a student of St. Olaf College in Minnesota, participated with the school's rugby team in a 1986 tournament held on the campus of Louisiana State University. Due to injuries suffered during a game, Fox was rendered a quadriplegic. Fox sued Louisiana State, claiming that the school was vicariously liable for the negligent conduct of the rugby club which held a cocktail party on the evening before the tournament, scheduled two matches for the same day, and purportedly failed to determine whether the players were properly trained, coached or supervised. Fox also claimed that the school was liable in its own right for failing to insure that the tournament was conducted safely.

The Supreme Court of Louisiana has upheld lower court rulings granting summary judgment to Louisiana State. It was noted that there was no evidence to show that the school was in a special relationship with Fox which would have required the school to act to ensure

Fox's safety. The school was obligated to provide premises free from defects, but to require the school to review the athletic ability of everyone using the athletic field would be "too onerous," declared the court.

The court also found that even if the rugby club was negligent, which the court did not decide, Louisiana State could not be held accountable for the club's alleged negligence.

Lower court rulings granting summary judgment to St. Olaf on the basis of a lack of personal jurisdiction were upheld; the contacts of the rugby club with Louisiana were not attributable to the school, and the "quality and consistency" of the school's other contacts with the state also failed to support the assertion of jurisdiction.

The court concluded by finding that Louisiana had jurisdiction over St. Olaf's insurers, reversed the judgment dismissing the insurance companies, and remanded the matter to the trial court for further proceedings.

Judge Watson, concurring in part and dissenting in part, would not have granted summary judgment dismissing Louisiana State since it appeared that there were factual matters to be decided with respect to the relationship between the school and the rugby club. Judge Watson also would have found that St. Olaf's was subject to jurisdiction.

Fox v. Board of Supervisors of Louisiana State University, 576 S.2d 978 (La. 1991) [ELR 13:7:18]

Art Fraud.

Artcurial, S.A. purchased a painting from art dealer Chester Lowenthal. The company paid Lowenthal $180,000 for a work purportedly painted by Manolo Millares. Artcurial soon discovered that the painting was

not an authentic Millares and that Lowenthal had purchased the work two months earlier for only $4400.

A Federal District Court entered a default judgment against Lowenthal, and awarded Artcurial compensatory damages in the amount the company paid for the painting, and punitive damages of $100,000. The court stated that the conclusion that Lowenthal "knew that the painting was a fake when he purchased it is inescapable, and therefore his representation to Artcurial that he was selling an original Millares was fraudulent."

Artcurial, S.A. v. Lowenthal, 763 F.Supp. 768 (S.D.N.Y. 1991) [ELR 13:7:18]

Previously Reported:

The Minnesota Supreme Court has affirmed an appellate court decision (ELR 12:9:15) holding that General Mills was bound by an agreement with the Metropolitan Sports Facilities Commission to purchase unsold Minnesota Vikings football tickets under specified circumstances. Metropolitan Sports Facilities Commission v. General Mills, Inc., 470 N.W.2d 118 (Minn. 1991) [ELR 13:7:18]

IN THE NEWS

Members of Writers Guild of America ratify new contract with PBS

The members of the Writers Guild of America have ratified a new contract with the Public Broadcasting Service. The contract, which expires on June 1, 1992, is

retroactive to July 2, 1988, when the old contract expired.

It has been reported that the contract, which covers writers employed by KCET in Los Angeles, WNET in New York, WGBH in Boston, and about sixty other producers and suppliers of PBS programming, provides increased compensation for many types of programming. [Dec. 1991] [ELR 13:7:19]

Apple Corps and Apple Computer settle action concerning use of apple logo

It has been reported that Apple Corps, owned by Paul McCartney, George Harrison, Ringo Starr and the estate of John Lennon, and Apple Computer, Inc. have settled a trademark dispute involving the use of an apple logo

on equipment designed by Apple Computer for synthesizing music.

Apple Corps claimed that the computer company breached a 1981 agreement specifying Apple Computer's right to use the apple logo on computers, but not in connection with music-related products.

Although the terms of the settlement were not disclosed, Apple Computer apparently will pay an unspecified amount to Apple Corps to end the lengthy proceeding in a London court. [Dec. 1991] [ELR 13:7:19]

Judge orders new damages trial after Merriam-Webster obtains $2.3 million jury verdict in trade dress infringement claim against Random House

A new trial on the amount of compensation has been ordered after a Federal District Court jury awarded Merriam-Webster Co. about $2.3 million in the company's trade dress infringement action against Random House. Federal District Judge Lawrence W. McKenna determined that the award was inconsistent with the evidence and ordered a new trial.

Merriam-Webster, the publisher of "Webster's Ninth New Collegiate Dictionary," claimed that Random House's "Webster's College Dictionary" used a similar color scheme of a red dust jacket cover with the word "Webster's" written in white lettering on the spine of the book.

The jury, in awarding Merriam-Webster about $1.8 million in compensatory damages and $500,000 in punitive damages, apparently determined that Random House diluted the distinctiveness of Merriam's "Webster's Collegiate" trademark, but the jury did not

issue a finding of trademark infringement. [Dec. 1991] [ELR 13:7:19]

Mexico enacts revised copyright laws

In July 1991, Mexico enacted copyright law revisions, pursuant to which copyright owners will have exclusive reproduction and distribution rights for a term of fifty years and exclusive rental rights. Most significantly, according to the Recording Industry Association of America, sound recordings will be protected under the copyright law. Previously, protection was extended only to underlying musical compositions, not to recorded sounds.

The legislation also increased the criminal and civil penalties for copyright infringement. [Dec. 1991] [ELR 13:7:19]

DEPARTMENTS

Book Review:

All You Need to Know about the Music Business, by Donald S. Passman

Early on in this book, its author notes that "[t]here is no way one book (even one filling several volumes) could poke into every nook and cranny of a business as complicated as the music business." Thus, readers are told that the book's purpose is to give them "the big picture, not all the details."

This lawyer-like disclaimer is consistent with the times we live in, but it reflects more modesty than the book requires. True, the leading treatise for music lawyers (the

"Music" volume of the four-volume set entitled Entertainment Industry Contracts) is three times the size of this book. Nonetheless, All You Need to Know about the Music Business truly lives up to its title, and is the first thing that should be read by anyone wanting to learn about the business and legal side of the music industry - lawyers included.

I'm a sucker for good writing, and there's a risk that what won me over about this book so quickly is the quality of its prose. Its author, Donald Passman, is a lawyer. He's a graduate of Harvard Law School and a partner in the Los Angeles firm of Gang Tyre Ramer & Brown. But apparently his pre-law roots helped him overcome the temptation to employ the staid and ponderous writing style used by so many in our profession. He was an undergraduate at the University of Texas, and with this book, Don takes his place beside fellow Texas wordsmiths Dan Jenkins ("Semi-Tough") and

Larry L. King ("Best Little Whore House in Texas"). Don writes with humor about business and law the way Jenkins writes about sports and King about politics. (Those unfamiliar with the work of Jenkins and King do not appreciate the magnitude of the compliment just paid.)

All You Need to Know about the Music Business claims to be for laymen - performers and songwriters - rather than for lawyers. That no doubt explains why Don went to the effort he must have to make it so readable. The book is being distributed to a mass audience through retail book stores, and at only $24.95 per copy, the book is certainly priced for the trade. (If published for the legal profession, a book this size would be $95 or more.) However, lawyers should not be put off by how accessible or inexpensive Don has made this. The origins of the book can be traced back more than a decade to a course that Don taught, for lawyers, in the

Advanced Professional Program of the University of Southern California Law School. And he wrote this book to supplement that course.

The book covers seven major topics in its 350 pages, each in a satisfying (but not numbing) degree of detail. The first part, "Your Team of Advisors," describes the roles and fees of personal and business managers, attorneys and agents; and it suggests how musicians should go about assembling their professional "team." While this part is aimed most directly at a lay (rather than professional) audience, even these chapters will be useful and interesting to lawyers new to the music industry.

Part II of the book consists of eight chapters on the intricacies of "Record Deals." The book's dust jacket carries this endorsement by Mo Ostin (Chairman of Warner Bros. Records): "I almost hesitate to recommend Don's book - it gives away more inside information than it should." No doubt Mr. Ostin was referring to this part of

the book in particular. It covers recording contract deal points, royalty computations, advances, recoupment and cross-collateralization, loan-outs, and independent production, label and distribution deals.

Part III covers Songwriting and Music Publishing. Here Don explains the sources of music publishing income, the provisions of songwriter agreements, and copublishing and administration deals; and he provides a short course on copyright law for the music business.

Next, in Parts IV, V and VI, the book canvasses issues that arise in connection with Groups, Touring, and Merchandising. Finally, in Part VII, it devotes seven chapters to Motion Picture Music, including performer deals and songwriter and composer agreements.

Quite apart from the book's style and broad coverage, three additional features makes this book unique.

First, Don illustrates many of his points by quoting actual contract language, and by explaining exactly why

that language produces one result rather than another. Moreover, if the other result is the one desired, he shows what language could be used to achieve it. An entire law school course in contract interpretation and drafting could be taught using just these illustrations.

Second, the book proves (to my delight) that those who suffer from math phobia cannot be music lawyers. Calculus and algebra are not necessary; but addition, subtraction, multiplication and division are. The book is spiced with dozens of sample calculations of the sort music lawyers must be able to understand and do for themselves. Don shows that these calculations are not as complicated as plotting the trajectory of a rocket to the moon - indeed, he shows they are not very complicated at all. However, those who are intimated by pocket calculators will learn from this book that the music business is not for them.

Finally - although Don omitted some "details" from the book in deference to space considerations, and also because "for some of those details, [he] charge[s] serious money" - he hasn't omitted the "money" details. This book is remarkably valuable because throughout its seven major topics, Don describes - in dollars and cents and percentages - the kinds of money deals being made today, over the entire spectrum of performers, from aspiring hopefuls to established superstars.

Readers will not, of course, learn everything there is to know about the music business simply by reading this book. But until they've mastered what's in this book, it's unlikely they'll be able to learn anything more. This book makes it easy and pleasurable to master the material it covers.

Everything You Need to Know about the Music Business is published by Prentice Hall Press (15 Columbus

Circle, New York, N.Y. 10023) and is available in bookstores now.

Lionel S. Sobel
Editor, Entertainment Law Reporter
[ELR 13:7:20]

In the Law Reviews:

The 1991 Entertainment, Publishing and the Arts Handbook, Robert Thorne and John David Viera, Editors, Stephen F. Breimer, Consulting Editor, has been published by the Clark Boardman Callaghan Company, 1-800-221-9428, with the following articles:

Moral Rights: All the World's Not a Stage by Beverly Ray Burlingame, 1991 Entertainment, Publishing and the Arts Handbook 3

Developments in Secured Financing in the Entertainment Industry by Mark Radcliffe and Dianne Brinson, 1991 Entertainment, Publishing and the Arts Handbook 15

Sue in Haste, Repent at Leisure: Supreme Court Imposes Rule 11 Sanctions on "Represented" Copyright Plaintiffs-Business Guides, Inc. v. Chromatic Communications Enterprises, Inc. by Maarten Kooij, 1991 Entertainment, Publishing and the Arts Handbook 27

The Law of Ideas: New York and California Are More Than 3,000 Miles Apart by Peter Swarth, 1991 Entertainment, Publishing and the Arts Handbook 41

Copyright Implications of the Digital Audio Tape by Elizabeth Robinson, 1991 Entertainment, Publishing and the Arts Handbook 59

Public Performances and Pirates: The Home Video Producer's Need to Police Intellectual Property by Vincent A. Cesarani, 1991 Entertainment, Publishing and the Arts Handbook 77

Photography "Surprises" the Law: The Portrait of Oscar Wilde by Jane M. Gaines, 1991 Entertainment, Publishing and the Arts Handbook 91

My Life, My Story, Right? Fashioning Life Story Rights in the Motion Picture Industry by Michelle E. Lentzner, 1991 Entertainment, Publishing and the Arts Handbook 107

Rethinking the Invasion of Privacy Tort by Hugh Stevens, 1991 Entertainment, Publishing and the Arts Handbook 147

Disclosure of Private Facts and the Media Defendant by Carole S. Gailor, 1991 Entertainment, Publishing and the Arts Handbook 155

Welcome to the Nineties Bindrim v. Mitchell: Now Drop Dead by Robert Asa Crook, 1991 Entertainment, Publishing and the Arts Handbook 163

New York Courts Deal Further Blows to Claims of Libel Based on Works of Fiction: New York Trend Favors Dismissal by Martin Garbus and Russell Smith, 1991 Entertainment, Publishing and the Arts Handbook 181

Crazy Horse Lives by Martin Garbus and Gerald E. Singleton, 1991 Entertainment, Publishing and the Arts Handbook 189

Read the Fine Print: It's a Great Tune by Joseph L. Grier, 1991 Entertainment, Publishing and the Arts Handbook 209

The Australian Music Industry 1991-A Lawyer's Perspective by Warren Cross, 1991 Entertainment, Publishing and the Arts Handbook 217

An Introduction to Negotiating Motion Picture Actor Agreements by Christian L. Castle, 1991 Entertainment, Publishing and the Arts Handbook 225

Buchwald v. Paramount: Minding Hollywood's Business by Douglas Kari, 1991 Entertainment, Publishing and the Arts Handbook 241

State Subsidies for Filmmaking: The Scandinavian Perspective by Per Neumann and Jens Ravnkilde, 1991 Entertainment, Publishing and the Arts Handbook 253

The Changing Fact of Television Finance by Leigh Brecheen and Peter Dekom, 1991 Entertainment, Publishing and the Arts Handbook 273

Ownership in the Communications Industry: Opportunities for Minorities and Women in the 1990s by Andrew C. Barrett, 1991 Entertainment, Publishing and the Arts Handbook 283

Adaptation in an Evolving Marketplace: Foreign and Domestic Co-Productions by Valerie Cavanaugh, 1991 Entertainment, Publishing and the Arts Handbook 291

Long Form Television 1990 by Gunnar Erickson, 1991 Entertainment, Publishing and the Arts Handbook 299

Crossing the Line: Television Entertainers and Intentional Infliction of Emotional Distress by Mark J. Markus, 1991 Entertainment, Publishing and the Arts Handbook 305

Broadcasting, Free Markets and the Public's Trust by Daniel Brenner, 1991 Entertainment, Publishing and the Arts Handbook 327

The Proposed Repeal of the Financial Interest and Syndication Rules: Network Domination or Public Interest

Representation? by Evie L. Kintzer, 1991 Entertainment, Publishing and the Arts Handbook 337

The Syndication and Financial Interest Rules: Is It a "Prime Time" for a Change? by Robert M. Osher, 1991 Entertainment, Publishing and the Arts Handbook 377

Valuation of Celebrity Goodwill by Rosemarie Reed, 1991 Entertainment, Publishing and the Arts Handbook 407

What to Do When the Money's Gone: Recovery by an Artist from a Manager's Theft by G. Robert Gage, 1991 Entertainment, Publishing and the Arts Handbook 415

Determining Damages for Breach of Entertainment Agreements by Melvin Simensky, 1991 Entertainment, Publishing and the Arts Handbook 423

Anatomy of a Talent Agreement for Advertising by David H. Carlin and Cherylyn D. Carr, 1991 Entertainment, Publishing and the Arts Handbook 437

The Entertainment Law Review has published Volume 2, Issue 5 with the following articles. It is available from Sweet & Maxwell, ESC Publishing, Mill Street, Oxford, OX2 OJU, United Kingdom.

An Introduction to Negotiating Motion Picture Actor Agreements by Christian L. Castle, 2 Entertainment Law Review 141 (1991) (For address, see above)

Perspectives of Intellectual Property Law in the Triangle of GATT, the European Community and a European Economic Area by Dr. Thomas Cottier, 2 Entertainment Law Review 147 (1991) (for address, see above)

Australian Government Subsidies and Co-Production by Paula Paizes, 2 Entertainment Law Review 151 (1991) (for address, see above)

Net Profit Formulas: Does Anybody Know Anything? by Giovanni A. Pedde, 2 Entertainment Law Review 155 (1991) (for address, see above)

BBC Satellite Television Rights by Robyn Durie, 2 Entertainment Law Review 158 (1991) (for address, see above)

The Architectural Works Protection Act of 1990 by Gary Baddeley, 2 Entertainment Law Review 160 (1991) (for address, see above)
[ELR 13:7:21]