LEGAL AFFAIRS

Pursuing the Home Court Advantage in International Copyright Litigation

by Lionel S. Sobel

Sam Cooke was shot to death in Los Angeles back in 1964, but his music has remained popular to this very day all around the world. So it's not surprising that in 1991, an English company known as the Music Collection International began making and selling Sam Cooke recordings in the United Kingdom and Ireland. Nor is it surprising that the Music Collection obtained a copyright license to do so, because records are protected by copyright in those countries. The Music Collection got its license from a Danish company known as Charly, and that did surprise ABKCO Music & Records

Inc., because ABKCO contends that it is the owner of the copyrights to Cooke's recordings, not Charly. A copyright infringement lawsuit by ABKCO was the result.

Since the recordings in question were being sold in the U.K., and since the Music Collection is an English company, ABKCO filed its lawsuit in England, against the Music Collection and Charly both. Proceedings against the Music Collection were stayed by consent, pending a decision on the question of which company owns the copyrights to Cooke's recordings, ABKCO or Charly.

Charly is domiciled in Denmark and does no business in the U.K. ABKCO served Charly under the British long-arm statute and the Brussels Convention which permit companies to be sued for tort in the country where the harm occurred. But Charly did not want to litigate the question in a British court. So Charly made a motion to dismiss the case as to it. (Under British law, the procedure involved the issuance of a "summons . . . to set aside service.") The motion was denied (that is, the judge dismissed the summons). And Charly appealed.

The U.K. Court of Appeal affirmed (under British practice, it dismissed Charly's appeal). It held that British courts do have jurisdiction to hear the case, even though Charly is Danish, and even though the only act Charly is alleged to have committed - namely, the act of granting a license to the Music Collection - was done by it in Denmark. ABKCO Music & Records Inc. v. Music Collection International Ltd., U.K. Court of Appeal (Civil Division) (1994) (available in LEXIS Eurcom Library, Cases File).

The ABKCO decision is the most recent British case in a growing body of cases involving copyright disputes that have an international dimension. Subafilms, Ltd. v. MGM-Pathe, 24 F.3d 1088 (9th Cir.)(en banc), cert. denied, 1994 U.S.LEXIS 8040 (1994) (ELR 16:5:10), is an example of a recent American copyright decision involving an international dimension. The exact nature of the international dimension varies from case to case. In some, like the ABKCO case, the plaintiff and defendant are from different countries. In others, like Subafilms, the plaintiff and defendant are located in one country but the alleged infringement took place in another. In others still, both parties are located in the same country where the infringement took place, but an important transaction took place in another country.

Regardless of the circumstance that gives these cases their international dimension, all of these cases have one thing in common. Since there are no international tribunals for the resolution of international copyright disputes, an infringement action must be filed in the court of one country or the other; and in all of these cases, the plaintiff has chosen the one that will give it the home court advantage. The advantage sought has four related parts: convenience, minimization of the plaintiff's expense, maximization of the defendant's expense, and the ability to use local counsel. While these advantages do not relate to the actual merits of the dispute, they usually are sufficient to justify a good deal of legal skirmishing in the early phases of an international case.

International litigation raises a host of common issues, regardless of the substantive nature of the claims asserted. Among these are: service of process abroad; venue; discovery abroad; sovereign immunity; the Act of State doctrine; and recognition and enforcement of judgments. These issues have been addressed in at least three books: Litigation of International Disputes in U.S. Courts by Ved P. Nanda and David K. Pansius (a treatise published by Clark Boardman Callaghan in 1986 and updated as recently as 1994); International Civil Litigation in United States Courts: Commentary and Materials (2nd edition) by Gary B. Born and David Westin (a combination treatise/casebook published by Kluwer Law and Taxation Publishers in 1992); and International Litigation and Arbitration: Practice and Planning by Russell J. Weintraub (a casebook published by Carolina Academic Press in 1994).

None of these books addresses itself to any particular type of case. Though they do cover the extraterritorial reach of substantive law, they use as examples the extraterritorial application of U.S. antitrust and federal securities laws. They say nothing about intellectual property law in general, let alone copyright law in particular. Naturally, international copyright cases raise all of the issues of general applicability discussed in these books. But they also raise additional issues that are unique to copyright law in particular. These issues include: (1) the extraterritorial application of copyright law; (2) subject matter jurisdiction; (3) personal jurisdiction; (4) choice of law; and (5) the geographic scope of available remedies. This article surveys the case law concerning each of these issues.

Extraterritorial application of copyright law

As a general rule, copyright laws are territorial - not extraterritorial - in their application. This means that each country's copyright law operates only within its own boundaries, not in other countries. So most of the time, foreign copyright law is not applicable within the United States, and U.S. copyright law is not applicable abroad. These general rules are well-illustrated by several interesting cases.

Foreign copyright law not applicable in U.S.

The rule that foreign copyright law is not applicable in the U.S. is one that was applied more than 80 years ago in a decision of the United States Supreme Court itself. Ferris v. Frohman, 223 U.S. 424 (1912), was originally filed in an Illinois state court. The complaint alleged that the defendant had infringed the plaintiff's Illinois common law copyright to a British play. As a matter of British copyright law, the public performance of a play constitutes "publication," and as a matter of Illinois law, common law copyright ended with "publication." Thus, the defendant argued that the play's earlier performance in Britain ended its Illinois common law copyright. But the Supreme Court held that British copyright law does not apply within the U.S. Thus, even though British copyright law treated public performance of a play as "publication," public performance of the play in Britain did not result in the play's loss of common law copyright in the U.S., because "performance" is not "publication" under U.S. law, and therefore the play retained its common law copyright protection here.

The principle that foreign copyright law is not applicable in the U.S. also was at the heart of Leo Feist, Inc. v. Debmar Publishing Co., 232 F.Supp. 623 (E.D.Pa. 1964). There, the court declined to apply the doctrine of res judicata, even though the defendant had previously won a British infringement action brought by the same plaintiff involving the same work, because the earlier British case was brought under British law and involved actions in Britain, while the U.S. case was brought under U.S. law and involved actions in the U.S. (On the other hand, the court did apply the collateral estoppel doctrine with respect to the British court's finding of fact that the defendant had not copied the plaintiff's song; and thus summary judgment for the defendant was entered. British law was not applied to the U.S. case - merely the finding of fact was.)

U.S. copyright law not applicable abroad

The leading case that shows that U.S. copyright law does not apply to activities that take place in other countries is Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1988 (9th Cir. 1994) (en banc), cert. denied, 1994 U.S.LEXIS 8040 (1994) (ELR 16:5:10). That case arose as a result of MGM's having authorized the domestic and foreign distribution of homevideo cassettes of the Beatles' movie "The Yellow Submarine" in the mistaken belief that its agreement with the plaintiff authorized homevideo (as well as theatrical and television) distribution of the movie. The Ninth Circuit Court of Appeals rejected the plaintiff's argument that U.S. copyright law applied to the foreign distribution of those homevideos. The court held that U.S. law does not apply abroad even if such extraterritorial acts of infringement "result in adverse effects within the United States."

This issue is one of those on which the Ninth Circuit agreed with the Second (something the Ninth Circuit frequently does not do). In Filmvideo Releasing Corp. v. Hastings, 668 F.2d 91 (2d Cir. 1981) (ELR 3:24:8), the Second Circuit Court of Appeals had held that U.S. copyright law does not apply abroad, and therefore the district court had abused its discretion by ordering the defendant to return infringing "Hopalong Cassidy" films to the plaintiff, because insofar as U.S. law was concerned the defendant could continue to distribute those films abroad. Likewise, in Beechwood Music Corp. v. Vee Jay Records, Inc., 328 F.2d 728 (2d Cir. 1964), the Second Circuit had held that the compulsory mechanical license provision of the U.S. Copyright

Act was not triggered by recordings of "Love Me Do" and "P.S. I Love You" that had been made by the Beatles in Great Britain. As a result, the sale in the U.S. of recordings of those songs, without a negotiated license from the owners of the copyrights to those songs, was an infringement under U.S. law.

The general principle that U.S. law does not apply in other countries is one that has been applied at least a few times in cases that dealt with whether publication abroad without the copyright notice once required by U.S. law caused the works in question to fall into the public domain in the U.S. In Heim v. Universal Pictures Company, 154 F.2d 480 (2d Cir. 1946), the court held that the publication of a work in Hungary, without the copyright notice then required by U.S. law, did not put the work into the public domain in the U.S. (where it never had been published). Likewise in Mills Music, Inc. v. Cromwell Music, Inc., 126 F.Supp. 54 (S.D.N.Y.

1954), it was held that the distribution in Palestine (under British law) of copies of the song "Tzena, Tzena" without the copyright notice then required by U.S. law (but not by British law) did not put the work into the public domain in the U.S. And in Eisen, Durwood and Co. v. Tolkien, 794 F.Supp. 85 (S.D.N.Y. 1992), aff'd without opinion, 990 F.2d 623 (2d Cir. 1993) (ELR 14:12:4), the court held that the British novel "The Lord of the Rings" by J.R.R. Tolkien had not forfeited its U.S. copyright, even though it was first published in the U.K. in 1952 without the copyright notice then required by U.S. copyright law.

Extraterritorial applications of copyright law

Like all general rules, the rule that U.S. law does not apply to activity that takes place abroad is subject to exceptions. One of these exceptions concerns a nowdiscontinued quirk of American law that required works to be published with a copyright notice. As noted above, prior to 1955, courts did not apply the notice requirement to works first published abroad. But in 1955, the U.S. adhered to the Universal Copyright Convention, and that multinational treaty permits countries to enforce a notice requirement even with respect to foreign-published works.

As a result, in response to U.S. adherence to the U.C.C., the Copyright Office adopted a regulation (section 202.2(a)(3) of then-existing Copyright Office Regulations) that provided that for any work (U.S. or foreign) to acquire copyright protection under U.S. law, publication anywhere - even abroad - had to have been done with the copyright notice then required by U.S. law. Congress too imposed extraterritorial notice requirements when it first enacted the Copyright Act of 1976. Section 401(a) (as it read prior to March 1989) provided that "Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies. . . ." (Emphasis added.)

Now of course copyright notice is no longer required by U.S. law on works published anywhere (not even within the United States), as a result of U.S. adherence to the Berne Convention. But before March of 1989, when the notice requirement was eliminated, publication abroad (since 1978 and perhaps since 1955) without notice could put a work in the public domain in the U.S. This almost happened in Hasbro Bradley v. Sparkle Toys, 780 F.2d 189 (2d Cir. 1985) (ELR 8:6:16), a case involving the U.S. copyright status of Japanese toys, 213,000 of which were sold in Japan without the copyright notice then required by U.S. (but not Japanese) copyright law. The court held that the omission of notice from the toys sold in Japan "violated [section] 401(a) of the Act," and thus the toys' U.S. copyright would have been forfeited, had the omission not been cured by Hasbro Bradley in the manner permitted by then-existing U.S. copyright law. Because the omission was cured, the Japanese toy copyrights were not forfeited.

The copyright-notice requirement of U.S. law was applied to works first published abroad as a result of affirmative decisions by the Copyright Office and then Congress to do so. From this it might be concluded that the general rule (that the copyright law of each country applies only to activities that occur within that country) applies unless that country decides - by legislation or regulation - to apply its law outside the country as well. However, there are other circumstances under which exceptions to the rule of territoriality might be made as well. These other circumstances have arisen (so far) in connection with choice of law issues, and thus they are discussed below.

Subject matter jurisdiction

United States District Courts are extremely powerful. But as powerful as they are, they are courts of limited jurisdiction. This means that they have jurisdiction to hear only those types of cases that Congress has authorized them to hear; and they have no power whatsoever in cases Congress has not authorized them to hear. This type of jurisdiction is referred to as "subject matter jurisdiction."

"Act of Congress" subject matter jurisdiction in the U.S.

Most of the time, U.S. District Courts have subject matter jurisdiction over copyright cases by virtue of section 1338(a) of Title 28 of the United States Code which confers jurisdiction on U.S. District Courts to hear actions "arising under any Act of Congress relating to . . . copyrights . . . " (emphasis added). Thus, if a copyright claim does not arise under an "Act of Congress," it is likely that U.S. District Courts will not have subject matter jurisdiction to hear it. (See generally, David R. Toraya, Note, "Federal Jurisdiction over Foreign Copyright Infringement Actions - An Unsolicited Reply to Professor Nimmer," 70 Cornell L. Rev. 1165 (1985).)

Cases that have tested the scope of district courts' subject matter jurisdiction under the "Act of Congress" grant of authority have involved three types of circumstances: those in which no infringing activity at all has taken place in the United States; those in which some infringing activity has taken place in the U.S., but that activity has been only slight in relation to foreign infringing activity; and those in which the only infringing activity that took place in the U.S. was the activity of authorizing other activity that actually took place in another country.

No activity in the U.S.

Where no infringing activity at all took place in the United States, it has been held unanimously that U.S. District Courts do not have "Act of Congress" subject matter jurisdiction. Thus, in De Bardossy v. Puski, 763 F.Supp. 1239 (S.D.N.Y. 1991) (ELR 13:4:11), the court ruled that it did not have jurisdiction over a suit that sought to enjoin distribution of books in Hungary, because the U.S. Copyright Act does not apply to activities that take place in Hungary. Similarly, in Zenger-Miller, Inc. v. Training Team, GmbH, 757 F.Supp. 1062 (N.D.Cal. 1991), the court held that it did not have subject matter jurisdiction over allegedly infringing activities that took place solely in Germany. And in Ahbez v. Edwin H. Morris Co., 548 F.Supp. 664 (S.D.N.Y. 1982), the court ruled that it did not have subject matter jurisdiction to hear allegations that the defendants had infringed the plaintiff's copyright as a result of actions they took in Europe.

Slight activity in the U.S.

On the other hand, where defendants have engaged in some infringing activity in the United States as well as infringing activity abroad, several cases have held that U.S. District Courts do have subject matter jurisdiction, even if the magnitude of the infringement that occurred in the U.S. was quite small compared to the magnitude of the foreign infringement. Thus, in National Enquirer v. News Group News, 670 F.Supp. 962

(S.D.Fla. 1987) (ELR 9:11:16), the court seemed to concede that it did not have subject matter jurisdiction as a result of the 5 million copies of an allegedly infringing newspaper published in Britain, but it held that it did have subject matter jurisdiction on account of 85 copies that were distributed in the United States, despite their relatively de minimis number. Similarly, in P & D International v. Halsey Publishing Co., 672 F.Supp. 1429 (S.D.Fla. 1987) (ELR 9:10:16), infringing public performances of a video took place on a ship at sea, and the court ruled that it had subject matter jurisdiction because the video was illegally copied by the defendant while the ship was still at the dock in Florida before it was shown at sea. And in Update Art v. Modiin Publishing, Ltd., 843 F.2d 67 (2d Cir. 1988), the appellate court held that the district court had subject matter jurisdiction to hear an action based (in part) on the distribution in Israel of newspapers containing unauthorized reproductions of a "Ronbo" poster (consisting of a picture of Ronald Reagan's head superimposed on Rambo's body). Subject matter jurisdiction in that case was premised on the defendant's having made one infringing copy of the poster in the United States, and then using that infringing copy to reproduce - in Israel - additional copies that were distributed there.

Authorizing in one country activity that occurred in another country

Courts have struggled the most with cases in which the defendant authorized in one country activity that occurred in another. At first, at least one court concluded that U.S. District Courts have jurisdiction to hear cases in which the defendant authorized, while in the United States, activity that actually took place abroad. The case is Peter Starr Prod. v. Twin Continental Films, 783 F.2d 1440 (9th Cir. 1986) (ELR 8:2:20), and the Ninth Circuit held that the district court had subject matter jurisdiction in a case where homevideos of a movie were distributed in Sweden and the U.K., because the defendant had authorized the distributor to do so in a contract signed in the United States. The rationale for this result was that improperly authorizing the distribution of copyright-protected material is itself an infringement, and thus in this case, infringing activity took place in the U.S. as well as abroad.

The Peter Starr Productions case was a controversial one, however, even among district court judges in the Ninth Circuit. As a result, it was treated with different degrees of respect. In Danjaq, S.A. v. MGM/UA Communications, 773 F.Supp. 194 (C.D.Cal. 1991) (ELR 13:5:8), aff'd on other grounds, 979 F.2d 772 (9th Cir. 1992) (ELR 14:10:13), the District Court ruled that it did not have jurisdiction over a claim alleging that

Pathe Communications had infringed the copyrights to several "James Bond" movies by authorizing their broadcast by television stations in Europe, because U.S. copyright law does not reach European broadcasts, even if negotiations for foreign broadcast rights were conducted in the U.S. and even if such negotiations constituted an authorization to infringe in Europe. The Danjaq decision distinguished the Peter Starr Productions case by saying that Peter Starr merely had inquired into the threshold issue of subject matter jurisdiction and had not reached the sufficiency of the plaintiff's claim - that is, it did not consider whether the complaint actually alleged an act that would constitute infringement under U.S. copyright law. Danjaq went a step further and did consider whether the complaint alleged an act that would constitute infringement under U.S. law; and it concluded that the complaint against Pathe had not alleged a violation of U.S. copyright law. If these distinctions seems exceedingly fine, at least one other judge thought so too.

In ITSI T.V. Productions v. California Authority, 785 F.Supp. 854 (E.D.Cal. 1992) (ELR 14:4:10), rev'd on other grounds, 3 F.3d 1289 (9th Cir. 1993), the issue was whether the U.S. district court had subject matter jurisdiction over an improper authorization that allegedly resulted in a television broadcast in Mexico. In this case, the court disagreed with Danjaq's distinction of Peter Starr, saying that the Ninth Circuit in Peter Starr necessarily considered the sufficiency of the complaint, and that the improper authorization in the U.S. of a television broadcast is a violation of U.S. copyright law even if the authorized broadcast occurs outside the U.S. Thus, it appears that this court would have found subject matter jurisdiction over a defendant who authorized, in the U.S., a Mexican television station to broadcast the plaintiff's programs in Mexico. As it happened, however, the defendant in this case was a Mexican television station, and it did not authorize, in the U.S., anyone else to broadcast in Mexico. Thus, the case was dismissed as to the Mexican station for lack of subject matter jurisdiction.

Finally, in Subafilms, Ltd. v. MGM-Pathe, 24 F.3d 1088 (9th Cir.), cert. denied, 1994 U.S.LEXIS 8040 (1994) (ELR 16:5:10), the Ninth Circuit sitting en banc expressly overruled Peter Starr Productions and held that when the defendant's conduct within the U.S. consists solely of authorizing acts that occur entirely abroad, U.S. courts do not have subject matter jurisdiction. That is, the court held that even if the acts authorized abroad would have violated U.S. copyright law if they had occurred in the U.S., and even if such acts violate the copyright law of the country where they occur, the allegedly infringing activity does not state a claim under U.S. copyright law. The court held that although the Copyright Act gives copyright owners the exclusive right "to authorize" certain uses of their works, a defendant does not violate the Act by authorizing activity which would not have been an infringement if the defendant had committed that activity itself; and if that activity took place only abroad, it would not have infringed rights under U.S. copyright law.

Improper-authorization cases also have arisen in another context. In Subafilms, the authorization took place in the U.S. and the other activity took place abroad. The other context is the one in which the authorization took place abroad, and the other infringing activity takes place in the U.S. The issue in these kinds of cases is whether U.S. courts have subject matter jurisdiction over the act of authorization that took place abroad, as well as the infringing activity that took place in the U.S., or whether instead the foreign authorization is beyond the reach of U.S. copyright law and thus beyond the jurisdiction of U.S. courts.

Suppose, for example, that a Danish company authorized - in Denmark - an American company to make and sell records in the U.S. that had been recorded by a British performer, and assume that the copyrights to those records actually were owned by a British company rather than the Danish company. U.S. District Courts would have subject matter jurisdiction to hear the British company's infringement lawsuit against the hapless American company that had gotten its license from the wrong source. But would U.S. District Courts also have subject matter jurisdiction against the Danish company on account of an improper authorization that took place in Denmark?

There is authority for a "yes" answer. (Of course, the U.S. court would have to have personal jurisdiction over the Danish company as well.) Under U.S. law, the claim against the Danish company would be one for contributory copyright infringement. In GB Marketing USA Inc. v. Gerolsteiner Brunnen GmbH & Co., 782 F.Supp. 763 (W.D.N.Y. 1991), a U.S. District Court ruled that it had subject matter jurisdiction to hear a contributory copyright infringement suit against a German company, even though the allegedly infringing works in question - bottle labels - were printed and affixed to the German company's products in Germany. Subject matter jurisdiction was not based on the German company's bottle-labeling activities in Germany; it was based on the German company's having contributed to the American distributor's infringing activities in the U.S.

The same result was reached quite recently in Metzke v. May Department Stores Company, 878 F.Supp. 756 (W.D.Pa. 1995) (ELR 17:3:26) In that case, an American defendant provided copies of the plaintiff's works to a Taiwanese manufacturer to use as models for making "knock-offs." The court acknowledged that it could not hold the defendant liable for the allegedly infringing manufacturing and sales activity that took place in Taiwan. But the Taiwanese manufacturer had sold its knock-offs to retailers in the U.S. (in addition to the defendant). The court therefore ruled that the defendant could be held liable for contributory copyright infringement (if the defendant knew or should have known that the Taiwanese manufacturer would sell the knock-offs to U.S. retailers).

The conclusion to be drawn from these cases is that the act of authorizing or contributing to infringing activity that takes place within the United States is a violation of the U.S. Copyright Act, regardless of where the act of authorizing or contributing takes place.

Alternate grounds for subject matter jurisdiction in the U.S.

While "Act of Congress" jurisdiction (under section 1338(a) of the United States Code) is the most commonly relied upon basis for U.S. District Court jurisdiction in copyright cases, it is not the only jurisdictional basis that ever has been used. "Diversity of citizenship" jurisdiction also has been relied on in at least one international copyright case, the facts of which read like a law school hypothetical.

In London Film Productions v. Intercontinental Communications, 580 F.Supp. 47 (S.D.N.Y. 1984) (ELR 6:8:9), a British plaintiff sued an American defendant because the defendant licensed South American companies to exhibit - in South America - movies that were in the public domain in the U.S. though not in Britain or South America. The court ruled that it had subject matter jurisdiction based on "interest analysis" and on the possibility that no court in the world would have both personal and subject matter jurisdiction. This case appears at first to be at odds with other cases construing "Act of Congress" jurisdiction, because the copyright laws that should have been applied in deciding whether infringements occurred in South America were the copyright laws of those South American countries where the movies were exhibited rather than the U.S. Copyright "Act of Congress." However, the court also had subject matter jurisdiction by virtue of "diversity of citizenship" (under section 1332(a)(2) of Title 28).

In addition, while U.S. District Courts are courts of limited jurisdiction, many state courts are courts of general jurisdiction. California Superior Courts (California's trial level courts) are courts of general jurisdiction, for example, and thus they have jurisdiction to hear every kind of case except those over which jurisdiction has specifically been given to another court. Thus, California Superior Courts would have subject matter jurisdiction to hear copyright cases based on foreign law, because federal court jurisdiction over copyright cases is "exclusive" (under 28 U.S.C. section 1338(a)) only with respect to cases based on U.S. copyright law - not foreign law.

Subject matter jurisdiction in other countries

Subject matter jurisdiction issues also have arisen in international copyright cases litigated in the United Kingdom. And the results there appear to be the same as those in the United States.

Thus, British courts do not have jurisdiction to hear cases involving infringements committed in other countries. This is the conclusion to be drawn from Tyburn Productions Ltd. v. Conan Doyle, [1990] 1 All

E.R. 909 (U.K.Chan.Div.), a case in which Tyburn Productions sought a judicial declaration that its exhibition of a Sherlock Holmes movie in the United States would not infringe the U.S. copyright of Sir Arthur Conan Doyle's daughter. The question arose, because Sir Arthur Conan Doyle died in 1930, and thus copyrights to his works expired in the United Kingdom 50 years later in 1980. Tyburn thus produced its movie without a license from Sir Arthur's daughter. In the United States, the duration of the copyrights to Sir Arthur's works was 75 years from first publication, and thus some Sherlock Holmes works were still protected by copyright here, and those copyrights were owned by Sir Arthur's daughter. Tyburn Productions' movie was based on an original script, but it did include the Sherlock Holmes and Dr. Watson characters. This was why Tyburn sought a declaration that Sir Arthur's daughter was not entitled to a copyright in those characters under U.S. law. The court held, however, that British courts do not have jurisdiction to issue rulings determining rights under U.S. copyright laws.

The Tyburn Productions case appears, at least at first, to be at odds with an earlier case in which a British court did decide which of two companies owned the U.S. copyright to a song. The case was Campbell Connelly & Co. v. Noble, [1963] 1 All E.R. 237 (U.K. Chancery Div.), and it involved a contract entered into in the U.K., pursuant to which a songwriter assigned to a British music publishing company the songwriter's "full copyright for all countries . . . together with all rights therein which he . . . may hereafter become entitled to. . . ." The issue in the case was whether this contract also assigned the U.S. renewal copyright, and the British court decided that it did. In reaching this decision, the court applied U.K. law, though U.S. law would have produced the same result. Despite initial appearances, this case may not be inconsistent with Tyburn Productions because that case would have required British courts to apply U.S. law, while this case permitted British courts to apply British law to interpret a contract entered into in Britain. (Cases concerning this choice of law issue are discussed below. They show that if the Campbell Connelly case had been litigated in a U.S. court, rather than a British court, some - though not all - U.S. courts would have applied British law to decide who owned the renewal term to the song in question.)

The most recent British case dealing with subject matter jurisdiction in international copyright cases is ABKCO Music & Records Inc. v. Music Collection International Ltd. - the case involving the disputed ownership of the copyrights to Sam Cooke's recordings mentioned at the beginning of this article. In that case, the U.K. Court of Appeal held that the Danish company could be sued in British courts even though the only act it committed was to authorize the sale of those recordings in the U.K. and Ireland and even though the authorization was done in Denmark. The precise wording of the U.K. copyright law - The Copyright, Designs and Patents Act of 1988 - supports this result. It does, because although section 16(1) of that Act gives copyright owners the exclusive right to copy and distribute their works "in the United Kingdom," section 16(2) of the Act makes it an infringement to authorize anyone to copy or distribute works in the U.K. without a license, regardless of where the act of authorization takes place. That is, the Act itself contains a geographic limitation clause ("in the United Kingdom") with respect to making copies and distributing them, but it does not contain such a clause with respect to improper authorizations.

Charly argued that as a general rule U.K. statutes do not apply to the acts of foreigners outside the U.K., and that this general rule should be applied in this case as well. It also argued that copyright law "is strictly territorial in its application," and this specific rule should be applied here too. But the appeals court disagreed. It said that it could see no reason why the act of authorization had to take place in the U.K., so long as what was authorized took place there. It explained "that a territorial limitation on the act of authorising would lead to anomalies. Anyone contemplating the grant of a licence to do an act restricted by copyright would be able to avoid liability simply by having the document executed abroad." As a result, it concluded "that, on its proper construction, an authorisation given outside the United Kingdom to another to do a restricted act in the United Kingdom is an authorisation to which section 16(2) extends. The scope of the tort has a sufficient territorial limitation because the restricted act which is authorised has to be done within the United Kingdom."

Personal jurisdiction

In addition to subject matter jurisdiction, courts also must have personal jurisdiction over a defendant, and personal jurisdiction is not conferred by the plaintiff's residence or place of business in the district where suit is filed. In order for a U.S. court to have personal jurisdiction over a defendant: (1) the requirements of the long-arm statute of the state in which the court is located must be satisfied; and (2) the long-arm statute must provide Constitutionally required due process. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Thus, in Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987), the Supreme Court held that due process would be violated by California courts asserting personal jurisdiction over a Japanese manufacturer of auto tire valves, because the Japanese company had insufficient contacts with the state of California. The Japanese company had sold its valves to a tire manufacturer in Taiwan, which in turn had sold those tires to distributors in California; and the Japanese company was aware that some of its valves would eventually reach California. But these facts were insufficient to satisfy the fair play and substantial justice requirements of due process.

These same principles are applicable in international copyright infringement cases.

No personal jurisdiction, in the absence of sufficient contacts

Copyright infringement committed abroad by a defendant that does not have the necessary minimum contacts with the United States will not confer jurisdiction on a U.S. court, even though the plaintiff is a U.S.

national and even though the work that is the subject of the case was created in the U.S.

A simple illustration of this principle is found in Foster v. WNYC-TV, 14 U.S.P.Q.2d 1048 (S.D.N.Y. 1989), where a U.S. District Court in New York held that it did not have personal jurisdiction over a television station in Trinidad which had no contacts with New York and had allegedly infringed the plaintiff's copyright by broadcasting the plaintiff's film in Trinidad.

A somewhat better case for personal jurisdiction was presented in Rano v. Sipa Press, Inc., 987 F.2d 580 (9th Cir. 1993) (ELR 15:8:11), though ultimately the court ruled that personal jurisdiction was lacking there too. That case was an action for infringement of copyrights to photographs owned by the plaintiff against a corporation and its president and shareholder individually. The District Court found that it did not have personal jurisdiction over the individual defendant, a man named Goskin Sipahioglu, who was a citizen of Turkey and a resident of France, and whose only "ties" to California amounted to three short visits totaling six days over seven years, none of which involved the plaintiff or his photographs. The plaintiff argued that Sipahioglu had "purposely availed" himself of the privilege of doing business in California by granting licenses to magazines distributed in California, and that the plaintiff's claim arose out of those licenses. The court disagreed, however, saying, ". . . there is no evidence that Sipahioglu invoked any of the benefits or protections of California's laws. [The plaintiff's] argument, if accepted, would render Sipahioglu, and other foreign owners of art who sell their products to publications, amenable to personal jurisdiction in every state in which their art eventually is displayed. We have held that litigation against an alien defendant requires a higher jurisdictional barrier than litigation against a citizen from a sister state."

Personal jurisdiction, if defendant has sufficient contracts

Personal jurisdiction over foreign defendants is not impossible to acquire, even where defendants are not (and never have been) in the United States, because sufficient contacts have been found to exist in a number of different circumstances.

In Zenger-Miller, Inc. v. Training Team, GmbH, 757 F.Supp. 1062 (N.D.Cal. 1991), personal jurisdiction over a German company was conferred by a contract clause in which the German company consented to the jurisdiction of U.S. courts, even though the contract was negotiated and signed in Germany and even though the company had performed all of its contractual duties in Germany. In National Enquirer v. News Group News, 670 F.Supp. 962 (S.D.Fla. 1987) (ELR 9:11:16), personal jurisdiction over a British newspaper was conferred by its contacts with the U.S. in connection with events that related to the eventual infringement abroad, including the newspaper's sale by subscription of a very small number of copies of the paper in the U.S. And in GB Marketing USA Inc. v. Gerolsteiner Brunnen GmbH & Co., 782 F.Supp. 763 (W.D.N.Y. 1991), the court ruled that it had personal jurisdiction over a German company that knowingly permitted its products (bearing allegedly infringing labels) to be sold in the U.S., even though an independent distributor actually purchased those products from the defendant in Germany and resold them in the U.S.

Perhaps the most interesting question to arise in the context of personal jurisdiction over foreign companies is the question of whether U.S. courts have personal jurisdiction over foreign subsidiaries or affiliates of American corporations, simply by virtue of that corporate family relationship. The answer is that U.S. courts may have jurisdiction over such foreign corporations - but not simply because of the family relationship. Something more is required. Thus, in Larball Publishing v. CBS Records, 664 F.Supp. 704 (S.D.N.Y. 1987) (ELR 9:9:7), the court did not have personal jurisdiction over CBS's foreign subsidiaries simply by virtue of the fact they were subsidiaries of CBS. On the other hand, the court said that the particular nature of a parent-subsidiary relationship could confer personal jurisdiction. And in this case, the court ruled that it did have personal jurisdiction over CBS's foreign subsidiaries, because CBS was the world-wide licensing agent for its foreign subsidiaries. Apparently the court was not entirely comfortable with the implications of its decision, because it also stated that personal jurisdiction would not be conferred over every foreign company that used an American company as its licensing agent, merely because it used an American company as its agent.

A similar question arose in Palmieri v. Estefan, 793 F.Supp. 1182 (S.D.N.Y. 1992) (ELR 14:6:7), in which Eddie Palmieri sued 33 foreign affiliates of Sony Corporation of Japan, along with Gloria Estefan and Sony Music Entertainment (Estefan's American record company), alleging that Estefan's song "Oye Mi Canto" infringed the copyright to Palmieri's song "Paginas de Mujer." A U.S. District Court in New York City held that it had personal jurisdiction over the Sony's foreign affiliates. In so ruling, the court did not rely solely on Sony's ownership of the foreign affiliates. Instead, it emphasized that Sony Music exercised some control over the foreign affiliates' financial decisions, approved key personnel decisions, assisted in artist negotiations, and acted as an agent for the affiliates' record sales worldwide. The court said that such "interrelatedness" made

Sony Music the agent of its foreign affiliates for jurisdiction purposes, even in the absence of actual control; and the court held that asserting personal jurisdiction in this case would not offend constitutional due process. (Palmieri's lawsuit has since been dismissed on other grounds. See ELR 17:4:23, below.)

The remarkable extent to which some courts are willing to go to find personal jurisdiction is shown by Roth v. Garcia Marquez, 942 F.2d 617 (9th Cir. 1991) (ELR 13:7:11). In that case the plaintiff sought a judicial declaration that he had the right to produce a movie based on the novel "Love in the Time of Cholera." The Ninth Circuit ruled that a U.S. District Court in California did have personal jurisdiction over the novel's author, Gabriel Garcia Marquez, even though: Garcia Marquez resides in Mexico, and his literary agent resides in Spain; negotiations concerning movie rights to the novel had taken place in Havana, Barcelona and

Mexico City; and even though only two meetings had ever taken place in California, one when Garcia Marquez was there on social visit, and another when his agent was there for a booksellers convention. The court had personal jurisdiction over Garcia Marquez because: if the movie had been made, it would have been (largely) produced in California, and payments under the contract would have been made from California; and the plaintiff (though not the defendants) executed the alleged contract in California. The personal jurisdiction issue became moot, because ultimately the Ninth Circuit determined that the letter agreement signed by the plaintiff's lawyer and the defendant's agent was merely an unenforceable agreement to agree, and not a binding contract at all. Still this decision is difficult to reconcile with the same court's decision in Rano v. Sipa Press, Inc., the photo agency case discussed in the prior section of this article. (See also, William A. Daniels, Sr., Note, "Roth v. Garcia Marquez: Fitting Motion Pictures with International Shoes," 13 Loyola of Los Angeles Entertainment Law Journal 353 (1993), and Christopher Lyon, Comment, "The Ninth Circuit's Approach to Personal Jurisdiction in Intellectual Property Cases: How Long is the Arm of California Courts in Reaching Foreign Defendants?" 15 Loyola of Los Angeles Entertainment Law Journal 661 (1995).)

Choice of law

When events that occurred in one country become significant in copyright litigation in the courts of another country, choice of law issues arise, because in order to determine what legal consequences those events have, courts must decide whether to apply their own country's law or the law of the country where those events took place. As a general rule, U.S. courts apply U.S.

copyright law, even in cases having an international dimension. Courts in other countries also apply their own copyright law in international cases. They do because the general rule in international copyright cases is that courts are to provide "national treatment" to all copyright owners, foreigners as well as nationals. As with all general rules, however, there are exceptions.

National treatment

The principle of "national treatment" means that the substantive law for international copyright protection is provided by the national copyright laws of individual countries - not by international treaties (except in countries where treaties, by virtue of national law, are self-executing or have been made part of national copyright law). This is so by virtue of the content of international copyright treaties themselves. Thus, Article 5(2) of the

Berne Convention provides that "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed by the laws of the country where protection is claimed."

National treatment is a two-edged sword in the sense that it results in protection for some works not protected in their country of origin, and denial of protection for some works that are protected in their country of origin.

A simple example of the two-edged nature of "national treatment" is found in Hasbro Bradley v. Sparkle Toys, 780 F.2d 189 (2d Cir. 1985) (ELR 8:6:16), where Japanese toy designs were protected by copyright in the United States under U.S. copyright law, even though toy designs are not protected by copyright in Japan. Similarly, in Lounge Chair, 13 IIC 777 (Germany Ct.App. 1981), a German court held that the design of a lounge chair created by an American was protected in Germany by German copyright law as a work of applied art (even though the design probably was not protected by copyright in the U.S.), because the plaintiff (who was the assignee of the American designer) was entitled to national treatment in Germany under German law. And in The Gold Rush, 2 IIC 315 (Switzerland S.Ct. 1970), the Swiss Supreme Court held that Charlie Chaplin's movie "The Gold Rush" was still protected in Switzerland, even though its copyright had already expired in the U.S., because the applicable copyright law was the law of Switzerland so that its life-plus-50 year term was applied rather than the U.S.'s shorter 28-year term.

The U.S. copyright status of the Italian movie "The Bicycle Thief" presents a more complicated and more dramatic example of the two-edged nature of national treatment. "The Bicycle Thief" was first published in Italy in 1948; thus it is still protected in Italy under Italy's 50-year from first-public-showing term, and it will continue to be protected there until 1998. Nevertheless, in International Film Exchange v. Corinth Films, 621 F.Supp. 631 (S.D.N.Y. 1985) (ELR 8:2:14), "The Bicycle Thief" was held to be in the public domain in the United States under U.S. law, because its copyright was not renewed 28 years after its first publication (as then required by U.S. law) by or in the name of any person eligible under U.S. law to renew the copyright. (The company that attempted to renew was a mere licensee; and licensees may not renew, as a matter of U.S. law.) "The Bicycle Thief" therefore received less protection in the U.S. than in Italy, because it received "national treatment." However, as a result of a very recent amendment to U.S. copyright law, the copyright to "The Bicycle Thief" will be restored in the U.S. on January 1, 1996. (See Lionel S. Sobel, "Back from the Public Domain," ELR 17:3:3) When that happens, the movie's restored copyright will have a duration of 75 years from first publication, which means it will be protected in the U.S. until 2023. Thus, once its copyright is restored, "The Bicycle Thief" will receive more protection in the U.S. than in Italy.

Potential exceptions to national treatment

Despite the usual rule of "national treatment," the applicable law as to certain issues may be the law of the work's country-of-origin, or the law of the country where the transaction was entered into (rather than the law of the country where protection is sought). Such issues include ownership of copyright and the duration of copyright. In some countries, ownership may be a contract rather than copyright issue, and duration is affected by the Rule of the Shorter Term. In connection with both of these issues, country-of-origin law may apply, rather than the law of the country where protection is sought.

Ownership and transfer of copyright issues

Identifying the "author"

The identity of the "author" of a work is often important in deciding who owns the work's copyright. Thusfar, courts have applied their own country's law to determine the identity of the author, even if the work was in fact authored in another country by a national of that other country. French courts addressed this issue explicitly in the "Asphalt Jungle" colorization case. French courts ruled that French law should be applied in deciding who the author of the movie was; and applying French law, they decided that the movie's authors were director John Huston and screenwriter Ben Maddow, rather than the studio that originally produced the movie, even though the movie was produced in the United States, even though Huston and Maddow were employees of the studio when they produced the movie, and even though under the "work made for hire" doctrine of U.S. copyright law, the movie's author was the studio rather than Huston and Maddow. Turner Entertainment v. Huston, Court of Appeal of Versailles France, Combined Civil Chambers Decision No 68, Roll No. 615/92 (1994) (published in full text at ELR 16:10:3)

The same result has been reached by American courts a few times. But these cases do not yet settle the issue, as a matter of U.S. law.

The earliest of the three U.S. cases is Sygma Photo News, Inc. v. Globe International, Inc., 616 F.Supp. 1153 (S.D.N.Y. 1985) (ELR 7:8:19). That case was a suit for the infringement of copyrights to photographs of Prince Charles, Princess Diana, and their son

Prince William, taken in Kensington Palace by an apparently British photographer at the request of the Royal Family. The photographer had assigned his copyrights in the photographs to the plaintiff, his U.S. photo agency. The defendant asserted that the photographs were works-made-for-hire, and thus the Royal Family, and not the photographer, owned the copyrights to the photographs. The court applied U.S. copyright law in deciding that the photographs were not works for hire. But the question of whether British copyright law should have been applied instead was not addressed and may never have been raised.

The choice of law issue was raised in Autoskill Inc. v. National Educational Support Systems, Inc., 994 F.2d 1476 (10th Cir. 1993). In that case, the court applied U.S. law to decide that a Canadian computer program was a work-made-for-hire so that its U.S. copyright was owned by the plaintiff (who was the "employer" of the Canadian programmers who created the program in Canada). The defendant had argued that Canadian law should have been applied in determining who owned the copyright to the program. The defendant also argued that Canadian copyright law does not contain a work-made-for-hire provision, and thus the program's copyright would be owned by the programmers themselves, not the plaintiff. The court rejected this argument, but did so on purely procedural grounds. The Federal Rules of Civil Procedure require notice to be given (in the pleadings or in some other fashion) by a party who contends that an issue in a case requires the application of foreign law; and in this case, the defendant had given no such notice in the District Court. The Court of Appeals did not indicate how it would have ruled on this issue if it had been raised in the District Court in the manner required by the rules.

The choice of law issue also was raised in Dae Han Video Productions v. Kuk Dong Oriental Food, 19 U.S.P.Q.2d 1294 (D.Md. 1990). There the court applied U.S. law to decide whether the copyrights to Korean television programs were owned as works-made-for-hire by the Korean companies that had produced the programs in Korea, or whether instead those copyrights were owned by the Korean screenwriters who had written the scripts as independent contractors. The court specifically rejected the defendant's argument that Korean law should be applied in deciding who the owners were. But in so ruling, the court relied in part on the fact that the Korean screenwriters had not filed their own copyright infringement suits in the United States. Thus, it is not apparent how the court would have ruled if the defendants in this case had acquired licenses from the Korean screenwriters, thus putting in issue the ownership of the copyrights as between the Korean screenwriters and the Korean production companies.

As a matter of policy, the identity of the author of a work ought to be determined pursuant to the law of the country where the work was created. This is so, because authorship determines ownership (at least initially), and the identity of the (initial) owner of a work ought to be the same throughout the world. In one narrow and brand new area, the U.S. Copyright Act does provide that authorship should be determined pursuant to the law of a work's country of origin. It does in new section 104A which restores U.S. copyright to certain foreign works. Section 104A(b) provides that when a copyright is restored (on January 1, 1996), ownership of it "vests initially in the author . . . of the work as determined by the law of the source country of the work." (See ELR 17:3:10) The Copyright Act does not expressly indicate which country's law should be applied to determine the author of foreign works whose copyrights never went into the public domain in the U.S., and thus do not need to be restored. But if the identity of the author of a work that went into the U.S. public domain now should be determined pursuant to the law of that work's "source country," there is no good reason to apply U.S. law to other foreign works simply because they did not go into the public domain here.

Determining the validity of the transfer

The validity of a transfer of copyright sometimes depends on which country's law should be applied in cases where the transfer took place in one country and a dispute concerning ownership of that copyright is litigated in another country. This question is not at all settled, in the United States or elsewhere. Indeed, conflicting answers can be found in one otherwise excellent international copyright treatise, International Copyright and Neighbouring Rights by S.M. Stewart. At page 30 (of the 2nd edition published in 1989), Stewart wrote: "[I]f an English author makes a publishing contract to have his work published in France and the published work is then performed in a slightly altered form without permission in Germany . . . the validity of the transfer of the right to the French publisher will probably be judged according to French law if the contract is a French contract. . . ." At 34, however, Stewart said, "In the realm of the law of movable (physical) property the law applicable to decide ownership is generally the law of the country where the property is acquired. If one bought goods in country A and takes them to country B, the question of whether one has become the rightful owner of the goods is to be decided by the law of country A. The position is different with regard to copyright. The law applying to the physical property . . . such as the book, the film, the record containing the work is governed by the above mentioned rules. The property in the work, however is governed by the law of country B, if that is where the right is claimed."

There are U.S. decisions supporting both conclusions.

Cases applying law of the country where the transfer took place

Almost a half century ago, in Khan v. Leo Feist, 165 F.2d 188 (2d Cir. 1947), the Second Circuit applied the law of Trinidad to determine the validity of an assignment of the copyright to a song written by a Trinidad songwriter, because the assignment took place in Trinidad. None of the parties seems to have argued for the application of U.S. law.

More recently, in Rano v. Sipa Press, Inc., 987 F.2d 580 (9th Cir. 1993) (ELR 15:8:11), the Ninth Circuit too suggested that the law of the country where a transfer takes place should be applied to determine whether the transfer was valid. The plaintiff was a photographer, and he alleged that his copyrights had been infringed by the photo distribution syndicate that had previously represented him pursuant to a non-exclusive oral agreement. The agreement had been entered into in France, and the issue presented to the court for its decision was whether California state law or the U.S. Copyright Act controlled the termination of that agreement. As between California law and the Copyright Act, the court decided that the Copyright Act would apply because it preempted state law with respect to termination. But in a footnote, the court said "We make no findings as to whether French, rather than California, law would apply on remand." The court then cited the Restatement of Conflicts for the proposition that the law of the country where contracts are made generally controls issues of contract validity, while the law of the place of performance generally controls issues of contract performance - thus suggesting that French law, rather than U.S. copyright law, might be applicable to the issue of the plaintiff's right to terminate the agreement.

British and German decisions also have applied the law of the country where the transfer took place. In Campbell Connelly & Co. v. Noble, [1963] 1 All E.R. 237 (U.K. Chancery Div.), a British court applied U.K. law to decide whether a contract entered into in Britain assigned the songwriter's U.S. renewal copyright. And in Hermann Luchterhand Verlag GmbH v. Albert Langen-Georg Muller Verlag GmbH, 7 IIC 134 (Germany S.Ct. 1975), a German court held that the plaintiff's license to publish Soviet author Alexander Solzhenitsyn's novel August Fourteen was valid, even though it had been obtained from a Swiss attorney who had a power of attorney from Solzhenitsyn rather than from the Soviet government agency that then had the exclusive power to grant copyright licenses to non-Soviets. The basis for the court's ruling appears to have been that Soviet law is effective only within the USSR, and the effectiveness in Germany of the power of attorney was to be determined under German law rather than Soviet law.

Cases applying law of the country where protection was sought

Despite Khan v. Leo Feist - the Trinidad song case mentioned immediately above - the Second Circuit itself has applied U.S. law to evaluate the validity of copyright transfers that took place in another country. In Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679 (2d Cir. 1993) (ELR 15:7:6), the court applied U.S.

copyright law to interpret music publishing agreements - negotiated and executed in Brazil and written in Portuguese - entered into by composer Antonio Carlos Jobim and a Brazilian publisher. The issue in the case was whether the agreements constituted an assignment by Jobim to the Brazilian publisher of Jobim's U.S. renewal term copyrights to five songs, or whether the agreements conveyed rights only to the initial terms of the songs' U.S. copyrights. (This issue arose because Jobim later conveyed U.S. renewal term rights to the plaintiff, while the Brazilian publisher conveyed renewal term rights to the defendants.) The court rejected the defendants' argument that the Brazilian contracts should be interpreted under Brazilian law. In doing so, the court said, "Factors arguing for the application of United States law include the following: United States renewal copyrights reflect a vital policy of United States copyright law; the forum in which the [Brazilian contracts] are to be construed is in the United States . . . ; and the place of performance of the contracts is also the United States. Under these circumstances, we believe that United States law is applicable."

Corcovado ignores the fact that when the contracts were entered into, the parties and their lawyers all were in Brazil and used language that was sufficient to transfer the full term of the copyrights in question, pursuant to the law under which they were operating when that language was drafted. They could have used slightly different language that would have transferred the U.S. renewal terms, if only they had been fully-familiar with U.S. law. That is, the "vital policy" to which the court alluded would not have prevented Jobim from transferring his renewal terms, if the right language had been used. So this decision penalized Jobim's original publisher, and gave him (and his new publisher) a windfall, simply because the original publisher's Brazilian lawyers did not know what language to use to accomplish their mission. Corcovado is an unfortunate blemish on the Second Circuit's usually fine record in copyright cases. (See also, David Nimmer, "Corcovado: Renewal's Second Coming or False Messiah?", 1 UCLA Entertainment Law Review 127 (1994).)

Duration of copyright issue

When the question is which country's law should be applied to determine the duration of a copyright, all countries apply their own law if its duration is shorter than the duration in the work's country-of-origin, but some countries apply the law of the work's country-of-origin, rather than their own, if the duration in the work's country of origin is shorter than their own. This principle is known as the "Rule of the Shorter Term."

Rule of the Shorter Term

The "Rule of Shorter Term" provides that the duration of copyright is the term in the country where protection is sought, or the term in the work's country-of-origin, whichever is shorter.

Despite the usual rule that "national treatment" must be provided to foreign works, countries are authorized to adopt a "Rule of the Shorter Term" by both of the major multi-national copyright treaties to which most countries have adhered.

The Universal Copyright Convention provides, in Article IV(4), that "No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed . . . by the law of the Contracting State of which the author is a national [for unpublished works] . . . [or] in which the work as been first published [for published works]."

While the Berne Convention provides, in Article 7(8), that the term of copyright "shall be governed by the legislation of the country where protection is claimed," this same provision makes the "Rule of the Shorter Term" the usual rule by adding, "however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."

If a work is published simultaneously in more than one country, the country of origin is deemed to be the country with the shortest duration, for shorter-term purposes. Berne Article 5(4)(a); UCC Article 4(6).

Whether U.S. law contains a Rule of the Shorter Term

United States law is more complicated than most others when it comes to the Rule of the Shorter Term. For most foreign works, there is no such rule; but for foreign works whose copyrights are restored, there is one.

The duration provisions of the U.S. Copyright Act, sections 302 through 305, are completely silent about a "Rule of the Shorter Term." That is, these provisions make absolutely no distinction between American works and works of foreign origin. This means that in a case where the U.C.C. is applicable (for example, a case involving a foreign work first published prior to March 1989), there is no "Rule of the Shorter Term" and the term of copyright in the U.S. is the term provided by U.S. law, even if the copyright to the foreign work has expired in that work's country-of-origin. Thus, for example, the duration of copyright in the U.S. for a German news photograph first published prior to March 1989 would be 75 years from publication if its copyright were properly registered and renewed in the U.S., which would be through the year 2020 in the case of a photograph first published in 1945 - even though the copyright to that photograph in Germany expired (under German law) 25 years after it was published, which would have been at the end of 1970 in the case of a 1945 photograph. In a case where the Berne Convention is applicable (that is, in a case involving a foreign work first published since March 1989), Berne Article 7(8) makes it appear that the "Rule of the Shorter Term" would apply. However, because the Berne Convention is not self-executing in the United States (see Berne Convention Implementation Act section 2(1)) Berne Article 7(8) is not itself applicable law in the U.S.; and the duration of the copyright for a foreign (Berne country) work also will be determined solely by reference to the U.S. Copyright Act. Thus, the Rule of the Shorter Term is not applied in the U.S. in most cases, and most foreign works (if they are protected at all in the U.S.) have the same duration of copyright protection in the U.S. as do American works.

However, U.S. law does contain a Rule of the Shorter Term for those foreign works whose copyrights once were in the public domain in the U.S. but whose copyrights will be restored on January 1, 1996 under new section 104A of the Copyright Act. This is so, because in order for a foreign work to be eligible to have its copyright restored in the U.S., the work must still be protected by copyright in its "source country." (Copyright Act section 104A(h)(6)(B); see ELR 17:3:13) Thus, if the copyright to a 1945 German news photograph had not been registered and renewed in the U.S., it would have gone into the public domain here in 1973 (28 years after its publication); and because the copyright to that photograph is not protected in Germany any longer, its U.S. copyright would not be restored.

Geographic scope of remedies

In those cases where U.S. courts do have subject matter and personal jurisdiction over foreign infringements, issues concerning the geographic scope of available remedies are raised. One of these issues concerns the method by which recoverable damages are calculated: may a U.S. court award damages based on infringements that occur abroad, or only based on those that occurred in the U.S.? Another issue concerns the permissible geographic scope of injunctive relief: may a U.S. court issue an injunction prohibiting further infringements abroad, or only prohibiting further infringements within the U.S.?

Damages

As a general rule, U.S. courts may not award damages based on infringements that occur abroad. This rule is illustrated by Robert Stigwood Group, Ltd. v. O'Reilly, 530 F.2d 1096 (2d Cir.), cert.den., 429 U.S. 848 (1976), where damages were awarded only for those infringing public performances of "Jesus Christ Superstar" that took place in the United States, and not for those performances that took place in Canada. The court explained this result by saying, "The Canadian performances, while they may have been torts in Canada, were not torts here."

The general rule also was applied in Gaste v. Kaiserman, 683 F.Supp. 63 (S.D.N.Y. 1988) (ELR 10:7:8), where the court held that the plaintiff was not entitled to recover damages based on foreign live performances of his song. This case added a potential wrinkle to the rule, however, because the court suggested that the plaintiff could have recovered for foreign performances of recordings that had been unlawfully made in the United States. While in this case, the court denied damages for foreign radio and television performances of a recording of the plaintiff's song, it did so only because the plaintiff had not proved that those broadcasts were from recordings originally made in the United States.

This wrinkle actually was applied in Update Art v. Modiin Publishing, Ltd., 843 F.2d 67 (2d Cir. 1988), where the Second Circuit affirmed an award of damages that had been based on the number of copies of infringing "Ronbo" posters distributed by the defendant in Israel (as well as in the U.S.), because the poster was copied in the U.S. and that copy was used to make the copies that were distributed in Israel.

It therefore is clear that in the Second Circuit, courts may award damages for infringements committed abroad, if those infringements involve the reproduction, distribution or performance of tangible copies of works that were themselves illegally reproduced in the United States to begin with. Whether this rule will be applied elsewhere - particularly in the Ninth Circuit - is more difficult to say. A conflict among the circuits may be brewing.

This very question was presented to the Ninth Circuit in Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1988 (9th Cir. 1994)(en banc) cert. denied, 1994 U.S.LEXIS 8040 (1994) (ELR 16:5:10). The plaintiff in that case sought to recover damages for unauthorized foreign sales (as well as U.S. sales) of homevideos of "The Yellow Submarine." In support of its claim for damages based on foreign sales, the plaintiff cited the Second Circuit's decision in the Update Art case. But the Ninth Circuit often disagrees with the Second in copyright cases, and suggested that it is ready to so again by saying that it would "express no opinion" on the "validity" of the Update Art decision in the Ninth Circuit. The Ninth Circuit was not compelled to express an opinion one way or the other in Subfilms, because the record on appeal in Subafilms did not reflect whether the negative for the infringing homevideos had been made in the U.S. or abroad. Therefore, the Ninth Circuit declined to resolve the question of whether the plaintiff could recover damages for the international distribution of homevideos, based on the theory that an act of infringement had occurred in the U.S. The court also declined to rule on the plaintiff's contention that it could be awarded damages for the international distribution of the homevideos on the theory that such distribution was part of "a larger conspiracy to violate [the plaintiff's] copyright that included actionable infringement within the United States," or on the theory that the plaintiff could recover damages for international distribution under foreign laws, or under a breach of contract theory. All of these questions were left "for the panel, in its best judgment, to consider" in further proceedings on remand.

Injunctive relief

It is reasonably clear that U.S. courts may issue injunctions only against further infringements in the United States and may not enjoin infringements abroad. This was the specific ruling in Filmvideo Releasing Corp. v. Hastings, 668 F.2d 91 (2d Cir. 1981) (ELR 3:24:8), a case in which infringement - under U.S. law - was found where the defendant distributed "Hapalong Cassidy" movies whose copyrights had expired, because those movies had been based on books the copyrights to which had been renewed. However, U.S. copyright law does not apply abroad, and therefore a district court order requiring the defendant to return its copies of the those movies was held to be an abuse of discretion, because as a matter of U.S. law the defendant could continue to distribute those films abroad.

The case reports do contain one decision which appears at odds with the rule applied in Filmvideo Releasing. That case is Nintendo of America, Inc. v. NTDEC, 822 F.Supp. 1462 (D.Ariz. 1993) (ELR 15:7:27), in which the court issued an injunction prohibiting the defendants from committing any further copyright infringements anywhere in the world. However, the defendants had defaulted and had not appeared for the remedies phase of this case. Perhaps for this reason, the court did not consider whether it could issue a worldwide injunction against copyright infringement, and thus it cited no authority in support of its doing so.

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RECENT CASES

Actors George Wendt and John Ratzenberger are entitled to a trial in their right of publicity case alleging that figures displayed in airport bars depict them in their roles as "Norm" and "Cliff" in the television series "Cheers," federal court of appeals rules

Cheers is the bar in Boston "where everybody knows your name." It really exists and today is quite a tourist attraction, because for more than 10 years, a replica of the bar was the setting for one of the most successful television series of all time. Fans of the Paramount-produced series will fondly recall that two of Cheers' human fixtures were Norm (the accountant) and Cliff (the mailman) who anchored the bar from customary seats. Throughout the series' years on the air, "Norm" and "Cliff" were portrayed by actors George Wendt and John Ratzenberger.

Now Wendt and Ratzenberger have taken on new, though related, roles - the roles of litigants in what could become a precedent-setting case. They have sued Host International, the operator of airport bars and restaurants, claiming that their rights of publicity have been infringed by life-sized robotic figures that are displayed in some of Host's airport bars. Shortly before their case would have gone to trial, Federal District Judge Manuel L. Real granted a defense motion for summary judgment - made by Host and by Paramount Pictures which intervened in the case on Host's side - and thus dismissed the case. According to Judge Real, the complained-of figures were not sufficiently similar in appearance to Wendt and Ratzenberger to give rise to liability. But that ruling has been reversed by the Court of Appeals, in an unsigned memorandum decision by Circuit Judges Warren J. Ferguson, Robert R. Beezer and John T. Noonan, Jr.

Host obtained a license from Paramount to build its "Cheers"-like airport bars, and it sought licenses from Wendt and Ratzenberger to replicate their likenesses in robotic figures. When no deal could be made with the actors, Host designed figures that were intended to not look like Wendt or Ratzenberger. Host even went so far as to name its figures "Hank" and "Bob," despite its license from Paramount.

The actors' right of publicity lawsuit claims that Host's "Hank" and "Bob" figures are really them, and it asserts that the figures violate their rights under California Civil Code section 3344, under California common law, and under section 43(a) of the Lanham Act.

Civil Code section 3344 prohibits the use of a person's "likeness" for commercial purposes without permission. According to the appeals court, it could not be said that Hosts' figures are so dissimilar to the actors that no reasonable fact-finders could find them to be "likenesses." Therefore the District Court should not have granted summary judgment, because a trial is necessary to determine just how similar the figures are to the actors. The degree of the similarity between the figures and the actors also is the fact of central importance with respect to the common law and Lanham Act claims, and thus a trial was said to be necessary on those claims as well.

The Court of Appeals' decision is marked "not appropriate for publication" and by court rule may not be cited.

Editor's note: Apparently, District Judge Real determined that Host's figures and the actors were dissimilar on the basis of photographs that had been submitted in support of the motion for summary judgment, because the appellate court made a point of indicating that at trial, similarity should be determined by looking at actual three-dimensional figures. If this case merely stands for the proposition that photographs were not sufficient evidence, it will do no harm to the law, and will not produce a different result after trial. I have seen the actual figures in airports, and when I first did, I was immediately struck by the fact they look nothing like Wendt or Ratzenberger. In fact, the figures are so different in appearance from the actors that until I learned of this lawsuit, and learned that the actors had not given Host a license, I though that Host's designer had simply done a terrible job. Thus in my opinion, Judge Real would have reached the same conclusion, even if he had looked at actual three-dimensional figures. This case is potentially troubling, though, because it suggests that jurors may be permitted to decide that Host has violated the actors' rights despite how different the figures are. The appellate court makes clear that under Civil Code section 3344, the jury may not take into account the context in which the figures appear, namely, a "Cheers"-like bar. But the court was less clear about whether the jury may take that context into account in deciding the common law and Lanham Act claims. The context of a "Cheers"-like bar does, after all, belong to Paramount, not the actors, so jurors should be instructed to disregard the bar altogether in deciding whether Host's figures are depictions of the actors. Paramount appears to have so argued, but the appellate court refused to so hold, preferring instead to leave this question completely unanswered. Thus, on its face, this decision is another in a line of ill-advised and poorly-reasoned decisions rendered by the Ninth Circuit in right of publicity cases - decisions which began with Judge Noonan's decision in Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (ELR 10:2:7), and continued with White v. Samsung

Electronics, 971 F.2d 1395 (9th Cir. 1992) (ELR 14:4:3), and Waits v. Frito Lay, 978 F.2d 1093 (9th Cir. 1992) (ELR 14:6:3).

Wendt v. Host International, Inc., 1995 U.S.App. LEXIS 5464, 35 U.S.P.Q.2d 1315 (9th Cir. 1995) [ELR 17:4:17]

Covenant of good faith requires MPAA to use same ratings standards for non-members as for members, so Maljack Productions is entitled to prove, if it can, that its movie "Henry: Portrait of a Serial Killer" was rated "X" because Maljack is not an MPAA member

"Henry: Portrait of a Serial Killer" was "no Snow White (nor even her wicked stepmother)." This much was acknowledged by Judge Stephen Williams of the U.S. Court of Appeals in Washington, D.C. Even Maljack Productions, the company that produced the movie, conceded that "Henry" contained "several explicit scenes of physical violence, including depictions of two rapes and several brutal murders." Nonetheless, Maljack took exception to the X-rating the MPAA had given the movie. X-ratings make it difficult to distribute a movie, because some newspapers won't advertise them and some theaters won't even exhibit them.

What upset Maljack was its view that the MPAA had frequently given "R" ratings to movies that were more violent than "Henry," simply because those movies had been produced by MPAA members. Maljack is a small independent production company that is not an MPAA member. And when Maljack couldn't get an "R" rating for "Henry," it sued the MPAA contending that the MPAA had discriminated against its movie solely because it isn't a member.

The MPAA rates movies for members and non-members alike. While ratings are not required by law, some theaters and newspapers treat unrated movies the same as X-rated (or now, NC-17 rated) movies, so as a practical matter, the producer of virtually every movie destined for theatrical exhibition seeks an MPAA rating.

Maljack had paid the MPAA $1,100 to rate "Henry," and thus an agreement between the two was entered into. Both Maljack and the MPAA assumed that California law would apply to this agreement; and under California law "all contracts contain an implied covenant of good faith and fair dealing [that] `requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.'" In its lawsuit, Maljack alleged that the MPAA had discriminated against it in violation of this implied covenant of good faith and fair dealing, and therefore the MPAA had breached the contract between them.

At first, Maljack had no more success in court than it had with the MPAA. A federal district court dismissed Maljack's case on the grounds that its complaint had not alleged facts that would support an inference that the MPAA had acted unfairly or in bad faith. On appeal, however, Maljack has done better. In an opinion by Judge Stephen Williams, the Court of Appeals has reversed the dismissal of Maljack's complaint and has remanded the case to the district court so that Maljack can attempt to prove its allegation that it was treated differently than MPAA members solely because it isn't a member.

The appeals court rejected the MPAA's argument that Maljack was contractually entitled to receive the MPAA's "subjective judgment and nothing more." Rather, the court ruled, Maljack reasonably expected that the MPAA would rate "Henry" in "good faith based upon the content of the film alone and not the identity of its producer" or the producer's "links (or lack of links)" to the MPAA. Moreover, and of great importance, the court ruled that "this expectation of fair dealing is protected under California law as if it were an explicit obligation of the contract."

The court ruled that if it turns out to be true, as Maljack alleged, that the MPAA "routinely" gave "R" ratings to movies produced by MPAA members that were more violent than "Henry," that would "certainly" suggest that the MPAA may have applied a different standard to "Henry" because its producer is not a member. The court acknowledged that "it will not be easy for Maljack to show so skewed a ratings pattern as to support the inference necessary to meet California's quite demanding requirements for demonstrating bad faith." But Maljack is entitled to try.

Judge Stephens contrasted "Henry" with "Snow White" because during oral argument, the MPAA had been asked to consider a hypothetical case in which a children's movie like "Snow White" had been given an "X" rating. In such a case, the MPAA conceded, the rating would be so out of line with the MPAA's other decisions that a compelling inference would be raised that something more had happened than a simple error of judgment or difference of opinion. The logic that led to this concession was the same as that contained in Maljack's complaint. The degree of difference between "Henry" and "Snow White" is a question of fact, Judge Stephens noted, but Maljack is entitled to further proceedings to show that despite the differences between these movies, the same inference ought to be drawn - namely, an inference of discrimination that violates the MPAA's contractual duty of good faith.

Editor's note: The MPAA began to rate movies in 1968. It did so in order to forestall then-pending legislation that would have put the federal government into the business of rating (and perhaps censoring) films. In a sense, the MPAA's rating system has been a victim of its own success. It has kept the government out. But now, much of the hostility that otherwise would have been directed against government censors is instead directed against the MPAA itself. This case is not the first in which producers have challenged X or NC-17 ratings. Until now, however, the MPAA has always prevailed. See, e.g., Miramax Films Corp. v. Motion Picture Association of America, Inc., 560 N.Y.S. 2d 730 (ELR 12:3:3). It may ultimately prevail in this case as well. Nonetheless, if - as this case holds - disappointed producers are entitled to attempt to prove disparate treatment, the MPAA ratings board may have to write explanations for why certain movies were given the ratings they were, rather than more or less severe ratings, simply to create a record establishing that ratings are consistent from movie to movie (if they are). Consistency is a key feature of justice throughout the law, not simply in relation to movie ratings. And the desire for consistency is one of the reasons that judges write opinions explaining their rulings. While it could become burdensome and time-consuming for the MPAA to produce written decisions explaining its ratings decisions, doing so would be useful in the defense of cases like this one - and useful too to producers looking for before-the-fact guidance on what sort of material is likely to result in which rating.

Maljack Productions, Inc. v. Motion Picture Ass'n of Amer., 52 F.3d 373, 1995 U.S.App.LEXIS 9675 (D.C.Cir. 1995) [ELR 17:4:18]

National Football League wins appeal from $32 million judgment that had been entered against it in salary-fixing suit brought by practice-squad players; appellate court holds that antitrust laws do not apply to NFL's imposition of uniform salary after collective bargaining had reached impasse

The National Football League is breathing a bit easier these days, because a federal court of appeals in Washington, D.C., has blown away a very dark and threatening cloud that had been hanging over its head for more than two years. That cloud was a $32-million judgment that had been entered against the League in a class-action antitrust lawsuit brought on behalf of 235 practice-squad players who were signed by NFL teams in 1989.

Football fans will recall that a collective bargaining agreement between the NFL and the NFL Players

Association expired in 1987, and that it was years before a new one was agreed to. During that time, the League and the Players Association were engaged in collective bargaining concerning many issues, one of which was an NFL proposal to pay a fixed salary of $1,000 per week to any player assigned to a team's practice squad. The Players Association did not agree to that proposal, and the league did not agree to the Association's counter-proposal. When this impasse was reached, the League unilaterally imposed the $1,000 a week salary, and advised its teams that none could pay practice squad players anything more or less than that amount. As a result, several of them filed a class-action antitrust lawsuit alleging that the League had unreasonably restrained trade in violation of the Sherman Act by unilaterally fixing their salaries. After four years of litigation, a federal district court agreed, and entered judgment in favor of the players. (ELR 14:4:14, 15:8:22, 16:3:34)

That judgment has now been reversed. In an opinion by Chief Judge Harry T. Edwards, the Court of Appeals has held that "Because the NFL in this case acted lawfully within the framework of the collective bargaining process when it unilaterally imposed a fixed salary for practice-squad players, and because this action affected only the market for professional football player services, the nonstatutory labor exemption precludes any finding of liability under the Sherman Act."

The Players Association had argued that the nonstatutory labor exemption applies "only where a union has manifested its consent to a restraint on trade by signing a collective bargaining agreement." In this case, the Players Association had never consented to fixed salaries for practice-squad players, and it contended that "Absent consent, the exemption is inapplicable." But

Judge Edwards flatly disagreed. He noted that by virtue of federal labor law, "unions are protected against unilateral action by employers with respect to subjects of mandatory bargaining while negotiations over such subjects are ongoing and continue to enjoy this protection until negotiations end in impasse." There is, however, another side to the labor law coin - one that favors employers. Because once impasse has been reached, "an employer does not violate the [Sherman] Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals."

Editor's note: This decision is not the first to hold that the labor exemption protects sports leagues (and other multi-employer groups) from antitrust liability even after a collective bargaining agreement has expired and an impasse has been reached in negotiations. Similar rulings have been issued in National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995) (ELR 16:11:5), and Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989) (ELR 12:9:5). This result, however, is a controversial one. In this very case, Judge Patricia M. Wald wrote a lengthy dissent in which she challenged the correctness of Judge Edwards' ruling on doctrinal grounds and its wisdom on policy grounds. A trend does seem to be developing, however - one that requires me to correct something I wrote in last month's issue. In the "Editor's note" following the report on Silverman v. Major League Baseball Player Relations Committee (ELR 17:3:14), I wrote that "one legal distinction still exists between baseball players on the one hand and basketball, football and hockey players on the other. As the law now stands, if football, basketball and hockey owners make unilateral changes after impasse in the terms of their players' employment, those players may sue for antitrust violations." At one time that appeared to be true. But now, as a result of NBA v. Williams, Powell v.

NFL, and especially this case, it isn't. That is, there no longer appear to be any differences between baseball players on the one hand and football, basketball or hockey players on the other - insofar as the applicability of the nonstatutory labor exemption to unilateral league action after impasse is concerned. The absence of any such distinction makes now-pending legislation to revoke baseball's historic exemption from the antitrust laws all the more irrelevant, because even if baseball's historic exemption is legislatively revoked, the nonstatutory labor exemption would not be. Thus, baseball players would not be able to seek antitrust relief with any more success if such legislation were passed than if it isn't.

Brown v. Pro Football, Inc., 50 F.3d 1041, 1995 U.S.App.LEXIS 5549 (D.C.Cir. 1995) [ELR 17:4:19]

Court awards singer-songwriter John Fogerty $1.35 million in attorneys' fees and costs in connection with his successful defense of copyright action brought by Fantasy Inc.

After ten years of litigation, singer-songwriter John Fogerty has emerged completely victorious from the legal thicket he entered back in 1970 when he wrote a song entitled "Run Through the Jungle" and sold its copyright to a predecessor of the music publishing and record company Fantasy Inc. In 1985 Fogerty wrote "The Old Man Down the Road" and recorded it for Warner Brothers Records. When he did, Fantasy sued him for copyright infringement, because according to Fantasy, "Old Man Down the Road" was merely "Run Through the Jungle" with new words. But a jury returned a verdict in favor of Fogerty, absolving him of the claim that he had infringed the copyright to the older song. (ELR 10:7:20)

As the "prevailing party" in the case, Fogerty asked the District Court to award him attorneys' fees and costs which by then had come to a million dollars. But the District Court refused to do so, and the Ninth Circuit Court of Appeals affirmed. At the time, the Ninth Circuit applied a "dual standard" for awarding attorneys' fees in copyright cases - a standard which made it much more difficult for a successful defendant to recover fees than a successful plaintiff. (ELR 15:1:7) Fogerty took the case to the United States Supreme Court which reversed the Ninth Circuit, and in a precedent-setting decision held that federal courts should apply an "evenhanded" standard in awarding fees in copyright cases - one that treats successful plaintiffs and defendants alike. (ELR 15:11:14)

Fogerty has now reaped the benefit of his victory in the Supreme Court, because District Judge Samuel Conti has awarded the singer-songwriter more than $1.35 million in attorneys' fees and court costs. In the process, Fogerty may have set yet another precedent, because it appears that this amount is the largest fee award ever entered in a copyright infringement case. In deciding how much to award, Judge Conti began with the time and billing records of Fogerty's lawyers - the Los Angeles firm of Gipson Hoffman & Pancione - and applied a multi-factor test to make adjustments where necessary.

In connection with fees and costs incurred through trial, Judge Conti noted that the trial had taken extensive time and labor, that the case involved novel and difficult questions, that copyright is a specialized area of the law that requires specialists in the field, that Fogerty's lead counsel Kenneth Sidle had extensive experience in copyright matters, that the fees charged by Fogerty's lawyers were customary in Los Angeles according to expert witness Joshua Wattles, and that the fees Fogerty incurred prior to and during trial were reasonable.

Fogerty had applied a "global deduction" of 80% to the fees he incurred in connection with his appeal to the Ninth Circuit, in order to account for work that pertained to Fogerty's counterclaims and certain non-copyright issues, and Judge Conti found that deduction to be reasonable.

Judge Conti also found to be "reasonable" the fees and costs Fogerty incurred in connection with his appeal to the Supreme Court, including the fees and costs of Sidle's partner and associate - Vincent Chieffo and Julia Ross - who traveled with him to Washington for oral argument and helped prepare him for it. Judge Conti pointedly noted that Fantasy's lead lawyer was accompanied to Washington by co-counsel, and the Judge seemed confident that if Fantasy had won the case, rather than Fogerty, Fantasy would have sought to recover the fees and costs of both of its lawyers for the trip.

Finally, Judge Conti also awarded Fogerty a portion of the attorneys' fees he incurred in connection with the fee application itself, an application which generated considerable litigation in its own right. But the Judge declined to award Fogerty pre-judgment interest on his fees and costs, saying there is no precedent for such interest in copyright cases.

Editor's note: The fact that successful defendants (as well as successful plaintiffs) are now entitled to recover their attorneys' fees in copyright cases in the Ninth Circuit (as well as elsewhere), and the seven-figure size of the fee-award in this case, should have an impact on the way copyright infringement cases are tried from now on. In many copyright cases, it is common for the defendant to make a motion for summary judgment on the grounds that the defendant did not have access to the plaintiff's work and thus could not have copied it, or on the grounds that the defendant's work is not substantially similar to the plaintiff's work as a matter of law. Until this case, it was equally common for plaintiffs to respond to such motions by opposing them vigorously, because copyright plaintiffs usually prefer jury trials to the more cerebral and analytical decisions of judges. This case demonstrates that plaintiffs expose themselves to the possibility of incurring considerable liability for fees and costs, if their jury-trial gambit fails. For this reason, in cases where access is not clear, and especially in cases where "substantial similarity" is in doubt, cautious and well-advised plaintiffs should prefer to get a judicial ruling on the merits of those issues before proceeding to trial. In other words, from now on, when defendants move for summary judgment, cautious and well-advised plaintiffs will make counter-motions for summary adjudication rather than blindly battle for a shot at a jury.

Fantasy Inc. v. Fogerty, 1995 U.S.Dist.LEXIS 6197 (N.D.Cal. 1995) [ELR 17:4:20]

Soviet musician Mstislav Rostropovich is entitled to trial on claims against U.S. companies that distributed CDs of his perfor- mances recorded in Soviet Union, because CD covers used his name and photograph without his consent

The dissolution of the Soviet Union has had many consequences, at least one of which is now the subject of a lawsuit pending in federal court in New York City. The plaintiff in the case is Mstislav Rostropovich, the

Soviet-born cellist, pianist and conductor. Rostropovich left the Soviet Union in 1974 to escape persecution and has been the Music Director of the National Symphony Orchestra in Washington, D.C., since 1977.

While he was still living in the Soviet Union, Rostropovich performed as a solo cellist with the Moscow State Philharmonic and the U.S.S.R. Orchestra. During the 1960s, recordings of some of his performances were made by the All Union Recording Studio, a government-owned or operated company that was privatized when the Soviet Union was later dissolved. Two separate companies claim to be the rightful successor to the All Union Recording Studio, and that appears to be at least one of the reasons this case arose. One of those companies licensed the Rostropovich recordings to Russian Disc America, a New Jersey company, which re-recorded them on CDs and then authorized Koch International, a New York manufacturer and distributor, to sell them in the United States. Koch is distributing ten different CDs, each of which features Rostropovich's name and photograph on its cover.

Rostropovich contends that Russian Disc America did not acquire rights from the true successor to the All Union Recording Studio, and thus he has sued Russian Disc (and its Chief Operating Officer) and Koch International on several theories because neither of them got his permission to use his name or photograph. The defendants moved for summary judgment or dismissal. While parts of their motion have been granted, not all of it has been, so Rostropovich will be entitled to take his case to trial on some of his claims.

District Judge John F. Keenan has ruled that Rostropovich is entitled to a trial on his false endorsement claim under Lanham Act section 43(a), because even though the covers of the CDs are literally true, the prominent display of Rostropovich's name and photograph on those covers could cause confusion as to whether he "in fact endorsed the discs."

Judge Keenan also will permit Rostropovich to go to trial on his misappropriation and unfair competition claim. He ruled that "Rostropovich, as a performer, has a property interest in his performances." Russian Disc and Koch of course claim that they bought the right to use that interest from the Russian company that now owns it, and therefore they did not misappropriate anything. But since the identity of the true successor to the All Union Recording Studio is in dispute, a trial will be necessary to resolve that issue. Judge Keenan also refused to dismiss Rostropovich's unjust enrichment claim, because there were disputed questions of fact concerning the musician's property rights in the recordings themselves as well as in his name and likeness.

Rostropovich also asserted a claim under section 51 of the New York Civil Rights Law - New York's right of publicity statute. That statute permits companies to use the "name, portrait or picture" of any author, composer or artist in connection with any work which he or she "has sold or disposed of with such name, portrait or picture used in connection therewith." Russian Disc and Koch argued that since Rostropovich disposed of his right to the recordings, they were entitled to use his name and photograph in connection with their sale of those recordings. But Judge Keenan interpreted the statute to mean that the "name, portrait or picture" had to be sold or disposed of as well as the work with which it was used. And, he said, the defendants had not shown that Rostropovich had done so, even if he had disposed of his rights to the recordings themselves. Nevertheless, as to six of the ten CDs at issue in the case, Judge Keenan did grant summary judgment, because the one-year statute of limitations had run before the case was filed.

Judge Keenan also rejected the defendants' argument that the company from which Russian Disc had acquired its rights was an indispensable party, and their argument that the proper venue for the case was Russia rather than New York.

Judge Keenan did grant summary judgment as to some claims. He granted summary judgment on Rostropovich's misrepresentation claim under Lanham Act section 43(a), because the CD covers make it quite apparent that the recordings were made in the 1960s and do not represent the musician's current work. Judge Keenan also dismissed claims based on California Civil Code section 3344 (California's right of publicity statute) and the California common law right of publicity. These were dismissed on the grounds that only one state's right of publicity law could be applied in any one case, and New York has a greater interest in applying its law in this case than California does.

In a separate subsequent ruling, Judge Keenan denied the defendants' motion for reargument of the false endorsement issue and denied their motion for certification of the issue for immediate appeal.

Editor's note: Reading between the lines of Judge Keenan's decision, it appears as though this case is a law professor's delight . . . and a litigator's nightmare. It's a delight for someone with an academic interest in its issues, because it raises so many legal questions in such a fascinating, international and historically significant context. It appears to be a litigator's nightmare because so many of the critical facts may be difficult if not impossible to come by. For example, the question of which company is the true successor to the All Union Recording Studio is one that will have to be answered on the basis of Russian law and factual evidence concerning just how the Recording Studio was privatized and to whom its assets were transferred. Also, the question of whether the All Union Recording Studio ever acquired the right to use Rostropovich's name and photograph in the first place is one that may be answered by his employment agreement with the orchestras he was performing with at the time, or by an agreement he may have signed with the Recording Studio at the time the recordings were originally made, assuming it was the practice of Soviet orchestras or recording studios to have musicians sign agreements at all, and assuming that if he did sign an agreement, a copy can still be located now, three decades or more later. If no such agreement was signed, the question of whether the Recording Studio nevertheless had the right to use Rostropovich's name and photograph would be a question to be answered under Soviet law, the content of which will have to proved by expert testimony. And of course the relevance of all of this assumes the defendants are able to prove that the company from which they acquired their rights is the company that is the true successor to the Recording Studio. Moreover, before this case is entirely concluded, now-dormant copyright issues may raise their heads as well. This is so because these recordings are pre-1972 recordings that have been and still are in the public domain in the U.S. But come 1996, their copyrights will be restored under the recently-enacted section 104A of the Copyright Act. (See, Lionel S. Sobel, "Back from the Public Domain," ELR 17:3:3) If that occurs, this case will get really interesting.

Rostropovich v. Koch International Corp., 1995 U.S.Dist.LEXIS 2785, 34 U.S.P.Q.2d 1609 (S.D.N.Y. 1995); 1995 U.S.Dist.LEXIS 10696 (S.D.N.Y. 1995) [ELR 17:4:21]

District Court excludes evidence of alleged access in case against recording artist Gloria Estefan alleging that her recording of "Oye Mi Canto" infringed copyright to an earlier song by pianist/composer Eddie Palmieri

Gloria Estefan's 1989 hit recording "Oye Mi Canto" has been the subject of a long-pending, multi-million dollar copyright infringement lawsuit brought by pianist/composer Eddie Palmieri, a successful Salsa musician in his own right. Palmieri has alleged that Estefan and her co-songwriters copied "Oye Mi Canto" from "Paginas de Mujer," a song he had written and recorded several years before.

At an earlier stage of the case, Palmieri won an important procedural ruling - one that permitted him to sue thirty-three foreign affiliates of Sony Corporation of Japan, along with Estefan, her co-writers and Sony

Entertainment (her American record company) in federal court in New York City. (ELR 14:6:7) Shortly before trial, however, Estefan's lawyers made a motion which, as things turned out, derailed Palmieri's case entirely. The motion was one to exclude certain evidence Palmieri intended to introduce to show that Estefan had access to his song and thus could have copied it. There were four such items of evidence, and District Judge Richard Owen granted the motion as to three of them.

In a copyright case, the plaintiff must offer "significant, affirmative and probative evidence" to support a claim that the defendant had "access" to the plaintiff's work. "Wide dissemination" of a work may be grounds for inferring access, but a "bare possibility" of access is not enough.

In this case, Palmieri's song had been recorded and played on the radio, but he could not present evidence of the number of times his song had been broadcast, nor could he show that Estefan (or her co-writers) had listened to a station that may have played it. While Palmieri did have a BMI statement showing payments had been made for 327 performances during one reporting period, those 327 performances were a "formulaic extrapolation" based on only five broadcasts actually monitored by BMI. This evidence was not sufficient, Judge Owen ruled, to infer access and thus was excluded.

Also excluded was evidence that two of Estefan's "associates" possessed recordings of Palmieri's song. One of these was a former member of the Miami Sound Machine band, but he left the band two years before "Oye Mi Canto" was written, and he testified that he never played Palmieri's album for her or lent it to her. The other associate was a deejay who had Palmieri's album in his 15,000 record collection. While Estefan may have been in the room where his collection was located, it does not appear there was any evidence he played it while she was in the room. Neither of these items of evidence was sufficient to support an inference of access by Estefan either, Judge Owen ruled, and so they too were excluded.

Finally, Judge Owen excluded evidence that Estefan's brother-in-law had played Palmieri's record at a family gathering, but there was no evidence that Estefan herself was present at that gathering.

Judge Owen refused to exclude evidence concerning Palmieri's record sales, saying he was unable to assess the potential significance of that evidence on the basis of what was before him in connection with the motion.

Palmieri had argued that even if his evidence showed only a "bare possibility" of access when considered one item at a time, he was entitled to introduce all of it on the grounds that it cumulatively showed a "reasonable possibility" of access. Judge Owen, however, ruled that he could not see "that such a conclusion could properly flow," and thus he considered each item of evidence only individually.

On the day the case was set to go to trial, Palmieri "declined to proceed," apparently because his case had been undercut by Judge Owen's exclusion of most of his evidence of access. Judgment was therefore entered against Palmieri and in favor of Estefan (and her co-defendants including her record company, Sony Music Entertainment). According to press reports, Palmieri intends to appeal.

Editor's note: "Access" had to be proved in this case, because in copyright cases - unlike patent and trademark cases - liability may be imposed only if the defendant actually copied the plaintiff's work. Similarity between two works is not sufficient by itself to result in copyright liability, if that similarity is explained by coincidence or common prior source. Thus in this case, if the similarities between "Oye Mi Canto" and "Paginas de Mujer" were explained by the fact that both were based on or inspired by a Cuban folk chant, as Estefan contends, no copyright infringement would have occurred no matter how similar the two songs were. "Access" (if proved) coupled with "probative similarity" permits the factfinder to draw an inference of copying. Even then, however, it is necessary for a plaintiff to prove that the two works are "substantially similar" as a result of copying of protectible elements from the plaintiff's work. Thus, if both of these songs were based on a Cuban folk chant, it looks as though this would have been a tough case for Palmieri to have won, even if he had been permitted to introduce his "access" evidence.

Palmieri v. Estefan, 1995 U.S.Dist.LEXIS 7617, 35 U.S.P.Q.2d 1382 (S.D.N.Y. 1995) [ELR 17:4:23]

Appeals court affirms dismissal of libel and false endorsement suit by Frank Sinatra's long-time lawyer Mickey Rudin against Kitty Kelley and Simon & Schuster arising out of unwanted acknowledgment in Kelley's biography of Nancy Reagan

An acknowledgment is an expression of thanks and gratitude, and thus is ordinarily safe to give and a pleasure to receive. But not always. Context may be as important as content. And when the context is the "Acknowledgments" section of an unauthorized biography by Kitty Kelley, being included may actually be offensive. This at least is what Mickey Rudin thought when he discovered that his name had been included (along with 610 others) in a list of "sources" thanked by Kelley in the Acknowledgments section of her biography of

Nancy Reagan. Moreover, in the chapter notes that detailed her sources, Kelley referred to "correspondence" with Rudin.

Rudin in fact received a letter from Kelley, written while she was researching her book. Her letter asked him a number of questions, and he replied. But to his thinking, the nature of his reply hardly made him a "source," because in his letter, he curtly "refused to answer" her questions and even "questioned the nature of her project." The only possible assistance he may have given Kelley was to refer her to someone else.

So when Rudin saw that he and his letter had been cited as a "source," he became angry. He became angry because Rudin is Frank Sinatra's long-time lawyer, and therefore, Rudin claimed, Kelley's false acknowledgment and thanks made it appear that he had helped her by providing confidential information and had violated professional confidences in doing so.

Rudin's claim was made in a lawsuit for libel as well as false endorsement and false advertising under the Lanham Act.

Federal District Judge Stephen V. Wilson granted a motion for summary judgment made by the defendants - Kelley, her publisher Simon & Schuster, and its corporate parent Paramount Communications - and dismissed the case. Judge Wilson did so on the grounds that Rudin had not proved "special damages" necessary under California libel law, and had not proved likelihood of consumer confusion necessary under the Lanham Act.

Judge Wilson's unpublished ruling has now been affirmed. In an unsigned memorandum opinion by Circuit Judges Charles E. Wiggins, Alex Kozinski and David R. Thompson, the Court of Appeals has held that since Rudin had failed to show he suffered any damages as a consequence of being acknowledged in Kelley's book, both of his claims had been properly dismissed.

This was so, because to prevail on a Lanham Act claim it is necessary to prove "both the fact and amount of damage," and to prevail in a California libel case it is necessary to prove "special damages" which are damages to one's property, business, trade, profession or occupation.

Rudin did show that his law practice dissolved a year and a half after Kelley's book was published, and he testified that the book contributed to the decline in his practice by diminishing his ability to attract new clients. He had not, however, produced evidence that he had lost any potential or existing client because of the book. Moreover, the Court of Appeals concluded that two factors suggested the decline in Rudin's practice was not in fact caused by the book. First, the book's reference to Rudin was "not so clearly defamatory, or even noticeable, as to make the reference inherently likely to cause such severe damage to Rudin's practice."

Moreover, the inference that Rudin had breached client confidences or endorsed the book was not "likely." Second, other factors were "more likely culprits in the demise of Rudin's practice." He acknowledged that he made no effort to attract new clients in 1992 and he admitted that the recession may have been responsible for the decline. The appellate court concluded that these factors were "more likely to have caused the decline in Rudin's practice than Kelley's acknowledgment."

The appellate court's decision is marked "not appropriate for publication" and thus under court rules may not be cited.

Editor's note: This is not the first time Mickey Rudin has sued for libel. In the early `80s, he sued Dow Jones & Co. because Barron's referred to him as Frank Sinatra's "mouthpiece." Initially the court ruled that the question of whether "mouthpiece" is defamatory as applied to lawyers was a question of fact requiring a trial.

Rudin v. Dow Jones & Co., Inc., 510 F.Supp. 210 (S.D.N.Y. 1981) (ELR 3:8:3) As a result of the trial however, the court concluded that "mouthpiece" is not defamatory, even as applied to lawyers. Rudin v. Dow Jones & Co., Inc., 557 F.Supp. 535 (S.D.N.Y. 1983) (ELR 5:2:12) While there is no doubt that Mr. Rudin would have preferred to win these cases, rather than lose them, it is perhaps to his credit that judges have found that his outstanding reputation as one of the deans of the entertainment bar is virtually impossible to sully - even by material that would irritate the most thick-skinned member of the bar.

Rudin v. Kelley, 1995 U.S.App.LEXIS 261 (9th Cir. 1995) [ELR 17:4:24]

Newspaper's unauthorized republication of assertedly "racist fable" written by police officer is held to be a fair use rather than an infringement

A "Tale of Two Islands" isn't The New Centurions and Edward Belmore isn't Joseph Wambaugh. But there are similarities. Belmore is a police officer, just as Wambaugh used to be; and Belmore wrote "Tale of Two Islands" just as Wambaugh wrote The New Centurions. Like Wambaugh's novel, Belmore's "Tale of Two Islands" also is fiction; Belmore called it a "fairy tale," a federal judge described it as a "fable." Moreover, and most important, "Tale of Two Islands" is protected by copyright like The New Centurions - but so far at least, not as much so. For if a newspaper had republished the entirety of Wambaugh's book for any reason, without Wambaugh's permission, every judge in the country would have ruled it an infringement. But when a newspaper in Minneapolis republished "Tale of Two Islands" in its entirety, one federal judge held it to be a "fair use."

Belmore is a member of the Police Officers' Federation of Minneapolis. The Federation publishes a monthly newspaper called "Show-Up," and Belmore's "Tale of Two Islands" was published in that paper's September 1993 issue. The very next month, City Pages, a Minneapolis weekly, republished "Tale of Two Islands" in its entirety, bracketed by a one-paragraph introduction and one-paragraph conclusion, without permission. City Pages' editor later explained that he did so, because he felt "Tale of Two Islands" was "racist" and "inappropriate material for a Police Federation publication." No doubt, the editor actually thought so, but there is no exception from copyright protection for "racist" material, so Belmore sued for infringement.

In response to Belmore's suit, City Pages moved for summary judgment, asserting that its copying was a fair use. The judge agreed and has granted the motion.

In its decision dismissing the case, the court performed the four-factor analysis required by section 107 of the Copyright Act. It concluded that the purpose and character of City Pages' use was for criticism, comment or news reporting, and thus this factor favored City Pages. The nature of "Tale of Two Islands" favored Belmore, because it was a creative work (rather than an informational one). The amount used also favored Belmore, because his work had been copied in its entirety; but the court ruled that "this factor does not have significant weight when applied to the unique facts of this case." And the last and most important factor - the effect on the market or value of the copied work - favored City Lights, because Belmore had not demonstrated any actual past or current harm, nor had he provided evidence to show the future marketability of his work had been impaired.

Editor's note: The result in this case is deplorable, though not entirely unprecedented. It permits the fair use defense to swallow whole the legal protection from which it is supposed to be a narrow exception. The precedent that makes this case less than unique is Hustler Magazine v. Moral Majority, 796 F.2d 1148 (9th Cir. 1986) (ELR 9:1:15), where the court held that the fair use doctrine excused Jerry Falwell's unauthorized copying and distribution of the entirety of an outrageous parody of him published in Hustler. The Hustler v. Moral Majority case is an example of what lawyers are talking about when they say that "hard cases make bad law." And this case between Belmore and City Pages is a manifestation of that bad law. According to City Pages' editor, he decided that the "repulsive message" conveyed by "Tale of Two Islands" could not be conveyed by excerpts and that he had to print all of it in order ensure that his readers understood what he was criticizing, in the two paragraphs he wrote himself. For some reason, the court "decline[d] to . . . involve itself in myriad possible methods of excerpting" Belmore's story - though judicious excerpting is all the fair use doctrine should be construed to permit, not wholesale copying. Readers who wonder whether City Pages' editor could have accomplished his purposes by excerpting can take a look at "Tale of Two Islands" for themselves. The court reproduced it - in its entirety - as Appendix A to its decision.

Belmore v. City Pages, Inc., 880 F.Supp. 673, 1995 U.S.Dist.LEXIS 6855 (D.Minn. 1995) [ELR 17:4:25]

Copyright to "Television and Cable Factbook" is valid because arrangement of its information is sufficiently original and creative, and was infringed by "Cable Access" computer database of substantially similar information

"Television and Cable Factbook" is a massive 1350-page directory of information about cable television systems throughout the country. While not great literature, it is a valuable collection of thousands of bits of well-organized data useful to those who do business with cable system operators. The "Factbook" is a printed volume, similar in physical format to a telephone book. "Cable Access" is a computer database product that provides the same sort of information as the "Factbook," but is published by Microdos Data Corp., a company unrelated to Warren. Except for their physical embodiments, the two works are similar - so similar in fact, that Warren sued Microdos for copyright infringement.

A federal district court agreed with Warren and entered summary judgment in its favor, and now an appellate court has agreed as well. The appeals court has held that Warren's copyright to "Television and Cable Factbook" is valid and was infringed by Microdos Data's "Cable Access."

The principal issue in the case was whether the "Factbook" is sufficiently original and creative to be eligible for copyright. The actual information in the directory is of course fact, and as such that information is not copyrightable in and of itself. Warren Publishing, however, claimed a compilation copyright in its organization of those facts, and in particular in its selection of the communities under whose names cable systems were listed. Because there are more communities than those listed in the "Factbook," and because other directory publishers use a different assortment of communities for the presentation of cable system information, a majority of the judges of the appellate court agreed with Warren (and with the district court) that Warren's selection was sufficiently original and creative to merit copyright protection.

One appellate judge dissented, saying this case was not distinguishable from Bellsouth Advertising v. Donnelley, 999 F.2d 1436 (11th Cir. 1993) (en banc), cert. denied, 114 S.Ct. 943 (1994), a case in which the same court had held that an alphabetically arranged "yellow pages" directory was not eligible for copyright.

Microdos also claimed that in compiling its "Cable Access" database, it had not actually copied Warren's "Factbook." Microdos argued that the similarities between the two works were explained by the common subject matter. But the defendant could not explain how certain fictitious cable systems that Warren had included in its "Factbook" as decoys had also appeared in "Cable Access." For that and other reasons, the court concluded that Microdos had in fact copied Warren's directory.

Editor's note: This decision is another in a growing body of case law dealing with copyright protection for factual compilations in the wake of the Supreme Court's 1991 decision in Feist v. Rural Telephone, 499 U.S. 340 (1991) (ELR 12:12:17). While the plaintiff won this case, copyright protection for databases is exceedingly thin in the post-Feist era - and the more comprehensive and complete the database, the thinner its protection. Comprehensive databases ought to be given more legal protection than they now are, particularly (as in this case) against their unauthorized use in the creation of competing databases. To provide such protection, however, Congress will have to amend the Copyright Act or create a stand-alone database law. If the Copyright Clause of the Constitution is deemed insufficient to do so (because comprehensive databases do not involve "creative authorship"), Congress can always rely on its powers under the Commerce Clause.

Warren Publishing, Inc. v. Microdos Data Corp., 52 F.3d 950, 1995 U.S.App.LEXIS 12245 (11th Cir. 1995) [ELR 17:4:25]

Briefly Noted:

Injunctive relief pending arbitration.

A federal district court may issue a preliminary injunction in a breach of contract case, even though the parties have agreed to arbitrate their disputes, in order to preserve the status quo pending the outcome of the arbitration. The Court of Appeals for the Sixth Circuit has so ruled, in a case between the licensor of stories and illustrations for children's books and the publisher of those books. As a result of the dispute between the licensor and the publisher, the publisher had refused to pay the licensor more than $184,000 in accrued royalties. The licensor sought a preliminary injunction requiring the publisher to pay the accrued royalties, but a federal district court denied the injunction on the grounds that the parties had agreed to arbitration. A split among the Circuits exists concerning whether preliminary injunctions may be issued where parties have agreed to arbitrate. The Eighth Circuit has held that they may not; but the First, Second, Third, Fourth, Seventh and Ninth Circuits have held that they may. This case was one of first impression in the Sixth Circuit; and now that Circuit has agreed with the majority and also has held that preliminary injunctions may be issued pending arbitration. The appellate court ordered the district court to issue the preliminary injunction requested by the licensor, because the licensor had established that if the accrued royalties were not immediately paid, it would go out of business before the arbitration could be concluded, and because the appellate court concluded that the licensor was likely to succeed on the merits.

Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1995 U.S.App.LEXIS 9819 (6th Cir. 1995) [ELR 17:4:26]

INTERNATIONAL CASES

French Supreme Court rules that Paris hotel must pay copyright royalties to show CNN in individual hotel rooms

Those who travel internationally look for particular features when deciding which hotels to stay in. Air conditioned guest rooms (not just lobbies) are essential in Paris in the summer. And for many travelers, CNN is essential year-round, even in Paris. The management of Novotel Paris knew this, so it wisely provided the all-news channel to its guests, on television sets located in the hotel's individual rooms. What Novotel Paris did not do, at first, was pay royalties.

Assuming that the hotel thought about the royalty matter at all, it apparently concluded that whatever royalties were necessary were paid by the cable or satellite company that made the CNN signal available to the hotel. Furthermore, it apparently thought that even if French copyright law requires hotels to pay royalties to play CNN in public rooms, like bars or lobbies, no further royalties were due from it, because it made CNN available only in private guest rooms. This at least was the argument that Novotel Paris made when CNN sued it for copyright infringement. The Cour d'Appel (the Court of Appeals) in Paris was persuaded by the argument and ruled in favor of the hotel. But CNN took the case to the Cour de Cassation - the French Supreme Court - and that court has reversed the Cour d'Appel and has ruled in favor of CNN.

The French Supreme Court has held that although each guest occupies an individual private room, the hotel's guests as a whole "form a public to whom the hotel management transmits television programmes in the course of and for the needs of its business," and such transmissions constitute the "performance of televisual works" within the meaning of the French Intellectual Property Code which requires the payment of royalties. The French Supreme Court has therefore remanded the case to the lower court with instructions to enter judgment in favor of CNN.

Editor's note: This decision of the French Supreme Court is more enlightened - from a copyright owner's point of view - than some decisions of American courts in cases involving the same issue. In Columbia Pictures v. Professional Real Estate Investors, 866 F.2d 278 (9th Cir. 1989) (ELR 10:9:13), for example, an American court held that playing a videotape in a hotel guest room does not amount to a public performance - and therefore no royalties are due the movie's copyright owner - because hotel rooms are not public places. Moreover, the American court rejected the argument that a hotel as a whole is open to the public, saying that videocassettes are played only within individual private hotel rooms. The French Supreme Court did not make the same mistake; it saw hotels for what they are: businesses open to the public. Of course, the French Supreme Court "owed one" to CNN's corporate parent, Turner Broadcasting, because a few years ago, it ruled against Turner in the Turner v. Huston case, the one in which the heirs of director John Huston challenged Turner's colorization of "The Asphalt Jungle." In that case, the French Supreme Court ruled that French law, rather than U.S. law, should be applied in deciding the identity of the "author" a movie that had been made in America by Americans pursuant to contracts entered into in America. (ELR 13:3:3) (That decision ultimately led to a ruling that the movie's colorization violated the French moral rights of Huston's heirs. (ELR 16:10:3)) When the French Supreme Court's ruled that French rather than American law should be applied in "The Asphalt Jungle" case, it disregarded earlier French precedent holding that the law to be applied in such cases is the law of the country where a movie is made or where contracts concerning its production are entered into. Rowe v. Walt Disney Productions (Paris Ct.App. 1986) (unpublished) France is a civil law (rather than common law) country, and precedent does not have the same significance there as it does in the U.S. Indeed, the decision of the French Supreme Court in this CNN case cites no case authority whatsoever, for any point, and the entire decision is only four paragraphs.

Cable News Network v. Novotel Paris-Les Halles SA, Cour de Cassation, [1994] ECC 530 (Available in LEXIS Eurcom Library, Cases File) [ELR 17:4:27]

British court exercises jurisdiction over Danish company in copyright infringement case involving sale of Sam Cooke recordings in U.K. and Ireland

The U.K. Court of Appeal has held that British courts have jurisdiction to hear a copyright infringement case against a Danish company, even though the only act the defendant is alleged to have committed was done by it in Denmark. The defendant, a company named Charly, granted the Music Collection International (an English company) a license to make and distribute Sam Cooke recordings in the United Kingdom and Ireland. But according to the plaintiff in the case, ABKCO Music & Records Inc., it - ABKCO - owns the copyrights to Cooke's recordings, not Charly.

The precise wording of the U.K. copyright law - The Copyright, Designs and Patents Act of 1988 - supports the result reached by the court. It does, because although section 16(1) of that Act gives copyright owners the exclusive right to copy and distribute their works "in the United Kingdom," section 16(2) of the Act makes it an infringement to authorize anyone to copy or distribute works in the U.K. without a license, regardless of where the act of authorization takes place. That is, the Act itself contains a geographic limitation clause ("in the

United Kingdom") with respect to making copies and distributing them, but it does not contain such a clause with respect to improper authorizations.

Charly argued that as a general rule U.K. statutes do not apply to the acts of foreigners outside the U.K., and that this general rule should be applied in this case as well. It also argued that copyright law "is strictly territorial in its application," and this specific rule should be applied here too. But the appeals court disagreed. It said that it could see no reason why the act of authorization had to take place in the U.K., so long as what was authorized took place there. It explained "that a territorial limitation on the act of authorising would lead to anomalies. Anyone contemplating the grant of a licence to do an act restricted by copyright would be able to avoid liability simply by having the document executed abroad." As a result, it concluded "that, on its proper construction, an authorisation given outside the United

Kingdom to another to do a restricted act in the United Kingdom is an authorisation to which section 16(2) extends. The scope of the tort has a sufficient territorial limitation because the restricted act which is authorised has to be done within the United Kingdom."

Editor's note: The question of which country's courts have jurisdiction to hear cases involving international copyright infringement is one that has arisen in the United States as well, on several occasions and with growing frequency. That question is the subject of the Legal Affairs article beginning at page 3 of this issue of the Entertainment Law Reporter.

ABKCO Music & Records Inc. v. Music Collection International Ltd., U.K. Court of Appeal (Civil Division) (1994) (available in LEXIS Eurcom Library, Cases File) [ELR 17:4:28]

IN THE NEWS

Art Buchwald and Paramount Pictures settle "Coming to America" case; trial court judgment is vacated and appellate court will not rule on whether "net profits" clause is "unconscionable"

And so it ends . . . not with a bang, but a whimper. Columnist Art Buchwald and Paramount Pictures have settled their long-pending case over who authored the story on which the movie "Coming to America" was based, and over the question of whether Paramount's "net profits" clause was "unconscionable." The settlement came to light when the California Court of Appeal issued a brief one-paragraph order on August 23, 1995 in which it vacated the judgment that had been entered against Paramount and remanded the action to the trial court with directions to "set aside the judgment and dismiss the action with prejudice pursuant to the parties' stipulation and settlement."

The terms of the settlement were not revealed in the appellate court's order. The New York Times has reported that Buchwald and his co-plaintiff Alain Bernheim are "being paid more than $1 million," and the Los Angeles Times has reported they are being paid $825,000. The judgment was for $900,000 plus court costs of approximately $120,000.

"Coming to America" starred Eddie Murphy in the role of an African prince who comes to the United States to look for a bride who will love him for himself, not because he is rich and will someday be king. The movie's script was written by Barry Blaustein and David Sheffield based on a story by Eddie Murphy. Several years before the movie was made, Paramount had acquired the movie rights to a two-and-half-page treatment by Art Buchwald which briefly sketched a story about a despotic African king who comes to the United States to negotiate a trade of his nation's oil for American weapons. Paramount had spent considerable time and money attempting to develop Buchwald's treatment into a script for an Eddie Murphy movie, but the studio eventually put the project into turnaround. Some time thereafter, Murphy himself pitched what he said was his idea for a movie about an African prince in search of true love and an American wife. It was that pitch that eventually ripened into "Coming to America."

Buchwald's contract with Paramount entitled him to be paid additional money (beyond what he was paid when he sold Paramount the movie rights to his treatment) if the studio made a movie "based upon" his treatment. The contract also provided that he was to receive a small percentage of any such movie's "net profits" as that term was defined by the contract itself. Buchwald's producer, Alain Bernheim, entered into a producing contract with Paramount that also entitled him to a percentage of the movie's "net profits," if Paramount made a movie "based upon" Buchwald's treatment.

When Buchwald and Bernheim saw "Coming to America," they concluded that it had been based on the Buchwald treatment, but Paramount thought otherwise. A breach of contract lawsuit resulted.

California Superior Court Judge Harvey Schneider heard the case in three distinct phases. The first phase focused on whether the movie was in fact "based upon" Buchwald's treatment. In January 1990, Judge Schneider concluded that it was. (ELR 11:9:9) An accounting of "net profits" showed that "Coming to America" had not achieved "net profits" as that term was defined in Paramount's contracts with Buchwald and Bernheim. Thus in phase two of the case, Judge Schneider heard their contention that the "net profits" clause was unconscionable. In December 1990, he ruled that it was. (ELR 12:8:3) As a result, Judge Schneider set aside the net profits clause, and in phase three he sought an alternate measure of damages entirely. In March 1992, that phase resulted in an award of $150,000 to Buchwald and $750,000 to Bernheim. (ELR 13:11:3)

Paramount appealed. It contended that Judge Schneider had used an erroneous legal standard in concluding that "Coming to America" had been "based upon" the Buchwald treatment, and it argued that he had erred in concluding that the "net profits" clause was "unconscionable."

Editor's note: At the time the case was settled, the appeal had been fully briefed though oral arguments had not yet been held. Because the judgment has been "vacated," it should have no collateral estoppel effect on Paramount, even if another net profit participant should mount an attack on the Paramount net profits clause similar to the one made by Buchwald and Bernheim.

Moreover, the California Superior Court is a trial level court, and therefore Judge Schneider's "unconscionability" ruling has no precedential weight and should have no influence in other cases involving the net profits clauses used by Paramount or other studios. Indeed, in a subsequent case that challenged the conscionability of Warner Bros.' net profits clause, California Superior Court Judge David Yaffe - whose courtroom is in the same building as Judge Schneider's - ruled that producers Benjamin Melniker and Michael Uslan had not proved that the net profits clause in their contracts for the "Batman" movies was unconscionable. (ELR 16:4:3) In the "Batman" case, Judge Yaffe rejected arguments made by Melniker and Uslan that were similar to those made by Buchwald and Bernheim in the "Coming to America" case, but Judge Yaffe did not cite or even allude to Judge Schneider's "Coming to America" decision. (Disclosure: I was co-counsel for Paramount

Pictures during the trial court proceedings in the Buchwald case. Those interested in the views of Buchwald's lawyer Pierce O'Donnell will find them in a book he co-authored with Dennis McDougal entitled Fatal Subtraction: The Inside Story of Buchwald v. Paramount.) [Sept. 1995] [ELR 17:4:29]

Customs Service makes first seizures of bootleg CDs under new anti-bootlegging law

The U.S. Customs Service has made its first seizures of recordings pursuant to the criminal remedies provisions of the new federal anti-bootlegging law enacted last December. (See, Lionel S. Sobel, "Bootleggers Beware," ELR 17:2:6). The seizures were carried out by personnel from the Fraud Division of the New York City office of the Customs Service with the assistance of representatives of the Recording Industry Association of America.

The RIAA has announced that Customs agents intercepted some 2,900 allegedly bootlegged CDs at JFK Airport on their way from Luxembourg to a customer in the U.S. and that another 5,500 allegedly unauthorized CDs, most of them bootlegged, were confiscated from a company in New York City.

The seized CDs were recordings by several different performers and groups including Madonna, Prince, Bruce Springsteen, The Beatles, The Doors, Nirvana, Pearl Jam, and The Rolling Stones.

The RIAA is the Washington-based trade association whose member companies make and distribute approximately 90% of the recordings sold in the United States. It operates a toll-free hot line, 1-800- BAD-BEAT, which can be called to report suspected music piracy and bootlegging. Steven D'Onofrio is the RIAA's

Executive Vice President and Director of Anti-Piracy. [Sept. 1995] [ELR 17:4:30]

WASHINGTON MONITOR

Senate passes bill granting digital performance rights to sound recordings

The United States Senate has passed a bill that would grant digital performance rights to sound recordings. As the Copyright Act now reads, the owners of copyrights to musical compositions (and other works) are given the exclusive right to publicly perform their works, but the owners of copyrights to sound recordings are not. Thus, this bill, S. 227, would make a significant change in the law, though digital performances are narrowly defined and thus even if the bill becomes law, the newly-created right will be much narrower than the existing right enjoyed by composers and songwriters.

A companion bill, H.R. 1506, is pending in the House of Representatives. The language of both bills is the result of an industry-negotiated compromise, and thus passage of the House version is likely. If and when the digital performance bill is passed by the House and becomes law, an analysis of its very detailed and complex provisions will be published in the Entertainment Law Reporter.

Digital Performance Right in Sound Recordings, S. 227, Congressional Record S11945 (Aug. 8, 1995) [ELR 17:4:31]

FCC proposes changes to its rules governing television network/affiliate programming practices; if adopted, changes will permit networks to exert greater influence

The television network business is in the midst of fundamental change. For years, the big three networks - ABC, CBS and NBC - had television viewers virtually to themselves. But that was before the birth of cable television, homevideo, and the Fox network. Now even more changes have come round the corner. Time Warner and Paramount have gotten into the network business. Disney has acquired ABC. Westinghouse is acquiring CBS. And General Electric's willingness to sell NBC is a topic of frequent speculation.

A television network is much more than a group of television stations under common ownership. Indeed, most network affiliates are stations owned by companies that are entirely separate and distinct from the companies that own the networks. The relationship between an independently owned station and its network is, at bottom, a contractual relationship. But for more than 50 years, the terms of those contracts have been heavily regulated by the Federal Communications Commission.

The FCC's rules concerning network/affiliate relations were adopted when AM radio dominated the broadcasting industry and television was in its infancy. The rules were intended to remove barriers that would inhibit the development of new networks, and to ensure that broadcasters retained sufficient control over their stations (despite their network affiliations) to fulfill their obligations to operate in the "public interest." Now, however, given the evolving changes in the industry, the FCC wonders whether such rules are "necessary or appropriately tailored to achieve these goals" or whether instead they "increase the costs of network affiliation without corresponding benefits."

The FCC is now in the midst of a comprehensive review of all of its rules concerning network television, including those that regulate network/affiliate relations with respect to television programming practices. As part of that review, the FCC has proposed to eliminate or modify five of these rules: (1) the right to reject rule; (2) the time option rule; (3) the exclusive affiliation rule; (4) the dual network rule; and (5) the network territorial exclusivity rule.

The "right to reject rule" provides that affiliation arrangements between a broadcast network and a broadcast licensee generally must permit the licensee to reject programming provided by the network. The FCC intends to retain this rule, because it is "inextricably linked" to a licensee's obligation to retain control over its programming and to program in the public interest.

However, the FCC has proposed to modify the rule to make it clear that the right to reject programming may not be invoked by stations based solely on financial considerations.

The "time option rule" prohibits arrangements by which a network holds an option to use specified amounts of an affiliate's broadcast time without actually committing to use that time. The FCC has proposed to eliminate that prohibition and to adopt in its place a requirement that networks give affiliates a particular amount of advance notice if they are going to use an optioned time slot. The FCC has pointed out that time optioning may be valuable to a new network, because a new network may want to book a time slot with enough stations so that it can raise funding to develop a programming concept. It also may want to retain the ability to opt out of those time slots if the program is unsuccessful. On the other hand, the FCC believes that unrestricted time optioning could interfere with an affiliate's long-range planning, and consequently, the FCC has proposed the "advance notice" requirement. Alternatively, the FCC has asked whether the rule should be repealed entirely so that any advance-notice issues would be left for stations and networks to decide for themselves.

The "exclusive affiliation rule" prohibits arrangements that forbid an affiliate from broadcasting the programming of another network. The FCC has proposed to eliminate this rule, at least in large markets, based on the potential economic benefits of exclusive affiliation and based on the fact that the rule no longer appears to be necessary for the development of new networks given the increase in the number of broadcast stations. With respect to small markets, however, the FCC is seeking comment on whether permitting exclusive affiliations might prevent the development of new networks in those markets.

The "dual network rule" generally prevents a single company from owning more than one broadcast television network. This rule was originally adopted to prevent one company from acquiring market power and blocking the development of new networks. The FCC is seeking comment on the continuing relevance of this rule in light of changes in the video marketplace, including the advent of digital television, though the FCC has expressed concern that a merger of two of the existing major networks could lead to excessive concentration of market power.

The "network territorial exclusivity rule" prohibits a station from entering into an agreement with a network that prevents another station located in the same community from broadcasting those network programs not taken by the network affiliate, or that prevents another station located in a different community from broadcasting any of the network's programs. The FCC has proposed to eliminate the "same community" prohibition, but to retain the "different community" prohibition while modifying its geographic scope. The FCC has concluded that the "same community" prohibition appears to provide little public benefit and that eliminating it (so that affiliates could obtain exclusivity even as to programs they choose not to carry) could be valuable to networks and affiliates. With respect to the "different community" prohibition, however, the FCC believes that its elimination would have no efficiency benefits and could deprive a segment of the public of a network's programming. The FCC is seeking comment, however, as to the relative costs and benefits of expanding the permissible area for "same community" exclusivity from a station's community of license to some larger area.

Editor's note: Fox went into the television network business just as the audience share of the big three networks began to decline, and many people wondered how Fox could make a go of it in such a climate. Then Time Warner and Paramount got into the network business, and it looked at first as though they too may have joined a club of dying dinosaurs. But more things of significance were happening than declining audience share - some of them regulatory. The most significant of these was the FCC's elimination of its Financial Interest and Syndication Rules as of November 1995. (ELR 16:8:11) The elimination of the "fyn-syn" rules will mean two things. It will mean that networks will be able to produce more of their programming in-house, thereby reducing the potential market for program producers (including Warner Bros. and Paramount); and it will mean that program producers will legally be permitted to get into the television network business without having to abandon their producing activities. Thus, it makes sense for producers to own their own networks - if for no other reason than to assure an outlet for what they produce. It also makes sense for another reason. The FCC is changing its rules (or at least is proposing to do so) in ways that could make the television network business a more profitable one to be in, from the point of view of network owners. For example, the FCC also is considering whether to modify or repeal rules that forbid networks from influencing their affiliates' advertising rates during non-network broadcast time; and the FCC is considering whether to modify or repeal a rule forbidding networks from acting as advertising representatives on behalf of their affiliates for the sale of non-network time. Those changes, along with the FCC's proposed changes in its rules governing network/affiliate programming practices, will permit networks to influence and coordinate the activities of their affiliates to a greater degree than has ever before been possible. If the influence and coordination that comes from network headquarters turns out to be wise, greater profits ought to result.

In the Matter of Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, MM Docket No. 95-92, Federal Communications Commission, 1995 FCC LEXIS 3979 [ELR 17:4:31]

FCC proposes more specific rules to improve children's television

The Federal Communications Commission has proposed changes to its rules concerning children's television programming - changes designed to improve its quality. Whether these changes will actually do so is anybody's guess, because the difficulty of the task is reflected by how long the FCC and Congress have been attempting to achieve this goal. The very first article in the very first issue of the Entertainment Law Reporter - an issue published 17 years ago - was an article reporting that the FCC had reactivated an inquiry into children's television that was seven years old at that time. (ELR Preview:1) Since then, Congress has enacted the Children's Television Act of 1990, in response to which the FCC adopted new rules. (ELR 13:3:20). And amendments to those rules have been the subject of FCC consideration for a couple of years already. (ELR 15:1:26)

The FCC is now proposing to make certain changes to it rules - changes which are intended to "facilitate licensee compliance" with the Children's Television Act of 1990 and "to implement the Act more effectively." In developing the proposed changes, the FCC has followed three principles: (1) judgments of the quality of a licensee's programming, educational or otherwise, are best made by the audience, not the federal government; (2) the FCC's rules and processes should be as clear, simple, and fair as possible; and (3) broadcasters should be guided by market forces to the greatest extent possible in determining whether they meet their programming obligations.

To achieve the first of these principles, the FCC has proposed measures designed to improve the flow of programming information so that the public, particularly parents, will be better able to judge the quality of a licensee's programming and act on that judgment. These measures include those requiring licensees to publicize the name and availability of a contact person at the station who is responsible for coordinating public reaction to the station's compliance efforts; requiring stations to identify programs as educational and informational at the time they are aired and provide such identifying information to publishers of programming guides; requiring stations to publicize the availability of their children's programming reports, perhaps by announcing their existence and location periodically over the air; and requiring that a station's children's programming reports be easily accessible by having them placed in their own separate file at the same location as the station's public inspection file.

To achieve the second of these principles, the FCC has proposed to create a definition of programming "specifically designed" to serve the educational and informational needs of children. Programming "specifically designed" for children has not previously been defined although the Children's Television Act requires each licensee to provide such programming. The existing FCC rule defines only "educational and informational" and has been criticized as ambiguous. Under the new proposed definition, such programming would meet the following requirements: (1) the program would be specifically designed to meet the educational and informational needs of children ages 16 and under; (2) the educational objective of the program and the target child audience would be specified in writing in the licensee's required children's programming report and in any submission it makes to the FCC; (3) the program would be aired between the hours of 6 AM and 11 PM; (4) the program would be regularly scheduled; (5) the program would be of substantial length (e.g., 15 or 30 minutes long); and (6) the program would be identified as educational children's programming at the time it is aired, and instructions for listing it as educational programming would be provided by the licensee to program guides.

While increasing the flow of information about a station's children's programming efforts, and a clearer definition "specifically designed" programming, will promote the goals of the Children's Television Act more effectively, the FCC also stated that it was concerned that these efforts may not be enough to serve the educational and informational needs of children and bring about the kind of measurable increase in such programming sought by Congress. Thus, the FCC also has proposed to adopt one of the following three options: (1) establishing monitoring procedures for a specified period of time; (2) establishing a "safe harbor" quantitative processing guideline; or (3) establishing a programming standard.

To achieve the third of these principles, the FCC has proposed a "program sponsorship" concept under which the FCC would permit a broadcaster to meet the processing guideline or programming standard by airing a certain number of hours of children's programming on its own station or by sponsoring a portion of those hours on another station in the market.

FCC Notice of Proposed Rulemaking re Children's Television, FCC 95-143 , MM Docket No. 93-48, 1995 FCC LEXIS 2250 [ELR 17:4:33]

DEPARTMENTS

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The Entertainment Law Review, published by Sweet & Maxwell Ltd, FREEPOST, Andover, Hants SP10 5BR, United Kingdom, has published Volume 6, Issue 5 with the following articles:

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[ELR 17:4:34]