BUSINESS AFFAIRS

"Presented by BMW" The Next Wave for Plugging the GAP: Investment and Ownership by Advertisers

by Schuyler Moore*

As though film financing weren't tough enough, the recent bankruptcy of Kirch in Germany and turmoil at Canal+ in France are further barometers of the turmoil roiling the foreign marketplace, expanding the shortfall between a film's budget and its pre-sales (the "gap") from a chasm to a canyon. The challenging goal of film financing is to plug that gap.

Through the years, the quest to achieve this goal has led to success only after many twists and turns, historical anomalies, and dumb luck, including chasing U.S. public equity, foreign banks, Japanese financing, insurance-backed financing, and split-rights transactions. For the last several years, the quest has lead squarely to the front door of Germany for two reasons:

The first falls into the dumb luck category. Several years ago, Germany lifted certain restrictions on the Neuer Markt - the German equivalent of our NASDAQ - and German media companies became the investors' darlings. These media companies, flush with cash, bid up film prices so high - it was not uncommon to sell Germany for 20-25% of a budget - that gaps all but disappeared.

The problem was that this wild over-spending could not, and did not, last. Many German media companies met their demise, prices fell far and fast, and it became hard to sell German rights for more than 7% of the budget. And that was before the Kirch bankruptcy.

The next German gap plugger was tax shelter funds, which fall into the historical anomaly category. The tax shelters are based on a quirk of German tax law that permits the immediate deduction for the cost of creating "intangible property" (which includes films) regardless of where it is produced. Put these ingredients together, and you have several billion dollars from German tax shelter funds plugging the gap on a whole lot of films.

However, the market for these funds is demonstrably slowing down due to a confluence of factors, including: (a) fear from the fall out among the Neuer Markt media companies; (b) failure of some funds to live up to expectations (and projections); (c) political heat caused by funding billions of dollars of production outside of Germany; and (d) a confusing welter of competition. Again, the Kirch bankruptcy is not going to help marketing efforts.

So what's next? What will be the next gap filler? Well, I would like to make a prediction (or perhaps a suggestion); the next gap filler will come from investment and ownership by advertisers. All the elements are lined up for this next step, and it follows logically from what has occurred to date for television and the Internet.

First, let's look at television. If we go back several decades, companies such as Proctor & Gamble sponsored and paid for entire television series. They did this for several reasons, including: (a) giving them the ability to control the content of the shows, thus targeting the shows to their specific audience; and (b) obtaining prominent brand identification with the shows, including a "Presented By" lead-in credit and advertising on the shows.

Fast forward several decades, and these same motivations led Hallmark to sponsor a number of television specials and mini-series. For Hallmark, this activity has escalated to the point where it is co-funding a 6-hour mini-series based on the best selling children's book Dinotopia, with a budget just under $100 million. Other companies are following suit, as Johnson & Johnson recently announced a series of made-for-television films that it will finance and sponsor for TNN, the Turner cable network, and in April Warner Brothers Network launched a new cable series that is produced in association with Ford and that is called "No Boundaries," which just happens to be the advertising slogan for Ford's line of trucks.

In television, the line between advertising and programming continues to blur. For example, last August, Hallmark established its own cable channel, and it is now doing a cross-promotional effort with its retail card stores for the upcoming mini-series "Stranded." The synergy is best summed up in a recent quote by Hallmark CEO Donald Hall: "Our independent retailers benefit from the powerful exposure of national cable television programming. The Hallmark Channel benefits by reaching the millions of consumers who visit Hallmark Gold Crown Stores across the country."

In another twist, The Gap is hiring talented motion picture directors, such as Cameron Crowe, the Coen Brothers, and Roman Coppola, to direct commercials as part of The Gap's new ad campaign. The ads are described as "mini-movies" staring hip actors.

The same trends are shaping the Internet. For example, BMW recently spent $12 million financing a series of brilliant, creative short-films (each portraying BMWs) that it presents for free on an Internet site. As with The Gap commercials, these short films are directed by talented motion picture directors. BMW reported receiving over 20 million hits to this site, which BMW views as a great marketing success for its investment.

The large advertisers each spend hundreds of millions of dollars per year advertising their products, and they know the value of being associated with theatrical films. They pay millions per year for product placement and far more for associated advertising for a premier film.

How much is at stake? For the next James Bond film alone, the estimate for combined product placement and marketing support is estimated at $100 million. Miramax is said to be negotiating a multi-year deal with a major brewery to cover a number of future films. Advertisers often use this product placement as the launch pad for new products. For example, Mercedes successfully launched its SUV vehicle by prominent placement within "Jurassic Park: The Lost

World," and Mercedes has a $10 million ad campaign that will coincide with the release of "Men in Black II," for which Mercedes has paid substantial product placement fees for the film to include new model Mercedes. The next James Bond film will feature a new $228,000 Aston Martin Vanquish, and "Matrix II" will feature two new vehicles, the Cadillac CTS and the Cadillac Escalade EXT.

Product placement alone, however, is not fully satisfactory to advertisers for a number of reasons:

First and foremost, they can't control the exact contours of whether and how their product will be used. This issue is left to the creative choices of the studio, producer, or director, who do not have the advertisers' best interests at heart. In a worst case, the product placement gets left on the cutting room floor.

Next, advertisers cannot control the content of the film itself. They are often chagrined to find that the final film contains more graphic violence, sex, or whatever than they contemplated, leaving them concerned with the possible negative association to their product. This same concern leads advertisers to pull their ads from television shows; witness the advertising defections from the popular new television show "The Shield."

If advertisers invested in and owned the films, they would have control over the creative aspects of the film itself and, specifically, the use of their products. This alone is a compelling reason for advertisers to take this step. But there are even more compelling reasons:

All the money in the world spent for product placement and associated advertising is just that - money spent. While the advertisers hope that product sales will increase, there is no other source for recoupment of this expenditure. If advertisers instead invest in a film, they have a source for recoupment of their investment, plus profits if the film works. This is undoubtedly what drives the Hallmark mini-series model. Hallmark sells its mini-series worldwide and no doubt hopes to either break even or make a profit from these sales.

By investing in a film, the advertiser could be extremely sure that the film was targeted to the exact audience that the advertiser wanted. Different genre of films have very specific demographics, which is the stuff advertiser dreams are made of. The average age of viewers for "Ace Ventura" was between 8 and 14 years old. "The Fast and the Furious" and "The Scorpion King" is targeted to a teen audience. Do you want a film aimed at the 20-30 year old female market? Just make it! There are no guarantees of success of the film itself, but you could guarantee that the film will be aimed at your target market.

A little money goes a long way. Advertisers do not need to finance 100% of a budget; they need only plug the gap, which might be perhaps 20% of the budget of a film. For example, a $20 million investment might be leveraged to fund $100 million of production costs, either in one blockbuster or over a number of moderately budgeted films.

Let's say that BMW wants to finance four films targeted to males over age 20, so it creates a series of four adult action films (a la "James Bond" or "Spy Game") where the lead characters roar around in the latest from BMW, a convertible SUV. The aggregate production budget for the films is $100 million, and BMW is able to cover 80% of the budgets with pre-sales to U.S. studios and foreign distributors. BMW invests the gap of $20 million and is the owner/producer of the films. As such, BMW has creative control over the films, including exactly how the new convertible SUV is portrayed.

Of course, BMW will hire the best directors it can (just as it did for its short Internet films), who will have day-to-day creative discretion, but BMW will be overseeing the process, just as a studio does. The main titles and paid advertising for all the films would have a "Presented By BMW" credit and the BMW logo.

This arrangement would give BMW the opportunity to prominently display its new product, advertise its trade name, recoup its investment, and share in profits. Not bad. If only one of the four films is successful, BMW may recoup its entire investment and make a profit. Even if all four films fail miserably, BMW ends up paying $20 million for loads of advertising, and no one is going to think less of BMW for lack of the films' success; it is the films that didn't work, not the BMWs.

Another development that may accelerate this process is the recent termination of the franchise agreement between the Screen Actors Guild and the Association of Talent Agents. While the dust hasn't settled yet, it would not be surprising to see one of the large advertising agencies (or indeed, advertisers) taking a large equity position in a talent agency in the not-too-distant future. What some see as potential conflict may turn out to be potential opportunity for all parties, particularly actors. The talent agencies could act as the catalyst in marrying talent and advertisers that follow the model suggested here. This can only lead to an increase in film production, which is good for everyone (except bankruptcy lawyers). It is certainly preferable to the shrinkage in film production that currently afflicts us due to widening gaps. The future may be that The Gap will plug the gap.

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[ELR 23:12:4]

IN THE NEWS

SAG arbitration award requiring Kelsey Grammer to pay The Artists Agency more than $2 million in commissions is affirmed by federal appeals court, even though representation agreement violated SAG rules, because evidence supported arbitrators' finding that SAG "waived the variances" after determining that agreement was in Grammer's best interests

Actor Kelsey Grammer will have to pay The Artists Agency more than $2 million in back commissions, as a result of a SAG arbitration award that was confirmed by a federal court order that in turn has been affirmed by the Court of Appeals.

The Artists Agency represented Grammer from the 1980s to 1998, when its most recent contract with him expired. The validity of that contract, and the term of the one that preceded it, were the primary issues determined in the case.

Grammer claimed that his most recent contract with The Artists Agency was completely invalid, and that their prior contract ended in January 1995. The Artists Agency contended that their most recent contract was perfectly valid, and that the prior one didn't end until May 1996. The commissions in dispute were those due in connection with Grammer's earnings from work done pursuant to acting and consulting contracts entered into during the term of their most recent contract and during the period from January 1995 to May 1996.

The reason the dispute arose is that Grammer became dissatisfied with The Artists Agency because it hadn't gotten him roles in theatrical feature films. Grammer wanted the right to hire another talent agency for feature film work. In January 1995 - almost a year and a half before his film and television contract with The Artists Agency was due to expire - The Artists Agency agreed that he could hire another agency for film representation, if he renewed its contract with him for television representation for an additional two years, to 1998.

The renewal agreement was signed in January 1995, and post-dated to May 1996 when their existing contract expired. The Artists Agency submitted the renewal agreement to SAG, as required by SAG rules. Initially, SAG rejected the contract, apparently because it violated certain SAG rules. But after The Artists Agency explained to SAG how and why the agreement came about, SAG was satisfied that it was in Grammer's best interests, and SAG accepted the renewal agreement.

Grammer nevertheless terminated The Artists Agency completely in 1996 and stopped paying commissions in 1998. The Artists Agency initiated a SAG arbitration to collect the commissions it alleged were still due; and it won.

There was no dispute that the 1995 agreement "was at variance from [SAG] Rule 16(g)" in at least three respects. The rule requires representation agreements to take effect on the date they are signed; it permits renewals to be signed only during the last third of a prior agreement; and it requires agreements to be filed with SAG within 15 days of being signed. Grammer argued that the agreement violated the rule in a fourth way too: by exceeding the Rule's three-year limit on duration.

Nevertheless, the arbitrators determined that SAG "had de facto granted a waiver" of these provisions. And their award was confirmed by a federal District Court.

On appeal, Grammer renewed his argument that the 1995 agreement was invalid because it violated the terms of Rule 16(g). Grammer's strongest argument may have been that Rule 16(g) itself provides that its terms may not be waived "except with the written consent of SAG." In his case, SAG had not consented in writing. This means, Grammer asserted, that the arbitrators' decision was "patently inconsistent with the plain language of Rule 16(g)," and should have been vacated for that reason.

However, in a decision by Judge Wallace Tashima, the Court of Appeals disagreed with Grammer. The arbitrators had characterized Rule 16(g) as "sometimes contradictory," and the Court of Appeals concurred. While one provision of the rule does require waivers to be in writing, another provision says that "if

SAG fails to indicate its disapproval of [contract] modifications within ten days from the date of filing, it shall be deemed approved." Moreover, the arbitrators heard testimony that "SAG occasionally overlooks Rule 16(g) violations of the exact type asserted by Grammer, without the use of formal waivers."

For these reasons, the Court of Appeals held that the arbitrators' conclusion that "SAG had granted a waiver . . . easily meets the deferential standard of review that this court must apply." For the same reason, the appellate court concluded that it was reasonable for the arbitrators to conclude that Grammer's prior contract with The Artists Agency remained valid between January 1995 and May 1996, even though he had signed a new contract in January 1995.

Finally, the appellate court upheld the arbitrators' decision that The Artists Agency was entitled to a commission on a $36,000 "consulting fee" Grammer earned while working on "Frasier." Rule 16(g) applies "to the representation of actors by agents in connection with their employment . . . in the television. . . . " And the court agreed that it was reasonable for the arbitrators to determine that Grammer's consulting services were "in connection with" his television employment.

The Artists Agency was represented by Marcia J. Harris and Andrew F. Kim of Alschuler Grossman Stein & Kahan in Los Angeles. Grammer was represented by Martin D. Singer and Lynda B. Goldman of Lavely & Singer in Los Angeles. The William Morris Agency (Grammer's new agents, and also a party to the case for reasons not revealed in the court's opinion) was represented by William T. Rintala of Rintala Smoot Jaenicke & Rees in Los Angeles.

Grammer v. The Artists Agency, Case No. 00-56994 (9th Cir., April 29, 2002), available at www.ca9.uscourts.gov [ELR 23:12:7]

Federal court upholds constitutionality of DMCA anti-trafficking provisions; denies motion to dismiss prosecution against company that sells software for stripping use restrictions from Adobe eBooks

Federal District Judge Ronald Whyte has rejected a multi-pronged attack on the constitutionality of the "anti-trafficking" provisions of the Digital Millennium Copyright Act, and has ruled they are constitutional in every respect. The DMCA's "anti-trafficking" provisions are those that prohibit the distribution of anything - including software -

"primarily designed" to circumvent technological measures that protect the rights of copyright owners.

Judge Whyte's ruling came in response to a motion to dismiss the prosecution of ElcomSoft, a Russian software company, for selling software that enables users to strip user restrictions imposed by the publishers of Adobe eBooks. The restrictions available to publishers who use Adobe eBook technology include the ability to prevent unauthorized copying, distribution and printing. Thus, ElcomSoft's program, which is called Advanced eBook Processor, enables its users to infringe the copyrights to eBooks by making and distributing unauthorized copies.

The United States Government is prosecuting ElcomSoft for violating the "anti-trafficking" provisions by selling Advanced eBook Processor in the United States. In a motion supported by the Electronic Frontier Foundation, ElcomSoft argued that the prosecution should be dismissed because, they argued, the "anti-trafficking" provisions of the DMCA are unconstitutional in several respects.

In a thoroughly-analyzed and assertively-written decision, Judge Whyte has denied the motion to dismiss. He ruled that the DMCA bans the distribution of "all" circumvention tools - not simply those used intended for infringing uses - and thus the Act is not unconstitutionally vague. The judge therefore rejected ElcomSoft's argument that the Act is so vague it denies Fifth Amendment due process.

Judge Whyte also rejected ElcomSoft's First Amendment free speech attack on the "anti-trafficking" provisions. He found that the government's interests in banning the distribution of circumvention tools "are both legitimate and substantial." And he found that those provisions do not burden more speech than necessary.

He also held that even if the Act prevents eBook users from making back-up copies or shifting eBooks from one computer to another, there is no First Amendment right to do either. Thus, the Act is not so overbroad as to impair users' First Amendment rights, the judge concluded.

ElcomSoft also argued that the Act is unconstitutionally vague, because it bans only those things that are "primarily designed" for certain uses. That phrase is defined in the Act, Judge Whyte noted. And when those definitions are taken into account, the law "is sufficiently clear to withstand a vagueness attack."

Finally, the judge rejected ElcomSoft's argument that Congress did not have the Constitutional authority to enact the DMCA. He ruled that "Congress plainly has the power to enact the DMCA under the Commerce Clause." And he concluded that "Congress did not exceed its constitutional authority . . . ," because the anti-trafficking provisions are "not irreconcilably inconsistent" with the Constitution's Intellectual Property Clause.

Two weeks after denying ElcomSoft's motion to dismiss the prosecution, Judge Whyte scheduled the trial to begin on August 26, 2002.

The United States represented by Scott Frewing, Assistant United States Attorney in San Jose. ElcomSoft was represented by Joseph M. Burton and Stephen H. Sutro of Duane Morris in San Francisco.

United States v. Elcom Ltd., Case No. CR 01-20138 RMW (N.D.Cal., May 5, 2002), available at www.eff.org [ELR 23:12:8]

WASHINGTON MONITOR

Librarian of Congress rejects Copyright Royalty Arbitration Panel's recommended statutory license fees for Internet transmissions of music recordings

At the recommendation of the Register of Copyrights, the Librarian of Congress has rejected the statutory license fees that were recommended by a Copyright Arbitration Royalty Panel for Internet transmissions of music recordings.

The Panel had recommended that webcasters pay royalties of $1.40 per 1000 listeners per song, and radio stations that retransmit their broacasts on the Internet pay $.70 per 1000 listeners per song (ELR 23:10:12). These royalties are those due record companies and recording artists, and are payable in addition to other royalties that are due to songwriters and music publishers.

Both sides - the record companies and artists, and the webcasters and broadcasters - appealed the CARP's recommendations to the Librarian of Congress, who by law had 90 days to review that recommendation and make a final decision on the royalty and its terms.

The Librarian's decision to reject the CARP-recommended royalties was made in a very brief order that simply read: "The Register of Copyrights recommends, and the Librarian agrees, that the CARP's determination must be rejected. A final decision will be issued no later than June 20, 2002."

It is not apparent from the Librarian's order whether he rejected the CARP's recommended royalties because they were too low (as the record companies argued) or too high (as the webcasters argued).

In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2 (May 21, 2002), available at www.copyright.gov/carp/webcasting-rates-order.html [ELR 23:12:9]

INTERNATIONAL DEVELOPMENTS

British Court of Appeal upholds judgment that World Wrestling Federation breached 1994 contract with World Wildlife Fund by using "WWF" initials on its website and elsewhere

The World Wrestling Federation is now known as World Wrestling Entertainment, so its new initials are "WWE" rather than "WWF," and its website is now www.wwe.com instead of www.wwf.com. This remarkable development occurred as a result of a lawsuit the company lost in Great Britain to the World Wildlife Fund, an organization also known by the initials "WWF."

The Fund's lawsuit did not assert claims for trademark infringement. Instead, the Fund alleged that the World Wrestling Federation breached a 1994 contract by which the Federation agreed not to use "WWF" except in very limited ways.

The 1994 contract between the Fund and the Federation was an agreement by which the two organizations settled several trademark infringement lawsuits the Fund had filed or threatened in a number of countries, one of which - in Switzerland - the Fund had already won. The World Wrestling Federation complied with the contract for a few years. But in 1997, it adopted the website address "www.wwf.com" and resumed using its initials "at will and on an increasing scale."

In response to the Fund's lawsuit, the World Wrestling Federation admitted that it had broken the 1994 contract; but it argued that the contract was an unlawful restraint of trade and thus void. The Fund of course thought otherwise, and made a motion for summary judgment, which was granted by the Chancery Division (ELR 23:6:6).

On appeal, the World Wrestling Federation renewed its restraint of trade argument, without any greater success. Writing for the British Court of Appeal, Lord Justice Carnwath explained that when a trademark owner settles "a genuine dispute" in a way that is "designed to define the boundaries of [the trademark owner's] rights as against the defendant, [the trademark owner] is entitled to expect that [settlement] to be enforced." In such cases, Lord Justice Carnwath said, the trademark owner does not have to prove that the settlement was reasonable. Rather, it is up to the accused infringer to show that it should be released from the settlement agreement. In this case, the World Wrestling Federation failed to make that showing.

The Court of Appeal concluded that the Federation had a good reason for entering into the settlement to avoid further litigation in Europe with the Fund, particularly because the Federation could have lost more cases (in addition to the Swiss case) in countries that impose liability for mere consumer "association" and do not require consumer confusion.

The Court of Appeal also rejected the Federation's argument that under the "free expression" guarantee of the European Convention of Human Rights, it has a right to use its "WWF" initials. The appellate court responded with the uncharacteristically abrupt observation that "On the facts of this case, we do not see this point as adding anything of substance to the case based on restraint of trade."

The Court of Appeal concluded that the Fund is "entitled to an injunction to enforce its rights under the agreement," even insofar as it bars the Federation from using "wwf" in its domain name.

The World Wildlife Fund was represented by Christopher Morcom QC and Mark Brealey, instructed by Edwin Coe. The World Wrestling Federation was represented by G.W. Hobbs QC, Siobhan Ward and Emma Himsworth, instructed by S J Berwin.

WWF-World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc., [2002] EWCA Civ. 196 (Feb. 2002), available at http://www.courtservice.gov.uk [ELR 23:12:10]

Federal Court of Australia issues rulings that permit video stores to rent DVDs in Australia without copyright licenses from Warner Home Video and Castle Rock

Video stores in Australia would like to rent DVDs to their customers, just as they rent videocassettes, and they would like to do so without seeking licenses from the owners of the DVDs' copyrights. Studios, on the other hand, would prefer that Australian video stores not rent DVDs, at least not without licenses to do so. Indeed, Warner Home Video and Castle Rock Entertainment have made their preferences known to Australian video stores by allegedly threatening them with copyright infringement proceedings, if they rent DVDs without consent.

These alleged threats prompted the Australian Video Retailers Association and several of its members to file a lawsuit of their own against the two movie companies in the Federal Court of Australia in Sydney. The lawsuit seeks a declaration that Warner and Castle Rock have made "unjustifiable threats" and have violated the Australian Trade Practices Act by doing so. Not to be outdone, Warner and Castle Rock responded with a cross-claim of their own that sought a declaration that the rental of DVDs of their movies would infringe their copyrights under Australian law, if done without a license.

From afar, it looks as though Australian law would treat videocassettes and DVDs alike. But that is not necessarily so. Videocassettes do not contain computer programs, but DVDs do. That is, DVDs contain - in addition to the digital audio and video files that make up the movie itself - other files that permit users to navigate between the movie, trailers, commentary, and other extras that are not part of the movie itself. These other files are "computer programs"; Warner and Castle Rock argued that the movie files are too.

Warner and Castle Rock hoped this distinction between videocassettes and DVDs would win the case for them, for this reason. Australian copyright law gives the owners of movie copyrights the exclusive right to copy their movies, to cause them to be seen in public, and to communicate them to the public; but the law does not give them the exclusive right to rent their movies. On the other hand, Australian copyright law does give the owners of computer program copyrights the exclusive right (among others) to rent their programs. Thus, Warner and Castle Rock argued that the rental of DVDs amounted to the rental of computer programs - something that could not be done under Australian law without their consent.

Apparently, everyone was able to agree about the facts that were necessary to resolve their dispute. They just couldn't agree on how Australian copyright law applies to those facts. They therefore posed four questions for Judge Emmett, the answers to which would resolve the case. The judge answered all four in a way that favors the video retailers.

Judge Emmett ruled that a DVD's audio and video files are not computer programs; only the files that enable users to navigate the DVD, and instruct DVD players and computers how to perform and display audio and video files, are "computer programs."

Although Australian copyright law gives computer program copyright owners the exclusive right to rent their programs, this exclusive right does not apply "if the computer program is not the essential object of the rental." (So, for example, if someone rents a car, some functions of which are controlled by a computer and computer program, Australian copyright law does not prohibit the rental of the program as part of the rental of the car.) Judge Emmett concluded that when a consumer rents a DVD, the computer program on the DVD "is not the essential object of the rental."

As a backup argument, Warner and Castle Rock also argued that when a consumer plays a DVD, the DVD player or computer on which it is played makes a "copy" of the movie itself, in RAM, and thus infringes copyright in that fashion. But Judge Emmett concluded that since only a very small portion of a DVD movie is in RAM at any moment, no infringement occurs, because Australian copyright law only prohibits copying "the whole or a substantial part" of a work.

For the same reason, Judge Emmett rejected Warner and Castle Rock's argument that DVD users "reproduce" the DVD's computer programs when they play DVDs.

These four rulings did not lead to an immediate judgment in favor of the video retailers. But it appears that such a judgment will be the next procedural step in the case.

The Australian Video Retailers Association and its members were represented by J.V. Nicholas SC and T.M. Catanzariti; and by Gadens Lawyers (Solicitors). Warner Home Video and Castle Rock were represented by D. Catterns QC and S.J. Goddard; and by Freehills (Solicitors).

Australian Video Retailers Association Ltd. v. Warner Home Video Pty Ltd., [2001] FCA 1719 (2001), available at www.austlii.edu.au/au/cases/cth/federal_ct/2001/1719.html [ELR 23:12:10]

RECENT CASES

Dreamworks' animated movie "The Road to El Dorado" is substantially "dissimilar" to play "The Sacrifice," so federal court dismisses playwright's copyright infringement suit

Federal District Judge Naomi Buchwald has dismissed a lawsuit filed against Dreamworks by the author of a play entitled "The Sacrifice." Playwright Godfrey Van DeWeever alleged that Dreamworks' animated movie "The Road to El Dorado" infringed the copyright to his one-act play "about Sir Walter Raleigh's search for gold in Latin America around the turn of the Seventeenth Century."

Dreamworks' movie, too, was about a search for gold in Latin America, though not about Sir Walter Raleigh's search. "The Road to El Dorado" featured "two mischievous Spanish con men" as the searchers; and they traveled to Latin America as stow aways on Cortez's ship, not Sir Walter Raleigh's.

In response to Dreamworks' motion for summary judgment, Judge Buchwald ruled that Van DeWeever's play and Dreamworks' movie are substantially "dissimilar," and that no reasonable jury could find otherwise. Moreover, the judge found that any similarities between the two relate solely to non-copyrightable elements - thus providing another reason, "sufficient on its own," to grant summary judgment to Dreamworks.

Van DeWeever represented himself. Dreamworks was represented by Tom J. Ferber and Michael Goldberg of Pryor Cashman Sherman & Flynn in New York City.

DeWeever v. Executive Producer, 178 F.Supp.2d 417, 2001 U.S.Dist.LEXIS 21289 (S.D.N.Y. 2001)[ELR 23:12:12]

Court of Appeals affirms denial of Fox's request for preliminary injunction against Marvel-licensed "Mutant X" television series, but reinstates Fox's false advertising claim

Sometimes, it appears, even good deals go sour. Case in point: the deal by which Marvel Enterprises licensed Twentieth Century Fox to produce a motion picture based on Marvel's "Mutant X" comic books. The resulting movie, Fox's "X-Men," has been so successful that Marvel may earn more than $7.5 million dollars in up-front and back-end compensation, as a result of Fox's gross receipts of more than $290 million (not including homevideo and merchandising revenue).

Nevertheless, Fox and Marvel are at bitter odds with one another in federal courts in New York, all because Marvel licensed Tribune Entertainment to produce and syndicate the television series "Mutant X." Marvel was able to do this, because in its contract with Fox, Marvel retained the television rights to "Mutant X" - a point that Fox didn't dispute. Fox, on the other hand, emphasized that the contract contains a "freeze" - a provision by which Marvel agreed not to exploit its television rights without Fox's consent. Marvel responded that despite its title, the "Mutant X" series does not use anything licensed to Fox, and thus the freeze was irrelevant.

All of these dueling contentions were made early in the case, when Fox sought a preliminary injunction barring the syndication of "Mutant X"; and when

Marvel and Tribune sought dismissal of Fox's case completely. District Judge Allen Schwartz refused to enjoin "Mutant X," and he did dismiss some of Fox's claims (ELR 23:8:9). Fox appealed, and has been partially successful - but only partially so.

In a short opinion for the Court of Appeals, Judge Jon O. Newman has affirmed the denial of Fox's request for a preliminary injunction. But he has reversed the dismissal of Fox's claim for false advertising.

Judge Newman agreed that any harm done to Fox's movie franchise by the "Mutant X" television series can be compensated in money damages, if it turns out the series does violate Fox's contractual rights. On the other hand, Judge Newman held that if Marvel and Tribune falsely advertised their "Mutant X" television series as a "spin-off" of Fox's "X-Men" movie, Fox would have a legal right to recover for that, under section 43(a) of the Lanham Act.

Fox was represented by Dale M. Cendali of O'Melveny & Myers in New York City. Marvel was represented by Jonathan D. Reichman of Kenyon & Kenyon in New York City. Tribune was represented by Maura J. Wogan of Frankfurt Garbus Kurnit Klein & Selz in New York City. Fireworks Television (a co-defendant) was represented by Steven H. Rosenfeld of Ohrenstein & Brown in New York City.

Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc., 277 F.3d 253, 2002 U.S.App.LEXIS 570 (2nd Cir. 2002)[ELR 23:12:12]

Muzak and AEI Music Network win appellate court decision that BMI rate court has authority to set fees for blanket licenses with "carve outs" and for per piece licenses

Muzak and the AEI Music Network provide "background music" services to retailers, offices and the like; and therefore they need public performances licenses from the owners of the copyrights to the compositions they perform. Both companies get these licenses from performing rights organizations that represent those copyrights owners: ASCAP, BMI and SESAC.

BMI (like ASCAP) was sued by the Justice Department more than 60 years ago for allegedly violating the antitrust laws. The case was quickly settled with a "consent decree" that requires BMI to offer "per program" and "per piece" licenses, in addition to BMI's license of choice - the "blanket license." More recently, in 1994, BMI's consent decree was amended to provide that the federal District Court for the Southern District of New York would act as a "rate court" (as it has for ASCAP since 1950). That is, the court was given the authority to determine "a reasonable fee" for the public performance of musical works, in cases where music users are unable to agree with BMI on what the fee should be.

All of this is important because in 1997, Muzak and AEI were unable to agree with BMI on license fees, so the two music services did ask the "rate court" to determine reasonable fees for them. Their request was particularly significant, however, because in addition to asking for rates for traditional blanket licenses, they also asked the rate court to determine rates for blanket licenses with a "carve out" and for "per piece" licenses.

A "blanket license" is one that permits performance of all of the songs in BMI's repertoire for a flat fee. A "per piece" license is one for a single song. And a blanket license with a "carve out" is a blanket license with a reduced fee to take into account songs that Muzak and AEI might license directly from the songs' publishers (rather than through BMI) or might license from BMI pursuant to "per piece" licenses.

BMI objected to Muzak's and AEI's request that the rate court set "carve out" and "per piece" license fees. It argued that under its amended consent decree, the rate court does not have authority to set fees for those types of licenses. District Judge Louis Stanton, acting as the rate court for this matter, agreed in part. That is, Judge Stanton agreed with BMI that the consent decree does not give the rate court authority to set "carve out" license fees. But he agreed with Muzak and AEI that the rate court does have authority to set "per piece" license fees.

Neither side was happy with that result. Both appealed. And Muzak and AEI have won.

The Court of Appeals has held that the rate court does have authority to set fees for "carve out" licenses, just as Muzak and AEI had argued. And, in an opinion by Judge Barrington Parker, the appellate court ruled that the rate court has the authority to set "per piece" license fees as well.

The United States Government was represented by Robert J. Wiggers of the Department of Justice in Washington D.C. Muzak and AEI Music were represented by R. Bruce Rich of Weil Gotshal & Manges in New York City. BMI was represented by Norman C. Kleinberg of Hughes Hubbard & Reed in New York City.

United States v. Broadcast Music, Inc., 275 F.3d 168, 2001 U.S.App.LEXIS 26476 (2nd Cir. 2001)[ELR 23:12:13]

Fishhead Records did not breach recording agreement with Wallace Coleman by failing to send timely royalty statement, nor did it owe Coleman royalties after deduction for allowable advances, Ohio appellate court rules

Cleveland-based Fishhead Records has won a breach of contract case filed against it by recording artist Wallace Coleman, but it had to take the case to the Ohio Court of Appeals to do so.

A trial court had ruled that Fishhead breached Coleman's recording agreement by failing to send him a royalty statement on time, and thus Coleman was entitled to rescind the agreement. The trial court also held that Fishhead owed Coleman $1,045 in unpaid royalties. However, in a decision by Judge Kenneth Rocco, the appellate court has reversed.

Judge Rocco ruled that a clause in Coleman's contract provided that a failure by Fishhead to perform its obligations would "not be deemed a breach" unless Coleman gave Fishhead notice of the failure and Fishhead didn't correct the failure within 60 days. The first notice Coleman gave Fishhead was the complaint in his breach of contract lawsuit. Fishhead did in fact send him a royalty statement less than 60 days after that. For this reason, Judge Rocco concluded that "Fishhead's prior failure to provide accountings was not a breach under the terms of the agreement."

Judge Rocco also held that Fishhead did not owe Coleman further royalties. Coleman's contract provided that recording expenses would be an advance against royalties and that Fishhead would cover recording costs "not to exceed" $6,000. In fact, Fishhead advanced more than $12,000 in recording costs and accounted for all of them as recoupable advances. Coleman argued that only the first $6,000 in recording costs could be recouped. But Judge Rocco ruled that the contract entitled Fishhead to treat the entire $12,000 as advances, not just the first $6,000.

Coleman was represented by Thomas A. McCormack in Chagrin Falls. Fishhead was represented by Charles H. Manning in Solon.

Coleman v. Fishhead Records, Inc., 758 N.E.2d 694, 2001 OhioApp.LEXIS 2078 (Ohio App. 2001)[ELR 23:12:13]

Court dismisses copyright infringement suit by Richard Warren complaining of unlicensed performances of music he composed for "Remington Steele," because compositions were works made for hire whose copyrights are owned by Fox Family (as successor to series' producer MTM Productions), and because Warren is not entitled to rescind work for hire agreements even if contractually-owed royalties have not been paid

Composer Richard Warren may have a perfectly valid claim against Fox Family Worldwide, but if he does, it's for breach of contract rather than copyright infringement. A federal District Court in Los Angeles has so held, in response to Fox Family's motion to dismiss Warren's lawsuit - a motion the court has granted.

During the 1980s, Warren composed music for the television series "Remington Steele" pursuant to contracts with MTM Productions, the series' producer. The contracts were work made for hire agreements, and that made MTM the owner of the music's copyrights. Nevertheless, the contracts also provided that Warren would be entitled to the writer's share of music public performance fees collected by ASCAP or BMI, and they provided that if MTM licensed the use of the series by anyone that didn't have an ASCAP or BMI license, MTM itself would pay Warren a portion of the license fees.

Warren's lawsuit was apparently prompted by licenses to show "Remington Steele" that were issued by Fox Family - MTM's successor - to the Christian Broadcasting Network and to Princess Cruises. Neither of them had ASCAP or BMI licenses at the time, but

Fox Family allegedly failed to pay Warren anything in connection with those licenses.

Fox, CBN and Princess all sought dismissal of Warren's infringement claims on the grounds that he is not the owner of the copyrights to the "Remington Steele" music. Judge Margaret Morrow has agreed. She found Warren's contracts to be work made for hire agreements, even though some of them did not use the "work made for hire" phrase and none of them recited that Warren's music was "specially ordered or commissioned."

Judge Morrow also ruled that Warren could not claim a "beneficial interest" in the copyrights that would entitle him to sue for their infringement, because creators of works made for hire "cannot assert a beneficial interest" in their copyrights.

Finally, the judge held that Warren was not entitled to recapture ownership of the copyrights by rescinding his work made for hire agreements, even if Fox Family failed to pay Warren royalties those agreements entitled him to receive. Warren's position "finds limited support in the case law," Judge Morrow acknowledged. "The weight of authority is to the contrary, however," she concluded. The judge explained that "Where . . . there is an express contractual obligation to pay royalties, the remedy for breach is clear, and the implication of a right to rescind is not necessary."

Warren was represented by Leonard J. Comden of Wasserman Comden & Casselman in Tarzana. Fox Family, CBN and Princess Cruises were represented by Daniel M. Petrocelli of O'Melveny & Myers in Los Angeles.

Warren v. Fox Family Worldwide, Inc., 171 F.Supp.2d 1057, 2001 U.S.Dist.LEXIS 22207 (C.D.Cal. 2001)[ELR 23:12:14]

Chuck Berry wins dismissal of Johnnie Johnson's copyright infringement claims because Berry was (at least) a co-author of disputed songs recorded between 1955 and 1966; but court refuses to dismiss Johnson's other claims seeking declaration of co-ownership, breach of fiduciary duty and fraud

Between 1955 and 1966, Chuck Berry and Johnnie Johnson recorded some 50 songs whose copyrights are at issue today as a result of a lawsuit Johnson has filed against Berry and Berry's publisher, Isalee Music Company. The lawsuit alleges that Johnson is the owner or co-owner of the songs' copyrights, and that Berry and Isalee infringed those copyrights, apparently by continuing to license their use without Johnson's consent. It also alleges that Berry breached fiduciary duties owed to Johnson and committed fraud.

Berry and Isalee responded to the suit with a motion to dismiss. Part - but only part - of that motion has been granted by federal District Judge Donald Stohr.

Judge Stohr dismissed Johnson's infringement claims on the grounds that the facts alleged by Johnson himself show that he claims the songs were co-authored by Berry. As a co-author, Berry also is a co-owner of the songs' copyrights, and as a co-owner, his use of the songs is not an infringement.

Because the songs were written and recorded decades ago, Berry also sought dismissal of Johnson's other claims, on the grounds that they are barred by the statute of limitations. Insofar as Johnson's claim that he is the co-author of the songs is concerned, Berry's motion was based on the legal principle that the statute of limitations for co-authorship claims is just three years.

But Johnson argued that he has been an alcoholic since the early 1940s, and that the statute of limitations was tolled during that time because of his incapacity. "Whether [Johnson's] alcoholism can constitute a disability tolling the statute of limitations . . . requires . . . a more detailed factual record . . . ," Judge Stohr concluded. He denied Berry's motion, for that reason.

The judge also rejected, "at this time," Berry's motion to dismiss Johnson's fiduciary duty and fraud claims on their merits.

Johnson was represented by Mitchell A. Margo of Curtis & Oetting in St. Louis and Scott J. Orr in

Sacramento. Berry and Isalee Music were represented by Martin M. Green of Green & Schaaf in St. Louis.

Johnson v. Berry, 171 F.Supp.2d 985, 2001 U.S.Dist.LEXIS 21443 (E.D.Mo. 2001)[ELR 23:12:14]

Major League Baseball did not violate former players' rights of publicity by using their names, stats, photos and video images in game-day programs, websites or videos, California appellate court affirms

Major League Baseball has defeated claims that it violated the rights of publicity of four former players by using aspects of their personalities in a variety of ways, without the players' consent. In an opinion by Justice Mark Simons, the California Court of Appeal has affirmed the dismissal of the players' lawsuit, thus bringing their case to an end.

The lawsuit was filed by Pete Coscarart, Dolph Camilli, Frankie Crosetti and Al Gionfriddo, all of whom played in the Major Leagues between 1932 and 1948. All too were named to the All-Star team or played in the World Series. "By virtue of their accomplishments," their names, statistics, photos and video images have been used in All-Star game and World Series programs, on Major League Baseball's websites, in videos and in television broadcasts.

Their lawsuit alleged that these uses violated their rights of publicity under California common law and the California right of publicity statute. The players hoped their case would be a class action, on behalf of themselves and other retired players. But in an earlier ruling, the Court of Appeal affirmed a decision denying the case class action status (ELR 20:6:18). As a result, the four players proceeded on their own.

In affirming the dismissal of their lawsuit, Justice Simons held that the information used without their permission "may fairly be characterized as mere bits of baseball's history. . . ." The use of this information in game programs, websites and videos, the judge said, "is a form of expression due substantial constitutional protection." It was not commercial speech, he ruled.

Justice Simons further concluded that "the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake." And for this reason, the Court of Appeal affirmed the dismissal of the players' common law claims.

Their statutory claims faired no better. One paragraph of the California right of publicity statute expressly provides that no consent is required to use a person's "name, . . . photograph, or likeness in connection with any news, public affairs, or sports broadcast or account." Justice Simons held that in this case, the uses to which the players objected "come within the 'public affairs' exemption to consent," and thus no consent was required.

The players were represented by Ronald Katz of Coudert Brothers in San Francisco. Major League Baseball was represented by Martin R. Glick of Howard Rice Nemerovski Canady Falk & Rabkin in San Francisco.

Gionfriddo v. Major League Baseball, 114 Cal.Rptr.2d 307, 2001 Cal.App.LEXIS 3089 (Cal.App. 2001)[ELR 23:12:15]

Minnesota Timberwolves did not violate antitrust law or interfere with business relations of free-lance photographer who was denied credentials to photograph team

Frank Howard is a free-lance photographer who, for several years, was given season passes to the games of the Minnesota Timberwolves, so he could shoot photos of the team on behalf of clients including a trading-card publisher named SkyBox International. Then, several things happened that eventually provoked Howard into suing the NBA team for antitrust violations and tortious interference with his business relations.

At the start of the 1993-94 season, the NBA team stopped issuing Howard season passes, and instead required his clients to make written requests for single-game passes. Later that year, the NBA adopted a policy that barred its teams from issuing credentials to photographers working for trading-card companies that didn't have contracts with the league. Since SkyBox did not have an NBA contract, SkyBox cancelled its contract with Howard. Then, at the start of the 1995-96 season, the NBA made a deal with a subsidiary called NBA Photos to take photos for the league; and that deal gave NBA Photos priority use of the Target Center's strobe lights. As a result, Howard was denied credentials on six occasions when he may have been given credentials if he could have used the Center's strobes.

Howard's lawsuit has not been successful for him. A Minnesota trial court dismissed his case, in response to the Timberwolves' motion for summary judgment. And in an opinion by Judge Terri Stoneburner, the Minnesota Court of Appeals has affirmed.

Judge Stoneburner ruled that the team is a single entity, and thus could not "conspire" to restrict Howard's access to the Center, in violation of state antitrust law. The judge also rejected Howard's argument that the Timberwolves had illegally "leveraged" its "monopoly" on playing NBA games in the Target Center by giving NBA Photos priority to use the Center's strobe lights. NBA Photos was a competitor of Howard's, and thus making a deal with it was not "anti-competitive," Judge Stoneburner seemed to suggest.

Finally, the judge also rejected Howard's interference with business relations claim. Under Minnesota law, the assertion of a legally protected interest is not "wrongful interference," the judge explained. In this case, the Timberwolves were merely asserting their right to exclude people from the Target Center. The team's reason for doing so - "whether to limit the number of strobe lights, protect the space available, or enforce the NBA rule prohibiting credentials to photographers whose trading-card clients did not have a contract with the NBA" - did not make that exclusion "tortious."

Howard was represented by Harvey H. Eckart of Reinhardt & Anderson in St. Paul. The Timberwolves were represented by Douglas R. Peterson in Mankato and David M. Jaffe of Leonard Street & Deinard in Minneapolis. The manager of the Target Center was represented by Eric J. Rucker of Briggs & Morgan in Minneapolis.

Howard v. Minnesota Timberwolves Basketball Limited Partnership, 636 N.W.2d 551, 2001 Minn.App.LEXIS 1260 (Minn.App. 2001)[ELR 23:12:15]

Pittsburgh Pirates not liable to spectator injured by foul ball, Pennsylvania appellate court affirms

The Pittsburgh Pirates are not liable to spectator Nancy Romeo for injuries she suffered when a foul ball hit her in the face while she was seated in a field box along the third base line in Three Rivers Stadium. A Pennsylvania state trial court so ruled, in response to the Pirates' motion for dismissal. And, in an opinion by Judge Peter Olszewski, the Pennsylvania Superior Court has affirmed.

Romeo's lawyer filed an "artfully pled complaint" on her behalf, Judge Olszewski acknowledged. The judge assumed, as that complaint alleged, that although the Pirates had screened some, more expensive, seats in Three Rivers Stadium, no screens protected Romeo's seat.

Nonetheless, earlier Pennsylvania decisions (like decisions in other states) had held that baseball stadia have "no duty" to protect spectators from foul balls or to warn spectators of the danger of being hit. Judge Olszewski easily concluded that those decisions applied to Romeo's case. Moreover, the judge added that even if the Pirates had a duty to warn Romeo, the team satisfied that duty by printing a warning on the back of her admission ticket.

Romeo's "artfully pled complaint" also alleged claims for products and ultrahazardous activity liability, for breach of contract, and for violations of state consumer protection laws. But Judge Olszewski affirmed the dismissal of those claims as well.

Romeo was represented by Steven B. Larchuk in Wexford. The Pirates were represented by Stephen J. Del Sole in Pittsburgh.

Romeo v. Pittsburgh Associates, 787 A.2d 1027, 2001 Pa.Super.LEXIS 3491 (Pa.Super. 2001)[ELR 23:12:16]

Previously Reported:

"Wind Done Gone" case settled. Houghton Mifflin and Suntrust Bank have settled the "Wind Done Gone" case. The Bank alleged that Alice Randall's novel The Wind Done Gone infringed the copyright to Margaret Mitchell's classic Gone with the Wind. Early in the case, a federal District Court agreed with the Bank and issued a preliminary injunction barring Houghton Mifflin from publishing Randall's book (ELR 22:12:4). The injunction, however, was vacated by the Court of Appeals (ELR 23:1:4, 23:6:10). The exact terms of the settlement are confidential, but to announce the settlement, the parties issued a statement reading: "Houghton Mifflin Company and the Stephens Mitchell Trusts . . . have agreed to bring to an end their litigation involving Houghton Mifflin's publication of Alice Randall's novel, The Wind Done Gone. Both sides continue to maintain the correctness of their respective legal positions taken since the outset of the litigation. The parties have entered into a confidential settlement agreement under which the novel The Wind Done Gone will continue in distribution labeled "An Unauthorized Parody," and a financial contribution will be made at the Mitchell Trusts' request to Morehouse College on behalf of Houghton Mifflin, but the rights of the Parties are reserved with respect to the future creation or publication of dramatic or any other adaptations of the book, including motion pictures, television movies or miniseries, sequels, prequels, and stage productions. The rights of Alice Randall with respect to any such adaptations of the book are not affected by the settlement." Statement available at: www.houghtonmifflinbooks.com/features/randall_url/may9pr.shtml.

NFL must pay attorneys' fees of one former employee but is entitled to costs from two others. In a case that casts the NFL Players Association in the unusual role of an employer, a federal appellate court has affirmed an order requiring the NFLPA to pay the attorneys' fees of one former employee who prevailed with her claim that the NFLPA discriminated against her in violation of Title VII (ELR 19:1:11, 20:3:11). The NFLPA didn't come away completely empty-handed, however. In an unpublished order, the lower court had denied the NFLPA's requests for costs from two other employees who did not succeed with their discrimination claims. The appellate court reversed that order, ruling that the NFLPA is entitled to recover costs from those two, because it was the "prevailing party" as to them. *Thomas v. National Football League Players Association*, 273 F.3d 1124, 2001 U.S.App.LEXIS 26371 (D.C.Cir. 2001)

Livent securities fraud claims now adequately alleged. The securities fraud claims of certain Livent noteholders were previously dismissed, in response to motions by two Livent underwriters (ELR 23:8:25). The noteholders, however, were given leave to amend their complaint, and they did. The underwriters then renewed their dismissal motions, arguing that even the amended complaint fails to state a valid claim. But this time, Judge Victor Marrero has ruled that the noteholders' allegations are adequate; and he has denied the underwriters' motion. *In re Livent, Inc., Noteholders Securities Litigation*, 174 F.Supp.2d 144, 2001 U.S.Dist.LEXIS 19688 (S.D.N.Y. 2001).

Decisions reported "In the News" are published. Decisions that were previously reported in the "In the News" section of the Entertainment Law Reporter have been published: Ashcroft v. The Free Speech Coalition, 122 S.Ct. 1389, 2002 U.S.LEXIS 2789 (2002) (ELR 23:11:5); Universal City Studios v. Corley, 273 F.3d 429, 2001 U.S.App.LEXIS 25330 (2nd Cir. 2001) (ELR 23:7:4); Satellite Broadcasting and Communications Ass'n v. Federal Communications Commission, 275 F.3d 337, 2001 U.S.App.LEXIS 26120 (4th Cir. 2001) (ELR 23:8:4); Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, 638 N.W.2d 214, 2002 Minn.App.LEXIS 91 (Minn.App. 2002) (ELR 23:9:10).
[ELR 23:12:16]

DEPARTMENTS

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Cardozo Arts & Entertainment Law Journal has published Volume 20, Number 1 as a symposium entitled Bridging the Digital Divide: Equality in the Information Age with the following articles:

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Inequality in the Digital Society: Why the Digital Divide Deserves All the Attention It Gets by Mark N.

Cooper, 20 Cardozo Arts & Entertainment Law Journal (2002)

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Mortal Kombat: The Impact of Digital Technology on the Rights of Studios and Actors to Images and Derivative Works by Gerald O. Sweeney, Jr. and John T. Williams, 3 Minnesota Intellectual Property Review (2002)

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Avast Ye, Hollywood! Digital Motion Picture Piracy Comes of Age by Christian John Pantages, 15 The

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