RECENT CASES

Federal Court of Appeals holds that television s family viewing policy must be reviewed by the FCC prior to further court action

In April of 1975, the National Association of Broadcasters adopted a "family viewing policy" as an amendment to the NAB Television Code. The policy provided that entertainment programming "inappropriate for viewing by a general family audience" should not be broadcast during the first hour of network programming in prime time and in the immediately preceding hour. The policy also required the use of advisories to alert viewers to any prime time programs containing material that might disturb significant segments of the audience and set forth requirements for the content and timing of the advisories both before and during such programs and in promotional material, including television program listings. The three major television networks all had previously indicated their willingness to comply with the policy.

The Writers Guild, Directors Guild, Screen Actors Guild and Tandem Productions brought actions against the NAB, the three networks and the Federal Communications Commission challenging the adoption of the family viewing policy. The plaintiffs contended that the family viewing policy violated the First Amendment, the Administrative Procedure Act, antitrust laws, and Section 326 of the Federal Communications Act which denies the FCC the power of censorship and the power to interfere with the right of free speech. The plaintiffs sought declaratory and injunctive relief, and Tandem also sought damages.

A Federal District Court in California concluded that the family viewing policy had been adopted by the NAB and the networks in response to threats, influence and pressure by the Chairman of the FCC; that the improper pressure was a per se violation of the First Amendment; that the FCC had violated the Administrative Procedure Act by using informal tactics to implement public policy instead of complying with the Act's procedural requirements; that the action of the networks and the NAB constituted "government action" for purposes of the First Amendment claim both because of FCC pressure and because the networks, the NAB and the FCC had participated in an "unprecedented joint venture" to effect the independent judgments of other broadcast licensees; and that the networks and the NAB had violated the First Amendment by becoming "surrogates in the enforcement of government policy." Writers Guild of

America, West, Inc. v. FCC, 423 F.Supp. 1064 (C.D.Ca. 1976).

However, a Federal Court of Appeals in California has vacated the District Court's judgment on the ground that the doctrine of primary jurisdiction requires the FCC to consider the plaintiffs' claims prior to any court action. The Court of Appeals therefore ordered the plaintiffs' claims held in abeyance pending administrative proceedings before the FCC.

The Court of Appeals, in reviewing the factors leading to the adoption of the family viewing policy, noted that in the summer of 1974, the House and Senate Appropriations Committees had directed the FCC to respond to growing public concern about violent and sexually-oriented television programming. According to the court, Richard Wiley, the FCC's Chairman, began "jaw-boning," that is, seeking to have the television industry adopt a system of self-regulation that would reduce the amount of sex and violence in programming without the need for formal FCC action. Thus, meetings were held between members of the FCC staff and industry representatives to discuss possible solutions. Chairman Wiley made speeches urging industry action and suggesting that the government might become formally involved in the absence of any action. And Wiley also conducted discussions with network executives and NAB representatives.

The District Court's decision had stressed the significance of the principle that broadcast licensees have the right and duty to make independent decisions regarding access to television programming. The District Court found that FCC pressure had interfered with the licensees' independent decisionmaking. The District Court concluded that neither the doctrine of primary jurisdiction nor the doctrine of exhaustion of administrative remedies required the plaintiffs to present their claims to the FCC prior to judicial review.

The doctrine of primary jurisdiction generally applies when a court is presented with issues involving a regulatory scheme. The judicial process is suspended pending referral of such issues to the appropriate administrative body, presumably in order to achieve uniformity and consistency in regulation and to allow the court to benefit from the expertise and insight of the agency. A similar doctrine, requiring the exhaustion of administrative remedies prior to judicial review, applies when a claim may be heard in the first instance by an administrative agency alone. The District Court found that the plaintiffs were not required to exhaust their administrative remedies because, (1) the FCC was "palpably without jurisdiction to interfere with broadcaster decisionmaking in the manner complained of . . .; (2) the FCC was biased and had already prejudged the issues, so that resort to the Commission would be futile . . .; (3) the FCC had imposed an immediate burden on the exercise of important rights, and . . . (4) the FCC lacked the power to provide plaintiffs an adequate remedy, since it lacked the power to award damages . . .”

The District Court also determined that it would not serve any purpose for the FCC to consider the factual questions surrounding the adoption of the family viewing policy because the questions raised did not require consideration by the FCC in order to further the uniform and expert administration of a regulatory scheme.

The Court of Appeals disagreed, stating “we cannot believe that the ultimate judicial resolution of these issues will not be aided by the FCC’s thorough consideration of them.” The Court of Appeals pointed out that licensees are subject to reasonable regulation since that Communications Act requires broadcasters to serve the public interest. But broadcast regulation requires a "delicate balance of competing interests" and "both the regulators and the licensees [walk] a `tightrope' to preserve the First Amendment values written into the . . . Communications Act."

The doctrine of primary jurisdiction could thus be utilized, according to the Court of Appeals, to obtain a determination by the FCC of whether it had "properly walked the tightrope," and whether a family viewing policy formally imposed by the FCC might violate the First Amendment. The court suggested that this determination could best be made in the more flexible administrative setting of the FCC, rather than in the context of a lawsuit. The court also noted that informal procedures of a government agency resulting in industry self-regulation often avoid the need for formal government intervention. But even if such procedures were characterized as official action by the agency, the Court of Appeals concluded that in this case the District Court "should not have thrust itself so hastily into the delicately balanced system of broadcast regulation"and should have initially deferred to the FCC.

Writers Guild of America, West, Inc. v. American Broadcasting Co., Inc., Case No. 77-1058 (9th Cir., Nov. 14, 1979) [ELR 1:14:1]

Dismissal of idea submission suit against Dick Enberg and the producer of the Sports Challenge TV quiz show is affirmed by California Court of Appeal

In 1964, Edgar Faris conceived an idea for a sports quiz show for which he prepared and registered a format. Six years later, Faris arranged a meeting with Dick Enberg at KTLA to discuss the possibility of Enberg's becoming the master of ceremonies, and possibly a co-owner, of Faris' proposed program. Nothing developed from their meeting, but some time later, Enberg did become the master of ceremonies of the "Sports Challenge" television show — a show which was both similar to and different from Faris' proposed idea (in ways which were not described by the court).

As a result, Faris filed two actions against Enberg, the producer of "Sports Challenge," Golden West Broadcasters and others, alleging breach of an express contract, breach of an implied-in-fact contract, breach of confidence, plagiarism, and breach of an implied-in-law contract. The California Superior Court dismissed the plagiarism and breach of implied-in-law contract claims; and the Court of Appeal affirmed in an unpublished opinion filed in 1977. In that opinion, the Court of Appeal held that Faris' plagiarism claim was inadequate, because his sports quiz show idea was not novel and concrete and thus was not subject to copyright protection. The court held that his breach of implied-in-law contract claim was inadequate, because an implied-in-law contract claim requires virtually the same proof as a plagiarism suit, namely novel, concrete, and thus protectable property.

After the Court of Appeal affirmed the dismissal of Faris' plagiarism and breach of implied-in-law contract claims, the defendants made a motion for summary judgment on the balance of his claims. The Superior Court granted that motion, finding there to be insufficient issues of fact to warrant a trial. Faris then appealed the dismissal of his breach of implied-in-fact contract and breach of confidence claims. The Court of Appeal has affirmed their dismissal as well, however.

The Court of Appeal held that in order to prove the existence of an implied-in-fact contract, one must show: that he or she prepared the work; that he or she disclosed the work to the offeree for sale; under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions under which it was tendered (i.e., the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable); and the reasonable value of the work.

In this case, the court concluded that these conditions were not satisfied, because there was no evidence that Faris expected or indicated his expectation of receiving compensation for revealing the format to Enberg. The only evidence was that Faris voluntarily submitted his format to Enberg solely to enable Enberg to determine whether he was willing to enter into a business relationship with Faris. The court found that Faris never intended to submit his idea for sale and did not tell Enberg that the format was for sale.

Faris argued that an implied contract existed, because Enberg had returned Faris' phone call and had asked to keep a copy of his format. The court disagreed, however. It held that an implied contract is not created "because a telephone call was returned or because a request was made for an opportunity to read the work that was unconditionally submitted."

The Court of Appeal also held that "a breach of confidence occurs . . . when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission. . . A confidential relationship will not be created from the mere submission of an idea to another. There must exist evidence of the communication of the confidentiality of the submission or evidence from which such an inference can be inferred. Among the factors from which such an inference can be drawn are: proof of the existence of an implied-in-fact contract . . . ; proof that the material submitted was protected by reason of sufficient novelty and elaboration . . . ; or proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller under certain circumstances."

In this case, the court found that there was no direct evidence that either party believed that the disclosure was being made in confidence. Nor were there other special facts from which a confidential relationship could be inferred. Faris might have argued that he and Enberg were joint adventurers, said the court, "but such was only Faris' unfulfilled hope. There was no evidence of more than a conversation which might have developed into a relationship later on."

Faris v. Enberg, 97 Cal.App.3d 309 (1979) [ELR 1:14:2]

Expiration of statutory copyright to 1937 version of A Star Is Born put movie in the public domain despite common law copyright in underlying script

The original version of "A Star Is Born" was copyrighted in 1937; and because the copyright was not renewed, it expired in 1965. The movie was based on an unpublished story and screenplay in which there was no statutory copyright, though there was a common law copyright. Common law copyright (which no longer exists since the Copyright Act of 1976) conferred perpetual rights, until the material was published. Distribution of a motion picture did not constitute "publication" of the underlying story or script. Thus the common law copyright to the story and script for the 1937 version of the movie has not expired, even though the statutory copyright to the movie itself has.

In a suit between Warner Brothers, owner of the underlying common law copyright to a "A Star Is Born," and Classic Film Museum, a film distributor that obtained prints of the 1937 version of the movie from persons who made the prints without authority but after the statutory copyright expired, a Federal Court of Appeals has held that the movie is in the public domain and may be freely distributed without Warner Brothers' consent.

The court distinguished G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir.), cert. den., 342 U.S. 849 (1957), which held that when a derivative work passes into the public domain while a statutory copyright still exists in the underlying material, only the new matter in the derivative work is dedicated to the public use. The court explained that ". . . any protection offered by the Ricordi doctrine was limited to the fixed life of the underlying copyright (28 years plus the renewal period). The Ricordi doctrine is not equally applicable where there is an underlying commonlaw copyright which might extend indefinitely. Such unending protection of the derivative work would allow the Ricordi exception to swallow the rule of limited monopoly found in the Constitution and copyright statutes."

Classic Film Museum, Inc. v. Warner Bros., Inc., 597 F.2d 13, CCH Copyright Law Reports, Para. 25,067 (1st Cir. 1979) [ELR 1:14:3]

Promoters of music festival were entitled to seek damages for town council s denial of entertainment license

Richard Romanello and American Music Productions, Inc., the promoters of a Folk-Blue Grass Music Festival that was scheduled to take place in July of 1975 at the Stepping Stone Ranch in West Greenwich, Rhode Island, were denied an entertainment license for festival activities by the West Greenwich Town Council. In seeking to recover damages for the nonperformance of the festival, the promoters alleged that the town council had violated the terms of both a Rhode Island statute and a West Greenwich ordinance regarding the licensing of public entertainment. A trial court's decision granting the defendants' motions to dismiss has been reversed by the Supreme Court of Rhode Island.

The Rhode Island Supreme Court found that the promoters possessed the requisite standing to maintain an action for the alleged illegal conduct of the town council even though a separate entity, Stepping Stone Enterprises, Ltd., had submitted the license application. The promoters had authorized the submission of the application, and the court found that a limited principal-agent relationship had been established between the promoters and Stepping Stone Enterprises.

The court also found that the trial court had erred in dismissing a cross-claim brought by Stepping Stone Enterprises against the West Greenwich town council. The claim alleged that the town council had acted in an arbitrary and capricious manner in voting to deny the license application. The court stated that "The allegations, if proved, would entitle Stepping Stone to relief for the wrongful refusal of the license application."

The court therefore remanded the case for further proceedings.

Romanello v. Maguire, 404 A.2d 833 (R.I. 1979) [ELR 1:14:4]

Author s comparison between Unification Church and occult groups in Nazi Germany was not actionable libel

In his book, Gods and Beasts, The Nazis and the Occult, author Dusty Sklar noted similarities between contemporary occult groups, including the Reverend Sun Myung Moon's Unification Church, and certain occult groups in Nazi Germany. Sklar also referred to the Unification Church's indoctrination techniques as a form of "brainwashing" and suggested that the Church represents a danger to American society. As a result, the Church filed suit seeking $4 million in damages for alleged libel. A New York state court has granted summary judgement to the author and the book's publisher, Harper & Row, finding that the author's statements were comparisons and expressions of opinion and as such were not actionable.

The Church, concededly a "public figure," had not shown that any allegedly libelous statement was made with knowledge of its falsity or reckless disregard for the truth. Further, the factual statements in the book had been extensively documented.

The defendants had also contended that the complaint should be dismissed because the First Amendment "bars any libel action by a religious denomination when the alleged libel relates to the validity of the beliefs and practices of that religion." However, the court found that the Unification Church's action did not involve the validity of any such beliefs and practices. Thus, while granting summary judgment, the court refused to dismiss the complaint on this ground.

Holy Spirit Association for the Unification of World Christianity v. Harper & Row, 420 N.Y.S.2d 56 (1979) [ELR 1:14:4]

Federal District Court refuses to dismiss astrologer s action alleging denial of access to broadcast programming and advertising

An astrologer and an astrological forecasting service contended that television station WFMY (a CBS affiliate in Greensboro, North Carolina), the CBS network, and the National Association of Broadcasters had engaged in a conspiracy to limit their access to broadcast programming and advertising.

The National Association of Broadcasters, a voluntary trade association of commercial radio and television broadcasters, promulgates a Television Code which sets forth guidelines for its members to follow in programming and advertising. Both WFMY and CBS are members of the NAB and subscribe to the Code. The two provisions of the Code challenged by the plaintiffs provide, ". . . Program material pertaining to fortune-telling, occultism, astrology . . . and the like is unacceptable if it encourages people to regard such fields as providing commonly accepted appraisals of life . . . The advertising of fortune-telling, occultism, astrology . . . or subjects of a like nature is not permitted."

The plaintiffs alleged that WFMY, acting in conformance with the Code, refused to sell television time to the forecasting service for advertising purposes and had refused to permit the astrologer to appear on WFMY's local programming, thereby depriving the plaintiffs of First Amendment rights to freedom of expression and of equal protection of the law.

While agreeing with the defendants that the rights of broadcasters to make independent decisions concerning the content of their programming and advertising have generally been upheld, a Federal District Court in North

Carolina nevertheless has refused to grant the defendants' motion to dismiss. The court noted that the plaintiffs had argued that the Federal Communications Commission might have been involved in the adoption of the cited provisions of the Television Code. And although doubting that the requisite government involvement could be established, the court pointed out that if the defendants' actions had become "intertwined" with the action of a government agency, the plaintiff's would be entitled to pursue their First Amendment and equal protection claims.

The defendants had also contended that the court lacked subject matter jurisdiction and that any judicial decision should be delayed pending an FCC opinion. The court rejected this argument, finding that the FCC possessed no special expertise in the matter which would justify any such delay.

Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F.Supp. 559 (M.D.N.C. 1979) [ELR 1:14:4]

Obscenity conviction reversed because trial judge refused to permit defendant to introduce Deep Throat and other films into evidence to show contemporary community standards

A defendant was convicted of possession of an allegedly obscene movie entitled "Swedish Erotica No.17." During the course of the trial which resulted in his conviction, the defendant's lawyer sought to introduce into evidence, and to show the jury, three other movies which the lawyer said were comparable: "Deep Throat," "The Devil and Miss Jones" and "Behind the Green Door." The purpose of showing these movies, the lawyer explained to the trial judge, was to show that they had been seen by millions of people and had grossed millions of dollars in California, and thus to demonstrate that "Swedish Erotica No.17" did not offend contemporary community standards.

The trial judge refused to permit the defendant's lawyer to show the other movies to the jury, however, apparently in the belief that the United States Supreme Court had held in Hamling v. United States, 418 U.S. 87 (1974), that comparable materials were not relevant or admissible on the issue of community standards. In Hamling, the Supreme Court affirmed a trial judge's decision to exclude from evidence materials which were similar to those involved in that case on the grounds that ". . . the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating." As stated by the Court of Appeals, the mere fact that materials similar to the brochure in question "are for sale and purchased at book stores around the country does not make them witnesses of virtue."

Nevertheless, the Appellate Department of the California Superior Court has reversed the defendant's conviction. It held that "Deep Throat," "The Devil and Miss Jones" and "Behind the Green Door" were offered only to show what was acceptable under contemporary community standards in California at the time of the defendant's arrest; and, said the court, "It was certainly relevant to that issue and we do not believe Hamling holds to the contrary. Nowhere in Hamling is it stated that comparable materials are not relevant or are inadmissible on the issue of community standards."

The appellate court also held that the trial judge had erred in ruling that the only evidence the defendant could present on the issue of community standards was expert testimony.

People v. Heller, 96 Cal.App.3d Supp. 1 (1979) [ELR 1:14:5]

Pennsylvania Workmen s Compensation Act held applicable to professional athletes

A Federal District Court has ruled that the Pennsylvania Workmen's Compensation Act is the exclusive remedy available to a professional baseball player in Pennsylvania seeking damages for negligent medical treatment by his employer.

Patrick Bayless, a former minor league pitcher in the Philadelphia Phillies organization, brought a tort action against the club for the mental illness that he allegedly suffered from pain-killing drugs administered by a team physician. The club argued that the pitcher's only remedy was the Pennsylvania Workmen's Compensation

Act which provides coverage for injuries and death resulting from accidents occurring in the course of employment for all employees of employers who have agreed to accept the provisions of the Act. Bayless claimed that the Act did not apply to his case, especially since he was a “high-priced athlete.”

In granting summary judgment to the defendant ball club, the court held that the Workmen’s Compensation Act applies to all employees, including professional athletes. “If professional athletes were excluded from coverage,” the court explained, “then hundreds and possibly thousands of low as well as high priced athletes on Major and Minor League Teams would be deprived of the humanitarian benefits and protection the Act affords.”

The court pointed out that under the Pennsylvania Workmen’s Compensation Act, “an employee’s common law right to damages for injuries suffered in the course of his employment as a result of his employer’s negligence is completely surrendered in exchange for the exclusive statutory right of the employee to compensation for all such injuries." The court also noted that the Act certainly covers injury from improper medical treatment by an employer.

The court found that Bayless had indeed placed himself within the purview of the statute since "there is a conclusive presumption that the parties to the employment agreement have accepted the Act, absent either party's written notice of rejection of its provisions." Bayless' failure to plead that the Act had been rejected was, according to the court, "tantamount to pleading that the parties have accepted the Act as part of the employment contract." The court thus concluded that Bayless had relinquished the right to bring such a civil action against the Philadelphia Phillies organization.

Bayless v. Philadelphia National League Club 472 F.Supp.625 (E.D. Pa. 1979) [ELR 1:14:6]

Briefly Noted:

Libel.

The Louisiana Court of Appeals has held that a newspaper was not liable for defamation when it reported that the plaintiff had been disbarred from legal practice, although at the time of the report the plaintiffs application for a rehearing was pending and the judgment disbarring him technically had not become final. Similarly, the newspaper's statement that the plaintiff was convicted of defrauding insurance companies by staging fake car accidents, although incorrect (the conviction was for conspiracy to commit mail fraud), was substantially true. Summary judgment for the defendant newspaper was therefore upheld.

Hamilton v. Lake Charles American Press, Inc., 372 S.2d 239 (La.App. 1979) [ELR 1:14:6]

Libel.

An article in Hustler Magazine describing litigation over the estate of newspaper publisher William Loeb's mother, referred to "high-priced New York lawyers" who supposedly ate up "over $800,000" of the one million dollar estate. A Federal District Court in New York City has awarded compensatory damages of one dollar to the attorney who represented the executor of the estate, finding that although the attorney had been libeled, he had not demonstrated that he had been damaged as a result of the libel. The court stated that the plaintiff was not entitled to damages "merely because there is an oblique reference to him in a magazine which he believes to be in bad taste."

Handleman v. Hustler Magazine, Inc., 469 F.Supp. 1053 (S.D.N.Y. 1979) [ELR 1:14:6]

Copyright.

Four music publishers have been granted summary judgment by a Federal District Court in Wisconsin in an action alleging the defendant's unauthorized public performance for profit of their copyrighted musical compositions. The court found that by failing to respond to the plaintiffs' requests for admissions, the defendant was deemed to have admitted facts that served to establish every element of the plaintiff's claim. Because no genuine issue as to any material fact had been raised, the court granted the plaintiffs' requests for injunctive relief and statutory minimum damages under the Copyright Act as well as costs and reasonable attorney's fees.

Chess Music, Inc. v. Tadych, 467 F.Supp. 819, CCH Copyright Law Reports, Para. 25,083 (E.D. Wisc. 1979) [ELR 1:14:7]

Copyright.

A Federal District Court in Pennsylvania has dismissed copyright infringement claims filed by one game manufacturer against another. Both parties' games consisted of drawings of baseball gloves printed on cloth to which plastic velcrocovered balls would stick. Similarities between the gloves were due to the fact that they depicted actual baseball gloves. There were sufficient differences between the gloves, however, so that their similarities were not ”substantial,“ and thus the defendant’s gloves did not infringe the copyright to the plaintiffs glove. Packaging for both parties’ games also was similar in that both had cartoon drawings of children catching balls on the edges of their gloves. However, no infringement was found in the packaging either, because the drawings were different in coloring, size, facial expression, and body posture. Any similarity in the position of the balls being caught was said to be necessary because the idea being described was the same.

Clarke v. G. A. Kayser & Sons, Inc., CCH Copyright Law Reports, Para. 25,102 (W.D. Pa. 1979) [ELR 1:14:7]

Copyright.

A Federal District Court in Washington, D.C., has dismissed a copyright infringement lawsuit filed against The Washington Monthly Magazine by the author of an article manuscript the magazine had declined to publish. The author alleged that an article published in the magazine after it had rejected his manuscript infringed his common law copyright. The court disagreed, however. It found that the published article was not substantially similar to the plaintiffs manuscript, although there was some overlap in the ideas expressed. Ideas cannot be copyrighted, however. In addition, the published article quoted two sentences from the plaintiff's manuscript which were attributed to him. However, these two sentences were found to be merely "peripheral supports" for the plaintiff's "basic thrust," and in no way reflected his manuscript, taken as a whole. Their use in the published article was said not to diminish the value of the plaintiff's manuscript, and thus was held not to constitute an infringement.

Jackson v. The Washington Monthly Co., 481 F.Supp., 647 CCH Copyright Law Reports, Para. 25,103 (D.D.C. 1979) [ELR 1:14:7]

Copyright.

A Federal District Court in California has held that videotaping television commercials for market research purposes is a fair use under the Copyright Act of 1976. The market researcher reproduced only 5 or 6 frames of the commercials in question (out of approximately 720 frames that make up the usual commercial) and included those reproductions in a questionnaire distributed to no more than 1,000 households. The court found that the market research questionnaires were a fair use, because they did not impair the value of the commercials, had no impact on the market for the commercials, performed a completely different function from the commercials themselves, and were used for the purposes of criticism, comment, news reporting, teaching, research, and scholarship.

Bruzzone v. Miller Brewing Co., CCH Copyright Law Reports, Para. 25,105 (N.D. Cal. 1979) [ELR 1:14:7]

Labor Arbitration.

Arbitrator Joseph Gentile has ruled that Hollywood Park Racetrack did not violate its Collective Bargaining Agreement with the Service Employees International

Union when the racetrack terminated a security guard because ne lacked sight in one eye. The guard's job required that he wear and possibly use a gun in crowds of 15,000 to 70,000 people. Under such circumstances, the arbitrator ruled that the absence of sight in one eye was a proper basis for disqualifying an individual for employment as a guard, and thus the racetrack did have "cause" to terminate the guard. The fact that the guard was certified to use a firearm was not found to be persuasive, because firing range conditions were found to be different than crowd conditions at the racetrack.

Hollywood Turf Club & Service Employees International Union, 79-2 CCH Labor Arbitration Awards, Para. 8407 (1979) [ELR 1:14:7]

Racing Regulation.

The Appellate Division of the New Jersey Superior Court has affirmed a decision of the New Jersey Racing Commission barring the plaintiff from Meadowlands Racetrack because the plaintiff's prior federal conviction for race-fixing made him a person "guilty of conduct detrimental to racing." A New Jersey statute requires racetracks to eject such persons. The court found that the Commission's action was supported by adequate credible evidence, and the plaintiff's challenge to the validity of the regulation to be "patently without merit."

Bislhop v. New Jersey Sports & Exposition Authorit, 403 A.2d 932 (N.J. Super. 1979) [ELR 1:14:7]

NEW LEGISLATION AND REGULATIONS

Internal Revenue Service rules that sliding scale method of depreciation may not be used to compute depreciation on master recordings and book manuscripts

Section 167 of the Internal Revenue Code permits depreciation deductions for a "reasonable allowance" for exhaustion, wear and tear of business or income-producing property. There are several methods for computing the "reasonable allowance" permitted. These methods include the straight line method, declining balance method, sum-of-the-year digits method, income forecast method, and cost recovery method.

However, in Revenue Ruling 60-358, as amplified by Revenue Ruling 64-273, the IRS ruled that most methods of depreciation are inadequate when applied to motion pictures, television programs and similar properties, because the "strikingly uneven flow of income" produced by such properties causes a distortion between income and expenses. Accordingly, the Rulings state that the "income forecast" method is an acceptable method of computing depreciation on such properties.

The income forecast method involves application of a fraction, the numerator of which is the income for the property for the taxable year, and the denominator of which is the estimated total income to be derived from the property. The amount of depreciation that is permitted each year is determined by multiplying this fraction by the cost of the film or other property (less its salvage value).

Nevertheless, in KIRO, Inc. v. Commissioner, 51 T.C. 155 (1968), acq., 1974-2 C.B. 3, the "sliding scale" method of depreciation was approved with respect to certain films, because the television station involved in that case and the film licensors had agreed to a sliding scale of refunds if any of the films were withdrawn by the licensor. The "sliding scale" method of depreciation utilizes a fixed percentage for depreciation over the useful life of the property, but this percentage is usually much higher in earlier years. In KIRO, the licensor and television station agreed that where a film was to be shown seven times by the station, after the first showing, 40% of its cost would be refunded to the station if the film were withdrawn. The Tax Court therefore agreed with the television station that after the first showing, 60% of the cost of licensing the film could be depreciated.

The IRS has now ruled that unless there is a contract similar to that in KIRO, the "sliding scale" method also may not be utilized with respect to master recordings or manuscripts, because these properties have the same uneven flow of income as is found in films. In such cases, the "income forecast" method or the "straight fine" method are preferred by the Internal Revenue Service.

Rev. Rul. 79-285, I.R.B. 1979-39, 10; 79 (10) CCH Standard Federal Tax Reports, Para. 6848 [ELR 1:14:5]

DEPARTMENTS

Book Note:

The Law of Canadian Film Production

During the last few years, Canada has become a producer of big-budget, star-studded feature films, similar in many ways to — and sometimes indistinguishable by the audience from — Hollywood productions. There are several reasons for Canada's emergence as a film-making country. The Canadian Film Development Corporation has recently stepped up its activities in subsidizing the development and production of movies. Canada has entered into coproduction treaties with experienced movie-making countries such as the United Kingdom, France and Italy (though not the United States). Canadian securities regulation has triggered the involvement of established Canadian banks and underwriting companies in motion picture financing. And — perhaps most important — the Canadian government enacted an income tax law which permits Canadian taxpayers to deduct as much as 100% of investments in "certified" films in the year in which the investments are made.

These developments quickly became of interest to members of the United States movie industry and their lawyers; and in October of 1979, UCLA Extension co-sponsored (along with the UCLA School of Law and the Canadian Consulate General) a one-day conference on "The Law of Canadian Film Production." The conference was chaired by Professor Neal Roberts of the Osgoode Hall Law School in Toronto (visiting this year at UCLA), and featured as speakers Canadian lawyers, financiers, and producers, as well as U.S lawyers.

Those who attended the conference received a 286-page Syllabus edited by Professor Roberts and E. Barry Haldeman of the Beverly Hills firm of Rosenfeld, Meyer & Susman. Unlike many conference syllabi which are merely outlines of the speakers' presentations or miscellaneous materials, "The Law of Canadian Film Production" syllabus is a book, each chapter of which is a full and detailed exposition of each speaker's talk.

The syllabus thus constitutes an excellent source of information about the Canadian movie tax shelter law, about Canada's securities regulation laws, about motion picture financing practices in Canada, and about Canadian copyright, libel, privacy and obscenity law.

The syllabus also contains a description of the tax, labor, immigration and other issues United States lawyers must consider when representing U.S. residents who are to be employed by Canadian producers and when representing Canadian producers who are dealing with U.S. talent, material or distributors.

Copies of the syllabus are available at a cost of $40 each from the UCLA School of Law (Attention: Lilian Rader), 405 Hilgard Avenue, Los Angeles, California 90024; phone (213) 825-8202.
[ELR 1:14:8]