

RECENT CASES

Movie Behind the Green Door protected by copyright, despite its alleged obscenity

Mitchell Brothers Film Group, the owner of the copyright to the movie “Behind The Green Door,” brought an action for copyright infringement against certain theaters and individuals who had obtained and exhibited copies of the movie without Mitchell Brothers’ permission. A Federal District Court in Texas ruled in favor of the defendants on the grounds that the movie was obscene, and thus, under the “unclean hands” doctrine, Mitchell Brother was barred from relief. On appeal, however, this ruling was found to be erroneous, and the judgment of the District Court was reversed.

The Court of Appeals first noted that the Copyright Act of 1909, under which the case arose, states that “[t]he works for which copyright may be secured . . . shall include all the writings of an author.” (17 U.S.C. Section 4) The court did not reach the question of whether the movie was obscene, because it found that in the Act “There is not even a hint . . . that the obscene nature of a work renders it any less a copyrightable `writing.’ There is no other statutory language from which it can be inferred that Congress intended that obscene materials could not be copyrighted.”

The legislative history of the 1976 Copyright Act also indicated that the policy of avoiding content restrictions on copyrightability would be continued, presumably in order to further the constitutional purpose of the copyright power, namely, “to promote the Progress of Science and useful Arts” (U.S. Const., Art. 1, Section 8, Cl. 8), by allowing all creative works to be accorded

copyright protection regardless of subject matter or content. Denying copyright protection to works considered obscene by a governmental agency not only might discourage creativity, but also might impair the uniform national standards of the copyright system, because public standards regarding obscenity vary from one generation to another and among Communities.

The Court of Appeals also pointed out that it was inappropriate for the defendants to claim that the alleged obscenity of the movie constituted “unclean hands” precluding any relief to Mitchell Brothers. The court found that allowing such a defense might require extensive judicial proceedings that would frustrate the purpose of the copyright laws. The District Court had found that the alleged obscenity constituted injury to the public as the basis for allowing the “unclean hands” defense, but the Court of Appeals found that this equitable doctrine should not be applied to frustrate the purpose of a

federal statute. The court also pointed out that the unclean hands doctrine would not apply in any event because the complained of conduct on the part of Mitchell Brothers did not affect the relationship between the parties in the matter before the court. Since state and federal statutes regulate the distribution of obscene material, the Court of Appeals considered it unnecessary to attempt to control obscenity by denying copyright protection. Further, if obscenity were allowed as a defense, it would “introduce an unmanageable array of issues into routine copyright infringement actions.”

The District Court also had interpreted the Copyright and Patent Clause of the Constitution as limiting Congress’ power to grant copyrights only to works promoting the sciences and useful arts, but the Court of Appeals rejected this interpretation as “unduly restrictive of Congress power.”

The United States Supreme Court denied a petition for certiorari.

Mitchell Bros. Film Group v. Cinema Adult 7-heater, 604 F.2d 852 (5th Cir. 1979) [ELR 1:15:1]

Injunction obtained by Dallas Cowboys Cheerleaders barring showing of movie Debbie Does Dallas is affirmed by Federal Court of Appeals

Early in 1979, the Dallas Cowboys Cheerleaders obtained a preliminary injunction barring the Pussycat Cinema from distributing, exhibiting or advertising the movie "Debbie Does Dallas." (Opinion reported at ELR 1:4:5) A Federal Court of Appeals has affirmed that preliminary injunction on the grounds that the Cheerleaders' costume is a valid trademark, and the use of an

almost identical uniform in the movie resulted in a likelihood of public confusion.

Pussycat Cinema argued that the Cheerleaders' uniform is a purely functional item necessary for the performance of cheerleading routines, and therefore it could not become a trademark. The Court of Appeals held, however, that not all of the characteristics of the uniform serve purely functional purposes, and that where the design of an item is nonfunctional and has acquired a secondary meaning, the design may become a trademark even if the item itself is functional. In this case, the court ruled that the combination of the uniform's white boots, white shorts, blue blouse, and white star-studded vest and belt is an arbitrary design which makes the otherwise functional uniform trademarkable.

Pussycat Cinema also argued that despite the similarity between Cheerleaders' uniform and the uniform used in the movie, the public is unlikely to be confused within

the meaning of Section 43(a) of the Lanham Act. Pussy-cat Cinema contended that the Lanham Act requires confusion as to the origin of the film, and that no reasonable person would believe the movie originated with the Dallas Cowboys Cheerleaders.

The Court of Appeals ruled, however, that in order to be confused, a consumer would not have to believe that the Cheerleaders produced the movie. The confusion requirement would be satisfied, the court held, if the public believed that the Cheerleaders sponsored or otherwise approved the movie's use of their uniform. In this case, said the court, “. . . the uniform depicted in ‘Debbie Does Dallas’ unquestionably brings to mind the Dallas Cowboys Cheerleaders. Indeed, it is hard to believe that anyone who had seen defendants’ sexually depraved film could ever thereafter disassociate it from plaintiff’s cheerleaders.” This association results in

confusion which has “a tendency to impugn [plaintiff’s services] and injure plaintiffs business reputation. . .”

Moreover, the court also pointed out (in a footnote) that under Section 368-d of New York’s General Business Law, trademark copying may be enjoined even in the absence of confusion as to source or sponsorship.

The Court of Appeals also rejected Pussycat Cinema’s contention that the movie’s use of the uniform was a “fair use,” and its contention that it had a First Amendment right to exhibit the film. “There are numerous ways in which defendants may comment on `sexuality in athletics’ without infringing plaintiff’s trademark,” the court said.

Dallas Cowboys Cheerleaders v. Pussycat Cinema, Lid.,
604 F.2d 200 (2d Cir. 1979) [ELR 1:15:2]

Arbitrators award authors of *West Side Story* almost \$400,000 in additional royalties from television package sales of the film

Leonard Bernstein, Stephen Sondheim and Jerome Robbins, authors of the movie “*West Side Story*,” have been awarded almost \$400,000 in an arbitration proceeding against United Artists Corporation in which they contended that they were entitled to additional payments from television sales and from theatrical distribution of the motion picture.

“*West Side Story*” was licensed to NBC in 1967 for a fee of \$5 million for two showings as part of a transaction in which a number of other motion pictures were also licensed for television exhibition. In 1971, the picture was licensed to CBS for two additional showings, again as part of a transaction involving the televising of

other motion pictures. The picture was also licensed or sold for televising in several foreign countries.

The arbitrators found that the amount received in the NBC transaction was a negotiated fee for the movie and that it was “a fair and reasonable license fee.” However, the arbitrators concluded that the “unilateral allocation” by UA of the sum of \$365,000 as the value of the picture in the CBS transaction was not fair and reasonable and that the value allocated to “West Side Story” should have been \$1,250,000. Further, with one exception, the arbitrators also found that UA’s allocation of sums received from foreign sales of the picture were not fair and reasonable.

The arbitrators rejected several other contentions raised by the authors including an argument that certain transactions were outright sales rather than sales to exhibitors (in which case they would have been entitled to a higher percentage of UA’s receipts) and an argument

that UA had improperly accounted for certain receipts from the theatrical distribution of the picture. The authors also unsuccessfully argued that UA had improperly deducted Canadian tax payments that were subsequently recouped as credits on its United States tax returns.

The arbitrators ordered UA to pay the authors their share of the additional amounts due which amounted to \$88,000 plus interest in connection with the CBS transaction, and \$257,261 plus interest in connection with receipts from foreign sales.

UA was also ordered to pay the administrative fees of the arbitration and to share with the authors the cost of compensating the arbitrators.

In the Matter of the Arbitration between Leonard Bernstein, Stephen Sondheim and Jerome Robbins, claimants, and United Artists Corporation and Arthur

Laurents, Respondents, American Arbitration Association, Commercial Arbitration Tribunal, Case No. 1310-0079-77, September 26, 1979 [ELR 1:15:2]

Arbitrator rules that film project was cancelled, not merely suspended, thus ending producer's obligation to pay wages to film editors

In February of 1978, the financing organization sponsoring the production of the film "The Hungry Edge" ordered the cancellation of production a short time after shooting of the film began. Apparently, script and casting problems, difficulties among crew members and unsatisfactory daily rushes led to the decision to abandon the project.

Subsequently, new writers were employed, new sets were built, and a new cast and crew were assembled;

and in July of 1978, filming began on a story called “The Number.” Two film editors who had been laid off when “The Hungry Edge” project was cancelled contended that “The Number” was merely a revision of the earlier film, and that under their collective bargaining agreement they were entitled to payment of their wages until the completion of “The Number.”

Arbitrator Syd N. Rose (selected by the parties through the Federal Mediation and Conciliation Service) has ruled that the editors were duly notified of their layoff in February and were not entitled to any further wages after the notification.

The IATSE Collective Bargaining Agreement in question provides: “Section 90 . . . The Producer shall employ the Editor . . . and one or more Assistant Editors . . . from the day shooting starts until the final dubbing of the picture is completed. Section 91 . . . An Editor and . . . Assistant Editor shall be employed on only one

picture at a time, excepting only re-takes and added scenes on the previous productions.”

The arbitrator noted that although the theme of the original movie — “a war veteran’s struggle against the pressures of society” — was retained, new writers and a new director had been hired and the format, the characters, the setting and the story line of the film had been changed and restructured. He found that the film editors’ testimony did not prove that the completed film was “The Hungry Edge.” He also found that the crew had been informed of the cancellation and the editors “had conducted themselves as laid-off employees normally act,” that is, by filing for unemployment benefits in one case, and going on vacation in the other. The arbitrator therefore concluded that the production company had not violated the Collective Bargaining Agreement.

Suncrest Cinema Corporation and International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, and Motion Picture Editors, Local No. 776, 79-2 CCH Labor Arbitration Awards, Para. 8498 (1979) [ELR 1:15:3]

Federal District Court rules that parents of murder victim have no right of action for invasion of privacy based on false report of son s homosexuality

In a diversity of citizenship case governed by Texas law, a Federal District Court in Texas has dismissed an invasion of privacy action brought by the parents of a murder victim. Their action was based upon a newscast in 1977, falsely reporting that their murdered son was

involved in a homosexual relationship with his employer, also murdered in the same incident.

Since no Texas case dealt with the question of whether individuals to whom a broadcast was not directed, or in which no reference to them was made, can maintain an action for invasion of privacy, the court reviewed the majority and minority rules of other states.

The court ruled that Texas law had or would recognize all four categories of the tort of invasion of privacy, which are: (1) Appropriation, i.e., commercial exploitation of the property value of one's name or likeness; (2) Intrusion, i.e., invading a person's physical solitude or seclusion; (3) Public Disclosure of Private Facts; and, (4) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation.

The court relied upon the persuasiveness of the majority position that a deceased's relatives may not maintain an action for invasion of privacy, either based on their

own privacy interests or as a representative for the deceased, where the alleged invasion was directed primarily at the deceased. The court went on to outline the policy difficulties in extending the right of action to those not mentioned in a broadcast, such as spurious claims, and fixing boundaries of relationship. In addition, the court pointed out that Texas' defamation law would not allow for recovery by the parents in this situation.

The court's ruling denied the victim's parents a right to bring an action for invasion of their own privacy, since no reference to them was made; and the court denied their right to bring action for invasion of their son's privacy since that right is personal.

Justice v. Belo Broadcasting Corp., 472 F.Supp. 702 (N.D.Tex. 1979) [ELR 1:15:3]

Doctor s libel suit against CBS, Mike Wallace and producer of 60 Minutes segment on abuse of prescription of drugs by diet doctors, raises issues requiring trial

In November of 1976, CBS telecast a segment of “60 Minutes” entitled “Over the Speed Limit” dealing with the alleged abuse by doctors of amphetamines and amphetamine substitutes to treat obesity. The show included an interview with Barbara Goldstein, a patient of Dr. Joseph Greenberg, an endocrinologist.

In the program, Ms. Goldstein told Mike Wallace that her treatment included prescription by Dr. Greenberg of 80 pills per day, between four and six of which were amphetamine-type drugs. Goldstein said she developed very strange side effects including feeling that her hands were not attached to her body. Ms. Goldstein said that Dr. Greenberg’s response was that everyone felt that

way. She also attributed birth defects in her daughter to the treatment she had received from Dr. Greenberg.

Dr. Greenberg brought suit in New York state court, and, after discovery and motions, all parties moved for summary judgment. The trial judge denied the motions because Dr. Greenberg had not succeeded in establishing the falsity of the broadcast, and CBS, Wallace and the producer had not succeeded in establishing the truth of their statements nor in making out their claims for privilege.

An appellate court has affirmed the trial court's ruling. The appellate court rejected CBS' contentions that its statements were not libelous as a matter of law because they were true and because they were constitutionally protected opinion. It had been shown that at the same time Ms. Goldstein was being treated by Dr. Greenberg she was being treated by at least four other doctors. Also, it was not established that Dr. Greenberg had

prescribed 80 pills per day. Further, the medication prescribed by Dr. Greenberg was not necessarily an amphetaminetype drug. Finally, the opinion privilege was not available to CBS since the facts upon which it was based were not exposed in the show. Therefore, the truth or falsity of the statements could not be determined without a trial.

The court also ruled that Dr. Greenberg was not a “limited issue public figure” since he had not thrust himself into the limelight merely by prescribing drugs to Ms. Goldstein, as contended by CBS. The crucial factor of controversy in the act in question was missing here. Even Dr. Greenberg’s acts of publishing numbers of articles in medical journals would not make him a public figure for these purposes. Critical factors not established were a broad audience and an appealing topic. Extensive activity alone was not enough. Finally, the court dismissed as “specious” CBS’ contention that Dr.

Greenberg should not be permitted to avoid public figure status by refusing to be interviewed.

According to the court, CBS had done little to verify the accuracy of Ms. Goldstein's statements. Although it had interviewed other patients, it had extended the privilege of confidentiality to them under New York's broad Shield Law, thus preventing Dr. Greenberg from verifying the information they allegedly provided. The court criticized CBS' use of the Shield Law "as a sword to prevent challenge by the plaintiff," and it ruled that if CBS continued to rely on the Shield Law at trial, it should be precluded from using those interviews as proof that it verified Ms. Goldstein's statements or as evidence that it acted responsibly.

Greenberg v. CBS Inc., 419 N.Y.S.2d 988 (1979) [ELR 1:15:4]

Articles in U.S. News & World Report and Time magazines were not of and concerning indicted Laetrile advocates, were privileged under Minnesota law, and thus were not defamatory

A Federal Court of Appeals has affirmed a trial court ruling granting summary judgment to U.S. News & World Report and Time magazines in a libel suit by plaintiffs who had been charged in a San Diego, California indictment with smuggling and selling Laetrile.

Plaintiff Donna Schuster admitted to being a distributor and seller of vitamin B-17, also known as Laetrile. She described herself as having been nationally and internationally known as a laetrile advocate as well as an advocate of the use of other natural foods for treatment of physical ailments. Plaintiff Donald E. Hanson acknowledged his association with Schuster. He claimed to be

well known in music and entertainment circles although not as prominent socially or in business as Schuster.

In its June 21, 1976 issue, U.S. News & World Report published an article entitled “What the Health Quacks are Peddling Now.” The article was critical of various treatments for various ailments but dealt with these subjects in a general manner. In the same issue, an article was published entitled “Heating Up: Latest Battle Over a Cancer `Cure.” This article concerned the Lactrile controversy in general and mentioned a San Diego, California grand jury investigation of some nineteen individuals. The article did not name either plaintiff, and purported to present both sides of the controversy.

In its June 7, 1976 issue, Time magazine titled its Medicine section “Laetrile Crackdown.” This article was directed to the San Diego investigation and eventual grand jury indictment of seven people. Again, neither plaintiff was mentioned in the article.

The trial court correctly applied the substantive law of the State of Minnesota; and therefore, the Court of Appeals ruled, it was not necessary to consider federal constitutional guarantees as they apply to the case. The trial court granted its summary judgment in part based on its view that defamation of a large group of persons was not actionable unless it could be reasonably understood to apply to a particular plaintiff. The Court of Appeals agreed that the vague and general references in the articles to a comparatively large group, without mentioning the plaintiffs, did not constitute actionable defamation.

The Court of Appeals also agreed with the trial court that under Minnesota law, the publication of the contents of the San Diego indictments was privileged as fair and accurate reporting of judicial proceedings. Therefore, the court held, the privilege was not abused.

Schuster v. U.S. News & World Report, 602 F.2d 850
(8th Cir. 1979) [ELR 1:15:4]

**Alabama Supreme Court reverses libel judgment
against newspaper due to incorrect jury instructions
regarding public figure status and malice**

The Mobile Press Register published several articles concerning the business, civic and political activities of the plaintiff jimmy Faulkner, a prominent local leader. The articles suggested that Faulkner had personally benefited from endorsing a bond issue of a public industrial board on which he served, that he had sponsored a locally unpopular road bill as a legislator in the 1950s, that as chairman of a Hospital Board he had misstated the fiscal condition of the hospital, and that he had

misled the bondholders of a company of which he was president.

In Faulkner's libel action against the newspaper, the trial judge had instructed the jury to determine whether Faulkner was a public figure. The lower court's judgment based on a jury verdict awarding \$25,000 to Faulkner has been reversed by the Alabama Supreme Court, which held that the determination of a plaintiff's status in a libel action must be made by the trial court as a matter of law.

The Alabama Supreme Court noted that the erroneous instruction alone would require reversal. The court went on however, to examine Faulkner's standing in society and his activity in the "public arena." The court noted that Faulkner had taken an active role in civic and political activities for 40 years as an elected official, unsuccessful candidate for Governor, Democratic Party official, member of government boards and publisher of

and writer for newspapers. The court found that “There can be no question but that Jimmy Faulkner was and is, a public figure. He occupies a position of such power and influence that he must be deemed a public figure for all purposes [and in particular] with regard to the published news articles.”

The court rejected Faulkner’s contention that he did not remain a public figure after 1958, the last year he had held or run for public office, finding that Faulkner had held “public and private positions of influence and power and has thrust himself into public controversies to influence their outcome.”

The Alabama Supreme Court also found that the trial court had erred in its instruction concerning “malice.” The instruction failed to point out that the jury had to find by clear and convincing evidence that the articles were published with actual knowledge of their falsity or with reckless disregard of their truth or falsity as

required by *New York Times v. Sullivan*, 376 U.S. 254 (1964). The instruction had also incorrectly suggested that malice might be shown by proof that the articles were published with ill will or evil intent. Since no evidence had been presented that the articles were published with *New York Times v. Sullivan* malice, the court found that the newspaper's motion for judgment notwithstanding the verdict should have been granted.

Mobile Press Register v. Faulkner, 372 S.2d 1282 (Ala. 1979) [ELR 1:15:5]

Briefly Noted:

Obscenity.

A New Jersey appellate court has held that the warrantless search and seizure of allegedly obscene films at the plaintiffs adult bookstore by employees of the County Office of Weights and Measures were unlawful. The court found that the statute relied upon by the defendants referred to inspection powers in connection with the enforcement of regulations prescribing standards of weights and measures for consumable items or items used in a household. The court noted that “reels of film do not fall within either category.” The search and seizure therefore were not justified under the Fourth Amendment, and the court reversed the trial judge’s ruling and remanded the matter for an assessment of the

compensatory and punitive damages claimed by the plaintiff.

PHK Corp. v. Chohamin, 401 A.2d 556 (N.J.App. 1979) [ELR 1:15:6]

Tax.

The Colorado Supreme Court has upheld a city tax imposed on the price paid for admission to any public place or event. The plaintiff, a theater owner, had contended that the tax violated a state constitutional provision requiring uniformity in taxes levied on various classes of real and personal property. The court pointed out, however, that this provision referred only to a direct or ad valorem tax on property and did not apply to an

excise tax on occupations and privileges, such as an admissions tax.

Deluxe Theatres, Inc. v. City of Engelwood, 596 P.2d 771 (Colo. 1979) [ELR 1:15:6]

Labor Arbitration.

A set decorator employed by the Canadian Broadcasting Corporation was discharged when it was discovered that he had used CBC purchase orders to lease musical instruments which he subsequently pawned. An arbitrator in Toronto has found that although the employee eventually redeemed the instruments and paid the rental charges, he had nevertheless exposed the CBC to financial loss and reputational damage, breached his fiduciary responsibility to his employer and obtained the rentals

by false pretenses. However, the arbitrator considered the employee's previous good record, his efforts to insure that none of the rental charges would be paid by the CBC, and the difficulty of finding work opportunities in the employee's field, and ordered him reinstated in some capacity associated with set design, but not involving financial transactions.

Canadian Broadcasting Corp. and Canadian Union of Public Employees, CCH Labor Arbitration Awards, Para. 8390 (1979) [ELR 1:15:6]

Sports Injury.

The Maine Supreme Court has held that documents signed by the parents of a boy who was injured while participating in a hockey clinic were not releases or

indemnity agreements; and thus a jury verdict in the boy's favor against the sponsor and director of the clinic was affirmed. The documents stated that the sponsor of the clinic, Bowdoin College, would not "assume" or "accept" any "responsibility" for injuries sustained by the boy, and that the boy's parents agreed "to assume all risk of injury" to their son." The court held that because the documents did not refer to the College's liability for its own negligence, they were reasonably interpreted to mean only that the College was unwilling to shoulder any additional liability which it would not otherwise bear, such as liability for "accidents" which were not the fault of anyone. Here the defendants were found liable for their own negligence, and thus the documents did not relieve them of that liability.

Doyle v. Bowdoin College, 403 A.2d 1206 (Me. 1979)
[ELR 1:15:6]

Racing Regulation.

The Pennsylvania Commonwealth Court has affirmed the five-year suspension of a horse trainer for possession of prohibited drug paraphernalia, which according to testimony heard by the Pennsylvania State Horse Racing Commission, the trainer had used to drug race horses. The court reviewed the testimony and documents considered by the Racing Commission and concluded that the Commission's order was based on substantial evidence. The court also rejected the trainer's contention that a five-year suspension was so severe as to be an abuse of discretion, because the Board of Stewards had recommended that the trainer's license be revoked.

Ramos v. Commonwealth, 403 A.2d 225 (Pa.Cmwith. 1979) [ELR 1:15:6]

Racing Regulation.

The plaintiff operated a messenger business which conveyed bets to a racetrack for persons unable or unwilling to attend the horse race; the fee charged for the service was 10 percent of the amount to be delivered to the racetrack. In an action for declaratory relief, the plaintiff contended that the Nebraska statute enabling the state to regulate betting on horse races did not allow the state to prohibit “an otherwise lawful occupation.” The Nebraska Supreme Court has upheld the statute and the legislature’s prohibition of racetrack messenger services. According to the court, the legislature had a legitimate state interest in regulating gambling and the

state had found that the plaintiff's business was so intertwined with gambling that it constituted a danger to public morals and the general welfare. A dissenting opinion questioned how the act of delivering bets to a licensed racetrack could be illegal when the state had not prohibited betting on horse races at the racetrack. The dissent suggested that instead of prohibiting the messenger service, the legislature could have regulated it by means of licensing, bonding or reporting requirements in order to alleviate any potential abuses.

Pegasus of Omaha, Inc. v. State of Nebraska, 280 N.W.2d 64 (Neb. 1979) [ELR 1:15:7]

Defamation.

The Supreme Court of Alabama has held that certain radio broadcasts taped by a church pastor at an Arab radio station constituted “libel,” if defamatory, rather than “slander.” In a case of first impression in Alabama, the court relied upon decisions from other jurisdictions and upon the Restatement of the Law of Torts, Second, defining libel as follows: “(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.” The Restatement specifically treats broadcasting by stating that defamatory matter broadcast by radio or otherwise is “libel” whether or not it is read from a manuscript.

First Independent Baptist Church of Arab v. Southerland, 373 So.2d 647 (Ala. 1979) [ELR 1:15:7]

Criminal Law.

A Federal Court of Appeals has upheld the conviction of the operator of a bogus talent agency for wire fraud arising out of his scheme to deceive women into believing he could obtain legitimate and well-paying acting and modeling jobs for them in order to gain their willingness to submit to his sexual advances. In its ruling, the court rejected the defendant's contentions that he could not be prosecuted merely for attempting to meet women, that wire fraud must involve an attempt to obtain money or property, and that the prosecution against him would violate public policy by protecting a bargain of sexual favors for career advancement. The court also

rejected the defendant's contentions that his constitutional rights were violated since the statute did not notify him his conduct was illegal and that it intruded into his private consensual activities.

United States v. Condolon, 600 F.2d 7 (4th Cir. 1979)
[ELR 1:15:7]

Obscenity.

The Kansas Supreme Court has upheld the convictions of exhibitors of films titled "Ghost Town" and "Affair in the Air" under a Kansas statute prohibiting promotion of obscene materials. The court rejected the defendants' contentions that the omission from the Kansas obscenity statute of the Miller v. California, 413 U.S. 15 (1973), phrase, "actual or simulated" demonstrated a legislative

intent to proscribe only sexual conduct actually shown on screen, as opposed to that which was simulated or otherwise depicted. Also, the court rejected the defendants' contentions that the film "Ghost Town" could not be ruled obscene as a matter of law under the "taken as a whole" standard of *Miller v. California*, since less than one-half of the film's footage involved depiction of sexual conduct.

State of Kansas v. Starr Enterprises, Inc., 597 P.2d 1098 (Kan. 1979) [ELR 1:15:7]

Obscenity.

Defendants in a prosecution in a Federal District Court in Louisiana, for interstate transportation of the allegedly obscene film, "Illusions of a Lady," succeeded in having

the trial court suppress the film as illegally seized by the F.B.I. The Court of Appeals has reversed the trial court, however, ruling that the affidavit submitted to the magistrate by F.B.I. agents adequately established probable cause in detailing the exposition of twelve sexually explicit scenes that graphically depicted sexual conduct. In so ruling, the Court of Appeals rejected contentions by the defendants that the affidavit was inadequate in that it did not enable the magistrate to determine the context in which the scenes were presented, thereby denying him the opportunity to “focus searchingly” on the issue of obscenity. The court stated that the episodes described in the affidavit contained successive acts which common sense would dictate required several minutes to perform and would consume a substantial portion of the 65-minute film, negating the trial judge’s concern that the scenes described might represent only a minute part of the movie.

United States v. Middleton, 599 F.2d 1349 (5th Cir. 1979) [ELR 1:15:7]

Obscenity.

The Rhode Island Supreme Court has struck down its state's obscenity statute as unconstitutional, because the statute expressly defined "patently offensive sexual conduct," and thereby invaded the exclusive province of the jury by establishing a conclusive presumption and pre-determination of what the average person applying contemporary community standards would find obscene. The statute contained descriptions of the types of sexual conduct that were to be deemed to be "patently offensive." The court ruled that if the legislature had merely compiled a list of the type of sexual conduct that might be subjected to the factfinder's scrutiny, the scheme

could be constitutionally satisfactory under *Miller v. California*, 413 U.S. 15 (1973); but the existing regulatory scheme did not allow the fact-finder to decide.

D&J Enterprises, Inc. v. Mitchaelson, 401 A.2d 440 (R.I. 1979) [ELR 1:15:8]

NEW LEGISLATION AND REGULATIONS

Organizations that record and sell contemporary symphonic and chamber music may qualify for federal tax exemption

Organizations formed and operated exclusively for charitable and educational purposes qualify for exemption from federal income tax. IRC Section 501(c)(3). In the past, organizations devoted to the promotion and

development of the arts, organizations that encourage and promote young musicians by conducting workshops, sponsoring public concerts and securing paid engagements for young musicians, organizations that sponsor public art exhibits, and organizations that publish and sell educational material all have qualified for tax exemption.

The Internal Revenue Service now has ruled that organizations that record and sell contemporary symphonic and chamber music also may qualify for tax-exempt status.

The organization that applied for the IRS's recent ruling records the new works of unrecognized composers and the neglected works of established composers. The music selected for recording has a limited commercial market and is not generally produced by the commercial music publishing and recording industry. The organization sells its records primarily to libraries and

educational institutions. Some records are provided free to educational radio stations. The organization also makes some sales to individuals by mail order and specialty record shops, but its records are not sold through commercial record stores. The organization does not advertise, but does publish a catalog. Compositions to be recorded by the organization are selected by an editorial board of recognized experts in contemporary music, none of whose works are considered for recording. Selections are made based on the quality of the work, not on its potential for profit. Composers receive royalties from the sale of the recordings, but due to the limited commercial market for this type of music, royalties are insignificant. Production subsidies provided by outsiders are reimbursed from sales, but those providing subsidies do not receive back more than they provide. The organization's deficits are made up by contributions from the public and from grants.

The IRS has ruled that an organization operated in this manner is operated exclusively for charitable and educational purposes and is exempt from federal income taxation. Organizations that consider themselves to qualify for exemption must file an Application for Recognition of Exemption with the IRS.

Revenue Ruling 79-369, I.R.B. 1979-46, 15, 79(10)
CCH Standard Federal Tax Reports, Para. 6910A [ELR
1:15:5]

DEPARTMENTS

In the Law Reviews:

“Comm/Ent - A Journal of Communications and Entertainment Law” published by Hastings College of the Law, contains the following articles in its latest issue:

Preassignments of Creators’ Rights: An Adhesion Analysis by Paul Geller, 2 Comm/Ent 1-45 (1979)

The Search for Media Ethics by Bernard Rubin, 2 Comm/Ent 47-86 (1979)

A New Approach to Risk Coverage in the Motion Picture Industry: Short-Term Life Insurance by Heinz J. Pulverman and Alan J. Setlin, 2 Comm/Ent 87-96 (1979)

“Can We Save Our Ball Club?”: The Availability of Injunctive Relief for a Municipality to Prevent the Threatened Breach of a Stadium Lease-Agreement by a

Professional Sports Franchise by William L. Babcock, Mark A. Steiner and Patrick Baldwin, 2 Comm/Ent 97-124 (1979)

Employment Discrimination in Television Broadcasting: A Study of FCC and EEOC Concurrent Jurisdiction by Glenda G. Leatherman, 2 Comm/Ent 125-176 (1979)

Sports and the Law: A Comprehensive Bibliography of Law-Related Materials by Frank G. Houdek, 2 Comm/Ent 177-220 (1979)

Copies of the issue, Volume 2, Number 1, are available for \$6.50 each from Comm/Ent, 198 McAllister Street, San Francisco, California 94102.

[ELR 1:15:8]