

## RECENT CASES

### **Publishers of "Fantastic Films" magazine obtain injunction preventing publication of competing magazine under the name "Fantastica"**

A Federal District Court in New York City has ruled that the publishers of a magazine entitled "Fantastic Films" had established sufficient trademark identification and possible consumer confusion to qualify for injunctive relief preventing publication of another magazine under the name "Fantastica."

The plaintiff, Blake Publishing Corporation, began publication of "Fantastic Films" in December of 1977. The magazine is devoted to motion picture and television works in the science fiction and fantasy genre. "Fantastic Films" had sold in excess of 400,000 copies

prior to May of 1979 and was considered to be successful, according to expert testimony.

The plaintiff sued on the eve of publication of "Fantastica" by the defendants under the Lanham Act, the New York General Business Law, and common law principles of unfair competition. The principal defendant, O'Quinn Studios, is a successful publisher in the science fiction field with several titles in the science fiction/fantasy genre.

It was shown at trial that the proposed editorial content of "Fantastica" would overlap substantially with that of "Fantastic Films." Further, both magazines appealed to the youth market (age 16 and younger), and both magazines were the same general size and approximate price. The logo of "Fantastica" and that of "Fantastic Films" were visually and verbally similar, especially when considered in the context of the manner in which distributors displayed them. The defendants acknowledged their

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familiarity with the plaintiffs magazine; and they acknowledged that the staff of "Fantastica" was aware of the "Fantastic Films" logo when they developed the logo for their proposed publication.

In granting the permanent injunction, the court found the plaintiffs product mark to be classifiable as "suggestive" rather than "generic" as contended by the defendants. The court ruled that the plaintiff had satisfied the "more likely than not" test of establishing secondary meaning for its mark. The court also acknowledged a growing recognition that trademarks with secondary meaning in the making are entitled to some protection. Most persuasive on that issue was expert testimony that title identification in the relevant market would occur after about two years, and that the plaintiffs extensive marketing accelerated the process.

Although the court found that the strength of the plaintiffs mark was not sufficiently "origin indicating" to

compel a finding of confusion without consideration of other factors, in light of the testimony concerning the manner of newsstand display, the visual and verbal similarity of the marks was significant.

The plaintiff succeeded in satisfying the ultimate test of confusion, which is not whether a consumer would know the difference between the two magazines if both were presented for a side-by-side comparison. Rather, the test is whether a consumer would be confused if he had heard of "Fantastic Films" and was then presented only with an issue of "Fantastica." The defendants' awareness, of prior use by the plaintiff and the fact that the defendants had not yet published helped tip the equities in favor of the plaintiff.

The order allowed the defendants to maintain use of the word "fantasy" or derivations in their other, existing publications.

Blake Publishing Corporation v. O'Quinn Studios, Inc.,  
202 USPQ 848 (S.D.N.Y. 1979) [ELR 1:16:1]

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**"Miss Nude U.S.A." and "Ms. Nude U.S.A." held to be confusingly similar to registered trademarks for Miss U.S.A. beauty pageant**

The plaintiff, Miss Universe, Inc., is the owner of the trademark and service mark "MISS U.S.A." and has produced the Miss U.S.A. beauty pageant since 1952. The winner of the Miss U.S.A. contest represents the United States in the Miss Universe contest. The defendants, William Flesher, Fran Flesher, Mel Lynn and Treehouse Fun Ranch, Inc., sponsored a beauty pageant in 1977, referred to as the "MISS NUDE U.S.A." "Ms. NUDE U.S.A.," and the "Miss Nude International Beauty Pageant." The obvious distinction between the

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two contests is disclosed by the titles of the defendants' contest.

A Federal District Court in Los Angeles granted the plaintiffs request for a preliminary injunction prohibiting the defendants from using the marks MISS NUDE U.S.A. and MS. NUDE U.S.A., because the defendants' marks caused inherent confusion of source and dilution of the plaintiff's registered marks. In granting the preliminary injunction, however, the District Court ruled that the defendants could use their marks in written material as long as a hyphen was inserted between "Nude" and "U.S.A." In all oral references to the names, the word "hyphen" or "dash" was ordered to be used: between the words "Nude" and "U.S.A."

A Federal Court of Appeals in California has ruled that the District Court did not abuse its discretion in finding that the defendants' use of their marks would irreparably damage the plaintiff or that the balance of the hardships

avored granting the injunction. The District Court had noted that the plaintiff had a substantial investment over many years in its well known and highly regarded marks and that the defendants' investment in the names "Miss Nude U.S.A." and "Ms. Nude U.S.A." was de minimis.

The Court of Appeals also agreed with the plaintiff's contention that the portion of the injunction requiring the use of hyphens or dashes to distinguish proper from improper use is impossible to comply with. The Court of Appeals held that the hyphen requirement in the temporary injunction was an abuse of the District Court's discretion, because it was inconsistent with the findings made by the District Court, and because it negated whatever protection the injunction would otherwise have provided.

Miss Universe, Inc. v. Flesher, 605 F.2d 1130 (9th Cir. 1979) [ELR 1:16:2]

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**Motion for summary judgment denied in antitrust action filed by Home Box Office against the Director's Guild of America as a result of DGA order that "free-lance" directors not deal with HBO after failure of contract talks**

A Federal District Court in New York City denied a DGA motion for summary judgment in Home Box Office's antitrust action against the Director's Guild, because there were insufficient facts in the record to enable the court to determine whether "freelance" directors and associate directors are employees or independent contractors, and because they might be includible in the DGA's bargaining unit even if they are independent contractors.

Since labor unions in pursuance of their legitimate functions are exempt from the antitrust laws, the crucial question to be resolved in this suit is whether the directors and associate directors with whom HBO sought to deal would be properly included in a collective bargaining unit represented by the DGA. The court pointed out that by bargaining on behalf of persons who are not employed by a producer, the union might lose its antitrust exemption for ordering its members not to deal with HBO, a non-signatory of the Live and Tape Television Agreement of 1978. The nature of the employment relationship between HBO and these union members therefore had to be determined.

The DGA's motion for summary judgment, based on its labor union exemption, was not granted by the court, because there were not sufficient facts to allow the court to determine the nature of the relationship between HBO and the directors. The court announced that the test of

whether the directors were or were not employees depends upon the nature and extent of the control retained by the producers over the work and judgment of the directors.

HBO contended that the directors and associate directors were independent contractors, and therefore a non-labor group, because of the following factors: (1) they were retained by HBO on a piecework basis; (2) they were paid a flat fee regardless of the time a project took or when it was completed; (3) free lancers were allowed to accept simultaneous additional projects; (4) free lancers had complete autonomy in the selection of technical crews; (5) the directors controlled the hours, technique and other personnel; (6) each free lancer had special skills; (7) the directors often had proprietary interests in the projects; and (8) it was a common practice of free lancers to incorporate and operate independently. DGA,

on the other hand, contended that free-lance and in-house directors perform essentially the same functions.

The court also acknowledged that the DGA was correct in its assertion that free-lance directors might lawfully be included in the DGA's bargaining unit even if classified as independent contractors, if they are in competition for jobs and wages with the Guild's in-house directors.

Home Box Office v. Director's Guild of America, 1979-2 CCH Trade Cases, Para. 62,900 (S.D.N.Y. 1979) [ELR 1:16:2]

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**Radio station is entitled to recover liquidated damages from former disc jockey who breached non-competition clause in employment agreement**

A radio station's employment agreement with an announcer contained a provision that the announcer would not participate in or be connected with "the ownership, management, operation or control" of any other station in Cullman County, Alabama for one year after leaving the station. The agreement also contained a liquidated damages clause providing that the employee would pay the station \$3,000 if he breached the agreement. The announcer's employment was terminated in January of 1978, and in July of 1978, he was employed as an announcer for another radio station in Cullman.

The announcer's original station was unsuccessful in the trial court in its action for injunctive relief and damages. However, the Alabama Supreme Court has reversed and remanded the case, finding that the station was entitled to recover liquidated damages.

The Alabama Supreme Court noted that the trial court found that the two stations for which the announcer

worked broadcast different types of music, and therefore, presumably had different listeners. But the original station argued that evidence could be presented to show that the two stations' country music and popular music audiences overlapped to a significant degree. Therefore, the Supreme Court held that the trial court had erred in distinguishing the stations' listeners on the basis of "common knowledge" without specific proof.

The Supreme Court also ruled that the covenant not to compete was enforceable. According to the court, there are three elements which must be satisfied in order to enforce such a covenant: the employer must have a substantial protectible right unique in his business; the restriction on the employee is relevant and reasonable to the protection of that right; and there is no imposition of undue hardship on the employee.

In this case, the fact that a radio station is often personalized and identified to its listeners by its announcers

was found to constitute a substantial business right. The restraint on employment for one year and within one county was found to be relevant and reasonable a's applied (i.e., the restraint would apply only to the same type of job as the announcer had previously performed); and there was no undue hardship on the employee.

The court also upheld the liquidated damages provision of the agreement, noting the difficulty of determining damages resulting from the employee's breach. And, said the court, such damages could be awarded even though the trial court had found that injunctive relief was inappropriate.

Cullman Broadcasting Co., Inc. v. Bosley, 373 So.2d 830 (Ala. 1979) [ELR 1:16:3]

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**Federal Court of Appeals finds that evidence established absence of "first sale" and therefore upholds criminal conviction for copyright infringement of sound recordings**

A Federal Court of Appeals in California has upheld criminal convictions for copyright infringement of sound recordings in violation of the former Copyright Act. The defendants purchased large spools of tape containing "sound-alike" albums (i.e., imitations of the original album). They would then splice the tapes into approximately 20 single album cartridges and attach a label to each rewrapped cartridge indicating that it was a recreation. The defendants unsuccessfully contended that the Government had failed to prove the absence of a "first sale."

The first sale doctrine provides that when a copyright owner parts with title to a particular copy of his

copyrighted work, he divests himself of his exclusive right to vend that particular copy (17 U.S.C. section 27; see sections 109 and 202 of the 1978 Copyright Act). Thereafter, the copyright owner cannot restrict subsequent sales or transfers of that particular copy.

In several recent cases involving criminal prosecutions for copyright infringement for the unauthorized sale of copyrighted motion pictures, courts have held that the Government is required to prove the absence of a first sale of the articles the defendant was charged with infringing. In this case, however, the court held that this did not require the Government to trace each recording to its original source. The court noted that "[s]ound recordings are not readily traced because of their wide distribution and the ease with which they can be reproduced," and it found that the Government nevertheless had established the proof necessary to demonstrate the absence of a first sale.

The court noted that in *United States v. Whetzel*, 589 F.2d 707 (D.C.Cir. 1978), the kind of circumstantial evidence that might be used to establish proof of the absence of a first sale had been set forth. Such evidence might include "the labels on the tapes listing a manufacturer with a non-existent address, the low price of the tapes, [and] the circumstances of the sale . . ." In *Moore*, the Government had presented evidence showing that the defendants had no authority from any company to manufacture or distribute either the individually packaged tapes in question or the larger spools of tape. And according to the court, "[t]he fact that the tapes were labeled and packaged by the defendants and that the price of the tapes was only about \$1.00 also pointed to the illicit origins of the tapes." An expert witness testified that the sound on the tapes sold by the defendants was inferior. No other evidence supported the legitimacy of the tapes. The court concluded that the evidence

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demonstrated the unauthorized nature of the tapes and established the absence of a first sale.

Although agreeing with the defendants that the District Court had erred by refusing to instruct the jury on the first sale doctrine, the court found that the error was harmless beyond a reasonable doubt.

The court also rejected the defendants' argument that proof was required that they had reproduced and distributed the recordings, since either act may constitute infringement. A dispute about the sufficiency of certificates of registration of copyright as evidence of the fixation date of the recordings was also resolved against the defendants.

United States v. Moore, 604 F.2d 1228 (9th Cir. 1979)  
[ELR 1:16:3]

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## **FCC rules that Seattle television station is not entitled to protection against cable systems' carriage of Canadian television signals**

KIRO-TV, a CBS licensee in Seattle, Washington, in a series of FCC and judicial proceedings, sought protection against cable systems in the Seattle-Tacoma market which were carrying the signals of Canadian television stations showing U.S. network programming as much as two weeks prior to the broadcasting of those programs by KIRO. KIRO initially had been denied special relief by the FCC, but a Federal Court of Appeals in Washington, D.C. remanded the matter to the FCC. The court noted that KIRO would have been entitled to exclusivity against simultaneous network duplication by distant domestic stations carried by cable, and that the FCC had recognized that prereleased programming on foreign stations might also have an adverse impact on local

stations. The FCC nevertheless had denied relief to KIRO, and the court could find no rational basis for the distinction between simultaneous and prerelease duplication or for the FCC's denial of relief to KIRO. After the matter was remanded to the FCC, KIRO was granted special relief. The cable systems then sought reconsideration of that decision; and in a recent Memorandum Opinion and Order, the FCC has found that KIRO had not made a substantial showing that the cable carriage of prereleased programming would have a critically adverse effect. Therefore, the FCC has denied the station's request for protection.

The FCC noted that it had just adopted a Report and Order in Docket 20649. Docket 20649 was instituted to "examine the effect of prereleased programming [by Canadian stations] on local U.S. stations." The Report concluded that it is "impossible to regard or to treat the Canadian prerelease practice as a demonstrable or

plausible threat to the survival of valuable local television services or stations in U.S. border markets generally." The FCC therefore rejected KIRO's contention that it was entitled to the same presumption of harm and presumption of need for protection as in simultaneous broadcast cases. Rather, the FCC determined to treat local stations' requests for protection against cable carriage of prereleased programming as petitions for special relief.

The FCC then found that KIRO had not shown that it would suffer unusual or exceptional harm requiring such special relief. KIRO contended that over 50% of its network programming was duplicated by the Canadian signals carried by the cable systems. But noting that studies indicated that KIRO would experience an audience loss of no more than 0.7% and that no more than 1.4% of its revenue would be lost, the FCC concluded that "[t]his small percent of potential revenue loss is well within the

range of projected market losses . . . deemed . . . to present no 'demonstrable or plausible' threat to the ability of local stations to continue to operate in the public interest."

In his dissent, Commissioner Abbott Washburn stated that the FCC's decision would erode "the ability of U.S. television stations located near the Canadian border to provide local service to their communities." He noted that although a revenue loss of 1 1/2% might seem insignificant, it could affect the quality of local service. And he pointed out the inconsistency of granting protection against simultaneous duplication of network programming while denying it in prerelease cases.

In re United Community Antenna Systems, Inc., Community Telecable of Seattle, Inc., Tele-Vue Systems, Inc., FCC 79-781 (1979) [ELR 1:16:4]

**Independent exhibitor's failure to present evidence of conspiracy among exhibitor chains and distributors to restrain film licensing results in directed Verdict for defendants; in separate suit, Twentieth Century-Fox is denied summary judgment in anti-trust suit by exhibitor**

Wilder Enterprises, which owned and operated two theaters in the Norfolk-Virginia Beach area of Virginia, alleged that three chains of motion picture exhibitors in the area and 11 motion picture distributors had engaged in a conspiracy to license first-run films only to the defendant exhibitors in violation of antitrust laws, causing his two theaters to lose business and eventually go out of business. A Federal District Court in Virginia has found that Wilder failed to present a prima facie case and granted the defendants' motion for a directed verdict.

The defendant exhibitors had been involved in a "split" arrangement whereby they divided available first run films and agreed to refrain from competitive bidding against the other split members on those films in an attempt to lower prices for film licenses. The court noted, however, that the split system was not "Per se illegal nor, standing alone, evidence of a conspiracy to violate the antitrust laws." Wilder had presented no evidence showing that the split had prevented any other exhibitor from competing in the bidding for licensing films. And non-split members, including Wilder, had been licensed films when they offered superior licensing terms.

Wilder also unsuccessfully contended that the distributors had implemented the split and had conspired to restrain trade by (1) providing advance information to exhibitor defendants, (2) requiring unreasonably high advances and guarantees from Wilder and other non-split exhibitors but not of split members, and (3)

rejecting superior bids of non-split exhibitors and accepting inferior bids of split members. The court found that Wilder had neither requested nor been refused the information acquired by its competitors. The guarantee requirement was found to be in the business self-interest of the distributors, and thus it did not necessarily support an inference of an agreement among the distributors to demand advances and guarantees. Further, the evidence showed that split members were required to furnish such guarantees. The court also found that there was no proof that any film was licensed to an exhibitor other than the one which made the best bid or that split members had received preferential treatment by the distributors.

Wilder's claim under Section 2 of the Sherman Act was also denied, again because there was no evidence as to "who was attempting to monopolize or even what product was alleged to be the subject of the monopoly."

The court pointed out that Wilder had not shown that it had been injured by and suffered calculable damages resulting from the defendants' allegedly anticompetitive conduct. There was no evidence that Wilder had bid for any of the 23 films which it purportedly did not receive due to the defendants' allegedly illegal activities or that allegedly inferior bids by the defendant exhibitors had been successful. And Wilder had not shown that it would have been futile to make bids on the films it sought. In fact, during the years when the conspiracy allegedly functioned, "a large percentage of the films [Wilder] played was licensed from distributor defendants." (The court noted that it could not determine whether the licensed films were of an inferior quality as Wilder claimed.)

The court also found that there was no evidence presented from which damages could be computed. The court suggested that if the successful bidder's gross

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receipts were compared with Wilder's house expenses on the 23 films in question, Wilder would have lost money by playing the films. Wilder also would have had to establish the income it received from the films it did show during relevant time periods as well as revenues received from concession sales. And, according to the court, Wilder had not shown that there was "a diminution of value of its real estate by virtue of its being sold without an ongoing theater business as opposed to its being sold as an ongoing enterprise," or that it suffered damages resulting from the loss of a profitable business, since apparently Wilder had consistently lost money."

The court concluded that there was no evident upon which a jury could base a verdict "without resorting to speculation or guesswork" and therefore entered judgment for the defendants.

In a separate case, a Federal District Court in Pennsylvania has denied a motion for summary judgement by

Twentieth Century-Fox on three of the four antitrust claims raised by Cinema Service Corp., an exhibitor. Cinema Service argued that Fox had conspired with other licensees, and in particular, with affiliated theaters and theater circuits, to grant such affiliated theaters higher house allowances. According to Cinema Service, this "discriminatory pricing policy" caused it to pay a larger film rental for Fox's films and impaired its ability to compete for the films, causing it a loss of revenue. Cinema Service had introduced evidence that Fox had refused to negotiate an increase in Cinema Service's house allowance, unless it agreed to submit to an audited breakdown of its actual expenses, a condition that was not required of affiliated theaters.

Cinema Service also offered to prove that it had been denied certain contractual advantages granted to the affiliated theaters such as extended runs, favorable credit terms and various rebates, again to its competitive

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disadvantage. Although Fox asserted that competitive factors and negotiation determined the terms of its exhibitor contracts, the court found that genuine issues of material fact existed precluding summary judgment.

Cinema Service had also claimed that Fox had conspired with the affiliated theaters in the Pittsburgh area in a split arrangement, affecting "the availability of desirable films." The court stated that "[a]lthough there is no evidence in this case, that the split system, standing alone, had this effect, or was so intended, there is evidence from which it may be inferred that an artificial price structure existed." Thus, it denied Fox's motion for summary judgment on this claim.

The court found that a jury question might exist concerning Fox's motives in ceasing to do business with Cinema Service when it refused to participate in the allegedly illegal conspiracies and filed its action against Fox.

Cinema Service also alleged that Fox's conduct violated the terms of a consent decree entered in *United States v. Loew's, Inc.* (1951 CCH Trade Cases, Para. 62,861). But the court found that a non-party to a decree entered in a government antitrust suit was not a third party beneficiary entitled to enforce the decree, and that Fox's dealings, allegedly in violation of the decree, were not necessarily contracts in restraint of trade. Therefore, the court ruled that reference to the decree would not be admissible at trial.

*Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.*, 1979-2 CCH Trade Cases, Para. 62,886 (E.D.Va. 1979); *Cinema Service Corp. v. Twentieth Century-Fox Film Corp.*, 477 F.Supp. 174, 1979-2 CCH Trade Cases, Para. 62,964 (W.D.Pa. 1979) [ELR 1:16:5]

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## **Briefly Noted:**

### **Children's Television Regulations.**

In April of 1978, the Federal Trade Commission published a Notice of Proposed Rulemaking in connection with proposed regulations on the content of television advertising seen by or directed at children. The Notice also announced a special set of rules, differing from the rules used by the FTC in other trade regulation rulemakings, that would apply only to the children's advertising proceeding. A challenge to the special rules brought by a group of advertisers and trade associations was rejected by a Federal District Court in Washington, D.C. A Federal Court of Appeals in Washington, D.C., although stating that it had "serious doubts about the validity of some of the [FTC's] actions," has upheld the District Court decision. The Court of Appeals concluded

that reviewing the rules prior to the adoption of regulations would be premature, and that any deficiencies in the rulemaking procedure could be adequately and more appropriately remedied after observing the effect of the rules on the FTC's proceedings.

Assn. of National Advertisers, Inc. v. FTC, 1979-2 CCH Trade Cases, Para. 62,950 (D.C.Cir. 1979) [ELR 1:16:6]

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### **Labor Regulation.**

In 1976, the California Industrial Welfare Commission adopted wage orders setting minimum and overtime wages for several industries, including the entertainment industry. A California Court of Appeal has upheld a lower court judgment declaring the orders invalid and

restraining their enforcement on the ground that the IWC had not made an adequate statement of the basis for adopting the orders. The Court of Appeal noted that a separate IWC order, effective since April of 1978, governs the minimum wage of all employees in California and thus invalidation of the 1976 orders "did not have the effect of depriving employees of benefits which they had previously been entitled to receive."

Hitchcock Transportation Co. v. Industrial Welfare Commission, 99 Cal.App.3d 262 (1979) [ELR 1:16:6]

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### **Tax.**

The Hutchinson (Kansas) Broncos, a semiprofessional baseball team which does not pay its players but does guarantee them employment in Hutchinson, has been

held to be a tax-exempt "charitable organization." Non-profit organizations that sponsor amateur sports competition may qualify for tax-exempt status. The IRS contended. that sponsorship of a semi-pro team is not a tax-exempt activity. However, the U.S. Tax Court has held that the Broncos, a non-profit organization, promoted and sponsored "amateur" sports, because its players were not paid for participating on the team. The organization sponsored sports by owning and operating the team, leasing and maintaining a baseball field for its team, other teams, and a baseball camp, and furnishing instructors for little league teams and a baseball camp. The organization raised funds by selling tickets, advertising and concessions, by solicitations and from operations of the Broncos. No member of the organization received any part of the profits.

Hutchinson Baseball Enterprises, Inc. v. Commissioner, 73 T.C., No. 14; 79(10) CCH Standard Federal Tax Reports, Para. 7914 [ELR 1:16:7]

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### **Obscenity.**

State courts have upheld obscenity convictions in the following cases, generally finding that the materials distributed were obscene and that the defendants possessed the requisite knowledge or intent:

The Georgia Court of Appeals has held that two motion pictures exhibited by the defendants were a "public portrayal of hard-core sexual conduct, for its own sake, and for the ensuing commercial gain and were not protected by the First Amendment." The court also rejected the contention of one of the defendants that he was an

"innocent bystander" rather than an active participant in exhibiting the films to the public. *Clayton v. State*.

The Georgia Court of Appeals has also upheld a conviction for distributing obscene material in *Stop, Inc. v. State*.

The Indiana Court of Appeals has found that a film and magazines sold by the defendants lacked 'serious literary, artistic, political, or scientific value despite the inclusion in the magazines of some insignificant text' and were therefore obscene. The defendants testified that their responsibilities included putting plastic covers on the magazines on display and, along with certain other facts, this was found sufficient for the jury to have inferred the defendants' knowledge of the nature and content of the exhibits presented at trial. *Hagood v. State*.

The Supreme Court of Delaware has held that the warrantless seizure of a film at an adult bookstore was improper, since the seizure was not justified by any

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"exigent circumstances" and was based solely on the observations of the arresting police officers without a prior judicial determination of obscenity. The defendant's conviction on that count was reversed. The court found, however, that there was no evidence that the introduction of the improperly seized film prejudiced the other evidence, which included several magazines and one film. The state was found to have met its burden of proving that the defendant had been aware of the nature and content of the materials sold. *Gotlieb v. State*.

The Tennessee Court of Criminal Appeals has held that magazines sold by the defendant were obscene and that the trial judge had properly instructed the jury to find whether the defendant had knowingly distributed the material with an awareness of its character, nature and contents. *Grigsby v. State*.

Clayton v. State, 254 S.E.2d 495 (Ga.App. 1979); Stop, Inc. v. State, 254 S.E.2d 463 (Ga.App. 1979); Hagood v. State, 395 N.E.2d 315 (Ind.App. 1979); Gotlieb v. State, 406 A.2d 270 (Del. 1979); Grigsby v. State, 586 S.W.2d 836 (Tenn. App. 1978) [ELR 1:16:7]

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### **Obscenity.**

Plaintiff, the operator of theaters engaged in the exhibition of sexually explicit material, contended that the enactment of a Dallas city ordinance regulating the location of establishments engaged in exhibition of certain sexually explicit materials deprived the plaintiff of its property in violation of the constitution, since the ordinance did not include a grandfather clause exempting preexisting businesses. A Federal District Court in Dallas has held that where there was no prior judicial

determination that the plaintiff's theater was a public nuisance, and where the plaintiff's theater was in operation prior to the effective date of the ordinance, the city could not enforce the ordinance. Dallas' ordinance was ruled not to be a reasonable regulation of sexually explicit businesses for the reason stated and because it did not contain findings concerning the effect of the regulated establishments.

Ellwest Stereo Theaters Inc, of Texas v. Byrd, 472 F.Supp. 702 (N.D.Tex. 1979) [ELR 1:16:7]

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## **Tax.**

The Florida Supreme Court has held that the state legislature had the authority to repeal the tax exemption granted to the Daytona Beach Racing and Recreational

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Facilities District and has found that land leased from the District for use by the Daytona International Speedway was subject to ad valorem taxation.

Daytona Beach Racing and Recreational Facilities District v. Volusia County, 372 S.2d 419 (Florida 1979) [ELR 1:16:7]

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### **Tax.**

The Maryland Court of Special Appeals has held that the leasehold interest of the defendant Washington National Arena Limited Partnership in land and improvements on part of the land it leased from a Maryland Park Commission was not exempt from county and state real property taxation as a "concession for occupancy of a public park." The defendant operated the Capitol

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Centre, a sport and recreation facility occupying approximately 80% of the Commission's property. The court found that the facility and an adjacent parking lot could not be considered a park because it did not provide "open space for recreation and the enjoyment of sunshine and air . . . and because the structures and/or improvements . . . circumscribe the potential use of the greater portion of the property to the detriment of the enjoyment of open space in its natural state."

Supervisor of Assessments of Prince George's County v. Washington National Arena, 402 A.2d 148 (Md.App. 1979) [ELR 1:16:7]

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## **Libel.**

A North Carolina Appellate Court has reversed a trial court order dismissing an action for libel brought by an advertising agency against a media buying service. The service had sent letters to television stations allegedly suggesting that the plaintiff agency breached its contracts and failed to pay its bills. The appellate court found that the letters were libelous per se because they tended to injure the plaintiff's reputation by disparaging the plaintiff's integrity in its business dealings.

Matthews, Cremins, McLean, Inc. v. Nichter, 256 S.E.2d 261 (N.C.App. 1979) [ELR 1:16:8]

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## NEW LEGISLATION AND REGULATIONS

### **New California statute permits income tax deductions for charitable contributions of artistic, musical and literary property**

As of January 1, 1980, creators of artistic, musical and literary properties will be able to deduct, for California state income tax purposes, the fair market value of their own works which they donate to charitable institutions. (Previously, the amount of the deduction was limited to the cost of the materials used in the creation of the work, such as paint and canvas in the case of art, or paper and pencils in the case of musical and literary manuscripts.)

In order to be eligible for the deduction, the taxpayer must be a resident of California for the entire year and must have earned at least 20% of his or her gross

income for the year, or at least 50% of his or her gross income for the prior three years, from the sale of artistic, musical or literary properties.

The fair market value of the donated property must be established by an independent appraisal.

While it appears that the fair market value of literary and musical manuscripts will be deductible when donated to charitable institutions, the new law specifically provides that letters, memoranda and similar property that are written by federal, state and local officeholders will not be deductible, if the writing is related to, or arises out of, the performance of the duties of such offices.

Chapter 925 of the California Statutes of 1979, amending Section 17216.2 of the California Revenue and Taxation Code [ELR 1:16:6]

**DEPARTMENTS**

**In the Law Reviews:**

Book Review of Nimmer on Copyright by David A. Gerber, 26 UCLA Law Review 925-963 (1979)

Reflections on Herbert v. Lando by Marc A. Franklin, 31 Stanford Law Review 1035-1058 (1979)

A Pig in the Parlor: FCC v. Pacifica Foundation, 6 Western State University Law Review 281-294 (1979)

Performance Rights in Sound Recording - How Far to the Horizon by H. Craig Hayes, 9 Performing Arts Review 121-167 (1979)

Authorship and Narrative in the Cinema by William Luhr et al., 9 Performing Arts Review 261-266 (1979)

Editorial Privilege and the Scope of Discovery in SullivanRule Libel Actions by Howard O. Hunter, 67 Kentucky Law Journal 789-822 (1978-1979)

Affirmative Action and a Free Press: Policies and Problems in Promoting the First Amendment by Don Lively, 11 Pacific Law Journal 65-94 (1979)

Federal Communications Commission v. National Citizen's Committee for Broadcasting: The Ultimate Media Hype by Raymond L. Yasser, 67 Kentucky Law Journal 903-926 (1978-1979)

The Equal Opportunity Doctrine in Political Broadcasting: Proposed Modifications of the Communications Act of 1934, 12 Indiana Law Review 745-776 (1979)

The "Seven Dirty Words" Decision: A Potential Scrub Brush for Commercials on Children's Television? by Gerald J. Thain, 67 Kentucky Law Journal 947-965 (1978-1979)

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