## RECENT CASES

### Federal District Court awards statutory copyright damages to Iowa State University on account of ABC'S unauthorized use of a student-made film

In 1972, Iowa State University offered to sell ABC the television rights to a film titled "Champion" which had been made by Iowa State film students about Olympic wrestler Dan Gable. ABC refused to buy the film. Later, however, in August of 1972, ABC took the film from one of its employees and copied it. During ABC's broadcast coverage of the Munich Olympics, ABC made two unauthorized uses of the film. The first, a seven to twelve second segment, was broadcast on August 25, 1972, as part of ABC's Olympic preview. The second, a two and one-half minute segment, was shown on August

27, 1972 as part of ABC's live coverage of the Olympics. In August of 1973 Iowa State notified ABC by letter of its claim to "Champion." Nevertheless, in February of 1974, ABC used an eight-second segment of the film as part of its "Superstars" program.

ABC was found liable for infringing Iowa State's copyright for the two showings broadcast in August of 1972 (in a decision reported separately at 463 F.Supp. 902). The "Superstars" infringement was conceded by ABC, but it contended that it was protected from liability because the statute of limitations had run. The court disagreed, however, interpreting general language in Iowa State's complaint to support damages for the later infringement.

The trial awarded statutory damages of $5,000 for each of the three broadcasts and $250 for the initial copying. The total damage award was $15,250. In support of its decision that all four infringements should be treated

separately, rather than as one infringement as ABC had urged, the court stated that the "time" test alone mandated that result, because at least two days and as many as nineteen months separated the infringements. In addition, the "heterogeneity" test confirmed the court's findings since each broadcast was for a difrerent purpose. Iowa State had unsuccessfully contended that it was entitled to actual damages of $25,000 for the two and one-half minute segment shown on August 27, 1972. However, the court found that Iowa State had not made a sufficient showing of actual damges merely by presenting the unsupported and uncorroborated testimony of an expert as to the film's value, or by testimony as to the cost of producing "Champion" compared to other films. Furthermore, the court refused to find that ABC's use diminished the market value of the film.

The court also denied' Iowa State's claim to statutory damages in excess of $5,000 for both August, 1972

showings, ruling that the film's copyright notice itself did not meet the statutory requirement of "actual notice" which is necessary to show that an infringement was made after knoweldge of the claim of the copyright holder.

Iowa State also was awarded attorneys' fees of $17,500 because ABC had initially denied the infringements and had defended the lawsuit vigorously.

Iowa State University v. American Broadcasting Co., 475 F.Supp. 78 (S.D.N.Y. 1979) [ELR 1:17:1]

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**Federal Court of Appeals holds that distribution of the film "Pygmalion" infringes copyright on George Bernard Shaw's play, despite expiration of film's own copyright**

A Federal Court of Appeals in California has held that the defendant's distribution of the film "Pygmalion" infringed the renewal copyright in the George Bernard Shaw play upon which the film was based, and it has affirmed a District Court judgment awarding the plaintiffs damages based upon the defendants' profits from unauthorized rentals of the film.

Shaw registered a copyright to the play "Pygmalion" in 1913; the renewal copyright, obtained in 1941, will not expire until 1988 due to extensions granted by Congress. In 1938, the film "Pygmalion" was produced under a license from Shaw and was copyrighted by Loew's. The film's copyright was allowed to expire in 1966.

In 1971, the plaintiffs, the current copyright proprietors of the play, licensed Janus Films (characterized by the court as the real party in interest in the case) to be the exclusive distributor of the 1938 film. In 1972, Janus

discovered that Budget Films was renting copies of the film and brought an action against Budget in a California state court alleging, among other causes of action, unfair competition. The state court found that it lacked jurisdiction because the action was essentially one for copyright infringement; and Janus subsequently brought its action against Budget in Federal District Court.

The defendants contended that because the film copyright on "Pygmalion" had expired, the film is in the public domain and their distribution of the film would not infringe the statutory copyright on Shaw's play. In rejecting the defendants' position, a Federal Court of Appeal in California has reaffirmed the "well-established docctrine" that a derivative copyright protects only the new material contained in the derivative work, not the matter derived from the underlying work. Thus, "although the derivative work may enter the public domain, the matter contained therein which derives from a work

still covered by statutory copyright is not dedicated to the public."

The court discussed at length the distinctions between this case and a recent case relied on by the defendants named Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir.), cert. den., 431 U.S. 949 (1977). In Rohauer, a silent film was made and copyrighted pursuant to an agreement with the author of a novel. The author died prior to the end of the first copyright period on her novel, and the beneficiary of the right to renew, who was not bound by the author's promise to reassign the film rights for the renewal term, granted movie and television rights for the renewal term to Rohauer. In a subsequent suit for copyright infringement against Killiam Shows, the successor in interest to the silent film's renewal copyright, a Federal Court of Appeals in New York held that the derivative film's independent copyright entitled the defendant to continue showing the film

without infringing rights under the renewal copyright in the underlying novel. Budget Films argued that Rohauer implies that when the derivative copyright expires, the whole product enters the public domain. But the Court of Appeals pointed out that the Rohauer court had emphasized the bargained-for promise of the novel's author to convey film rights in the renewal term, while Budget had never entered into any agreements with Shaw or his successors. Further, Killiam held a copyright in the film that was still valid and this was found to give him "sufficient rights in the matter derived from the novel to continue showing it as part of the film." The copyright on the film "Pygmalion" had expired, and the court stated "[d]efendants here could never have laid claim to the right recognized in Rohauer, and we perceive no reason to award it to them at the expense of the holders of the renewal copyright which still covers the Shaw play."

The defendants also cited as support for their position the opinion in Classic Film Museum, Inc. v. Warner Bros., Inc., 597 F.2d 13 (1st Cir. 1979) (reported at ELR 1:14:3). Classic Film held that the exhibition of the film "A Star Is Born," to which the film copyright had expired, did not infringe the common law copyright in the unpublished screenplay and musical score from which the film was derived. The court pointed out that a common law copyright might extend indefinitely and "[s]uch unending protection of the derivative work would allow the [exception offering protection to the fixed life of the underlying copyright] to swallow the rule of limited monopoly found in the Constitution and copyright statutes." This case would conform to the "limited monopoly" policy, however, because upon expiration of the statutory copyright in 1988, Budget could distribute its copies of the 1938 film. Until that time, the

court held that Budget's activities would infringe the copyright in Shaw's play and were properly enjoined.

In affirming the District Court's award of damages to the plaintiffs in the amount of $3,700, the court reviewed the various methods of determining infringement damages. The $3,700 award represented an estimate of Budget's gross receipts derived from rentals of the film from 1972 (when the state court proceedings began) to 1977. The court rejected the plaintiffs' arguments that statutory "in lieu" damages were mandatory. Such damages would have amounted to at least $34,000, calculated at $250 for each of 136 infringing bookings. The Court of Appeals also rejected the plaintiffs' contention that the District Court had abused its discretion in limiting damages to the defendants' gross profits.

The court first noted that statutory damages would be mandatory "when injury is proved but neither the infringer's profits nor the copyright holder's actual

damages can be proved." This was not the situation before the District Court. The question of awards of "in lieu damages" was addressed by the Court of Appeals in its recent opinion in Sid & Marty Krofft Television Productions, lnc. v. McDonalds Corp., 562 F.2d 1157 (9th Cir. 1977), in which the jury awarded the plaintiffs damages of $50,000. The plaintiff's motion for an accounting of the defendant's profits was denied, and the Court of Appeals remanded the case for a determination of whether such profits were ascertainable, stating that the plaintiffs "are entitled to the larger of either the profits or damages, unless the district court, in its discretion, awards the statutory `in lieu' damages. If the profits are not ascertainable, then plaintiffs are entitled to the compensatory damages as found by the jury, unless the district court awards the discretionary `in lieu' damages."

In the Pygmalion case, the court found "no reason" for holding that "in lieu" damages would be mandatory

rather than discretionary in the reverse of the Kroft situation, i.e., where Budget's profits rather than Janus' damages were calculable. The District Court had found that Budget's gross receipts based on rental charges were the amount of its profits. (The defendants' attempt to deduct its costs was not found acceptable by the District Court.) And this profit figure was upheld as sufficiently certain to preclude the mandatory "in lieu" damages rule.

The court also upheld the discretionary refusal of "in lieu" damages, noting that Krofft only requires that such damages not be given if they hurt the plaintiffs. Further, the profits here were not de minimis so as to justify awarding the larger statutory amount and the award was sufficient to "discourage wrongful conduct." The court pointed out that the award of $10,000 to the plaintiffs for attorneys' fees was not unreasonable and also might serve as "additional deterrence to would-be infringers."

The court briefly considered the defendants' contention that the action was barred by laches, since the plaintiffs allegedly had deliberately brought a legal action in state court, refusing to acknowledge the copyright nature of the action and causing the defendant to incur litigation expenses and to rely on their belief that there was no valid copyright in the film. This argument was rejected because the defendants had early notice of the nature of the plaintiffs' objections to their activities and were not prejudiced under the laches doctrine. They had not, for example, changed their film distribution activities due to Janus' suit.

Russell v. Price, 612 F.2d 1123 (9th Cir. 1979) [ELR 1:17:2]

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## Criminal conviction for failure to file federal tax returns is reversed, because jury was shown prejudicial videotape of "The Tomorrow Show" on which defendant had made guest appearance

A Federal Court of Appeals in New York has reversed the conviction of Irwin Schiff, an author and lecturer on financial matters, for willfully failing to file federal income tax returns. The court, noting that it was the first federal court of appeals to rule on such a question, held that the admission into evidence of a videotape of "The Tomorrow Show" on which Schiff appeared and discussed the charges against him constituted prejudicial error and ordered a new trial.

The participants on the April 12, 1978 show Schiff -- host Tom Snyder, and a former member of the U.S. Attorney's Office who specialized in civil and criminal fraud cases -- discussed Schiff's philosophy regarding

taxation and his failure to disclose his gross income on his 1974 and 1975 tax returns. Snyder and his guest commented on the likelihood that Schiff would be convicted. The "tax expert" implied that a failure to file returns for three years would establish willfullness, a key element of the charges against Schiff. The tax expert also accused Schiff of practicing law without a license and obstructing the IRS in collecting revenue by his public lectures, although Schiff had not been charged with these offenses.

The defense objected to the admission of the tape on the grounds of unfair prejudice and lack of authentication. The Government contended that the tape was offered only to show Schiff's responses. The District Court judge noted that he would so instruct the jury, and also found that there was sufficient evidence of intent, independent of the tape, for the case to go to the jury. The Court of Appeals, although agreeing with this

conclusion, reversed on the ground that any minimal relevance of the tapes would be far out-weighed by their prejudicial effect on the question of Schiff's good faith.

The court pointed out that the tapes were replete with prejudicial statements and that "[t]his pre-judgment of the defendant's guilt, accompanied by fervid commentary that conveyed an air of incontestable truth, was presented to the jury before the defendant could testify on his own behalf. By the time he took the stand his credibility has been placed on the scale in as derogatory a fashion as is conceivable. The jury saw the defendant's views mocked and discredited as incredible before he could speak for himself."

The court also found that a cautionary instruction would not sufficiently cure the prejudice caused by the tape.

United States v. Schiff, Docket No.79-1139 (December 12, 1979) [ELR 1:17:3]

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**Illinois Appellate Court rules that the business of preparing and submitting photos of children to a booking agency does not constitute the operation of a theatrical employment agency**

National Talent Associates, Inc., solicits customers by mailing letters to parents, stating that their child may have the qualifications to enter the commercial advertising field. If the parent responds, a screening process begins. If the child is found acceptable, the parents are offered a contract by which National Talent Associates arranges to have the child photographed and the pictures submitted to a booking agency. The contract continues for a period of seven years, with new photos taken

annually until the contract period expired or the child is accepted by a booking agency.

In 1973, National Talent was informed by the Illinois state agency responsible for regulating employment agencies that National Talent was conducting business without a license. National Talent filed a lawsuit asking for a declaration that its business was not that of a theatrical employment agency. The trial court agreed with National Talent and the State appealed.

The Illinois statute in question provides, in part, that a theatrical employment agency includes any business conducted "for the purpose of procuring or offering, promising or attempting to provide engagements" for persons who want employment in a theatrical or related field.

In arguing that National Talent in fact conducted an employment agency, the state contended that its regulatory scheme was not limited to businesses that actually

send applicants on interviews, but covered any business that was designed to secure employment in the theatrical field. The State also argued that National Talent encouraged its customers to take the initial step of gaining acceptance by a booking agency, which is an integral part of the employment process.

National Talent, on the other hand, argued that the phrase, "procuring or offering, promising or attempting to provide" means the direct arranging of employment.

In arriving at its decision, the Appellate Court of Illinois considered decisions from New York and California, since no Illinois court had ever considered the question.

The Appellate Court found that the trial court made the correct ruling. The Appellate Court stated that National Talent makes no promise to find employment; and in fact, the contract it uses with its customers explicitly

states, "This agreement in no way guarantees placement will be made."

The Appellate Court also refused to follow the State's suggestion that the statutory language be read very broadly, so that the potential for evil in businesses like National Talent's could be regulated. The possibility for exploitation, dishonesty and fraud were argued by the State to exist in National Talent's business, creating the opportunity to induce customers to do business on the basis of false pretenses. The Court enumerated the evils that are inherent in those businesses that attempt to arrange employment and deal with employers, but found none of those evils present in National Talent's operation.

National Talent Associates, Inc. v. Holland, 395 N.E.2d 142 (Ill.App. 1979) [ELR 1:17:4]

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## Purchaser of television station denied tax deductions for cost of FCC license and advertising contracts, but is allowed deduction for cost of terminated network affiliation agreement

In 1965, Forward Communications Corporation purchased all of the assets of television station KVTV in Sioux City, Iowa, for almost $4 million. The purchase price was allocated among the assets acquired which in addition to tangible broadcasting equipment, included an FCC license, network affiliation agreements with both CBS and ABC, and several year-long advertising contracts.

Forward sought to amortize that portion of the purchase price allocated to the FCC license. In doing so, it relied upon a 1963 decision of a Federal District Court in Tennessee permitting amortization of the cost of an FCC television license. Since 1963, however, the U.S.

Court of Claims, two Courts of Appeals, the Tax Court and a District Court in Virginia all have refused to permit amortization of television licenses, on the grounds that such licenses do not have determinable useful lives, because the FCC almost always has renewed them automatically.

Forward argued that there has been a change in the attitude and policies of the FCC concerning license renewals, so that now it is no longer certain licenses will be renewed. (If not, licenses would have a reasonably determinable useful life, and thus would be amortizable.)

According to Forward, a change in FCC attitudes and policies is evidenced by Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C.Cir. 1970), cert. den., 403 U.S. 923 (1971), and Citizens Communications Center v. FCC 447 F.2d 1201 (D.C.Cir. 1971). In Greater Boston Television, the FCC treated a license

renewal application as a fresh comparative proceeding, because of misconduct on the part of the licensee, and then awarded the license to one of the competing applicants.

In Citizens Communications Center, the Court of Appeals invalidated an FCC policy statement which said that if a licensee could demonstrate a record of substantial service without serious deficiencies, it would be entitled to renewal, and all other applications would be dismissed without a hearing on their merits. The court held that even in a license renewal proceeding, all other applicants are entitled to be heard on the merits.

The Court of Claims decided that neither of these cases cast any substantial doubt on Forward's prospects for renewal of its license, especially because both were decided after the taxable years in question.

The Court of Claims also held that the portion of the purchase price allocated to the year-long advertising

contracts, pursuant to which Forward was paid by those whose commercials were broadcast on KVTV, was not deductible either as a loss or as a return of basis. Forward's expectation of continued business with those advertisers meant that their contracts had no determinable useful life and made them simply parts of an "indivisible" or "mass asset" includable in good will.

On the other hand, the Court of Claims did hold that Forward could deduct as a loss that portion ofthe purchase price allocated to the CBS affiliation contract. The CBS contract was terminated by Forward voluntarily so that it could enter into an exclusive ABC contract providing for substantially greater compensation. Although Forward enjoyed a gain from ABC which more than offset its losses from CBS, the Court of Claims held that Forward was entitled to a "loss" deduction, because the additional income it received from ABC was not "compensation" for the CBS loss such as "insurance" or

anything else which Forward had a legal right to recover. Thus IRC Section 165(a), which permits deductions for losses "not compensated for by insurance or otherwise" was applicable.

The IRS and Forward had agreed that the aggregate value of both the CBS and ABC affiliation contracts was $1 million on the date the station was purchased. During the year preceding Forward's purchase of the station, CBS has contributed 57.2% of the station's total network revenue, and ABC had contributed the other 42.8%. Accordingly, the Court of Claims held that Forward's loss upon termination of the CBS contract was 57.2% of $1 million, or $572,000.

Forward Communications Corporation v. United States, 608 F.2d 485, 79-2 USTC Para. 9638 (Ct.Cl. 1979) [ELR 1:17:5]

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## Professional golfer fails to obtain preliminary injunction barring his exclusion from certain PGA sectional events

The Philadelphia Section Professional Golfers' Association has an eligibility rule which provides that any PGA member who participates in more than 12 PGA national tour events during the preceding year is eligible to participate only in Philadelphia Section "championship" events. The Philadelphia Section PGA sponsors approximately 40 events each year, only 9 of which are "championship" events.

In 1978, professional golfer Michael Nilon won the 1978 Philadelphia Sectional Championship for which he received $4,500 in prize money and the right to compete in PGA National Tournaments during 1979. From January to August of 1979, Nilon competed in 20 national tournaments, but won no prize money at all. However,

because he had competed in more than 12 national events, the Philadelphia Section eligibility rule excluded him from competing in more than 75% of its events. As a result, Nilon filed an antitrust suit alleging that the rule was an illegal group boycott.

Nilon contended that the Executive and Tournament Committees of the Philadelphia Section had adopted the rule in question in order to exclude him, and others like him, from Section events, so that the Committee members as individuals would be more likely to win the prize money in the more than 30 sectional events from which he had been excluded. The Philadelphia Section, on the other hand, argued that the rule was reasonable under the circumstances.

Thusfar, a Federal District Court in Philadelphia has agreed with the Philadelphia Section PGA. In response to Nilon's application for a preliminary injuction, the court ruled, "The evidence on this record is that the club

professionals are responsible for a host of routine duties at their club and do not have the time to hone their golf game to the extent that a touring professional does. It is perhaps this distinction which makes the case troublesome because there is an intent on the part of the club professionals to restrict the level of competition at 75% of their events to non-touring professional players. However, I find this reasonable because it conforms to the distinction between a professional golfer and a club professional. It is proper to protect fair competition in sports and games . . . I hold that the club professionals under the facts in this case may organize themselves and exclude from some of these tournaments professional golfers who have elected to compete on the national tour . . . I fail to perceive that it is antitrust violation to exclude a national tournament competitor from some local events of limited importance."

Accordingly, the court denied Nilon's application for a preliminary injunction.

Nilon v. Philadelphia Section Professional Golfers' Association, 1979-2 CCH Trade Cases, Para. 62,961 (E.D. Pa. 1979) [ELR 1:17:6]

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**Federal Court of Appeals reverses decision that "Monopoly"' trademark was infringed by the game "Anti-Monopoly" and orders reconsideration of whether "Monopoly" has become a generic name**

A Federal District Court in California held that Anti-Monopoly, Inc. had infringed the "Monopoly" trademark of Parker Brothers, and it issued a permanent injunction forbidding use of the words "Anti-Monopoly" as a trademark or trade or corporate name. That

judgement has been reversed, however, by a Federal Court of Appeals in California, and the matter has been remanded for further findings concerning the validity and enforceability of the "Monopoly" trademark.

The Court of Appeals reviewed the history of the game of "Monopoly" which was first played from about 1920 to 1932 and patented in 1935. (The patent expired in 1952.) Parker Brothers, which had acquired all rights to the game, registered the word "Monopoly" as a trademark in 1935 and 1936. The original commercial producer of the game also had obtained a copyright on part of the game equipment, but the copyright laws were not involved in the case because "business ideas, such as a game concept, cannot be copyrighted."

The plaintiff, which began marketing Anti-Monopoly in 1973, sought a declaratory judgement that the "Monopoly" trademark in invalid, and Parker Brothers

counterclaimed for the declaratory and injunctive relief granted by the District Court.

On appeal, Anti-Monopoly contended that "Monopoly" was, when originally registered, or has since become, a generic (common descriptive) name. The Court of Appeals first noted that trademark laws are designed to protect the identification of a product's source and that a "trademark is misused if it serves to limit competition in the manufacture and sales of a product. That is the special province of the limited monopolies provided pursuant to the patent laws." Thus, if a trademark primarily denotes a product, and not the product's producer, the trademark is lost.

The District Court apparantly concluded that "Monopoly" would be a generic term only if the name had come to signify "all board games involving real estate trading." But the Court of Appeals found that the District Court had erred by not making the "crucial

determination" of whether consumers use "Monopoly" to refer to a product or to its producer. (In a footnote, the court found it "significant" that the original patent application referred to a game "known on the market as Monopoly" prior to any association of Parker Brothers with the game.)

The Court of Appeals also instructed the District Court to consider whether the plaintiff's use of "Anti-Monopoly" would infringe the "Monopoly" trademark if the trademark were found to be valid, noting that the following considerations would affect a determination of infringement: "the similarity in appearance, sound, and meaning of the marks, the strength or weakness of the marks, the proximity or similarity of the goods, evidence of actual confusion, the marketing channels used to market the goods, the type of goods and the degree of care likely to be exercised by the purchaser, the alleged

infringer's intent in selecting the mark, and the likelihood of expansion of product lines."

The court did state that even if the District Court decides that "Monopoly" is generic, the plaintiff has an obligation to the public to distinguish the source of its product.

The court agreed with the District Court that the plaintiff was not entitled to a jury trial since both parties sought only equitable relief.

Anti-Monopoly, Inc. v. General Mills Fun Group, Case No. 77-2302 (9th Cir., Dec. 20, 1979) [ELR 1:17:6]

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**Federal Appeals Court requires additional fact finding in suit by magazine rack jobber against regional distributor to determine whether the regional distributor, a monopolist, has a duty to deal**

The plaintiff, Andrew Byars, brought suit against Bluff City News Co., alleging a violation of the Sherman Antitrust Act because of the defendant's refusal to do business with the plaintiff, and for common law unfair competition based upon an alleged campaign of "dirty tricks" staged by the defendant. After a trial, a Federal District Court found for the defendants in all respects. However, the Court of Appeals has required further proceedings in order to develop additional findings of fact.

The business relationship between the parties began in 1957 when the then owner of Bluff City decided it was not economical to continue to service small outlets in the Memphis-Shelby County Tennessee area. Rather than lose all of those small customers, Bluff City decided to arrange to have a Mr. Troyer buy periodicals from them and sell them to small retail outlets that Bluff City preferred not to service. Mr. Troyer and the plaintiff were

business associates and began to work together. In 1967 the plaintiff took over the entire operation and continued to operate it doing business as Andrew Byars News. By 1970, Byars had a customer list of about 150 retail outlets and gross sales of about $350,000.

In 1970, the owners of Bluff City sold their business to the defendant. The new owners decided to return to servicing the entire area and refused to do business with the plaintiff as an independent rack jobber, preferring an employer/employee relationship which would have paid the plaintiff a salary. This new arrangement was unacceptable to the plaintiff, who was forced to resort to the sale of "secondary line" periodicals (magazines with special interest to limited groups, as opposed to "primary line" periodicals, which are of a general appeal), and a limited selection of primary line periodicals that the plaintiff was able to acquire only after a long and difficult search.

In its opinion, the Court of Appeals stated that it was not disputed that Bluff City controlled approximately 90% or more of the relevant market. The question to be resolved was whether Bluff City's refusal to deal with the plaintiff amounted to illegal monopoliza tion. In order to determine whether illegal monopolization existed, it must be decided whether Bluff City possessed monopoly power in the relevant market and whether that power was abused. The trial court's analysis of Bluff City's market position was criticized by the Court of Appeals.

The trial court was also criticized for its treatment of the plaintiff's contentions that Bluff City abused its monopoly power by its refusal to deal and by a "dirty tricks" campaign involving allegations of removal of the plaintiffs magazines from racks and disparaging remarks about the plaintiff and his financial condition. The Appeals Court instructed the trial court to consider this evidence anew.

The Court's opinion outlined for the trial court the approach for analysis of abuse of monopoly power should monopoly power be found to have been possessed by Bluff City. The Court pointed out that if Bluff City is not found to have had monopoly power, then not dealing with plaintiff was within its rights. The Court stated: In assessing whether Bluff City possessed monopoly power, and second, whether an unlawful refusal to deal took place, the district court should focus on the following: (1) Whether Bluff City can offset the inference of monopoly which accompanies its massive market share; (2) Whether Bluff City's refusal to deal was justifiable on efficiency grounds; (3) Whether other business reasons justified the refusal to deal; (4) Whether, and to what extent, Bluff City engaged in predatory "dirty tricks"; (5) Whether an injunction ordering Bluff City to deal with the plaintiff is feasible.

Byars v. Bluff City News Co., Inc., 1979-2 CCH Trade Cases, Para. 62,928 (6th Cir. 1979) [ELR 1:17:7]

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## Briefly Noted:

### Obscenity.

The Florida Supreme Court has ruled that a Florida statute that allows for the destruction, after no longer needed as evidence, of obscene materials which have been "seized" and delivered to the clerk of the court is ancillary to the Florida statutory scheme for adjudging material obscene, and therefore could not be used to justify destruction of video tape of the film "Deep Throat." The tape had been surrendered voluntarily by a college professor who had been using it in a course in communications. The professor later demanded return of the tape,

and his demand was refused. Since there had been no prior adjudication of obscenity and no warrant issued for the seizure of the film, it was not appropriately before the court and was ordered returned. Various constitutional questions were not reached because of the statutory construction articulated by the court.

Roberts v. State of Florida, 373 So.2d 672 (Fla. 1979) [ELR 1:17:7]

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## NEW LEGISLATION AND REGULATIONS

### Federal Communications Commission eliminates "Top-Fifty" Policy concerning television station ownership

The FCC has announced that it has eliminated the use of its "Top-Fifty" Policy and has terminated its proposed rule making proceeding concerning limitations on group ownership of stations in the top fifty television markets. The policy, adopted in 1968, required parties seeking to acquire a fourth television station (either UHF or VHF) or a third VHF station in the top fifty markets to make a "compelling public interest showing" in order to overcome the presumed decrease in the diversity of information sources available to the public that would result from such an acquisition. The FCC noted, however, that in 19 cases arising under the policy, the group owners were permitted to acquire the stations they sought upon showing of resultant benefits, such as enhanced local service. Thus, the FCC has concluded that its present multiple ownership rules are sufficient to achieve programming diversity and also prevent increased economic concentration.

The Commission Report points out that the "Top-Fifty" Policy did not significantly affect the diversity of sources of information available on a local level, since it applied only to ownership of stations in different cities. The FCC's multiple ownership rule (restricting cross-ownership in the same market to one AM-FM combination or one TV station or one daily newspaper) directly deals with local diversity. And the FCC's regional ownership rule restricts a party to two stations within a 100 mile radius.

On a national level, the FCC's concern that "increased concentration of media ownership [will result] in a reduction of diversity" is also reflected in its rule limiting a single owner to 5 VHF stations and a total of 7 TV stations, thus "effectively [limiting] a group's share of the total national audience to under 5%." Therefore, the Report states, "While we agree that maximizing the diversity of viewpoints is an important goal, we cannot agree

that the `Top-Fifty' Policy or rule would offer a meaningful contribution beyond that provided by the present ownership rules. If we think of diversity in terms of concentration of power over national opinion, it does not appear that a `Top-Fifty' Policy is really necessary in view of the large number of stations in the top fifty markets and nationwide, ownership of which is in many hands."

The FCC also found that there has not been a significant increase in major group owners since 1968, contrary to concern over a possible trend toward increasing ownership concentration.

And, even without a policy, the FCC can require a hearing for any application raising "substantial public interest issues" arising in connection with a proposed top-fifty acquisition. Thus, a separate statement of Chairman Charles Ferris points out, local citizens can continue to

require multiple owners to provide EEO and programming commitments.

Report and Order in BC Docket No. 78-101 (November 1979) [ELR
1:17:4]

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On Freedom of Expression by Harry H. Wellington, 88 Yale Law Journal 1105-1142 (1979)

The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness? by Linda N. Woito and Patrick McNulty, 64 Iowa Law Review 195-232 (1979)

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Fear, Risk and the First Amendment: Unraveling the "Chilling Effect" by Frederick Schauer, 58 Boston University Law Review 685-732 (1978)

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[ELR 1:17:8]