RECENT CASES

U.S. Supreme Court rules that author of book Decent Interval must turn over all royalties to Federal Government because he failed to obtain prepublication clearance from CIA

Former CIA agent Frank Snepp wrote a book entitled Decent Interval concerning CIA activities in South Vietnam. Although Snepp had agreed with the CIA, in writing, never to disclose classified information, and not to publish any information relating to the CIA without the CIA's prior approval, Snepp did not seek prepublication clearance for his book. When it was published, the Federal Government filed suit seeking an injunction requiring Snepp to submit future writings for prepublication review, and seeking an order imposing a "constructive trust" for the Government's benefit on all profits that Snepp might earn from the book. This was done even though the Government did not contend that the book disclosed classified information.

A Federal District Court in Virginia found that Snepp had breached his position of trust with the CIA and the secrecy agreement he had signed, and therefore granted the Government the orders it sought.

On appeal, a Federal Court of Appeals agreed that Snepp had breached a valid agreement, and that Snepp's failure to submit his manuscript to the CIA for prepublication review had inflicted "irreparable harm" on intelligence activities vital to the country's national security. The Court of Appeals therefore upheld the injunction requiring Snepp to submit future writings for prepublication review. However, the Court of Appeals held that a constructive trust on all of Snepp's profits was not appropriate, because Snepp had a First Amendment right to publish unclassified information. The Court of Appeals therefore limited the Government's recovery to "nominal damages." The Court of Appeals also ruled that if the Government could prove that Snepp deceived it into believing that he was going to submit his manuscript for prepublication review, and if the Government relied on his misrepresentations to its detriment, then the Government could obtain punitive damages against Snepp as well.

The U.S. Supreme Court — in an unsigned "Per Curiam" decision issued without oral argument or full briefing — reversed the Court of Appeals' decision and reinstated the District Court's judgment imposing a constructive trust on Snepp's profits. The Supreme Court ruled that, "Whether Snepp violated his trust does not depend upon whether his book actually contained classified information. The Government does not deny — as a general principle — Snepp's fight to publish unclassified information . . . The Government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources."

With respect to the appropriate remedy, the Supreme Court explained that the Government's actual damages are "unquantifiable." Nominal damages were described as a "hollow alternative, certain to deter no one." Punitive damages, said the Court, would be "speculative and unusual," and even if recovered, "may bear no relation to either the Government's irreparable loss or Snepp's unjust gain." On the other hand, said the Court, "A constructive trust . . . protects both the Government and the former agent from unwarranted risks . . . If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material . . ., the trust remedy simply requires him to disgorge the benefits of his faithlessness . . . And since the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain."

Justices Stevens, Brennan and Marshall dissented. It was their view that the constructive trust was not an appropriate remedy. The dissenting opinion pointed out that several federal statutes prohibit and impose penalties for the disclosure of classified or national defense information, but not one of them provides for a constructive trust, nor had Snepp's secrecy agreement provided for such a remedy. Furthermore, the dissent pointed out that because Decent Interval did not contain classified information, the CIA would have been required to clear the book for publication in precisely the same form as it was published. (The majority opinion and the dissent agreed that if the CIA had failed to approve the book for publication, Snepp would have had a right to judicial review of its failure to do so. According to the majority opinion, the CIA then would have had the burden of seeking an injunction to prevent publication.)

Even the dissenting justices apparently would not have awarded Snepp a complete victory, however. "In view of the national interest in maintaining an effective intelligence service," Justice Stevens said that he was not prepared to say that the prepublication review requirement is "necessarily intolerable in this context." Nor was he opposed to the possibility of awarding punitive damages to the Government "for the generalized harm he [Snepp] has caused by failing to submit to prepublication review and to deter others from following in his footsteps." For these purposes, Justice Stevens felt that punitive damages were "clearly . . . preferable" to a constructive trust.

Ironically, although Justice Stevens viewed the constructive trust as being "draconian," the Court's majority opinion did lift the threat of punitive damages from Snepp's shoulders; and though no one will ever know whether punitive damages would have been awarded, or if so in what amount, it is possible that punitive damages may have exceeded the amount of profits Snepp earned, and will now have to turn over to the Government.

Snepp v. United States, U.S. Sup. Ct., Nos. 78-1871 & 79-265 (February 19, 1980) [ELR 1:20:1]

Arbitrator rules that Universal Pictures violated the Director s Guild of America Basic Agreement by permitting Sylvester Stallone to direct the film Hawks for one day

An arbitrator has determined that Universal City Studios, Inc. violated the Director's Guild of America, Inc. Basic Agreement of 1978 when Sylvester Stallone, a director member of the DGA and the star of the film "Hawks," was permitted to direct principal photography of the film for one day — the time it took Universal to hire a new director and transport him to the New York City location after the film's original director was discharged.

Section 7-1401 of the Basic Agreement provides, in pertinent part, as follows: "No person assigned to, or performing in a particular motion picture before the Director is replaced can replace that Director. The Director may be replaced only by a person who has never been assigned to or performed in the particular picture . . . None of the above conditions shall apply in the case of a bona fide emergency in which event a person employed on the shooting company may direct for a period not in excess of five (5) shooting days pending arrival of a substitute Director . . ."

Universal contended that a bona fide emergency existed because if principal photography had not taken place on the day in question, the use of a New York City subway location, which had required special advance arrangements, would have been lost. Further, the loss of one day's shooting might have had a "domino effect" on the production schedule, interfering with the planned use of other New York City public facilities. According to Universal, the original director was replaced because the unit had fallen one day behind, and it was felt that the subway location shooting would not be completed on time.

Arbitrator Arnold D. Burk concluded that Universal had not demonstrated that a "bona fide emergency" existed within the exception of Section 7-1401. The collective bargaining history of the section indicated that "[t]his exception was intended to protect situations analogous to that of a unit remote from population centers and transportation, with a director disabled from performing his duties, and no possibility of an immediate replacement." Such an emergency cannot be created by an employer who discharges a director at a time of its own choosing, the arbitrator ruled.

Nevertheless, the arbitrator rejected the DGA's request for an injunction forbidding the use of the one day of filming Stallone had directed and damages of $100,000 for each day of such photography because of the absence of a "prior clear precedent," because of Universal's "good faith effort" to comply with the provisions of the Basic Agreement, and because only a one-day period of noncompliance was involved. However, Universal was ordered to pay to the DGA damages of $50,000, the arbitrator's fees and hearing costs.

In the Matter of the Expedited Arbitration between the Director's Guild of America, Inc. and Universal City Studios, Inc., Before the Arbitration Tribunal of the Director's Guild of America, Inc., Case No. 00669 (February 4, 1980) [ELR 1:20:3]

Income received by movie theaters from the sale of student discount cards must be included in gross receipts when calculating license fees payable to distributors

In an action filed by Paramount Pictures and nine other distributors against Marcus Theaters, a Wisconsin Court of Appeals has held that Marcus Theaters is required to include income from the sale of student discount cards in its "gross receipts" when calculating the license fees it pays distributors. The ruling reverses a Wisconsin trial court decision that student discount card income need not be included in "gross receipts" (reported at ELR 1:2:2).

The trial court had found that the distributors' contracts had not clearly stated that student discount card income was to be included in "gross receipts," and it held that the consequence of this ambiguity had "to be lodged at the doorstep of the person who drew it" — the distributors.

This case shows, however, that ambiguity, or its absence, is in the eye of the beholder, because the Court of Appeals held: "Based on the plain meaning of the language utilized to define gross receipts in the licensing agreements, we have concluded that the licensing agreements are not ambiguous. A contract is ambiguous only if its language is reasonably susceptible of different constructions . . . The licensing agreements are not susceptible of different constructions with regard to the inclusion of proceeds from student discount cards in the definitions of gross receipts. The definition of gross receipts in the licensing agreements is comprehensive. It includes all monies collected for admission to the theater. Student discount cards are purchased by students for admission to the theater. The proceeds from their sale are therefore gross receipts as defined in the licensing agreements."

Accordingly, the Court of Appeals ordered Marcus Theaters to render an accounting to the distributors for the proceeds received from the sale of student discount cards during the six-year period prior to the commencement of the lawsuit. Thereafter, damages are to be awarded to the distributors in the amounts found to be due each.

The Wisconsin Supreme Court denied a petition for review filed by Marcus Theatres and that decision has thus become final.

Paramount Pictures Corporation v. Marcus Theaters Corporation, Wisconsin Court of Appeals, Case No. 79-120 (Nov. 12, 1979) [ELR 1:20:3]

Animated version of Lincoln-Mercury s cougar held not to infringe copyrights to the Pink Panther

The animated character known as the "Pink Panther" was created in about 1963 for the film entitled "The Pink Panther." In about 1974, the character was featured in the opening and closing titles of the film "The Return of the Pink Panther." And in the interim, the character appeared in cartoons exhibited in theaters and shown on television and "became a character and personage in its own right."

In November of 1975, Kenyon & Eckhardt, an advertising agency, began to create an advertising campaign for 10 Lincoln-Mercury Dealer Associations. The campaign eventually selected depicted "a feline humanoid character" which was an animated version of the established corporate symbol of a five cougar reclining on a Lincoln-Mercury sign. The animated cat figure was intended to appear "virile, noble, elegant, classy, macho, sophisticated, sexy and athletic."

United Artists and other owners and assignees of the copyrights in the two "Pink Panther" films contended that Lincoln-Mercury's animated cat closely resembled the Pink Panther and infringed upon their rights in that character. A Federal District Court in New York City has found, however, that the defendants did not copy the plaintiffs' creation and that any resemblance between the animated cat and the Pink Panther was not consciously intended.

A memorandum written by an advertising agency employee had suggested that the animated cat resembled the Pink Panther, but the court pointed out that since the Pink Panther is "undoubtedly the preeminent animated large feline character," such a comparison was as inevitable as referring to Donald Duck or Mickey Mouse in discussing an animated duck or an animated mouse. And it appeared that the defendants had attempted to create a unique character projecting a strong corporate image rather than the more "showbiz" personality of the Pink Panther.

The court also concluded, after viewing the Pink Panther films and the defendants' commercials, that "the resemblances between the two figures are not of such magnitude as to support the allegation of subconscious copying" and that an ordinary viewer of the defendants' commercials would readily detect the differences between the animated cat and the Pink Panther. The court stated that it had considered the two characters in their totality, including the accompanying music and voiceover narration, the actions and movements of the two figures, their color, and the physical characteristics of the figures (the animated cat was a more realistic looking animal than the Pink Panther). And the court, again noting the "considerable history of identification between Lincoln-Mercury and the cougar as a symbol," found that the defendants had created "a character which was unique, which was identifiable with their previously utilized logo, and which could be regarded as a representative of the dealers themselves."

The court rejected the plaintiffs' claims under state or federal unfair competition law because there was "no attempt to pass off the animated cat as the Pink Panther . . ., no misrepresentation of plaintiffs' goodwill in the Pink Panther created by a confusion of sponsorship, and [no misappropriation] in any fashion of any secondary meaning in the Pink Panther."

United Artists Corporation v. Ford Motor Company, CCH Copyright Law Reports, Para. 25,128 (S.D.N.Y. 1980) [ELR 1:20:4]

Radio station s use of the phrase I Love You in promotional slogan did not constitute trademark infringement or unfair competition

A promotional campaign by Milwaukee radio station WOKY featured the slogans "WOKY Loves You, Milwaukee" and "Ron Edwards Loves You, Milwaukee." M.B.H. Enterprises, Inc. is in the business of running promotional campaigns for radio stations, and it had organized such campaigns for approximately 30 stations around the country, in which billboards, bumper stickers and T-shirts proclaimed "I Love You (name of city, state or region)" and the call letters of the client radio station. MBH registered the phrase "I Love You" with the United States Patent and Trademark Office. Nevertheless, MBH's claims that WOKY's slogans infringed their registered trademark and constituted unfair competition have been rejected by a Federal District Court in Wisconsin.

The court has denied MBH's request for a preliminary injunction and has granted summary judgment to WOKY. In doing so, the court found that WOKY's slogans had not been used as trade or service marks since they were not used "to designate or identify the goods or services of the user." Further, although one of MBH's clients was a Milwaukee radio station which had run an I Love Milwaukee campaign, the court found that WOKY's campaign was not intended to and was not likely to confuse Milwaukee listeners, since WOKY's call letters appeared on all of its promotional advertising. Thus, WOKY was not attempting to pass itself off as another radio station and its use of the slogans was in good faith. Finally, the court noted that WOKY's slogans served to describe the station's product by attributing to it a particular quality, "in this case, the quality of civic involvement."

Summary judgment was also granted to WOKY on MBH's unfair competition claim because there was no evidence that the slogans would be likely to confuse listeners.

M.B.H. Enterprises, Inc. v. WOKY, Inc., Case No. 79-C-252 (E.D.Wisc., Jan. 11, 1980) [ELR 1:20:4]

Ladies Night promotions at Seattle Supersonics basketball games held to violate Washington s Equal Rights Amendment and a state statute prohibiting sex discrimination

For the past ten years, the Seattle Supersonics of the National Basketball Association has staged "Ladies' Night" promotions, which allowed women, but not men, to purchase game tickets at half price. As a result of this ticketing practice, a male patron, who was denied the fifty percent discount accorded to females, filed a class action for damages against the Sonics organization and the City of Seattle alleging sex discrimination in violation of the Washington Equal Rights Amendment and the Washington Law Against Discrimination. The Court of Appeals of Washington has ruled in favor of the plaintiff.

Under the Washington Equal Rights Amendment, discrimination by an action of the state on account of sex is prohibited. In holding the Sonics organization's ticket policy discriminatory on the basis of sex, the appellate court concluded that the leasing of the Seattle Coliseum by the City of Seattle to the Sonics for its basketball games constituted sufficient state action to invoke the Amendment. The court explained that "... state action pervades the sex discriminatory policies carried out by [the Sonics] . . . Despite its responsibilities as guardian of all its citizens . . ., the City of Seattle did nothing in the face of sex discrimination by its lessee with the excuse that it only collects taxes."

The appellate court also found the Sonics' ticket policy violative of Washington's Law Against Discrimination, which confers upon all persons the right to "the full enjoyment of any of the accommodations, advantages, facilities,or privileges of any place of public resort, accommodation, assemblage, or amusement." According to the court, this right to "full enjoyment" is to be construed as "the right to be admitted to the places enumerated on equal terms with all others" and thus applies in the sex discrimination context.

The court recommended that if the Sonics wish to promote female attendance, it might stage "Spouses' Night" instead, so as to comply with Washington Law.

MacLean v. First Northwest Industries of America, Inc., 600 P.2d 1027 (Wash.App. 1979) [ELR 1:20:5]

Briefly Noted:

Copyright.

A Federal District Court in Michigan has awarded Aucoin Management, Inc., the owner of the trademarks, copyrights and rights of publicity for the rock group "KISS," $10,000 in attorneys' fees in an infringement suit against wholesalers and retailers of unauthorized KISS merchandise, including T-shirts and heat transfers.

In earlier proceedings, the defendants had been enjoined from further sales of such merchandise, and were thereafter held in contempt for violating that injunction. The court noted that an award of attorneys' fees in a copyright suit is intended to compensate the prevailing party and to impose statutory liability on infringers. Aucoin's actual attorneys' fees exceeded $15,000, but some portion of those fees was incurred in connection with claims asserted against a defendant who was released from liability.

Aucoin Management, Inc. v. Veil's Fads, Inc., CCH Copyright Law Reports, Para. 25,124 (E.D. Mich. 1979) [ELR 1:20:6]

Labor Arbitration.

An arbitrator in San Antonio, Texas has found that the Symphony Society's attempt to dismiss an untenured staff trumpeter did not comply with contractual procedural requirements. The musician had been verbally warned of dissatisfaction with "his musical performance and with his flippant attitude during rehearsals and concerts." Subsequently, he was given written "final notice" of his termination. The arbitrator, noting that an arbitrable procedural matter rather than substantive issues of competence or cause, was involved, concluded that the musician had not received the required "jeopardy letter" notifying him of a brief grace period to "shape up" prior to any final action. The musician was ordered reinstated as an untenured staff musician.

Symphony Society of San Antonio and American Federation of Musicians, Local No. 23, 79-2 CCH Labor Arbitration Awards, Para. 8526 (1979) [ELR 1:20:6]

Labor Relations.

Theatre Techniques, Inc. (TTI), a general contractor supplying settings and props for theatrical, television and film productions, had subcontracted to Nolan Scenery Studios, Inc. the painting of props for the shows "Stop The World I Want to Get Off" and "Working." TTI's employees were not represented by a union; Nolan had a collective bargaining agreement with the Brotherhood of Painters and Allied Trades, a local of United Scenic Artists. A union business agent gave Nolan's president, Abramson, permission to have his employees paint the props. However, he also advised

Abramson that the collective bargaining agreement would entitle Nolan employees to sculpt (fabricate) as well as paint the props. The agent stated that therefore a payment to the union would be required, based on the time it would have taken Nolan's employees to sculpt the props had they been given the opportunity to do so and that similar payments would be required in the future for props sculpted elsewhere. The National Labor Relations Board has found that the proposed fee arrangement was, in essence, an altenative to the withholding of "permission" for the painting of the props and that this was "Unlawful pressure to claim work that the immediate employer [was] not in a position to award." This attempt to influence TTI's manner of doing business was held to be secondary and unlawful in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act. However, the NLRB rejected a contention that the failure of Nolan's employees to do any painting work on the props was a work stoppage induced by the union in violation of section 8(b)(4)(i)(B) of the Act. Although the union had demanded that Nolan cease painting props which had not been produced by scenic artists employed by Nolan, the Board concluded that there was insufficient evidence to determine whether the work stoppage actually occurred, whether employees had in fact refused to do the work, or whether they were induced to refuse to work on the props by the union in violation of the Act.

United Scenic Artists, Local 829, Brotherhood of Painters and Allied Trades, AFL-CIO and Theatre Techniques, Inc., 1979-80 CCH Labor Law Reports, Para. 15,976 (1979) [ELR 1:20:6]

Racing Regulation.

A Commonwealth Court in Pennsylvania has held that an attempt by the Pennsylvania Horse Racing Commission to increase riding fees paid to jockeys by horse owners or trainers exceeded the Commission's statutory authority. Gilligan v. Pennsylvania Horse Racing Commission, 407 A. 2d 466 (Pa. Cmwlth. 1979). In a separate case, the court has upheld a fine imposed on a trainer by the Commission, because a drug was found in a horse's urine sample taken after a race, despite the trainer's contention that only a small quantity of the drug had been accidentally ingested by the horse.

Hacker v. Pennsylvania Horse Racing Commission, 405 A.2d 1379 (Pa. Cmwlth. 1979) [ELR 1:20:6]

Torts.

An Illinois Court of Appeals has reversed a trial court decision granting summary judgment to the operators of a “giant slide” ride. The ticket for the ride stated that the holder assumed all risk of personal injury, and a sign at the top of the slide also warned, “slide at your own risk.” The plaintiff acknowledged that he had ridden similar slides at other amusement parks and had watched other patrons on the slide. The court found, however, that there existed a factual dispute as to the specific knowledge on the part of the plaintiff of the specific risk which caused his injury, a fractured vertebra.

In a similar case, an 87-year-old man sued the operator of a roller coaster for injuries allegedly suffered as a result of the negligent failure to warn him of the possible dangers of the ride. The Supreme Court of Ohio has found that summary judgment was improperly granted to the defendant by the trial court and has ordered further proceedings to determine whether the defendant had a duty to warn the plaintiff of the nature of the ride, particularly because of the plaintiffs age and poor physical condition.

The Vermont Supreme Court has found that a trial court did not err in its instruction regarding the “ordinary” standard of care owned to a plaintiff injured while skiing on the defendant’s ski slopes and has affirmed a judgment in favor of the defendant based on the jury’s finding that the plaintiff was 51% negligent and the defendant was 49% negligent.

Russo v. The Range, Inc., 395 N.E.2d 10 (Ill.App. 1979); Jackson v. Kings Island, 390 N.E.2d 810 (Ohio 1979); Green v. Sherburne Corporation, 403 A.2d 278 (Vt. 1979) [ELR 1:20:7]

Tape Piracy.

In an action for tape piracy brought by several record companies on behalf of themselves and all persons engaged in the manufacture of records, a Wisconsin Court of Appeals has upheld a temporary injunction prohibiting the defendants from advertising or selling the tapes in question, despite the fact that the injunction and certain other orders in the case were entered prior to the certification and notification of members of the class. The court found that the defendants had not demonstrated that the trial court's procedures prejudiced them in any way. The court also pointed out that the "misappropriation" or "unfair competition" involved was an illegal activity and "the prohibition of advertisements concerning this illegal activity [did] not run afoul of the defendant's first amendment rights." Further, although the temporary injunction may have imposed a burden on interstate commerce, the burden was not excessive in relation to the local interest in discouraging tape piracy. An order for the imprisonment of an individual defendant for failure to pay costs of a contempt proceeding was reversed, however, because the record failed to make the required showing that the defendant had the ability to pay.

Mercury Records Productions, Inc. v. Economic Consultants, Inc., 283 N.W.2d 613 (Wisc.App. 1979) [ELR 1:20:7]

Cable Television.

A Michigan taxpayer and landowner brought two actions (which were consolidated in the Court of Appeals) challenging certain cable television regulations. The Supreme Court of Michigan, reversing the decision of the lower court in one of the cases, has held that the state's constitutional requirements that public utility franchises must be revocable at the will of a city or village and must provide for approval of the franchise by 3/5 of the city's voters only applied to light, heat and power utilities. Therefore, the granting of the cable television franchise, although not meeting these requirements, was nevertheless constitutional. In his other action the plaintiff had sought damages for trespass on the theory that the cable television company had no right to contract for the use of poles owned by the defendant Detroit Edison on a public utility easement on his property. The

Supreme Court, finding that cable television is a public utility within the state's Subdivision Control Act, affirmed the lower court opinion granting the defendant's motion for summary judgment.

White v. City of Ann Arbor, 281 N.W.2d 283 (Mich. 1979) [ELR 1:20:7]

Copyright.

A Federal District Court in Florida has awarded United Feature Syndicate statutory damages of $16,000 on account of two separate infringements of its copyrights to Peanuts characters, including Snoopy. The defendant infringed United Feature's copyrights by selling unauthorized heat transfers. The exact number of transfers sold was not determined, in part because the defendant never answered the complaint against him. The court ruled that statutory damages were proper in default cases, and it also awarded $1,230 in attorneys' fees.

United Feature Syndicate, Inc. v. Rheingold, CCH Copyright Law Reports, Para. 25,114 (S.D. Fla. 1979) [ELR 1:20:7]

Libel.

The use of a girl's picture and name in a feature beauty article in "Seventeen" Magazine portrayed a "newsworthy event" and was not a use "for advertising purposes, or for purposes of trade," even though brand names of certain commercial products were mentioned in the article, the Appellate Division of the New York Supreme Court has held. It therefore ruled that the New York

Civil Rights Law was not violated and granted the magazine's motion for summary judgment.

Lopez v. Triangle Communications, Inc., 421 N.Y.S.2d 57 (1979) [ELR 1:20:7]

Previously Reported:

The following cases reported in previous issues of the Entertainment Law Reporter have been published: Russell v. Price, CCH Copyright Law Reports, Para. 25,125 (1:17:2); Byars v. Bluff City News Co., Inc., 609 F.2d 843 (1:17:7); Writers Guild of America v. American Broadcasting Co., 609 F.2d 355 (1:14:1); Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, 479 F.Supp. 351 (1:19:1).

In Miami Valley Broadcasting v. Commissioner of internal Revenue, a Federal Court of Appeals reversed the Tax Court's valuation of a lease for a building and land used by a television station because the Tax Court had not adequately explained the method by which it had made its calculation. (That decision was previously reported at ELR 1:7:7) On remand, the Tax Court has explained that the difference between the fair market rental value of the property and the rental required by the lease would result in a savings of at least $957,667 to the station's owner. However, that savings had to be discounted by 15-20% annually because of several factors, including the station's obligation to broadcast a 5-second spot announcement for Jack London Square every 6 hours, and the single purpose nature of the building which reduced the liquidity of the lease. The Tax Court's decision following remand appears at

80(10)CCH Standard Federal Tax Reports, Para. 7308(M).
[ELR 1:20:8]

NEW LEGISLATION AND REGULATIONS

Copyright Royalty Tribunal decides that broadcasters are not entitled to cable royalty fees, but that sports teams are; Tribunal also issues notices of rate adjustment proceedings for jukebox and mechanical royalties

The Copyright Royalty Tribunal has decided that television broadcasters are not entitled to a share of the cable royalty fees the Tribunal has been collecting pursuant to Section 111 of the Copyright Act of 1976. The National Association of Broadcasters, on behalf of its television station members, had argued that broadcasters should share in those royalties because television stations' broadcasts of various programs during the day constituted compilations as to which the stations owned the copyrights. The NAB also argued that stations were entitled to share in the cable royalties when cable systems retransmitted syndicated programming into markets where television stations have exclusive rights, on the theory that the exclusive right to syndicated programming was copyright ownership in those areas. The Copyright Royalty Tribunal rejected both of these arguments, however. The notice of its decision, which was published in the Federal Register, did not contain the Tribunal's analysis or reasoning.

The Tribunal did rule that performing rights organizations are entitled to a share of cable royalty fees. It also ruled that "sports claimants" that is, sports teams and leagues and other promoters of televised sporting events, are entitled to a share of cable royalty fees as well, "except when contractual arrangements specifically provide that such royalties shall be distributed to broadcaster claimants."

In separate notices, the Copyright Royalty Tribunal announced that it would conduct hearings in proceedings to adjust the royalty rates provided in Sections 115 and 116 of the Copyright Act of 1976 for jukeboxes and mechanical royalties. Economic or other studies to be introduced in the mechanical royalty proceeding are to be submitted to the Tribunal not later than April 1, 1980, and reply comments not later than April 21, 1980; hearings on the adjustment of mechanical royalties shall commence April 28, 1980.

Clarification: The foregoing article reports that "The Copyright Royalty Tribunal has decided that television broadcasters are not entitled to a share of the cable royalty fees the Tribunal has been collecting pursuant to

Section 111 of the Copyright Act of 1976." Following the article's original publication, Editorial Advisory Board member Philip Rochberg pointed out that the Tribunal had not gone as far as the quoted sentence implies. The Tribunal merely rejected a contention made by the National Association of Broadcasters that television stations are copyright owners of the "compilations" of programs produced by others and broadcast by the stations during the broadcast day. The Tribunal also rejected a contention that exclusive syndication rights within an area to programs produced by others constitutes copyright ownership of those programs within the exclusive area. The Tribunal held that since television stations were not copyright owners of such programming, they were not entitled to share cable royalty fees for those programs. However, Mr. Hochberg pointed out that in those cases where television stations produce programming themselves, such as local news shows for example, they obviously are the copyright owners and the proper copyright claimants. In those cases, television stations will receive some portion of the cable royalty fees being collected by the Tribunal. As reported, the Tribunal also ruled that sports claimants are entitled to a share of the cable royalties, except when contractual provisions specifically say that such royalties are to be distributed to broadcasters. In January of 1980, the NAB filed a petition for review of the Tribunal's decisions. Mr. Hochberg reports that on April 21, 1980, the Federal Court of Appeals denied that petition.

Notice of Copyright Royalty Distribution Proceeding, 44 Federal Register 75201, CCH Copyright Law Reports, Para. 20,057; Notice of Royalty Adjustment Proceeding for Coin-Operated Phonorecord Players, 45 Federal Register 62, CCH Copyright Law Reports, Para. 20,058; Notice of Royalty Adjustment Proceeding for Compulsory License for Making and Distributing

Phonorecords, 45 Federal Register 63, CCH Copyright Law Reports, Para. 20,059 [ELR 1:20:2]

New California statute permits deregulation of cable television rates, if cable system offers public access channel and satisfies other conditions

California law permits local governments to franchise cable television systems in their areas. Until the end of last year, state law also permitted local governments to regulate the rates which those systems charged their subscribers. As of the beginning of this year, however, a new California statute will permit certain cable systems to become exempt from rate regulation.

In order to be eligible for exemption from rate regulation, a cable system must provide at least one "community service" or public access channel, at least 20 channels altogether, must be able to receive television signals by satellite earth receiving station, must be located in an area that has three television stations, and must not have more than 70% of the homes in its area as subscribers. (If a cable system has 70% or more of the homes in its area as subscribers, or if it has fewer than 20 channels but is located in a sparsely populated area, the system will be able to increase its rates a certain amount, though its rates will not be deregulated entirely.)

In order to be eligible for rate deregulation, a cable system also must participate in a program to provide instruction to those interested in using public access channels, and must contribute 50 cents per subscriber to a public foundation which will make grants to public access channel users.

The new law provides that cable systems are not to be liable for acts arising from the use of public access channels, though cable systems are required to establish regulations restricting the use of public access channels for libelous or illegal programs.

The new law provides for penalties of up to $500 for preventable service problems not remedied by cable systems within a reasonable period after receiving notice of them.

The California Public Broadcasting Commission is to report to the Legislature by April 15, 1982 concerning the effect on subscribers of rate deregulation, and by January 1, 1983 concerning the uses that government, educational agencies and community organizations have made of public access channels. The new law expires by its own terms on January 1, 1984, unless it is extended by the Legislature.

Chapter 1086 of the California Statutes of 1979, adding Section 53066.1 to the California Government Code [ELR 1:20:5]

Videotaping Statute.

The State of Oregon has enacted a statute which makes it a misdemeanor to videotape a motion picture if the videotape is produced for sale without the written consent of the owner of the motion picture or if the videotape is sold or offered for sale without such consent. Title 16 Oregon Revised Statutes, Chapter 164. CCH Copyright Law Reports, Para. 11,125 [ELR 1:20:6]

DEPARTMENTS

In the Law Reviews:

Excluding income on returns of publications and records: An analysis of Section 458 by H. Stephen Merlin and Robert S. Sichel, 52 The Journal of Taxation 86-87 (February 1980)

Amortizing a sports team's contract: An analysis of First Northwest lndustries by Howard M. Zaritsky, 52 The Journal of Taxation 88-91 (February 1980)

Investment Tax Credit in Connection with Record Masters and Motion Pictures - The Only Game in Town by Harley Williams, 52 Southern California Law Review 1121-1162 (1979)

Informal Rulemaking Procedures at the Federal Communications Commission: Judicial Administrative and Legislative Reform by Stuart N. Brotman, 1 Communications and the Law 3-14 (1979)

Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report by Kathryn Dix Sowle, 54 New York University Law Review 469-545 (1979) [ELR 1:20:7]

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