RECENT CASES

Elvis Presley s name and likeness are now in the public domain, a Federal Court of Appeals decides

Does anyone now own the exclusive right to exploit Elvis Presley's name and likeness? Since Presley died in 1977, that question has been considered by at least three courts. The first two decisions held that Presley's heirs and assigns own that exclusive right. But on March 6, 1980, a Federal Court of Appeals for the Sixth Circuit held that Presley's right of publicity was not inheritable, and when he died, his right of publicity passed into the public domain "where it is equally open to all."

This most recent case arose from the activities of the Memphis Development Foundation, a nonprofit corporation which planned to erect a large bronze statue of

Presley in downtown Memphis. The Foundation solicited public contributions to finance the construction of the sculpture, and gave donors of $25 or more an 8-inch pewter replica of the proposed statue.

Prior to his death, Presley had conveyed the exclusive right to exploit his name and likeness to Boxcar Enterprises, a corporation owned mostly by Presley and his manager, Colonel Tom Parker. Two days after Presley's death, Boxcar sold a license to use its rights to Factors Etc., Inc.

When the Memphis Development Foundation began distributing 8-inch replicas in exchange for contributions, Factors Etc. objected. The Foundation filed suit seeking a declaratory judgment that Factors' license did not prevent the Foundation from continuing to distribute the replicas or from erecting the intended statue. Factors in turn filed a counterclaim seeking damages and an injunction against further distribution of the replicas.

Factors argued that the Foundation was really selling the statuettes and was thus infringing Factors' exclusive right to the commercial value of Presley's name and likeness. A Federal District Court in Tennessee issued the injunction requested by Factors, allowing the Foundation to build the memorial statue but prohibiting further sales of the replicas.

A Federal Court of Appeals has reversed that injunction, however. Although the Court of Appeals recognized that there is a right of action for the unauthorized commercial use of one's name or likeness, it held that the right to control such uses may be enforced by a person only during his or her lifetime. The court held that the right cannot be inherited or enforced by assignees after the person's death.

The court acknowledged earlier decisions holding that the right of publicity may be inherited, including one of the earlier Elvis Presley cases, Factors Etc., Inc. v. Pro

Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979). The court did not attempt to distinguish those cases in any way. Rather, it merely disagreed with their conclusions. In doing so, the court did not cite a single supporting opinion or statute. Instead, it relied upon what it described as "practical and policy considerations," the treatment of similar rights, the relative weight of the parties' conflicting interests, and "certain moral presuppositions concerning death, privacy . . . and economic opportunity."

According to the court, making the right of publicity inheritable "would not significantly inspire the creative endeavors of individuals in our society." On the other hand, "A whole set of practical problems of judicial line-drawing would arise should the courts recognize such an inheritable right," such as "How long would the `property' interest last?" The court also said, "Heretofore, the law has always thought that leaving a good

name to one's children is sufficient reward in itself for the individual, whether famous or not. Commercialization of this virtue after death in the hands of heirs is contrary to our legal tradition and somehow seems contrary to the moral presuppositions of our culture."

Thus, the court concluded that "It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few."

The national impact this case is likely to have is difficult to predict. It is, as noted, at odds with earlier decisions, including one rendered by a Federal Court of Appeals in New York in an earlier Elvis Presley case. In addition, this latest case only purports to determine what the law of the State of Tennessee is. On the other hand, this case is consistent with the recent decisions of the California Supreme Court in the Bela Lugosi and Rudolph Valentino cases (ELR, Vol. 1, No. 18, pg. 1). It is

thus possible that those having such rights to enforce will attempt to do so in New York (or other Second Circuit states), while those who desire to exploit the names and likenesses of deceased celebrities without a license will seek to have any cases that result heard in California, Tennessee, or other states that may follow their leads.

Memphis Development Foundation v. Factors Etc, Inc., No. 79-1270, U.S. Court of Appeals, 6th Circuit (March 6, 1980) [ELR 1:22:1]

Ban on production and distribution of feature films by Loew s Corporation is modified by Federal District Court in New York City

A 1952 Consent Order barring Loews Corporation and Loew's Theatres, Inc. from producing and distributing feature films has been modified by a Federal District Court in New York City. The court denied a motion to vacate the Consent Order, which had been entered into by Loew's Incorporated in connection with the United States v. Paramount antitrust litigation. But in a Memorandum accompanying its order, the court commented on the scarcity of feature film product and noted that "Loews' entry into production and distribution will represent the entry of a new competitor and a probable increase in the supply of successful feature films."

Pursuant to the modification, Loew's may distribute feature films subject to certain restrictions. The company is enjoined from exhibiting any feature it produces or distributes in any theater operated by Loew's; from granting licenses fixing admission prices; from agreeing with any exhibitor or distributor to maintain a system of

"clearances"; from making any formula deal or master agreement with a theater circuit; and from entering into licenses in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.

The modification further allows Loew's to acquire interests in theaters without having to demonstrate to the court that competition would not be restrained by such an acquisition. For a period of 10 years, however, Loew's must still obtain prior court approval for any acquisition of a theater in metropolitan New York, as well as specified theaters in New York County, New York State, and in Ohio.

United States v. Loew's Incorporated, Case No. 87-273 (ELP) (S.D.N.Y., Feb. 27, 1980) [ELR 1:22:2]

Antitrust challenge to BMI s blanket licensing practices precluded summary judgment for BMI in a copyright infringement action

A Federal District Court in Delaware has denied a motion for summary judgment in an action for copyright infringement brought by the copyright owners of certain musical compositions and by BMI, the licensor of performing rights to the compositions, against the owner of the Triple Nickel Saloon in Delaware. The court found that the copyrights in question had been infringed. But summary judgment was denied because, according to the court, a counterclaim had raised material issues of fact ". . . as to whether the licensing practices which BMI concededly employs violate the federal antitrust laws and constitute copyright misuse."

The relationships between BMI and its licensees are governed primarily by a 1966 consent decree issued

following the initiation of a government antitrust suit. The decree, although similar to one governing ASCAP's dealings with its licensees, requires BMI to offer per piece licenses to nonbroadcast users seeking performance rights for particular compositions. The Triple Nickel contended that BMI was willing to issue only a blanket license covering all songs in its repertory rather than a modified per piece license. Evidence was introduced to show that although BMI had offered a per piece license, it had declined to supply a list of its compositions, and had only entered repertory-wide blanket license agreements with users similar to the Triple Nickel, thus forcing them to take a blanket license or forego the use of BMI compositions.

The court pointed out that the United States Supreme Court has recently found that "the consent decrees did not immunize BMI and ASCAP from antitrust challenges . . . by nonparties to the earlier litigation" (BMI

v. Columbia Broadcasting System, Inc., 99 S.Ct. 1551 (1979), reported at ELR 1:1:1). Although BMI argued that the club had never requested any form of license, the court found that the record supported an inference that a request for a "small blanket" license would have been futile. The club was therefore entitled to demonstrate that BMI's licensing practices under the consent decree did not meet the "rule of reason" because there was no real alternative to the blanket license for users such as the Triple Nickel.

Broadcast Music, Inc. v. Moor-Law, Inc., CCH Copyright Law Reports, Para. 25,131, 1980-1 CCH Trade Cases, Para. 63,157 (D.Del. 1980) [ELR 1:22:2]

Various antitrust issues raised in a lawsuit by producer of theatrical scenery against union are decided in pretrial proceedings before a Federal District Court in New York City

Theatre Techniques, Inc., a producer of theatrical scenery whose business was located in Newburgh, New York, brought an antitrust action against a labor union alleging that the union had conspired with employers located in New York City to set wages paid by non-Nw York City employers at a higher rate than those paid in the city. The industry collective bargaining agreement provided that scenic shops outside a 10-mile radius of mid-Manhattan were required to pay a $30 per diem and travel cost to any employee living more than 10 miles or onehalf hour from the shop. A Federal District Court in New York City has refused to find that this provision constituted a per se antitrust violation, noting that a

factual issue existed as to whether the agreement was an attempt to impose a wage scale negotiated with one set of employers on a noncontracting party. But the court denied the union's motion for summary judgment, commenting that "the anticompetitive effect of the increased cost of labor to firms outside of New York City is obvious. The fact that plaintiff has survived may merely prove its tenacity. It does not show the lack of any restraint."

The employer also alleged that the contract covering in-house scenic shops maintained by the three nationwide television networks contained wage rates more favorable to the employers than the independent scenery shop contract. On this issue, the court granted the union's motion for summary judgment. The higher wage scale was not shown to have resulted from collusion between the networks and the union. Further, the networks

offered full-time employment and fringe benefits not usually available in the independent shops.

In a separate opinion, the District Court considered Theatre Techniques' contention that the union actually consisted of a group of independent designers "masquerading as a union" in order to restrain competition and allocate markets. The union had asked the court to rule that the status of its members was irrelevant to the case.

The court refused to do so, however. It found that it was relevant to determine whether the presence of some scenic artist "employee" members qualified the organization for the labor exemption from the antitrust laws. The status of the designer members was also found relevant to the claim that the local itself was an unlawful combination apart from having engaged in an alleged conspiracy with another party. The court ruled that if the designer members were independent contractors "using

the union to achieve unlawful ends, the Local would lose any exemption it might have had in the first instance by reason of its representation of the scenic artists." (A National Labor Relations Board decision involving the parties in this proceeding was reported in ELR, Vol. 1, No. 20, pg. 6.)

Theatre Techniques, Inc. v. United Scenic Artists, Local 829, 1980-1 CCH Trade Cases, Para. 63,031 (S.D.N.Y. 1979); Theatre Techniques, Inc. v. United Scenic Artists, Local 829, 1980-1 CCH Trade Cases, Para. 63,174 (S.D.N.Y. 1980) [ELR 1:22:3]

NBA Commissioner s compensation award to Seattle Supersonics for loss of Marvin Webster is found to be a penalty and is set aside by Federal District Court

The subject of "compensation" for free agents who sign with new teams is much in the news these days, because it is one of the major points in this spring's negotiations between Organized Baseball and the Major League Baseball Players Association. Other sports confronted the compensation issue in earlier years, and though they were able to agree on compensation systems now used in other leagues, the implementation of the National Basketball Association compensation rule has brought that league and the National Basketball Players Association into court again.

The case began when Marvin Webster's contract with the Seattle Supersonics expired at the end of the 1977-78 season and he became a veteran free agent. Not long thereafter, Webster signed a 5-year, $3 million, no-cut contract with the New York Knicks. The current NBA collective bargaining agreement gave Seattle the

right to receive compensation from New York for Webster, but the two teams were unable to agree between themselves on who or what fair compensation would be. Accordingly, pursuant to the collective bargaining agreement, the compensation question was submitted to NBA Commissioner Larry O'Brien. O'Brien awarded Seattle Lonnie Shelton, New York's first round 1979 college draft pick, and $450,000 in cash.

Although the collective bargaining agreement gives the Commissioner "full, complete and final jurisdiction" over compensation disputes, the agreement also provides that the purpose of the compensation rule is "not to serve as a penalty, but is to ensure that a team which loses . . . a player is, to the nearest extent possible, made whole for the loss of such player."

The Players Association concluded that O'Brien's award to Seattle was excessive, and in fact was so excessive that it constituted a prohibited "penalty." Thus,

the Players Association petitioned the Federal District Court in New York City to set aside the award. (The petition was filed pursuant to a provision in the agreement by which the case of Robertson v. NBA, 556 F.2d 682 (2d Cir. 1977), was settled.)

A Special Master was appointed to hear the Players Association's petition, and the Special Master found that the Commissioner's award to Seattle had been "excessive" and would "chill the market" for veteran free agents. Nevertheless, the Special Master refused to set aside the award, because there was no substantial evidence that the Commissioner intended to make Seattle more than whole, nor was the award so clearly excessive that it had to be attributed to intent or gross error of judgment.

Federal District Judge Robert L. Carter — who conducted the proceedings in the Robertson v. NBA case — has reversed the Special Master, however, and has

vacated Commissioner O'Brien's award to Seattle. Judge Carter compared the compensation awarded for Marvin Webster with the compensation the Commissioner had awarded to the San Francisco Warriors only one month before for the loss of Rick Barry to Houston, and found that the two awards could not be reconciled. Compensation awarded Seattle for Webster was more than double what the Commissioner had awarded to San Francisco for the loss of Barry, even though the Commissioner himself had described Barry as a "superstar" and the most important member of the San Francisco team. These two awards were "patently incongruous," Judge Carter ruled.

Although Judge Carter acknowledged that the Commissioner has "full" and "complete" authority to determine what compensation to award, Judge Carter held that the purpose clause of the compensation rule — which says the rule is not to serve as a penalty — "is

meant to constitute an express limitation on the Commissioner's authority." And said Judge Carter, "In the event the Commissioner awards compensation in excess of the lost player's value to his old team, the Agreement allows a challenge by the players."

The NBA contended that the court should not substitute its judgment for that of the Commissioner. Judge Carter agreed, but said that the settlement agreement gave the court the power to determine whether the Commissioner's award complied with or violated the agreed upon purpose of compensation. "Exercise of that responsibility in no way impinges upon the Commissioner's power to determine what form of compensation is appropriate in a given case," Judge Carter held.

The NBA has appealed Judge Carter's decision to the Federal Court of Appeals for the Second Circuit.

In re Robertson Class Plaintiffs, 479 F.Supp. 657 (S.D.N.Y. 1979) [ELR 1:22:3]

Louisiana courts refuse to enjoin New Orleans Jazz from moving to Utah

The efforts of the Oakland Raiders to move to Los Angeles — and the flurry of lawsuits that have resulted — are much in the news these days. Unless those cases are settled, some of them may make new and interesting law. In the meantime, last year's move by the New Orleans Jazz to Salt Lake City, Utah — which also touched off complicated litigation — already has produced a published opinion for the lawbooks.

In 1975, the Jazz entered into a ten-year lease with the Louisiana Stadium Exposition District requiring the Jazz to play its home games in the Louisiana Superdome.

When the Jazz moved to Utah, the State of Louisiana, its Stadium and Exposition District, the manager of the Superdome, and the City of New Orleans all filed suit against the partnership that owns the team, the team's players, and the National Basketball Association, alleging that the move constituted a breach of the lease and a violation of Louisiana's state antitrust laws. The various plaintiffs sought a preliminary injunction barring the Jazz from making the move to Utah.

A Louisiana trial court refused to issue a preliminary injunction, and the Court of Appeal of Louisiana has affirmed that refusal. The primary reason relied upon by the courts for refusing to enjoin the move was that by the time the plaintiffs had filed their case and sought a preliminary injunction, the Jazz had effectively removed its business from New Orleans and had started up its business in Utah. Accordingly, the issuance of a preliminary injunction "to maintain the status quo" — the usual

reason for preliminary injunctions — would have been of no avail to the plaintiffs.

The Court of Appeal also noted "that to require the Jazz to play in the Superdome also requires us to order the NBA member teams to schedule and play those games. At this stage of the proceedings, and considering the preparations necessarily involved in such scheduling, we cannot conclude that plaintiffs' injuries will preponderantly outweigh the possible injuries to defendants."

HMC Management Corporation v. New Orleans Basketball Club, 375 So.2d 700 (La.App. 1979) [ELR 1:22:4]

Professional football player barred from bringing civil lawsuit for knee injury against former team and

head coach; arbitration and workmen s compensation claims held to be exclusive remedies

The Colorado Court of Appeals has affirmed a lower court's dismissal of a tort action brought by professional football player Clarence Ellis against his former team, the Denver Broncos, and its head coach at the time, John Ralston. Ellis had sued Ralston and the Broncos for the damage to his knee which allegedly arose from their requiring him to engage in contact football drills before he had fully recovered from an off-season knee operation.

The appellate court ruled that Ellis' claims were barred on two grounds. First, the court concluded that Ellis was bound by the mandatory arbitration requirements of his National Football League Standard Player Contract which covered all matters in dispute between a player and his club. Second, the court noted that Colorado's

Workmen's Compensation Act provides the exclusive remedy for injuries suffered in the course of one's employment from the negligent and intentional acts of employers and co-employees.

Ellis v. Rocky Mountain Empire Sports, Inc., 602 P.2d 895 (Colo. App. 1979) [ELR 1:22:5]

Publication of the scholastic standings of college athletes is held not to be an invasion of their privacy

On November 1, 1977, the Washington Star and a student publication, the Diamondback, published articles concerning the possible athletic ineligibility for academic reasons of several University of Maryland basketball players. The articles specifically detailed the poor scholastic records of the student-athletes. The players

brought suit for invasion of privacy against the publishers of those newspapers and the alleged authors and editors of the articles. Although the players conceded that they were public figures and that the information printed was true, they contended that their scholastic status was a purely private matter unaffected by any public interest or concern. The trial court disagreed and granted the defendants' motion for summary judgment.

The Court of Special Appeals of Maryland has upheld this ruling. It noted that the publication of a matter concerning the private life of an individual does not constitute a tortious invasion of privacy when the matter is of legitimate concern to the public. Moreover, according to the appellate court, when a public figure is involved, this legitimate concern may be extended to permit the publication of facts "which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life."

The court thus concluded that since the players had "achieved the status of public figures solely by virtue of their membership on the University basketball team," their possible athletic ineligibility for academic reasons was a matter of legitimate public interest. "The players, having sought and basked in the limelight," the court ruled, "will not be heard to complain when the light focuses on their potentially imminent withdrawal from the team."

Bilney v. The Evening Star Newspaper Company, 406 A.2d 652 (Md.App. 1979) [ELR 1:22:5]

Federal District Court denies motion to dismiss price discrimination claims of magazine and paperback book wholesaler against national distributors and

competing wholesaler, but does dismiss monopolization claims against distributors

A major antitrust action is pending in Federal District Court in Kansas which, according to the judge hearing the case, "could have a significant impact upon the industry which distributes periodicals and paperback books in this country." The lawsuit was filed in late 1975 by Palmer News, Inc., a major magazine and paperback book wholesaler in the Midwest and Southwest. Named as defendants were ARA Services, Inc., the nation's largest wholesaler which has agencies throughout the United States, and several national distributors.

The distributors and ARA made motions for partial summary judgment hoping to have certain of Palmer's claims dismissed before trial. In a recently published opinion, the court refused to dismiss Palmer's price

discrimination claims, but did dismiss one of its monopolization claims.

Generally speaking, magazine and paperback book publishers sell to national distributors who in tum sell to wholsalers who sell to retailers from whom customers ultimately purchase.

In this case, Palmer alleged that it competes with ARA in certain territories, that the distributors know of this competition, and that despite their knowledge of this competition, the distributors discriminated against Palmer and in favor of ARA by giving ARA lower prices and greater allowances than those given to Palmer and by giving ARA special privileges not given to Palmer at all. Palmer further alleged that these preferences have enabled ARA to offer better terms to retailers within Palmer's areas of operation, and that as a result, competition has been or may be substantially lessened in those areas. Palmer also alleged that ARA

used its enormous purchasing power to induce the distributors to grant these discriminatory prices, allowances and services.

The Robinson-Patman Act makes it unlawful for sellers to discriminate in price, allowances or services between different purchasers, if the effect of such discrimination may be to substantially lessen competition. It also prohibits buyers from knowingly inducing or receiving an unlawful discrimination. (15 U.S.C. section 13)

The defendants' motion to dismiss Palmer's price discrimination claims was based on their contention that Palmer's complaint failed to allege certain specific facts, and on the contention that where specific facts were pled, those facts did not constitute a violation of the Robinson-Patman Act. The specific facts said to be missing were the identities of the specific ARA agencies with which Palmer was in direct competition which Palmer claimed received the allegedly discriminatory

prices, allowances and services. The court made short shrift of this contention, however, saying that "the age of fact pleading is past," and holding that Palmer's complaint was sufficient "even though it does not specifically spell but the discrimination between a given ARA agency and Palmer agency competing in the same area."

More serious was the defendants' contention that the particular facts alleged by Palmer do not constitute Robinson-Patman Act violations. Some of the discriminatory terms given to ARA were allegedly "disguised . . . through various bookkeeping maneuvers" pursuant to which a lump-sum transportation allowance and certain rebates for ARA as a whole were allocated by the distributor to particular ARA agencies which were not in competition with Palmer. The court held that such disguised discrimination violates the Robinson-Patman Act "as surely as undisguised direct discriminations would."

Palmer also alleged that the distributors grant "favorable" prices and terms to ARA agencies which do not compete directly with Palmer agencies, and that ARA uses the profits it makes in those agencies to underwrite below-cost competition in those areas where ARA does compete with Palmer. The court agreed with the defendants that this "interstate underwriting" theory does not violate the Robinson-Patman Act, for two reasons. First, the ARA agencies allegedly receiving these discriminatory prices and terms were not in competition with Palmer agencies, and the court could find no authority to support Palmer's contention that "competition between it and ARA should be measured on the whole," rather than agency by agency. Second, there was no connection between the distributors and Palmer's alleged injury. At most, the distributors allowed ARA to earn a profit in areas where it did not compete with Palmer which ARA used to compete with Palmer elsewhere.

The court found this link between the distributors' conduct and Palmer's injury "to be too tenuous to support a Robinson-Patman claim."

The court also dismissed one of Palmer's monopolization claims against the distributors. Section 7 of the Clayton Act prohibits corporations from acquiring the stock or assets of other corporations, where the effect may be to substantially lessen competition or create a monopoly. Palmer alleged that ARA had acquired a wholesaler in Kansas City, and had thereby created a monopoly in that area. Palmer also alleged that the distributors had conspired with ARA to create that monopoly. The court noted, however, that the distributors had not themselves acquired the Kansas City wholesaler, and held that even if they had aided ARA in doing so, aiding an acquisition does not violate section 7 of the Clayton Act even if the acquiring corporation does so.

In a separate, unrelated case, a Federal District Court in Illinois has dismissed Robinson-Patman Act claims made by one magazine and book wholesaler against a competitor and the Secretaries of the Army and Air Force. The plaintiff in the case alleged that its competitor discriminated in favor of an Air Force base exchange by giving it lower prices than others, and that as a result, the plaintiff was damaged because it failed to obtain the contract to distribute books and magazines to the base exchange.

The base exchange was operated by the Army and Air Force Exchange Service, an arm of the United States government; and the court held that as an arm of the government, it was immune from liability under the Robinson-Patman Act. The court also held that the sovereign immunity of the Exchange Service extended to the Secretaries of the Army and Air Force. And finally, the court held that since the buyers — the Exchange

Service and the Secretaries — were not liable for inducing RobinsonPatman violations, the selling wholesaler could not be liable either.

Palmer News, Inc. v. ARA Services, Inc., 476 F.Supp. 1176 (D.Kan. 1979); Champaign Urbana News Agency, Inc. v. J. L. Cummins News Company, Inc., 479 F.Supp. 281 (C.D.Ill. 1979) [ELR 1:22:5]

Briefly Noted:

Libel.

A Kansas attorney, who was publicly censured by the State Board of Law Examiners after he had entered into a contingent fee contract in a criminal case, alleged that certain statements in newspaper accounts of the matter

were libelous. The Supreme Court of Kansas has affirmed a lower court decision granting summary judgment to the defendants. The court found that the attorney had been active in community affairs and had achieved "the requisite fame and notoriety in his community to be declared a public figure for all purposes." And the newspaper reports were found to be substantially true, thus precluding any recovery by the attorney.

The Supreme Court of Arkansas, however, has held that a lower court erred in granting summary judgment to a newspaper in a libel action brought by an attorney who had been suspended from the practice of law. The court found that the attorney was not a public figure because he "had not thrust himself into the vortex of public controversy . . . Moreover, he neither had taken steps to attract public attention, nor had he strived to achieve a degree of public acclaim." The court upheld the dismissal of the attorney's false light invasion of privacy

claim, however, because he had not shown that the articles regarding his attempt to regain admission to the bar were published with knowledge of their falsity or in reckless disregard of the truth.

Steere v. Cupp, 602 P.2d 1267 (Kan. 1979); Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840 (Ark. 1979) [ELR 1:22:6]

Libel.

In a libel action brought by Ralph Nader against columnist Ralph de Toledano and Copley Press, Inc., a Court of Appeals in the District of Columbia has partially reversed a District Court decision granting summary judgment to the defendants. The court found that Nader, a public figure, had demonstrated that a

reasonable jury could find with "convincing clarity" that de Toledano's statements regarding Nader's conduct during a Congressional investigation of car safety were made with actual malice. The court affirmed the granting of summary judgment in favor of Copley Press, noting that at most Copley may have been negligent in "failing to verify independently the accuracy of de Toledano's statement," but that a finding of actual malice could not be based on such an investigatory failure in itself.

Nader v. de Toledano, 408 A.2d 31 (D.C.Ct.App. 1979) [ELR 1:22:7]

Libel.

A Federal Court of Appeals in Texas has granted summary judgment to the Associated Press in an action for

libel and invasion of privacy brought by several beef retailers. The court found that a report stating that the liability of the retailers under a consent decree in the State of Washington could total $700,000 was substantially accurate.

Brueggemeyer v. Associated Press, 609 F.2d 825 (5th Cir. 1980) [ELR 1:22:7]

Libel.

The Appellate Division of the New York Supreme Court has found that in the absence of a showing of actual malice, a newspaper publisher was entitled to summary judgment in an action for defamation brought by a town tax assessor. An editorial, which proved to be incorrect, criticized the assessor's practice of granting tax

exemptions for Universal Life Church ministers, and stated that the assessor had himself become a minister in the Church. The newspaper published a retraction of the incorrect statement that the assessor had benefited from the tax exemption, and the court found that "[a]t most, negligence has been established for which defamation liability will not here attach."

Kerwick v. Orange Count Publications Division, 422 N.Y.S.2d 179 (N.Y.App. 1979) [ELR 1:22:7]

Noncompetition Covenant.

Certain franchise agreements for the sale and distribution of the publication T.V. Tempo have been held unenforceable by the Supreme Court of Georgia. The court, treating the agreements as employment contracts,

found that covenants not to accept employment with a competitor "in any manner" were broader than necessary to protect the business interest of the employer. The absence of a time limitation on such covenants was also held unreasonable.

T.V. Tempo v. T. V. Venture, Inc., 1979-2 CCH Trade Cases., Para. 63,057 (Ga. 1979) [ELR 1:22:7]

Tax.

If the owner of a radio or television station is required to sell that station in order to "effectuate" a change in FCC policy concerning ownership or control of broadcasting stations, the selling owner may elect not to recognize some (or in some cases, all) of its taxable gain in connection with the sale. This may be done if the owner

invests the proceeds from the sale into another broadcast station or into controlling stock of a corporation owning another station. However, the IRS has recently ruled that the owner of a station may not take advantage of this election if the owner invests the proceeds of the sale of a station in newly issued stock of a wholly-owned subsidiary corporation. The IRS ruled that the purchase of newly issued stock in a wholly-owned subsidiary would not change the taxpayer's interest in that corporation because it already owns all of its stock. Instead, said the IRS, such an investment would be more akin to a capital contribution, which does not qualify for the nonrecognition election.

Rev. Rul. 79-293, I.R.B. 197939, 20; 79(10)CCH Standard Federal Tax Reports, Para. 6856 [ELR 1:22:7]

Tax.

A Michigan Court of Appeals has found that a statute exempting copyrighted motion picture films from the payment of the state's use tax, while assessing such a tax for the exhibition of noncopyrighted "adult films," was not a denial of equal protection since the state may have had several grounds, such as promoting originality, for establishing the exemption.

American Amusement Company v. Department of Revenue, 283 N.W.2d 803 (Mich.App. 1979) [ELR 1:22:7]

DEPARTMENTS

New Book:

Sports Violence: The Interaction Between Private Lawmaking and the Criminal Law by Richard B. Horrow

This book examines "during the game" violence which may constitute violations of criminal law. It discusses the factors which influenced prosecutors' decisions to prosecute sports violence in several specific cases, based on interviews with and survey responses from county prosecutors. Surveys also were sent to 1400 professional athletes and 67 teams in three major sports. 286 pages. Published by Carrollton Press, Inc., 1911 Fort Myer Drive, Suite 905, Arlington, Virginia 22209.

Cloth binding $27.50 plus postage; paper binding $17.50 plus postage. [ELR 1:22:8]

In the Law Reviews:

Copyright and the Musical Arrangement: An Analysis of the Law and Problems Pertaining to this Specialized Form of Derivtive Work, 7 Pepperdine Law Review 125-146 (1979)

Performance Rights in Sound Recordings: A Look at the Issues Involved by J. Frank Stewart, 14 Beverly Hills Bar Association Journal 141-158 (1980)

Access to State-Owned Communications Media - The Public Forum Doctrine, 26 UCLA Law Review 1410-1461 (1979)

An Examination of the Application of Common Carrier Regulation to Entities Providing New Telecommunications Services by Kaye L. O'Riordan, 29 Case Western Reserve Law Review 577-602 (1979)

The First Amendment Newsman's Privilege: From Branzburg to Farber, 10 Seton Hall Law Review 333-368 (1979)

Book Reviews by Richard M. Mosk and Edward Rubin of The Copyright Law by Latham and The Law of Sports by Weistart and Lowell, 14 Beverly Hills Bar Association Journal 161-164 (1980)
[ELR 1:22:8]