RECENT CASES

Arbitrator rules that theater company was not required to pay additional compensation to chorus members who performed individually in the play "Sweeney Todd"

Is there a difference between an individual or solo performance and a performance that is "individual in character"? This was the issue confronting Arbitrator Daniel Collins in an arbitration proceeding between the Actors' Equity Association and the Barber Company, producer of the play "Sweeney Todd." The issue arose because the Actors' Equity collective bargaining agreement requires the payment of additional compensation to any chorus member who "is required to play a part, speak lines, sing a song, or do a dance, that is individual in character . . ."

In the opening of "Sweeney Todd," a chorus member appears on stage and starts up various foundry machines and then quickly reappears as the foreman in a scene with two other chorus members. At almost the same time, another chorus member proceeds to an organ and strikes several notes that signify the start of the major stage action. On two other occasions in the play, there are some lines sung separately by chorus members who are on stage as members of a trio or quintet. The question the arbitrator was required to decide was whether these performances were "individual in character," for if so, the chorus members involved would have been entitled to additional compensation. The arbitrator conducted two days of hearings and viewed the play twice, once before the hearings and then again after the hearings. Based on the evidence received during the hearings and on his own observations of the play, Arbitrator Collins concluded that these performances were not individual in character.

The arbitrator noted that although chorus members had sung some lines separately from the trio and quintet, he said he "was entirely conscious in each instance of the choral entity and not of any individual performance either within or apart from that entity." The arbitrator was careful to note that he was not saying the performances of the chorus members in the trio and quintet were unsuccessful. "On the contrary," he said, "they seemed immensely successful, but as a unified whole rather than as individual projections."

In support of its contention that these performances were individual in character, Actors Equity referred to the decision of another arbitrator in an arbitration involving "Fiddler on the Roof." In that case, it was held that chorus members who performed the "Bottle Dance" in "Fiddler were entitled to extra compensation for individual performances. Arbitrator Collins noted that it is difficult to compare stage performances through arbitrators' decisions. Nevertheless, he said, the decision in "Fiddler on the Roof" made it clear that the arbitrator in that case had observed dance performances of "a memorably individualized character." In this case, said Arbitrator Collins, he had "a different impression."

His conclusion was the same with respect to the appearances of chorus members at the opening of "Sweeney Todd." None involved spoken or sung lines or dance, nor were they parts that were individual in character, he ruled. The first chorus member who appeared on stage and the organist who appeared thereafter had no significantly different relationship to the main action from other chorus members. They simply came first, the arbitrator ruled.

The scene in which the foreman appeared on stage with two other chorus members had potential for silent interaction suggesting individualized parts: and indeed there was a suggestion of individualized conflicts within the scene when the arbitrator viewed the play the first time, the arbitrator noted. The second time he viewed it, however, "there was not even that suggestion," he ruled. Thus, "on balance," he concluded that no additional compensation was due to the chorus members in this scene either.

In a separate proceeding involving the interpretation of an agreement between Actors' Equity and the Barber Company settling an unrelated dispute. Arbitrator Collins ruled that swing actors were entitled to one-half the highest weekly rate for set moves that would have been paid to a regular cast member for whom a swing actor went on during that week, for the period preceding the settlement date. The settlement agreement had provided that regular cast members would be paid $5 per week for each set, scene or prop move in which the actor participated during a performance. The settlement also provided that swing actors would receive pro rata compensation for the actual number of moves made by the swing during a week, beginning with performances following the settlement. Actors' Equity and Barber Company disagreed, however, about whether the pro rata formula was to be applied retroactively. Barber Company thought so; Actors' Equity thought not. The arbitrator's decision, he said, represented "a reasonable compromise that the parties might have agreed to" on the day they settled.

In the Matter of the Arbitration between Actors' Equity Association and Barber Company, Re: Sweeney Todd (Nov. 12, 1979; April 9, 1980) [ELR 2:2:1]

Westinghouse Broadcasting fails to enjoin New England Patriots from granting radio and television rights to another broadcaster

Option clauses have been the subject of much litigation in the professional sports business. Most of those cases involved efforts by teams to enforce their options to the services of players, when players have indicated their intention to "jump" to other teams in other leagues. Recently, however. the New England Patriots of the National Football League found itself the defendant in an option clause case filed by Westinghouse Broadcasting when the Patriots indicated their intention to "jump' to another broadcaster.

In 1976, the Patriots and Westinghouse entered into a contract giving Westinghouse the radio and television rights to the Patriots' games for the 1976, 1977 and 1978 football seasons. The contract also contained a clause giving Westinghouse an option on the broadcasting rights to the Patriots' games for 1979 and 1980 as well.

Westinghouse exercised its option for the 1979 season, and the Patriots honored the option for that season after the Patriots' lawyer resolved a dispute with Westinghouse concerning late payments and funds withheld by Westinghouse (for reasons not explained in the court's opinion). At the time the dispute was resolved, the Patriots' lawyer notified Westinghouse that "In the event that Westinghouse fails to make timely payments of any installment due in 1979, there will be no option for the 1980 season."

Despite this warning, Westinghouse's first payment for the 1979 season was not received by the Patriots until a week after it was due. Accordingly, the Patriots repudiated Westinghouse's option for the 1980 season and indicated an intention to grant radio and television rights to its games for that season to another broadcaster. Westinghouse filed suit and sought a preliminary injunction barring the Patriots from doing so.

A Massachusetts Superior Court has denied Westinghouse's application for an injunction. In doing so, the court did not resolve the issue of whether Westinghouse's August 1979 payment was made in a "timely" fashion. The court ruled that even if that payment had been "timely" made, it would decline to issue the requested injunction anyway. The court did so after weighing what it described as the "equities on each side of the case" and after giving "due regard for the public interest." In doing so, the court noted that every payment made by Westinghouse during the entire three years up to and including the August 1979 payment had been made late. The court also considered that whether or not the injunction were issued, the Patriots would be free to grant radio and television rights to another broadcaster for the 1981 season, and thus it could not be said that the public interest would be harmed by changing broadcasters one year earlier. The court also observed that an injunction would "wed" the Patriots and Westinghouse for the 1980 season; and while the court recognized that this was not the classic "opera singer" case where the quality of performance would be difficult to police, the court was nevertheless reluctant to order the Patriots and Westinghouse "into an uneasy harness."

Finally, the court noted that it had not been persuaded that Westinghouse does not have an adequate remedy at law, referring to a suit for money damages. "The remedy need not be perfect," the court observed, or what Westinghouse "would understandably prefer, it need only be adequate."

Westinghouse Broadcasting Company, Inc. v. New England Football Club, Inc., Massachusetts Superior Court, Case No. C.A. 41096 (May 2, 1980) [ELR 2:2:2]

Walt Disney Productions obtains preliminary injunction barring game manufacturer from using title "Black Hole in Space"

In October of l978, Walt Disney Productions began a prerelease publicity campaign for its film "The Black Hole," which was scheduled for release in December of 1979. Merchandising licenses were also being negotiated for children's products using names and characters from the film. In connection with the merchandising program, Disney acquired all rights to a previously trademarked game titled "The Black Hole."

In April of 1978, Kusan, Inc., doing business as Schaper Manufacturing Company, developed a game known initially as "Hole in Space." A prototype of the game was exhibited to company personnel and to a Sears representative. The game allegedly was referred to by the company and initially marketed as "Black Hole in Space." Eventually, Disney and Schaper sought preliminary injunctions against each other's continued use of the name "Black Hole in Space."

A Federal District Court in California has rejected Schaper's contention that it was the prior user of the game title and has granted Disney a partial preliminary injunction. Schaper's internal shipment of the game and the display of the game to a Sears representative were found not sufficient to constitute a public use of the trademark. At the time, the game was not even labeled "Black Hole in Space." And, citing the recent case of New West Corp. v. NYM Co. of Cal., Inc., 595 F.2d

1194 (9th Cir. 1979) (ELR 1:6:1), the court found that Disney had not only "adopted" the trademark in question but had also established the requisite identification of the product with Disney in the public mind prior to Schaper's first public use.

The court further concluded that the balance of hardships in the case favored Disney, noting that $20 million had been spent in producing the film, that $2.5 million had been spent in advertising, and that Disney planned to spend an additional $5.5 million for advertising. Advertising and licensing efforts had been undertaken without knowledge of Schaper's contemplated use of the title. Significantly, Schaper apparently had waited nearly a year after learning of Disney's film before it sought an injunction against Disney and evidence indicated that Schaper "intentionally traded upon Disney's goodwill and business reputation."

In order to avoid public confusion with respect to the approximately 73,000 "Black Hole in Space" games already commercially shipped by Schaper, the court enjoined further marketing of the game by Schaper except under the name "Hole in Space." Although not required to recall the games, Schaper was ordered to distribute to its retailers decals reading "Hole in Space" to be added to the contents of the game box or given to consumers with each purchase and to notify the retailers that the game was to be marketed and sold only under that name. Any commercials by Schaper using the title "Black Hole in Space" were also enjoined. Disney was ordered to print its name prominently on the games it planned to release in December of 1979, indicating that the game was the "official game" associated with Disney's "Black Hole in Space" movie.

Walt Disney Productions v. Kusan, Inc., 204 USPQ 285 (C.D.Cal. 1979) [ELR 2:2:3]

Record duplicator's conviction for piracy is upheld despite defenses of statutory vagueness, lack of willfullness and selective prosecution

In the most recent of various actions involving E C Tape Services' practice of duplicating and compiling recorded anthologies of copyrighted music without authorization from the copyright owners (see ELR 1:20:7), a Federal Court of Appeals in Wisconsin has affirmed the conviction of David Heilman, the company's president, for record piracy under the former Copyright Act (17 U.S.C. section 104).

In 1975, the U.S. Justice Department announced that it intended to criminally prosecute for copyright infringement persons who duplicated records "fixed" prior to February 15, 1972, regardless of whether a licensing fee was paid. And in 1976, Congress provided that compulsory licensing for copyrighted musical works would not be available to persons making unauthorized duplications of sound recordings. Heilman sought a declaratory judgment that his business did not violate the Copyright Act, but summary judgment was entered against him. Heilman v. Levi, 391 F.Supp. 1106 (E.D.Wis. 1975) aff'd sub. nom. Heilman v. Bell, 583 F.2d 373 (7th Cir. 1978), cert. den., 440 U.S. 959.

In the subsequent criminal prosecution, Heilman contended that the Copyright Act was unconstitutionally vague due to ambiguity as to whether Heilman's duplication of records fixed prior to February 15, 1972 would be a "similar use." If so, Heilman would have been entitled to pay a compulsory license fee to the copyright holder and avoid liability for infringement. The court rejected the vagueness argument, noting that at the time when his offenses were committed in 1975-76, five federal courts had ruled that record duplicators were not protected by the "similar use" provision of the Copyright Act because "similar use" did not include duplication of original recordings. The court pointed out that Heilman had received notice of these decisions in the trade press.

The court also rejected Heilman's argument that he was not guilty of a willful violation of the Copyright Act because he had consulted counsel regarding the legality of his business and offered to pay the statutory license fee. It was found that Heilman knew of the Justice Department policy and the federal court decisions and that his activities had been found illegal in New York, California and Wisconsin.

Heilman also had not demonstrated that his indictment was a discriminatory prosecution in retaliation for his criticism of changes in the record piracy laws or that there was a causal connection between the exercise of his First Amendment rights and his prosecution. As stated by the court, "[i]t is not improper for the Government to concentrate on those violations which appear most flagrant."

United States of America v. Heilman, 614 F.2d 1133, CCH Copyright Law Reports, Para. 25,133 (7th Cir. 1980) [ELR 2:2:3]

Ohio Supreme Court rules that all salaries paid to Cincinnati Bengals' players are "paid" in Ohio for purpose of calculating Bengals' Ohio franchise tax liability

Last year, the California Franchise Tax Board ruled that out-of-state professional sports teams must pay

California franchise taxes, even though they do not maintain places of business in California (ELR 1:18:5). The Board so ruled, even though two such teams had argued that it would result in double taxation. The Board acknowledged that there might be "some overlap," but refused to agree that California was at fault. Instead, the Board suggested that if other states would recognize that their teams have business activities in California, the risk of "duplicative taxation" could be avoided.

The "risk" of "duplicative" or "overlapping" taxation has become a reality, at least insofar as Ohio teams are concerned, as a result of a recent decision of the Ohio Supreme Court. For years, the Cincinnati Bengals of the National Football League has calculated its Ohio franchise tax as though player salaries attributable to games played in other states were not paid in Ohio. That is, the Bengals allocated player salaries attributable to "away games" to states other than Ohio. As a result, the

Bengals' Ohio franchise taxes were less than they would have been had the Bengals allocated 100% of those salaries to Ohio.

However, the Ohio Supreme Court has ruled that the Bengals should have allocated 100% of its players' salaries to Ohio in calculating its franchise tax. The Ohio statute in question provides that compensation is paid in that state if some of the service is performed in Ohio and the employer's base of operations is in Ohio, or if the employer has no base of operations, the place from which the service is directed or controlled is in Ohio.

The court noted that it is undisputed that some of the players' services are rendered in Ohio, because some games are played there. The court also ruled that the Bengals have a base of operations in Ohio. Pre-season training and most practice sessions are in Ohio. Players are briefed on strategy and game plans in Ohio. A majority of the Bengals' games are played in Ohio. And most administrative decisions are made in Ohio.

The court did not discuss the double taxation issue.

Cincinnati Bengals v. Lindley, 399 N.E.2d 1257 (Ohio 1980) [ELR 2:2:4]

National Labor Relations Board asserts jurisdiction over Major League Rodeo

In response to a petition filed by the Major League Rodeo Players Association, the National Labor Relations Board has asserted its jurisdiction over Major League Rodeo.

Major League Rodeo is an association of professional rodeo teams formed in 1977 for the purpose of administering professional team rodeo. During 1978, its first season, the league had six teams located in Colorado, Missouri, California, Utah, Texas and Oklahoma' Each team played approximately 14 home games and another 14 away games.

The Major League Rodeo Players Association was organized in the summer of 1978 by William Hines, who was aided in his organizing efforts by Ernie Wright, western regional director of the National Football League Players Association, and by Professional Athletes International, an affiliation of existing sports players unions.

The Rodeo Players Association filed an election petition with the National Labor Relations Board in August of 1978 and a hearing was held the following November. The League contended that the NLRB did not have jurisdiction over professional team rodeo because it was essentially local in character and had no substantial impact on interstate commerce. The League also argued that the NLRB should exercise its discretion to decline jurisdiction over team rodeo because the sport was similar to horseracing, an industry over which the NLRB has declined to assert jurisdiction. Alternatively, the League urged the NLRB to apply its $500,000 retail standard to the League and to decline jurisdiction over it because its team members had gross receipts of less than that amount.

The Rodeo Players Association countered with the contention that the NLRB did have jurisdiction over the League and should exercise jurisdiction because team rodeo is an interstate enterprise which is similar to other professional sports over which the NLRB has asserted its jurisdiction. It also contended that the League's 1978 gross revenues were not insubstantial, and that the NLRB should assert jurisdiction because the League had not adequately responded to subpoenas for documents that would have established team members' revenues and expenses.

During the hearing, the parties stipulated that team members had purchased goods and services in interstate commerce valued at more than $50,000 and that each team had purchased more than $15,000 worth of goods and services from outside of its home state during the 1978 fiscal year. The League's commissioner had testified that the aggregate gross revenues of the League's teams exceeded $281,000 in 1978, not including $50,000 the League received from Caesar's Palace for All-Star game prize money.

Given these facts, the NLRB ruled that it had jurisdiction over Major League Rodeo and that it should assert its jurisdiction. It found that any labor disputes in the team rodeo industry would be at least regional in scope and would "radiate their impact far beyond individual state boundaries." Furthermore, the NLRB held that given the revenues testified to by the League's commissioner, the League "has a substantial impact on interstate commerce" and that a labor dispute involving professional team rodeo would have such an impact as well.

The NLRB found "no merit" in the League's contention that the Major League Rodeo Players Association was not a labor organization, or that if it were one, it was affiliated with the National Football League Players Association and that such affiliation should appear on the ballot.

An election was therefore ordered. The unit was defined to be all rodeo players on the active and inactive lists of League teams, excluding managerial personnel and supervisors, and excluding players who had played out their contracts.

Major League Rodeo, Inc. and Major League Rodeo Players Association, 246 NLRB No. 113, 1979-80 CCH Labor Law Reports, Para. 16,590 (1979) [ELR 2:2:4]

Arbitrator rules that IATSE collective bargaining agreement requires theater owner to seriously consider union members when hiring manager-projectionist

An arbitrator in Minnesota has found that the United Artists Theater Circuit violated the terms of a collective bargaining agreement in connection with its hiring of a theater manager-operator. The company transferred a non-union manager to a theater where he would be required to operate projection equipment in addition to his other duties.

During conversations about the pending transfer, a company representative apparently agreed to interview union members who might bid for the job, even though the company was not required to hire a union member. The interviews were not conducted, however, and the union contended that the company had violated its collective bargaining agreement by placing a management employee in a bargaining unit position without interviewing and considering applicants who had previously worked within the local's jurisdiction. The union also alleged that the company did not consider these qualified applicants because of their union membership and that the company had failed to follow a binding past practice of submitting jobs for bidding and interviewing qualified applicants (with the expectation that a senior union member would be hired).

The arbitrator initially concluded that there had not been a binding past practice obligating the company to follow the procedures demanded by the union. The arbitrator stated that in order to be binding, a past practice "must be engaged in over a long period of time. It must be practiced out of a belief that it is based upon obligation. It must be consistent. It must he known to the parties. It must be engaged in with some reasonable degree of frequency. A past practice is binding upon the parties because it becomes engrained in the conduct in which they engage under the contract."

In this case, the arbitrator found that the company had used the bidding procedure on only one prior occasion, and the fact that the procedure had been used by other employers or was required by the union's constitution did not bind the company. The arbitrator found that the "alleged past practice [had] not been engaged in with sufficient frequency, nor for the purpose of complying with an obligation."

Under the terms of the collective bargaining agreement, however, the company was obligated to give preference of employment to persons previously employed in the local's jurisdiction. Although the arbitrator ruled that the grievant (the union member who had trained the manager and who would have been the most likely successful applicant) had not been discriminated against because of his union membership, the company's failure to seriously consider union applicants was a violation of the "preference" obligation.

The arbitrator therefore ruled that the grievant was entitled to back pay until the company hired a manager-operator using procedures to ensure that the required preference would be adequately considered.

United Artists Theatre Circuit and IATSE, Moving Picture Machine Operators, Local 219. 80-1 CCH Labor Arbitration Awards, Para. 8074 (1979) [ELR 2:2:5]

AT&T's refusal to allow multiple cable television attachments to its telephone poles held to violate antitrust laws

A Federal Court of Appeals has reversed - for the second time - the dismissal of an antitrust suit filed by a cable television system against AT&T and its Bell Telephone System. The suit was filed 10 years ago by TV Signal Company of Aberdeen, a cable television company in South Dakota, as the result of a Bell policy - since abandoned - against permitting more than one cable company to attach cables to Bell's telephone poles.

Bell's refusal to allow pole attachments by TV Signal Company required TV Signal to build a more costly underground cable distribution system. In its suit, TV Signal alleged that Bell's one-cable-perpole policy was an attempt to restrict the development of traditional cable television operators, because it was possible they would become competitors of Bell in the area of "broadband services" such as two-way data services, meter reading, medical alerts, security and fire alarm services and information retrieval.

Early in the case, TV Signal's complaint was dismissed for failure to state a claim. That dismissal was reversed by the Court of Appeals, however, and the case was sent back to the District Court for trial. After trial, the District Court again dismissed TV Signal's complaint (see ELR 1:8:6). It is that decision which the Court of Appeals has just reversed.

The District Court had ruled that because TV Signal had sold its business at a profit, it did not have standing to sue AT&T because it failed to prove that it had been injured. The Court of Appeals disagreed. It held that even a profitable business may be damaged by illegal restraints of trade, and the antitrust laws do not require a plaintiff to retain possession of its business until the business is bankrupted or shut down by an antitrust violation.

The District Court had also held that the additional costs incurred by TV Signal in installing underground cables would be offset by ensuing benefits. The Court of Appeals held, however, that conspiracies which result in higher initial costs have a tendency to keep competitors out of the market. It held that TV Signal had proved that it had been damaged by being forced to bury its cables underground.

The District Court also had held that TV Signal lacked standing because it was not in competition with AT&T, because one was in the television business and the other in the telephone business. The Court of Appeals disagreed with this as well. It held that both were also in the broadband services business. On this issue, however, the Court of Appeals acknowledged that TV Signal may not have suffered any damage (apart from higher cable laying costs), and that TV Signal would have to show that it suffered damage to the broadband services portion of its business before it could recover anything for any such damage.

The Court of Appeals also held that Bell's oneper-pole policy placed it in direct competition with any cable television system that wanted to distribute its own signals. Accordingly, the court ruled that TV Signal had standing, because it was both a competitor and a potential competitor of AT&T. The area in which they competed, the court held, was a submarket of the cable television industry, the construction of cable television distribution facilities and the distribution of cable television signals.

The Court of Appeals thus reversed the dismissal of TV Signal's complaint, and sent the case back to the District Court for further proceedings.

TV Signal Co. of Aberdeen v. American Telephone & Telegraph, 1980-1 CCH Trade Cases, Para. 63,242 (8th Cir. 1980) [ELR 2:2:6]

Massachusetts Supreme Court finds that Atlantic Monthly's unauthorized use of photograph did not violate state publicity or libel laws

The Atlantic Monthly magazine published an article in November of 1976 entitled "After the Sexual Revolution." The article was illustrated by a photograph depicting young women conversing at a public club or restaurant, though the article did not discuss or identify these individuals. One of the women brought an action against the magazine and the author of the article alleging that her photograph was used without consent for advertising or trade purposes in violation of Massachusetts law and that the use was libelous.

The Supreme Court of Massachusetts has construed for the first time a Massachusetts statute dealing with the unauthorized publication of a person's name or picture, Although noting that the statute contains language similar to Sections 50 and 51 of New York State's Civil Rights Law, the court pointed out that Section 50 of the New York law is captioned "Right of Privacy." But the interest protected by the Massachusetts law is "the interest in not having the commercial value of one's name, portrait or picture appropriated to the benefit of another." The court ruled that the magazine had made only incidental use of the photograph and had not used it to solicit sales or in association with any advertising. The fact that the magazine is published for profit did not of itself transform an incidental publication into an appropriation for advertising or trade purposes.

The court also ruled that the publication of the photograph was not libelous. It therefore affirmed the lower court judgment granting the magazine's motion to dismiss the complaint.

Tropeano v. Atlantic Monthly Co., 400 N.E.2d 847 (Mass. 1980) [ELR 2:2:6]

Briefly Noted:

Libel.

A Federal Court of Appeals in Alabama has upheld a lower court judgment dismissing a libel claim against

Will D. Campbell, the author of the autobiography "Brother to a Dragonfly." The granting of summary judgment to Campbell and the publisher of the book with respect to Carlyne Campbell's invasion of privacy claim was also affirmed. The court found that "a logical nexus existed between a matter of legitimate public interest, i.e., the life of a contemporary religious and civil rights leader and certain facts presented in the book about Carlyne's marriage to the author's brother."

Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980) [ELR 2:2:7]

Cable Television Regulations.

In 1972, in response to the FCC's announcement of proposed cable television regulations, certain cable operators, copyright owners and broadcasters entered into a consensus agreement that modified some of the proposed regulations. The FCC found that the modifications were in the public interest because they might facilitate the then-pending passage of new copyright legislation. and adopted the regulatory specifications as set forth in the consensus agreement. A Federal Court of Appeals in Washington, D.C. has concluded, however, that once the copyright law was revised, the original public interest justification for the consensus regulations might no longer be valid. The FCC was therefore ordered by the court to reexamine the public interest basis of the 1972 regulations.

Geller v. Federal Communications Commission, 610 F.2d 973 (D.C.Cir. 1979) [ELR 2:2:7]

Publishing Contract.

The authors of a drama anthology brought an action for breach of contract against Allyn & Bacon claiming that the publisher had discouraged their efforts to compile a revised edition of the anthology by suggesting that they find another publisher and by notifying them that advertising funds for the second edition would be limited. A Federal District Court in Massachusetts has granted the publisher's motion for summary judgment. The court found that the authors had not shown an "absolute and unambiguous repudiation of the contract ... making it futile for the authors to proceed." Thus, applying New York law (as required by the contract), there was no anticipatory breach. The court also found that the authors had not substantially performed the contract themselves. because they had not completed the final assembly of the manuscript.

Goldman v. Allyn & Bacon, 482 F.Supp. 963 (D.C.Mass. 1979) [ELR 2:2:7]

Cable Television.

Under its franchise agreement with the City of New York, Teleprompter, a cable television system operator, agreed to pay the City a franchise fee of five percent of gross receipts. in addition to special franchise taxes. Pursuant to a New York State law the purpose of which is to prevent municipalities from imposing an inequitable double tax on holders of special franchises, Teleprompter brought an action to have franchise fees paid by it credited against amounts owed for its special franchise taxes. A Supreme Court in the County of New York held that because the franchise fees were "in the nature of a tax" and public policy invalidates the clause in the franchise agreement which purported to waive the statute, New York law entitles Teleprompter to its requested credit, but only for payments made during 1978. Claims for credit for payments made in preceding years were barred by the applicable statute of limitations.

Teleprompter Manhattan CATV Corp. v. City of New York, 420 N.Y.S.2d 544 (1979)[ELR 2:2:7]

Constitutional Law.

A television station was alleged to have electronically eavesdropped and recorded its program directors' conversations over studio intercom equipment. The program directors claimed that such conduct violated a Federal Civil Rights law (42 U.S.C. section 1985(3)) which provides relief for victims of conspiracies to deprive equal protection of the laws. A Federal District Court in Illinois has found that (1) the television directors are not a "class" protected by Section 1985(3), and (2) where, as here, the complaint rests upon the Fourteenth Amendment, which affords protection against discrimination only if "state action" is involved, a purely private conspiracy to discriminate is not prohibited by Section 1985(3).

Bianco v. American Broadcasting Companies, Inc., 470 F.Supp. 182 (N.D.Ill. 1979) [ELR 2:2:7]

Obscenity.

A conviction for knowingly possessing and selling a magazine entitled "Lollitots" has been upheld by the Supreme Court of Delaware. The court held that mere "lewd exhibition of genitals" constitutes "hard core" sexual conduct which may constitutionally be proscribed under a Delaware statute which met constitutional muster.

Raymond Heartless, Inc. v. State, 401 A.2d 921 (Del. 1979) [ELR 2:2:7]

Licenses.

Owners and operators of an amusement center containing twelve leased pinball machines were convicted of violating an ordinance which provided for the licensure of mechanical amusement devices at an annual fee of $150. The Commonwealth Court of Pennsylvania held the ordinance was a valid exercise of the municipality's police power and the $150 license fee was not excessive.

Phillips v. Borough of Folcroft, 403 A.2d 194 (Pa. Cmwlth. 1979) [ELR 2:2:7]

Tax.

A rental or license to exhibit a motion picture is a taxable "sale" under Connecticut's Sales and Use Tax Act, the Supreme Court of Connecticut has held, and since the film was a saleable end product, the personal service exemption of that tax act is inapplicable.

Columbia Pictures Industries, Inc. v. Tax Commissioner, 410 A.2d 457 (Conn. 1979) [ELR 2:2:7]

Invasion of Privacy.

In an action by the brother of a murder victim against the producer of a motion picture which allegedly "intruded upon Plaintiffs physical and mental solitude and seclusion by bringing back into the public eye a tragic and painful segment of Plaintiff's life," a Court of Civil Appeals of Texas has held that an action for invasion of privacy cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity.

Moore v. Charles B. Pierce Film Enterprises, Inc., 589 S.W.2d 489 (Tex.Civ.App. 1979) [ELR 2:2:8]

Previously Reported:

The following cases, reported in prior issues of the Entertainment Lam, Reporter, have been published. (References are to Volume, Issue and Page numbers, in that order.) United Artists v. Ford Motor Company, 483 F.Supp. 89 (1:20:4), Theatre Techniques, Inc,. v. United Scenic Artists Local 829, 483 F.Supp. 104 (1:22:3); T.V. Tempo, Inc. v. T. Venture, 262 S.E.2d 54 (1:22:7); KGB, Inc. v. Giannoulas, 104 Cal.App.3d 844 (2:1:2); Broadcast Music, Inc,. v. Moor-Law, Inc., 484 F.Supp. 357 (1:22:2).

The California Supreme Court has granted a hearing in Graham v. Scissor-Tail, Inc., thus vacating the opinion of the Court of Appeal which was reported at 1:24:3.

The National Labor Relations Board has affirmed the rulings, findings, and conclusions of the Administrative

Law Judge in Actors' Equity Association and John Clark, reported at 1:7:1.

An interim order of the Federal District Court in CBS v. ASCAP, requiring increased payments to BMI, has just been published at 483 F.Supp. 616. Since that order was issued, the entire case has been dismissed by the Court of Appeals in an order reported at 1:24:1.
[ELR 2:2:8]

DEPARTMENTS

New Book:

"Performing Arts Management and Law Litigation Forms" by Dr. Joseph Taubman

This is the seventh in a series of form books published as companions to Joseph Taubman's two-volume treatise, Performing Arts Management and Law. This volume contains, among other things, forms for copyright litigation, arbitration proceedings, and contract, trademark and defamation actions. Earlier form books in the series contain forms concerning motion pictures, television, theatre and dance, live performances, managers and agents, book publishing, sound recordings and music publishing. The entire set is published by Law-Arts Publishers, Inc., 453 Greenwich Street, New York, N.Y. 10013; (212) 925-4987. [ELR 2:2:8]

In the Law Reviews:

Violence on Television: An Old Problem with a New Picture, 58 North Carolina Law Review 97-136 (1979)

The Copyright Act of 1976 and Law Reviews, 2 Western New England Law Review 87-109 (1979)

Moral Rights and the Compulsory License for Phonorecords, 46 Brooklyn Law Review 67-94 (1979)

In Defense of that Biased, Ignorant, Rapacious, Arrogant, Knee-jerk, Irresponsible Press by Floyd Abrams, 19 Judge's Journal 10-13 (1980)
The Courts, the Press, and the Public: The Case of Myron Farber and The New York Times by Donald Meiklejohn, 30 Syracuse Law Review 789-823 (1979)
[ELR 2:2:8]