RECENT CASES

Antitrust judgment against 20th Century-Fox for conspiring with General Cinema Corporation is affirmed by Federal Court of Appeals

A treble damage judgment for $136,779 plus attorneys' fees of approximately $80,000 entered against 20th Century-Fox last year has been affirmed by a Federal Court of Appeals. The case was filed by four theaters in Westchester County, New York, all of which were owned by Ronald Lesser, who alleged that Fox had conspired with General Cinema Corporation to deprive his theaters of Fox films. General Cinema is the largest theater circuit in the United States. Five of its theaters are located in northern Westchester County, where their only substantial competition is from the four theaters owned by Lesser.

The dispute between Fox and Lesser arose in 1975 when Fox admittedly refused to license its films to Lesser's theaters, even though it had done so in earlier years. According to Fox, it decided not to license Lesser's theaters any longer, because a now defunct group of theaters in upstate New York, of which Lesser was president and a one-third owner, had failed to pay $7,500 which it owed to Fox.

Fox's decision not to license movies to Lesser's theaters would not have constituted a violation of the anti-trust laws, if Fox had acted unilaterally in refusing to deal with Lesser. Lesser contended, however, that the $7,500 debt owed by the defunct theater group was not the real reason Fox had refused to deal with him. A jury returned a verdict in favor of Lesser's theaters and against Fox, which the trial judge refused to set aside.

(See ELR 1:23:3.) On appeal, Fox contended that there had been insufficient evidence to allow a rational jury to conclude that Fox had conspired with General Cinema to deprive Lesser's theaters of the opportunity to obtain Fox films or that Lesser's theaters had been financially damaged. The Court of Appeals has affirmed, however.

The Court of Appeals observed that although there had been no direct evidence of a conspiracy, there had been sufficient indirect evidence to justify the jury's drawing an inference of conspiracy. This was so for several reasons, the Court of Appeals explained.

First, Fox's explanation to Lesser for why his theaters could not obtain licenses to exhibit "Young Frankenstein" and "Towering Inferno" were found to be "apparently false." Second, Fox's reliance on the unpaid $7,500 debt could have been found by the jury to have been an "after-the-fact excuse," because evidence had been presented showing that during 1974, General Cinema owed

Fox more than $1 million in film rentals, approximately half of which had been due for more than 90 days. Third, there had been evidence that Lesser's theaters were equal or superior to General Cinema's, so the jury could have concluded that it would have been irrational for Fox to refuse to deal with Lesser, unless Fox "received some hidden benefit from doing so." Fourth, evidence had been introduced showing that Fox had a history of favoring circuits such as Cinema General, rather than independent movie houses such as those owned by Lesser. And fifth, there had been evidence from which the jury could have inferred that Fox had attempted to establish a deal with General Cinema one of the terms of which was a cutoff of Lesser's theaters. Among other things, there had been evidence that General Cinema had given Fox a larger advance for "Towering Inferno" than Fox had requested in its statement of terms to exhibitors, while General Cinema had received more favorable contract terms than Lesser's theaters with respect to house allowances and post-run adjustments when box office receipts were disappointing.

The Court of Appeals acknowledged that this indirect evidence was "less than overwhelming proof of a conspiracy between General Cinema and Fox to cut off [Lesser's theaters]." Nevertheless, the Court of Appeals ruled that "the jury might reasonably have inferred from the evidence at trial that Fox and General Cinema reached an understanding that Fox, in order to obtain more business with General .Cinema in the New York metropolitan area, would deny Fox pictures to General Cinema's only substantial competitor in northern Westchester County."

Fox also contended that Lesser's theaters had not sustained damages, because General Cinema had informally given Lesser the exclusive right to bid on United Artists films during the period in which his theaters could not get Fox films. United Artists films had outperformed Fox films during that period. Lesser argued, however, that his theaters could have exhibited films from Fox and United Artists both, if his theaters had not been cut off by Fox, and that therefore they had been damaged. The Court of Appeals noted that the jury had awarded Lesser's theaters only about one-third of the damages they had claimed, and thus the jury may have made an adjustment for the profits Lesser's theaters received from exhibiting United Artists movies. Accordingly, it rejected Fox's argument that Lesser's theaters had not been damaged at all.

Beech Cinema, Inc. v. Twentieth Century-Fox Film Corporation, Docket No. 80-7021 (2d Cir., June 3, 1980) [ELR 2:5:1]

ABC's unauthorized broadcast of segments of a student-made film were not a "fair use"; copyright infringement judgment in favor of Iowa State University is affirmed by Court of Appeals

A copyright infringement judgment against ABC, entered as a result of its unauthorized use of segments of a film made by an Iowa State University student, has been affirmed by a Federal Court of Appeals. The film in question, entitled "Champion," was a profile of Olympic wrestler Dan Gabler. ABC used a two and a half minute segment of the film during its coverage of the 1972 summer Olympics, a seven to twelve second segment during an Olympic preview broadcast, and an eight second segment during an ABC "Superstar" broadcast in 1974. A Federal District Court in New York City held that these uses infringed Iowa State's copyright to the film, and it awarded the University $15,250 in statutory damages and $ 17,500 in attorneys' fees. (See ELR 1:17:1)

ABC appealed, arguing that its use of the film constituted a "fair use" because the benefits of broad public dissemination outweighed any harm to Iowa State. The Court of Appeals has disagreed, however.

The court pointed out that four factors are considered in determining whether a particular use is "fair" and thus non-infringing. They are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the material used, in relation to the copyrighted work as a whole; and (4) the effect of the use on the copyright holder's potential market for the work.

ABC had relied heavily on the first factor, arguing that it had used the student film to disseminate information about the life of an important public figure who was involved in an event of intense public interest. The court responded that "This argument proves too much." The court acknowledged that ABC had an unfettered right to use any of the factual information in the film. What it could not do, however, was "bodily appropriate" the "expression" of that information by broadcasting portions of the actual film itself. The court was unable to resist needling ABC by observing that ABC probably would not "embrace their own defense theory if another litigant sought to apply it to the ABC evening news." The court also commented that although ABC did not automatically lose its claim to fair use simply because its Olympic broadcasts were intended to be profitable, "'it is relevant' that the film was used, at least in part, for 'commercial exploitation.'"

The court also rejected ABC's contention that the nature of its broadcasts had been essentially different than the nature of the film itself. The court found ABC's short vignettes on the lives of Olympic athletes to be essentially of the "same genre" as "Champion."

Although the longest segment of the film broadcast by ABC was only two and a half minutes in length, that represented approximately eight percent of the film's twenty-eight minutes. Furthermore, since ABC broadcast some of it on three separate occasions, the court found it obvious that the portion used by ABC was at least of some importance and perhaps essential.

Finally, the court rejected ABC's contention that its broadcast had not affected the market for the Film. The District Court had found that the market value of the film may have increased after the ABC broadcasts due to a dramatic upsurge in rental requests for it. "Nevertheless," said the court, "we believe that ABC did foreclose a significant potential market to Iowa - sale of its film for use on television in connection with the Olympics."

The court concluded its opinion by noting that according to the findings of the District Court, ABC had copied the film while purporting to assess its value for possible purchase, and when confronted with the claim that it had used the film without authorization, it had repeatedly denied that it had ever used the film at all. Because the "fair use doctrine" is entirely equitable, the court said that ABC's conduct was not irrelevant to the fairness of its use.

Iowa State University Research Foundation v. American Broadcasting Companies, Inc., CCH Copyright Law Reports, Para. 25,156 (2d Cir. 1980) [ELR 2:5:2]

"Guns of Autumn" libel suit against CBS News is dismissed by Federal District Court

A defamation suit by an organization of hunters and several of its members against CBS News arising out of two telecasts concerning the subject of hunting has been shot down by a Federal District Court in Michigan which has granted CBS' motion for summary judgment.

The plaintiffs claimed they were defamed by the CBS News documentaries "The Guns of Autumn" and "Echoes of 'The Guns of Autumn'," both broadcast in September of 1975.

One of the crucial elements of defamation is that the publication be "of and concerning" the plaintiff, stated the court. Thus, in rejecting the libel claims of four sport hunters who filed suit in their own behalf and as representatives of the more than one million sport hungers in Michigan, the court decided that since the injuries claimed by the plaintiffs flowed from the alleged libel of a group, the case was governed by the special rules applicable to group libel. The court found that these plaintiffs failed to show circumstances surrounding the publication which would give rise to the conclusion that any one of the more than one million individuals was being focused upon in the documentaries. Thus, as a matter of law, the defamation of a group this large can have no personal application to the individual members, held the court, dismissing the plaintiffs' claim.

The court rejected the libel claims of the Michigan United Conservation Clubs (MUCC) and its Executive Director, Thomas Washington. Unless the publication has some personal reference or application to the individual, or to an organization, a suit brought by either of them cannot be maintained, stated the court. The court found no reference in the broadcasts to MUCC or its Executive Director and rejected these claims as well.

"The only plaintiff," stated the court, "who was in any way implicated by either of the two programs in question was Thomas Washington." At one point in the "The

Guns of Autumn" documentary the scene shifted from Colorado to Utah where deerhunters were shown walking along the side of a hill. As the scene progressed the views of several individuals are heard on the soundtrack. The last of these views was expressed by Mr. Washington. His voice is heard to say, "Nature's way is actually very cruel, and the ultimate death of most animals comes cruelly, either via predation or starvation or some form of disease in nature. The hunter's way is actually quite humane." As these words were spoken, and in classic CBS News style, the film showed hunters lifting a dead deer onto the back of a pickup truck. The court found nothing defamatory in Mr. Washington's quote, or in the circumstance surrounding its broadcast, stating, "It is a necessary part of hunting that the dead animal be removed from the woods so its meat can be butchered and eaten. Loading a deer onto a truck, or car, is a natural step in this process and as such it cannot be perceived how this scene would so harm the reputation of Mr. Washington as to lower him in the estimation of the community or to cause third persons to keep from associating with him."

Plaintiffs also alleged that by presenting the programs without editorial comment, it caused the uninformed television viewer to believe that all hunters act in ways which are not followed by the vast majority of hunters in Michigan and America. The plaintiffs stated that by doing this, CBS News 'violated its duty as news broadcasters to present the truth as it exists and presenting these programs which portrayed the sport game hunter in a very unfavorable light, damaged these plaintiffs in their reputation." The court construed these allegations as asserting a violation of the so-called "fairness doctrine" and an invasion of the plaintiffs' privacy by portraying the sport hunter in a false light.

With regard to the "fairness doctrine" claim, the court held that since Congress has delegated the primary responsibility for enforcing the "fairness doctrine" to the Federal Communications Commission, this claim must be dismissed for failure to exhaust administrative remedies.

Turning to the "false light" cause of action, the court referred back to the rule that in the area of defamation, a publication is not actionable unless it is ..of and concerning" the individual. The court could find no reason why a similar rule should not be extended to claims of false light. Since the group in this case is not so small that the publicity can be reasonably understood as referring to the plaintiffs, the court held that the plaintiffs' claim for false light invasion of privacy was not actionable.

Michigan United Conservation Clubs v. CBS News, 485 F.Supp. 893 (W.D.Mich. 1980) [ELR 2:5:3]

RKO General loses licenses to operate television stations in Boston, Los Angeles and New York

Since 1969, the FCC has been considering the application of RKO General, Inc. for the renewal of its license for station WNAC-TV in Boston. In a recent decision, the Commission has concluded that granting the license renewal would not be in the public interest and has denied RKO's application. RKO was also found to be unqualified to continue as the licensee of stations KHJ-TV in Los Angeles and WOR-TV in New York City.

The conduct of both RKO and its parent, General Tire and Rubber Company, was carefully scrutinized in the Commission's lengthy decision. Of primary significance was the participation by General Tire and RKO for many years in a reciprocal trade practices scheme in which General Tire used its largescale buying power to coerce its suppliers to purchase goods and services from General Tire. Such services included advertising time on RKO stations. Reciprocity schemes are anticompetitive practices and, according to the FCC, General Tire and RKO may have violated antitrust laws. The FCC found that RKO's participation in such practices was "corruptive of the normal free market process by which the demand for advertising time helps ensure that radio and television programming is responsive to public desires."

It was also found that RKO's Annual Financial Reports to the FCC for its stations for the years 1972 to 1976 included materially false entries relating to trade and barter transactions - transactions in which advertising time is exchanged for consideration other than normal advertising fees. RKO had failed to disclose the inaccuracies of the Reports and indeed, had made statements designed to conceal the company's knowledge of the inaccuracies. In all, the FCC concluded, RKO had "demonstrated a general lack of candor in its dealings with the Commission ..."

General Tire's conduct was also reviewed - its relevance to the proceeding being that RKO, a wholly owned subsidiary of General Tire, had worked closely with General Tire in the reciprocal trading program and had concealed information from the FCC regarding General Tire's misconduct at a time when General Tire was the subject of investigation by the Securities and Exchange Commission. The FCC noted that over a period of approximately 20 years, General Tire had participated in a wide variety of illegal and improper conduct including schemes to make illegal domestic political contributions and had violated its fiduciary duty to partly-owned foreign affiliates and bribed foreign officials in connection with business transactions in foreign countries.

The Commission emphasized that the past misconduct of RKO and General Tire demonstrated that RKO was unlikely in the future to be a "dependable and trustworthy trustee of the public airwaves."

The Commission therefore reversed the 1974 decision of an Administrative Law Judge due to RKO's abuse of the broadcast facilities the company was licensed to operate. RKO's broadcast performance record was not found "sufficiently meritorious to overcome the negative impact of the misconduct."

The three dissenting opinions disagreed with the decision's emphasis on the nonbroadcast-related misconduct of General Tire. The decision has been appealed by RKO to the Federal Courts.

In re Applications of RKO General, Inc., Docket No. 18759 (June 6, 1980) [ELR 2:5:4]

Playboy magazine obtains preliminary injunction prohibiting the publication of competing magazine under the name "Playmen"; but Women's Day magazine is unable to prevent registration of trademark "Man's Day"

Playboy Enterprises uncovered efforts by an Italian publisher and Chuckleberry Publishing, a New York corporation, to market a men's entertainment magazine in the United States entitled PLAYMEN and brought suit for trademark infringement and unfair competition.

In an opinion which thoroughly applied the laws of trademark and unfair competition, a Federal District Court in New York has granted Playboy's motion for a preliminary injunction, determining that Playboy had established "probable success on the merits," the presence of "possible irreparable harm," and a "balance of hardships which tips decidedly in [its] favor."

The court stated that whether Playboy is likely to succeed on the merits depends on whether the planned use of PLAYMEN would be likely to cause public confusion within the meaning of the federal trademark laws, specifically Sections 32(l) and 43(a) of the Lanham Act. This, said the court, depends on (1) the strength of Playboy's mark, (2) the degree of similarity between the two marks, (3) the degree of similarity between the products, (4) the purpose of the defendant in adopting its mark, and (5) evidence of confusion.

The strength of a mark depends ultimately on its distinctiveness, or its "origin-indicating quality in the eyes of the purchasing public," stated the court. The court found that the PLAYBOY mark has acquired great distinctiveness among consumers, and is therefore entitled to a high degree of protection. In this regard, the court commented that the PLAYBOY mark appears "to be 'suggestive' in that the word 'playboy,' evoking the aspirations, if not the life-style, of certain men, suggests to the imagination the nature of the magazine's content."

In analyzing the similarity of the marks, the court stated that "in terms of both appearance and suggestion, PLAYMEN is about as close as a mark to PLAYBOY as can be conceived without outright duplication." Although the existence of other sexoriented magazines using the word "play" raises some substantial questions, conceded the court, the extent to which the PLAYBOY mark has been affected by such magazines depends upon their similarity to PLAYBOY in form, content, circulation and market. The magazine PLAYBIRDS, for example, "consists essentially of a series of unclad women with their legs open, exhibiting with dull redundancy the organ that PLAYBOY strives to make mysterious and interesting through suggestive display." Further, PLAYBIRDS is published in Britain and no evidence was produced to show that it circulates in the United States, said the court. The court distinguished PLAYGIRL magazine, whose readership target is female, and PLAYGUY, which is aimed at the male homosexual population. The court also mentioned at this point that ever since PLAYMEN magazine was first published in Italy, Playboy Enterprises has sued in several nations and succeeded in enjoining the publication of PLAYMEN everywhere but in Italy, "where a standard inconsistent with our law was applied to deny PLAYBOY any protection."

Concerning the similarity between the products, the court declared that the magazine PLAYMEN is similar to PLAYBOY in terms of content, format and appearance. The defendants emphasized differences in logotype and argued that PLAYMEN has a "sophisticated" European flavor not found in PLAYBOY. The court, however, determined that these differences would not adequately serve to avoid public confusion.

As to the defendants' purpose in adopting the PLAYMEN mark, the court found incredible the defendants' suggestion that the name PLAYMEN was innocently conceived. The court pointed to publicity regarding the English language version of PLAYMEN which appears designed to build upon the mark by repeatedly linking it to PLAYBOY, and to the defendants' budget for legal fees which is significantly higher than that budgeted for promotional expenses. The latter, said the court, indicates they were well aware of the risks involved in launching a magazine under the PLAYMEN mark.

Finally, the court found confusion would likely occur because some consumers would certainly mistake PLAYMEN for PLAYBOY, or would think PLAYMEN was published by, or somehow associated with, Playboy Enterprises. Furthermore, the court commented that confusion may also take the form of "subliminal or conscious association" with the PLAYBOY name, allowing the defendants the opportunity to gain a foothold in Playboy's market, and thereby gaining an unfair advantage. Thus, the court held that likelihood of public confusion between the PLAYBOY and PLAYMEN marks had been established, and that therefore Playboy would likely succeed on the merits.

The court also stated that where there is as high a probability of confusion as was established in this case, injury is "irreparable" in the sense that it may not be fully compensated in damages. The court agreed that PLAYBOY's sales would suffer if PLAYMEN's sales were to increase through improper confusion or association. In addition, PLAYBOY's reputation would be threatened, because of differences in sexual explicitness and taste. That is, PLAYBOY may lose control of its relatively "wholesome" reputation at the hands of PLAYMEN, "which appeals to the more prurient some might call it kinkier - imagination."

The opinion closed with the court finding that the hardships PLAYBOY was likely to suffer if a preliminary injunction were denied were far more substantial and less deserved than those the defendants may bear if an injunction were granted.

In an unrelated case, the registration of the mark MAN'S DAY for a men's magazine was opposed by CBS Consumer Publishing on the ground that it is strikingly similar to the mark WOMAN'S DAY for a magazine for women, now published by CBS. The Trademark Trial and Appeal Board of the Patent and Trademark Office has approved the registration of the MAN'S DAY trademark, however. The Board ruled that CBS is estopped from seeking to prevent the registration of the

MAN'S DAY mark because of the equitable doctrine of "acquiescence."

In 1974, John Webster was given permission by his employer, Fawcett Publications, then owner of WOMAN'S DAY, to develop the name MAN'S DAY for a magazine he would publish on his own while continuing in the employ of Fawcett. Webster soon resigned from Fawcett to devote more time to his new enterprise. In October of 1975, he was given a farewell party by the executives and employees of Fawecett who wished him success with MAN'S DAY magazine, offered him advice with respect to organizing and producing the magazine, and "to top it off" offered both to print and to distribute Webster's MAN'S DAY magazine.

Later that month Webster had a meeting with the president of CBS Consumer Publishing concerning possible funding of the project. In December of 1975, Webster filed an application for the trademark registration of

MAN'S DAY. In October of 1976, Webster met again with CBS concerning financing or a possible merger with CBS. No decision was reached. In February of 1977, CBS acquired Fawcett Publications, including the trademark WOMAN'S DAY. CBS then offered Webster a job with CBS to implement MAN'S DAY, which offer Webster declined to accept unless CBS first purchased his Man's Day Publishing Company. CBS answered by filing an opposition to Webster's application for registration of the mark MAN'S DAY.

The equitable defense of "acquiescence" is applicable only in those cases where there is reasonable doubt that likelihood of confusion exists. The Board found, however, that in this case the issue of likelihood of confusion was not free from doubt. "In reaching our decision we have taken into account the realities of the marketplace, wherein, as pointed out by the applicant, there are many publications with similar subject matter and closely related titles, such as "PlAYBOY and "PLAYGIRL," "WOMAN'S DAY," and "WOMAN TODAY" and others, all owned and published by different entities," stated the Board.

The most significant factor in its decision, said the Board, was that Fawcett had full knowledge of the intent and activity of Webster concerning the use of the mark MAN'S DAY, did nothing to discourage him or indicate a possible conflict with its mark WOMAN'S DAY, but did in fact actually encourage him and offer him every assistance possible. This, the Board found, amounted to an admission that Fawcett did not consider confusion to be likely.

The Board regarded CBS to be merely an assignee of Fawcett Publications and concluded that "It is axiomatic that an assignee must accept the consequences of its assignor's conduct, and, accordingly, in the present case, opposer is bound by the statements and activity of its predecessor, Fawcett Publications."

Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 486 F.Supp. 414 (S.D.N.Y. 1980); CBS Inc. v. Man's Day Publishing Company Inc., 205 U.S.P.Q. 470 (TTAB 1980) [ELR 2:5:5]

Briefly Noted:

Labor Relations.

When CBS, Inc., discharged three cameramen, the local union of which they were members objected to CBS' actions as "arbitrary and capricious," and demanded arbitration. CBS contended that arbitration was not in order, and sought a declaratory judgment in Federal

District Court. The court rejected CBS' argument that an arbitration clause in the collective bargaining agreement applied only to the International union; not to the local. Among other factors, it was noted that the local had signed the agreement. In addition, the court found no merit in CBS' claim that the employees were "laid off' in accordance with a separate agreement concerning lay-offs. The matter was therefore deemed subject to arbitration.

CBS, Inc. v. International Photographers of the Motion Picture Industry, Local 644, I.A.T.S.E., 483 F.Supp. 880 (S.D.N.Y. 1979) [ELR 2:5:7]

Newspaper Advertising.

A wholesale distributor of automotive parts has charged that the Los Angeles Times' advertising rate structure amounts to both an unfair business practice and an unreasonable restraint of trade. The newspaper's two-tiered rate structure gives retailers substantially lower rates than manufacturers and wholesalers. The California Court of Appeal has found that while the Times' advertising practices might possibly be improper, the automotive parts distributors failed to state a cause of action. There was no showing that the Times intended to restrain trade, nor was there any indication of economic harm to the wholesaler. However, the court granted the distributor permission to amend.

Motors, Inc. v. Times-Mirror Co., 102 Cal.App.3d 735 (1980) [ELR 2:5:7]

Obscenity.

Courts have been struggling for a long time to agree upon a narrow definition of obscenity. The "prurient interest" element of the obscenity test was the subject of disagreement in an appeal heard by the Kansas Supreme Court, The State contended that at the trial of a theater owner charged with promoting obscenity, "prurient interest" should have been defined for the jury as "an appeal to sexual desire." The court disagreed, holding the jury instruction desiring "prurient interest" as something more than an appeal to sexual desire" was proper. The court pointed to a series of cases clearly defining prurient interest as something more than a mere arousal of sexual desire.

State of Kansas v. The Great American Theater Co., 608 P.2d 951 (Kan. 1980) [ELR 2:5:7]

Acting School.

In a suit brought by a student who was expelled by the American Academy of Dramatic Arts, the Civil Court of New York City found that the school acted improperly in retaining the student's tuition money after dismissing him solely because he was an "exhibitionist." An enrollment agreement which gave the Academy the right to dismiss any student not meeting the school's "professional standards" was unconscionable, the court reasoned. Such an agreement would give a school absolute discretion and would deprive a student of a hearing prior to dismissal. The retention of tuition money would be appropriate only if a dismissal were made for just cause. Since there was no showing of substantial misconduct by the student, his expulsion was unjustified and he was entitled to a full refund.

King v. American Academy of Dramatic Arts, 425 N.Y.S.2d 505 (1980) [ELR 2:5:7]

Civil Rights.

In 1973, several Houston firemen were indicted following a series of articles in the Houston Post concerning corruption in the city fire department. The firemen were acquitted of charges that they stole and misused property, and subsequently filed a complaint alleging a conspiracy to deprive them of their civil rights. Named in the suit was an Assistant District Attorney. A Federal Court of Appeals has held that the District Attorney was immune from liability since he was acting within the scope of his prosecutorial duties. Not immune, however, were two firemen and a newspaper reporter alleged to have conspired with the prosecutor. The court noted that private persons who act in concert with immune state officials are not entitled to derivative immunity.

Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980) [ELR 2:5:7]

Racing Regulation.

An Ohio racetrack did not act improperly by permanently banning a spectator from the premises without a hearing after the patron had used obscene language and had threatened another patron, a Federal Court of Appeals has held. The spectator could not point to a specific state or federal law establishing a property or liberty right to visit the track, and therefore, he had no right to a due process hearing. Furthermore, Ohio law specifically allows racetracks to exclude spectators as they see fit, so long as the exclusions are not based on race, creed, color or national origin.

Rodic v. Thistledown Racing Club, 615 F.2d 736 (6th Cir. 1980) [ELR 2:5:7]

Libel.

The Appellate Division of the New York Supreme Court has granted the Hearst Corporation's motion for a summary judgement in a libel suit brought by a former County Attorney of Albany. The plaintiff's action for damages arose out of a series of alleged defamatory articles appearing in the Hearst Corporation owned and published Knickerbocker News. In reversing a lower court denial of the Hearst Corporation's motion, the court found that the attorney failed to show that the statements were published with either knowledge of their falsity or with reckless disregard as to whether they were false or not, and further, he failed to establish that the statements were actually untrue.

Roche v. Hearst Corporation, 424 N.Y.S.2d 930 (1980) [ELR 2:5:7]

Trademark.

While performing a religious ritual at Pittsburgh's Three Rivers Stadium, the International Society for Krishna Consciousness distributed buttons bearing an imitation of the Pittsburgh Pirates' team logo, a trademark owned by the Pittsburgh Athletic Club. The club subsequently assigned its claims for, among other things, trademark infringement and unfair competition to Three Rivers Management Corporation. When the International Society for Krishna Consciousness brought suit for interference with its 1st and 14th Amendment rights, Three Rivers Management Corporation counterclaimed for trademark infringement and unfair competition. A Federal District Court in Pennsylvania has granted the plaintiff's motion to dismiss the counterclaims, reasoning that since Three Rivers Management Corporation did not own the trademark at the time of the alleged infringement it had no standing to bring suit.

International Society for Krishna Consciousness of Western Pennsylvania v. Stadium Authority of the City of Pittsburgh, 204 U.S.P.Q. 661 (W.D.Pa. 1979) [ELR 2:5:7]

Trademark.

"Video Buyer's Guide" is a generic term, a Federal Court of Appeals has held. It therefore affirmed a District Court order denying Reese Publishing Company's motion for injunctive relief and dismissing its complaint against Hampton International Communications in a case in which Reese alleged that Hampton infringed its magazine title "Video" and its annual Buyer's Guide to video products by publishing "Hampton's Official 1980 Video Buyer's Guide." The court stated, "we will not hesitate to find the title of even a consumer publication generic if that title describes not only a class of goods but a class of magazines about those goods."

Reese Publishing Company v. Hampton International Communications, Inc., 205 U.S.P.Q. 585 (2d Cir. 1980) [ELR 2:5:7]

Previously Reported:

The following cases, reported in prior issues of the Entertainment Law Reporter, have been published (references are to Volume, Issue and Page numbers): DC Comics v. Filmation Associates, 486 F.Supp. 1273 (2:1:3); Russell v. Price, 205 U.S.P.Q. 206 (1:17:2); CBS v. ASCAP, 205 U.S. P.Q. 880 (1:24:1); TV Signal Company v. A.T. & T, 617 F.2d 1302 (2:2:6).

The United States Supreme Court denied petitions for certiorari in U.S. v. Heilman (2:2:3) on June 17, 1980, and in Russell v. Price (1:17:2) on May 19. 1980. [ELR 2:5:8]

NEW LEGISLATION AND REGULATIONS

FCC proposes ban on cross-ownership of television stations and cable systems in the same area and divestiture of existing crossownerships

The FCC has announced proposed rules prohibiting the cross-ownership of television stations and cable systems located in the same broadcast service area, and requiring the divestiture of existing cross-ownerships. Rules prohibiting such crossownerships were adopted in 1970 (Second Report and Order in Docket 18397, 23 FCC2d 816 (1970), recon. denied, 39 FCC2d 377 (1973)). But in 1975, the divestiture requirement of the rules (Section 76.501(b)(2)) was amended to "grandfather" then existing cross-ownerships. In only the most "egregious" cases (such as when a company owned the only television station as well as the only cable system in an area) would divestiture be required. This policy conformed to the FCC's treatment of newspaperbroadcast cross-ownerships. (Further Notice of Proposed Rulemaking in Docket 18110, 22 FCC2d 339 (1970)).

The FCC has now concluded that an identical policy is not required for newspaper-broadcast crossownerships and for broadcast-cable crossownerships. The Commission has characterized the competition between newspapers and television stations as a competition for advertising, while the competition between broadcasters and cable systems .,concerns the attention of television viewers." According to the Commission, broadcast-cable crossownerships are "undesirable in that they involve an inherent conflict between the operation of the two entities that would lessen competition in the economic and ideological marketplaces ... This inherent conflict attaches to existing as well as prospective crossownerships."

Waivers of the divestiture rule will be granted on an ad hoc basis, particularly in situations where varied programming is presented by the cable system. The economic competition and diversity of viewpoints resulting from such programming might overcome the presumption of conflict between the coowned television station and cable system, the Commission has said.

Divestiture would be required within one year of final action on the rule change; approximately 25 broadcast-cable cross-ownerships may be affected.

The FCC has requested comment on criteria to be used in determining when a waiver of the divestiture might be appropriate. Suggested criteria include: the size of the community served by the cross-owned cable system; the size of the television market in which the cross-owned station and system are located; the presence and ownership of other mass media in the market; the extent to which the divestiture would produce negative results in the areas of economic and program diversity; and the extent to which divestiture would cause undue economic hardship to the parties involved.

Comments on the proposed rule change must be received by the FCC by October 6, 1980 and reply comments by November 5, 1980. Further information may be obtained from Stephen Bailey or William Johnson at (202) 632-6468.

Further Notice of Proposed Rulemaking, FCC Docket No. 20423 (June 25, 1980) [ELR 2:5:4]

DEPARTMENTS

In the Law Reviews:

A Regulatory Approach to Diversifying Commercial Television Entertainment, 89 Yale Law Journal 694-718 (1980)

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