RECENT CASES

Dinner theater production of "Peter Pan" infringed copyright to J.M. Barrie's play

An unlicensed dinner theater presentation of "Peter Pan - The Magical Musical" has been found to have infringed the copyright to J. M. Barrie's classic play "Peter Pan or The Boy Who Would Not Grow Up" by a Federal District Court in Alexandria, Virginia.

In response to an action brought by The Hospital for Sick Children and by Samuel French, Inc., the owner of the exclusive right to license the play in the United States, Melody Fare Dinner Theater challenged the Hospital's ownership of the copyright to "Peter Pan." Melody Fare contended that the copyright was owned by Charles Frohman for whom Barrie purportedly wrote the work under a commission for hire. The court rejected this contention and upheld the ownership interest of the Hospital, noting the "voluminous credits" attributing the work to Barrie, the lack of any challenge to Barrie's interest by successors to Frohman and the fact that the copyright to "Peter Pan" was registered by Barrie in 1928. Barrie assigned the copyright to the Hospital in 1929, and on Barrie's death in 1937, he bequeathed all of his copyright interests in the play to the Hospital.

On the merits of the action, the court concluded that the defendants' musical was a "piratical composition," with "striking and substantial similarities" to Barrie's play. Among these similarities were the characters including Peter Pan, Michael, John, Wendy and Tinker Bell, the theme and the plot. Melody Fare argued that the characters had appeared in Barrie's earlier works and were in the public domain. The court pointed out, however, that while characters alone may not be copyrightable, the play "Peter Pan" was a copyrightable "amalgamation" of Barrie-created characters.

Access to the Barrie play was shown by its worldwide popularity and by the hundreds of productions of "Peter Pan." Further, Ardith Cavallo, the author of the accused work, testified that she had had access to several recordings of various arrangements of the musical version of "Peter Pan." The fact that Cavallo's work was a libretto, rather than a narrative, was not found significant.

The plaintiffs elected to recover statutory damages and the court awarded them $2,500 (amounting to $50 per performance), additional damages of $7,500 against Ardith Cavallo who was found liable for wilfull infringement, and attorneys' fees and costs.

Melody Fare also was found liable for violating the Lanham Act on the basis of having attempted to "pass off' its musical production as the original "Peter Pan." The use of the name in the title of, and in advertisements for, the musical was found likely to create consumer confusion. Although some advertising materials stated that the Melody Fare production was "based on" Barrie's work (thus indicating a version other than the original work), other ads did not include this disclaiming reference. Therefore, the defendants also were enjoined from producing, presenting, exploiting or advertising any dramatic work containing the term "Peter Pan" as the title or containing Barrie's characters, and from in any way infringing the Hospital's copyright.

The Hospital For Sick Children, Great Ormond Street, London and Samuel French, Inc. v. Melody Fare Dinner Theater, Case No. 79-975-A (E.D.Va., June 12,1980) [ELR 2:6:1]

Shubert Organization is granted permission to manage theater in Washington, D.C., despite claims that competition will be lessened

A Federal District Court in New York City has granted the Shubert Organization permission to manage the National Theater in Washington, D.C.

A 1956 consent decree enjoined Shubert from acquiring a beneficial interest in any theater unless it were show that such an acquisition "will not unduly restrain competition." The court noted that the Antitrust Division of the Department of Justice had found that granting Shubert's motion would increase competition, and that if Shubert did attempt to use the right to manage the National Theater to gain a competitive advantage, a remedy would be provided under the injunctive provisions of the consent decree.

Nederlander Theatrical Corporation had argued that by controlling the National Theater, Shubert would be dominant in the theater "try-out" circuit of Boston, Philadelphia and Washington. The court concluded, however, that Washington alone was the relevant market. And in any event, Shubert's control of theatres in the 'try-out" cities would increase by only 2.2%, an increase that was not shown to have an anticompetitive effect.

Also rejected was Nederlander's contention that Shubert had used the capital of its nonprofit Shubert Foundation to attract productions to Shubert theatres. The court pointed out that many recipients of Foundation grants presented Broadway productions at non-Shubert theatres. Nederlander also claimed that Shubert induced the producers of the show "Annie" to book it into a Shubert Theater in Los Angeles on less favorable terms than those offered by an independent theater operated by Nederlander. But certain financial and aesthetic considerations apparently had resulted in the producer's decisions.

Thus, Nederlander's claim that Shubert had shown a "propensity" to violate the consent decree was found to be unsupported, as was its claim that Shubert management of the National Theater would lessen competition.

United States of America v. Shubert, (S.D.N.Y., No. 56-72, June 11, 1980) [ELR 2:6:2]

Licensing performance rights to a song to BMI, and subsequent radio play of the song, established personal jurisdiction over music publisher

A copyright holder is subject to personal jurisdiction in a "foreign" state on the basis of having licensed

Broadcast Music, Inc. to authorize performances of the allegedly infringing song throughout the world, together with subsequent radio play of recordings of the song within the state, according to a Federal District Court in Pennsylvania.

The assignees of rights in the song "Kept on Singing" brought an action in Pennsylvania against the writers of the song "Keep on Singing" and against Helen Reddy, the performer of the song, and Big Apple Music Company, Wes Farrell and the Wes Farrell Organization, assignees of the song's copyright. Big Apple contended that it was a New York corporation not qualified to do business in Pennsylvania, that it did not own any property in Pennsylvania, and that it had not shipped any merchandise into the state. However, Big Apple had assigned to BMI the performance rights licensing of its songs. Under Pennsylvania law, the shipping of merchandise directly or indirectly into the state constitutes "transacting business." And an "indirect shipment" occurs when a corporation "could reasonably foresee that its product would be sold ... to outlets around the country, and that Pennsylvania would be one such market." The court found that Big Apple had indirectly shipped the allegedly infringing song into the state through BMI, noting It is of no import that Big Apple's contract with BMI was executed without Pennsylvania or that Big Apple engaged in no physical acts in the Commonwealth. Since BMI is authorized to distribute songs such as "Keep on Singing" anywhere in the United States, Big Apple could reasonably have foreseen that the song would be distributed in Pennsylvania.

The court, citing a case involving a California producer of game shows who was found subject to suit in New Jersey for copyright infringement (Edy Clover Productions, Inc. v. National Broadcasting Co., Inc., 572 F.2d 119 (3d Cir. 1978)), ruled that it was not unfair to require Big Apple to appear in Pennsylvania since the company could have anticipated that an infringement might occur outside New York. Big Apple's motion to dismiss for lack of jurisdiction and venue was therefore denied.

Similar motions to dismiss by Wes Farrell and the Wes Farrell Organization were granted by the court, however. Farrell, the sole officer and director of Pocket Full of Tunes, one of the assignees of "Keep on Singing," was found to have conducted business solely on behalf of the corporation, an activity which did not establish jurisdiction over Farrell individually. And, according to the court, the Wes Farrell Organization was a title used by Farrell to identify the many companies he controlled and was not a distinct entity, such as an unincorporated association, which would be liable to suit.

Testa v. Janssen, CCH Copyright Law Reports, Para. 25,147 (W.D.Pa. 1980) [ELR 2:6:2]

"Thieves market" value for counterfeit tapes used in criminal prosecution to establish required minimum value for federal offense

A "thieves market" valuation for counterfeit tapes has been applied by a Federal District Court in Chicago in upholding a criminal conviction for willful violation of the Copyright Act and for illegal interstate transportation of at least $5,000 worth of stolen property in violation of 18 U.S.C. section 2314.

The counterfeit tapes were packaged to resemble legitimate tapes, but the value of the stolen property in the legitimate retail market was found to include "a profit margin appellants reasonably could never have obtained in the illegitimate market." Other courts have applied the wholesale value of the stolen property to determine whether the $5,000 minimum was met. In this case, the defendants and the copyright holders were wholesalers. But the wholesale value was rejected by the court as misleading for several reasons, including the fact that it did not meet Section 2314's requirement that the price reflected what a "willing buyer would pay a willing seller" during the period of concealment.

In reaching its decision to apply the retail thieves market price, the court noted that the valuation methods of prior cases involved "garden variety" interstate transportation of tangible stolen property while in this case, the defendants had legally acquired the physical tapes and had actually stolen only sound waves. The thieves market price was established by testimony as $3.50 per tape. The defendants contended that a portion of the $3.50 figure should have been allocated to the nonstolen part of the tapes. But the jury had been instructed that the fixation of recorded sounds had been stolen, and the court found that sufficient evidence had been presented for the jury to have decided that the $5,000 statutory minimum was met.

Other challenges raised by the defendants based on the circumstances of their arrest and the seizure of the tapes also were rejected by the court.

U.S. v. Berkwitt, CCH Copyright Law Reports, Para. 25,151 (N.D.Ill. 1980) [ELR 2:6:3]

North American Soccer League ordered by Federal Court of Appeals to bargain collectively with NASL Players Association

A Federal Court of Appeals has ordered the North American Soccer League to bargain collectively with the NASL Players Association, despite League contentions that its members were not joint employers and that league-wide bargaining with all of its players in a single unit would be inappropriate.

The case began in 1977 when the NASL Players Association filed a representation petition with the National Labor Relations Board. Hearings were held the following month, and in June of 1978, the Board ordered an election. By a vote of 271 to 94, players in the League voted to be represented by the Players Association, and in September of 1978, the Board certified the NASL Players Association as the exclusive bargaining representative of all NASL players in the United States. (Players for three teams based in Canada were excluded from the unit, because the Board determined that it did not have jurisdiction over Canadian teams.)

Unfair labor practice charges were filed by the Players Association against the League in October of 1978, alleging that the League had refused to bargain collectively in good faith; and in April of 1979, the National Labor Relations Board entered summary judgment in favor of the Players Association ordering the League to bargain collectively. The League then petitioned a Federal Court of Appeals for review; and the Board filed a cross-petition for enforcement of its bargaining order.

The primary issue before the Court of Appeals was the correctness of the Board's determination that the League and all of its teams were joint employers and that the appropriate unit of players was all NASL players in the United States. The League contended that each of its teams was a separate employer and should be required to bargain collectively only with the players it employs.

The existence of a joint employer relationship depends upon the control which one employer exercises over the labor relations policies of another. In this case, the court agreed with the National Labor Relations Board that the League exercises a significant degree of control over essential aspects of each team's labor relations. Specifically mentioned as examples were League rules providing for an annual college player draft, rules governing interclub player trades, rules requiring players to be waived before their contracts may be terminated, rules requiring the use of standard player contract forms and requiring the consent of the Commissioner before any term of the standard player contract may be altered, and the Commissioner's authority to discipline players for misconduct either on or off the field.

The Court of Appeals also held that these same factors justified the Board's finding that a leaguewide bargaining unit of all U.S. players was appropriate. The court noted that once a player is hired, his working conditions are significantly controlled by League rules, and thus

"Collective bargaining at that source of control would be the only way to effectively change by agreement many critical conditions of employment."

Certain due process contentions of the League also were rejected by the court, including the contention that the Players Association was improperly competing with the League by conducting soccer camps and seveal indoor winter games.

North American Soccer League v. National Labor Relations Board, 613 F.2d 1379 (5th Cir. 1980) [ELR 2:6:3]

Copyright infringement action is dismissed due to lack of similarity of expression between two psychology texts

A Federal District Court in Missouri has found that a psychology textbook contained ideas, concepts and theories similar to those of a competing text, but that such similarities did not constitute copyright infringement.

Frank McMahon, the author of Psychology, The Hybrid Science, sought to terminate his publishing contract with Prentice-Hall, Inc., which had also published the allegedly similar work, Psychology, An Introduction by Charles Morris. McMahon also sought to have Prentice-Hall assign the copyrights to his books to him and to enjoin the further publication and sale of the Morris text. And he claimed profits and royalties earned by the Morris text as well as statutory copyright infringement damages and actual and punitive damages.

It was initially determined that a jury trial was appropriate because McMahon had presented a claim for actual damages in addition to seeking equitable relief and statutory damages. (The court pointed out that, arguably, there might not be a right to a jury trial if only statutory damages were claimed, citing Broadcast Music, Inc. v. Papa John's, Inc., 201 USPQ 302 (N.D. Ind. 1979).)

Determining whether two books are substantially similar generally is a jury question. However, the court concluded that due to the absence of any similarity of expression between the texts, a directed verdict would have to be granted if the case were to be tried. The court therefore granted the defendants' motion for summary judgment and dismissed McMahon's claims.

The court found that the same topics and concepts were covered by both works, but that similarity of content did not amount to copyright infringement. Further, "[a] writer may not claim a monopoly on a particular writing style by virtue of a copyright." An infringement claim also could not be based on Morris' use of certain theories presented by McMahon since "theories, as such, are not copyrightable." And the use of similar photographs (to which McMahon did not own the copyright) also did not constitute an infringement, because the collection and arrangement of pictures in the McMahon work was not unique and Morris' book used only a small percentage of the photographs used by McMahon.

McMahon v. Prentice-Hall, Inc., 486 F.Supp. 1296 (E.D.Mo. 1980) [ELR 2:6:4]

Statements depicting sportscaster as the "worst" in town and as the only one enrolled in a remedial speaking course are held to be non-libelous opinions, given the satirical context in which the remarks appeared

In September of 1976, Boston Magazine published an article which purported to pick the "best" and "worst" in various categories. Jimmy Myers was selected as the worst sportscaster and was described as the "only news-caster in town who is enrolled in a course for remedial speaking." Myers consequently sued for libel. Boston Magazine filed a motion to dismiss the complaint on the grounds that the statements at issue were expressions of opinion and constituted fair comment regarding a public figure. The trial court granted the motion, but the decision was reversed on appeal. However, the Supreme Judicial Court of Massachusetts has reversed the appeals court and has affirmed the judgment of the trial court.

Recognizing that "under the First Amendment there is no such thing as a false idea," the high court explained that a motion to dismiss should be granted if the language in question could not reasonably be read as stating a fact. This determination, the court pointed out, requires an examination of the allegedly defamatory remarks in their totality in the context in which they appeared.

The pervasiveness of satire in the challenged article convinced the court that the statements about Myers were "incontrovertibly opinion." With regard to the remark that Myers was enrolled in a remedial speaking course, the court explained: "... it can reasonably be understood to suggest that Myers should have been so enrolled.... The author may have meant only that Myers' sports news reading needed improvement. On either of these interpretations, the challenged publication states a critical judgment, an opinion."

The court also noted, however, that "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

The court used as an example the bald statement that a person is an alcoholic. According to the court, such an unsupported expression of opinion "implies that there are undisclosed facts on which the opinion is based" and thus may be libelous. But the court pointed out that this was not the case in Myers' action since "Myers' performances were often on view, and they furnished the assumed facts from which the critic fashioned his barb."

Myers v. Boston Magazine Company, Inc., 403 N.E.2d 376 (Mass. 1980) [ELR 2:6:4]

Vermont use tax on motion picture film rentals by exhibitors is upheld by state's supreme court

Operators of motion picture theaters in Vermont are liable for use taxes on rentals of motion picture films from out-of-state suppliers, according to a recent decision of the Vermont Supreme Court, which reversed a lower court ruling.

Merrill Theater Corporation unsuccessfully argued that the use tax would result in double taxation since theatergoers pay an amusement tax for admission to theaters. But the court noted that although the amusement tax is transmitted to the state by the theater operator, it is paid by the patron. The tax paid by the operator "is imposed on the rental fee, not on the admissions. There are two completely different taxpayers in each instance; two separate and distinct privileges are being taxed."

Merrill also contended that the Vermont statute applied only to the sale of tangible personal property within the state and not to rentals of films for resale to the theater's patrons. This argument was also rejected, however. In an earlier decision (Mt. Mansfield Television, Inc. v. Vermont Commissioner of Taxes, 133 Vt. 284, 336

A.2d 193 (1975)), the court had concluded that the "tangible personal property" referred to in the statute was the film itself, not the image which it produces, and that the tax was imposed on the film and its rental. Thus, the court in Merrill stated,

"It may well be that the theater patron is "sold" or "leased" some right to view and enjoy the product of the film's projection, but he acquires no right whatever to the tangible property itself. He never comes into possession of it, and exerts no control over it. No transfer occurs to the patron in any reasonably acceptable sense. He takes nothing into the theater, neither does he take anything out."

The recoupment of rental fees or other exhibition costs as part of the admission fee was not found equivalent to resale.

The court also rejected Merrill's contention that the film was not tangible personal property since it became part of an image produced and then sold to the theater patron. It was again pointed out that the film was not a component part of the image which is the product of projection, and thus the film "is not consumed or destroyed; it does not lose its identity."

The assessment of use taxes against Merrill in the amount of approximately $25,000 was therefore upheld.

News reports indicate that exhibitors plan to seek an exemption from the use tax in the Vermont state legislature.

In re Merrill Theater Corporation, Case No. 74-79 (Vermont Supreme Court, July 3, 1980) [ELR 2:6:5]

Action alleging sex discrimination in employment practices by CBS and station KNXT is resolved by Consent Decree

In 1976, Melinda Cotton, a former employee of CBS Inc. at station KNXT in Los Angeles, instituted a class action alleging that CBS and KNXT had engaged in employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. The action has been resolved by a Consent Decree which recently received final approval by a Federal District Court in Los Angeles.

Under the terms of the Decree, which shall be in effect until June of 1984, CBS has agreed to increase the number of women who will be considered when upper level managerial and production positions are vacant. The Decree sets forth a formula for "an extra preference factor" designed to increase the number of women candidates considered for such positions. An annual review by the court will determine whether the percentage of women hired, promoted or transferred into the "Targeted Jobs" satisfies the requirements of the Decree.

CBS has also agreed to post notices of job vacancies, to appoint a station EEO officer, to institute a technical training program open to women employees, to conduct a job evaluation study and to arrange a Career Development Training Seminar. And a scholarship for women has been established at the USC School of Broadcast Journalism.

Melinda Cotton will receive $30,000 from CBS and has agreed to resign from her position at KNXT. The plaintiff class, which includes all women who were, are or will be employees of KNXT or who were, are or will be applicants for employment at KNXT, except for "on-camera" personnel or applicants for "on-camera" positions, was also awarded reasonable attorneys' fees.

The court noted that the Decree does not constitute an adjudication on the merits of the case and that it is not an admission by CBS of any violation of Title VII or of any other equal employment law or order. Further, the Decree does not "require CBS not to hire or promote the best qualified available applicant or candidate for any position or require CBS to hire or promote any unqualified applicant or candidate for any position."

Cotton v. CBS Inc., Case No. 76-2215 HP (C.D.Cal., July 9, 1980) [ELR 2:6:5]

U.S. Supreme Court rules that the press and the public are free to attend criminal trials in the absence of overriding circumstances

Courts face a major challenge in attempting to reconcile the First Amendment freedoms of speech, press, and assembly with the Sixth Amendment right to a fair trial.

Last year, in the case of Gannett v. De Pasquele, 443 U.S. 368 (1979), the United States Supreme Court held that trial judges may close pretrial hearings to protect the defendant's right to a fair trial. In what may be perceived as a reaction to that ruling, the Supreme Court has now decided that the Constitution guarantees the public and press the right to attend criminal trials.

When a judge presiding over a Virginia murder trial barred the press, Richmond Newspapers appealed to the state supreme court. That court upheld the trial judge's closure order, and Richmond Newspapers then sought review in the U.S. Supreme Court.

The U.S. Supreme Court reasoned that while there is no express Constitutional provision giving the public the right to freely attend trials, there are certain rights which are implicit in enumerated guarantees. "Free speech carries with it some freedom to listen," Chief Justice Burger wrote.

The Court added that in this particular case, the trial judge acted arbitrarily in issuing a closure order without first considering alternatives, such as sequestering the witnesses, which would have assured a fair trial.

The Court's holding does not mean that the public's right to attend trials is an absolute one. Left intact is a trial judge's power to close proceedings when "overriding circumstances" are present and articulated.

Richmond Newspapers, Inc. v. Virginia, U.S.Sup.Ct. No. 79-243 (July 2, 1980) [ELR 2:6:6]

Federal Court of Appeals holds there is no constitutional right to maintain casino gambling licenses

A Federal Court of Appeals in Nevada has ruled that casino owners have no due process right to maintain their operating licenses. The ruling reversed a Federal District Court order which had prevented the Nevada Gaming Commission from closing the Aladdin Hotel. The Court of Appeals' decision hinged on the determination that the District Court lacked jurisdiction in the matter.

The Aladdin's license was first suspended in March 1979, following its conviction of federal felony offenses. Gambling was permitted to continue while a suitable buyer for the hotel was sought. When the Gaming Commission attempted to shut down the Aladdin's operations five months later, the hotel obtained a restraining order barring license revocation.

The Aladdin had argued that the Commission's failure to allow it a reasonable time to find a buyer violated its constitutional right to due process. But the Court of Appeals found no federal authority entitling the holder of a license to a reasonable time to dispose of its property before revocation.

Rather, the court found that the basis for the Aladdin's claim of a right to maintain its operations derived from its interpretation of a June 1979 agreement with the Gaming Control Board. The pact gave the Aladdin the opportunity to find a buyer for the casino. In exchange, the hotel agreed to forego the usual hearing accorded gaming establishments prior to license revocation.

The court held that any disputes arising under the agreement presented questions of state law, and therefore, the federal court lacked jurisdiction to resolve the matter.

Aladdin Hotel Corp. v. Nevada Gaming Commission, Case No. 79-3497 (9th Cir., June 5, 1980) [ELR 2:6:6]

Briefly Noted:

Libel.

The characterization of plaintiff Leonard Schultz as an "underworld figure" in a Newsweek magazine article entitled "Where's Jimmy Hoffa?" and in four newspaper stories in the Detroit News was not libelous, held a Federal District Court in Michigan. The articles in question were in the" public interest, determined the court, and therefore are qualifiedly privileged under Michigan law, requiring the plaintiff to show that the defendants acted with actual malice. The court found no evidence of malice on the part of either Newsweek or the Detroit News and granted the defendants' motion for summary judgment.

Schultz v. Newsweek, Inc., 481 F.Supp. 881 (E.D.Mich. 1979) [ELR 2:6:6]

Labor Arbitration.

The Screen Extras Guild has been directed by an arbitrator to hold a re-run election of some of its constitutional offices. The arbitrator determined that the elections included and were substantially influenced by the votes of 52 ineligible Life Members.

Screen Extras Guild and Grievants (Charges With Respect to November 1978 Election of Constitutional Offices), CCH Arbitration Awards, Para. 8592 (1979) [ELR 2:6:6]

Labor.

The National Labor Relations Board has upheld the finding of an Administrative Law Judge that a television station in Duluth, Minnesota had committed an unfair labor practice in violation of Section 8(a)(3) and (1) of the National Labor Relations Act when the station discharged certain employees and eliminated its six o'clock newscast. The television station contended that its actions were motivated by poor ratings. The Board found, however, that the timing of certain pay increases, the demotion of a 'superstar" newscaster, and management's prediction of future discharges were attempts to avoid the then-pending unionization election of the newsroom staff. The termination of newsroom staff members and the cancellation of the news program after the union won the election were reprisals for the victory, according to the Board and were also unlawful.

RJR Communications, Inc. and Local 346, International Brotherhood of Teamsters, 1980 CCH Labor Law Reports, Para. 16,914 (1980) [ELR 2:6:7]

Trademark.

Meredith Corporation is the owner and publisher of Better Homes and Gardens magazine and is also the owner and operator of Better Homes and Gardens Real Estate Service, a nationally franchised real estate brokerage operation, which was nationally announced on August 8, 1977. Meredith filed an action in a Federal District Court in Illinois for trademark infringement against Gerald Bouschard and Better Homes and Gardens Realtors, an Illinois corporation, whose articles of incorporation were issued on November 29, 1977.

Meredith relied on decisions which prevent the fraudulent creation of domestic corporations for the purpose of preventing the incorporation or licensing of foreign corporations. However, the District Court denied Meredith's motion for summary judgment, because there was a legitimate factual dispute regarding whether Bouschard incorporated his realty company under the "Better Homes and Gardens" name with knowledge of Meredith's entry into the realty business and for the fraudulent purpose of preventing Meredith from incorporating. The court stated that Meredith made no showing that the defendants had infringed Upon its mark for fraudulent purposes.

Meredith Corporation v. Bouschard, 205 U.S.P.Q. 513 (N.D.Ill. 1979) [ELR 2:6:7]

Trademark.

The Trademark Trial and Appeal Board has sustained the opposition of Vogue magazine to a registration of the mark VOGUE for travel agency services. "Applicant's services are travel agency services and travel has served as a significant, albeit not the principal, feature of opposer's magazine for many years," stated the Board. The Board concluded that the applicant's mark "VOGUE" and design so resemble Vogue magazine's previously used and registered mark "VOGUE" as to be likely, when applied to applicant's travel agency services, to cause confusion, mistake or deception within the meaning of the Lanham Act.

Conde Nast Publications, Inc. v. Vogue Travel, Inc., 205 U.S.P.Q. 579 (1979) [ELR 2:6:7]

Trademark.

The Trademark Trial and Appeal Board has precluded the registration of "OUTDOOR SPORT" as a trademark for a magazine to focus on outdoor activities relatively near the home. The application was held to be in derogation of the registered mark "OUTDOOR LIFE" for a magazine devoted to outdoor sporting activities, published by Times Mirror Magazines and its predecessors since 1898. The Board stated that "it can be argued that SPORT and LIFE, per se, do not present any conflict; but in our opinion, when you preface these words by the term OUTDOOR, a new dimension is added which lends specificity to the words LIFE and SPORT and, in essence, brings the mark as a whole into the same 'ballpark.'" Thus, the marks were held to generate a substantially similar impression which may cause confusion as to the source of the publication. The Board also held that the registration was precluded by the failure to make a bona fide use of the mark "OUTDOOR SPORT" at or prior to the filing of the application; the applicant acknowledged that no issues of its magazine had yet been published. "No trade, no trademark, much less a registrable trademark," concluded the Board.

Times Mirror Magazines, Inc. v. Sutcliffe, 205 U.S.P.Q. 662 (1979) [ELR 2:6:7]

Trademarks.

In an action by the publisher of "The Original Peter Rabbit Books" against a competitor for the use of illustrations in which the plaintiff claimed trademark protection, a Federal District Court in New York has denied cross motions for summary judgment. Plaintiff's motion was denied on the ground that the record did not permit a finding that the illustrations have acquired secondary meaning. The defendant argued that its use of the illustrations and marks is permissible because they are part of copyrightable works now in the public domain. The court stated, however, that the fact that a copyrightable character or design has fallen into the public domain should not preclude protection under the trademark laws. "Dual protection under copyright and trademark laws is particularly appropriate for graphic representations of characters," noted the court, denying defendant's motion for summary judgment.

Frederick Warne & Co. v. Book Sales, Inc., 481 F.Supp. 1191, 205 U.S.P.Q. 444 (S.D.N.Y. 1979) [ELR 2:6:7]

Insurance.

It is a settled principle of contract law that when one enters into a contract knowing that the other party is mistaken as to certain significant information, there exists a duty to reveal all relevant facts. An Illinois Appellate Court has applied this rule in a suit to recover the insured value of art objects stolen in a burglary. On the application for insurance coverage, the plaintiff had listed the appraised value of the goods at an amount far greater than his actual cost. This misrepresentation prevented the insurance company from judging its actual risk, and furnished grounds for rescission of the policy.

Stone v. Those Certain Underwriters at Lloyds, London, 401 N.E.2d 622 (Ill.App. 1980) [ELR 2:6:7]

Consumer Protection.

The term "consumer product" encompasses a wide variety of items. A Federal District Court has classified an aerial tramway in an amusement park as a "consumer product." The court's ruling arose out of an attempt by the Consumer Product Safety Commission to gather information about the "Skyride." The park owner objected to the Commission's efforts, claiming that since customers had no "control" over the tramway, but used it only temporarily, it was not a "consumer product." The court disagreed, reasoning that the main consideration is the extent to which customers are exposed to a product, rather than their ability to permanently control the item. Furthermore, it was not necessary that the Commission obtain a search warrant before gathering the park owner's records. Where the purpose of an investigation is regulatory, warrantless searches are permissible.

Here, the Commission was attempting to protect the general public from a potentially hazardous product. Since the park owners themselves were not the subjects of the investigation, the Commission's procedure did not invade their privacy.

Robert K. Bell Enterprises v. Consumer Product Safety Commission, 484 F.Supp. 1221 (D.Okla. 1980) [ELR 2:6:8]

Tax.

The Tax Court has held that where a taxpayer sustained substantial losses over a twenty-year period in publishing her scientific materials, she did not have a good faith expectation of profit and, therefore, could not deduct her research and experimental expenses. The taxpayer had a major source of income from trusts established by relatives. In 1929, she established a botanical research facility and in the 1940's began to photograph certain plants, for which she gained a prominent scientific reputation. In 1950 she began publication of a five-volume series on her research. Two volumes were eventually published. The taxpayer expended approximately $360,000 over a twenty-year period in her research. The Court held that although she kept adequate records, she did not attempt to decrease expenses or increase profit. The Court concluded that her writing efforts were for personal gratification, were not based on a profit motive and, therefore, it disallowed the claimed deductions.

Hires v. Commissioner T.C. Memo 1980-172, 80(10) CCH Standard Federal Tax Reports, Para. 7653(M) [ELR 2:6:8]

DEPARTMENTS

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[ELR 2:6:8]