RECENT CASES

Antitrust action against ABC and CBS television networks is resolved by consent judgments curtailing network production and distribution of prime time entertainment programming

Consent judgments have been entered against CBS Inc. and ABC Inc. by a Federal District Court in California in connection with an alleged combination among each network and its affiliated stations to restrain and monopolize prime time television entertainment programming in violation of Sections 1 and 2 of the Sherman Act. (The judgments were based in large part on the final judgment previously entered in United Slates v. National Broadcasting Company, Inc., 74-3601-RJK (C.D.Cal. 1977).)

CBS alone provides television programming to approximately 200 affiliated stations and to five ownedand-operated stations. These stations were found to "depend upon CBS for virtually all of their television entertainment programming." A similar relationship exists between ABC and its affiliates. The commercial value of such control over programming, in addition to the first network showing, includes stripping (broadcasting program series episodes more than once a week after their initial network exhibition), syndication, foreign distribution, merchandising, literary and musical rights.

During the 1950s many advertisers purchased programs from independent program suppliers for showing on network television. But by 1967 only 11% of the entertainment programs offered were advertiser-supplied (down from 40% in 1958). At present, there is no programming on CBS or ABC which is advertiser-supplied. And the networks have progressively increased the

number of shows which they produce or in which they have subsidiary rights.

In response to these practices, the FCC adopted rules forbidding the networks from demanding financial interests or syndication rights in television programs from independent suppliers. (47 C.F.R. Section 73.658(j) But the networks continued to seek the following rights, among others, from program suppliers in addition to the right of network exhibition: long-term yearly renewal options for exclusive network exhibition with preset license fee escalation rates; exclusive rights for program spinoffs; creative program control by the network; the right to all profits from the network exhibition; and a right of first refusal at the end of the option period.

In its action, the Government was prepared to contend that the networks had illegally and unreasonably restrained and monopolized prime time television entertainment programming by conditioning a program

supplier's access to prime time upon the relinquishing of rights in the supplier's programs, by favoring programs in which the networks had such rights and interests, and by engaging in extensive production of programming. The Government also claimed that the networks had restrained the ability of program suppliers to distribute and exhibit their programs by reducing the number of program purchasers, thereby lessening competition among licensees for such programs.

The consent judgment, certain provisions of which will be in effect for 10 years and others for 15 years, enjoins the networks from acquiring syndication and other distribution rights or profit shares in the nonnetwork exploitation of entertainment programs produced by others. The judgment also prohibits domestic syndication of programs by the networks but would allow network-produced and certain foreign programs to be distributed by the networks in foreign markets. In order

to increase competition in entertainment program production and exhibition, the judgment limits the amount of programming which may be produced by the networks to no more than 2 1/2 hours per week each in prime time (with similar restrictions for other time periods). (The 2 1/2hour restriction will apply to ABC for 5 years; ABC will then be allowed to increase its program production over the next 5 years to a maximum of 5 hours per week.)

Other practices barred by the judgment include a prohibition against purchasing the exhibition rights to an independent supplier's program on the condition that any rights be granted other than those incident to network licensing and use of the program; a ban on requiring a program supplier to use network production facilities; a prohibition against purchasing network exhibition rights to any other network's entertainment programs on the condition that the other network purchase similar rights.

In addition, contracts with program suppliers may not include exclusive yearly options for more than a total of 4 years (and detailed guidelines regarding the negotiation of options are set forth in the judgment).

The networks also will not have exclusive rights in connection with the exhibition of feature films either theatrically, nontheatrically, on discs, cartridges or cassettes, or on closed circuit television in certain situations.

The networks will be barred from retaining rights to option program pilots not selected for broadcast, though a network may retain options to no more than 35% of the pilots produced. This would serve to increase competition for the remaining product. The networks will also be limited when obtaining exclusive rights to spinoffs of program series unless a continuing character is involved. If the spinoff depicts a noncontinuing character, the network may contract only for first negotiation

and a limited first refusal right. The use of repeat broadcasts of program series episodes is also curtailed.

With respect to talent agreements, the judgment provides that individuals performing continuing or essential creative talent services on a prime time series licensed to a network would be barred from entering agreements precluding them from being able to continue to provide their services to the series if it were licensed elsewhere. Thus, a program supplier could take a series whose term has expired or which has been canceled to another broadcaster with the essential talent intact even if the talent is under contract to the network. In general, the networks may not use exclusive rights to talent to circumvent a program supplier's ability to seek a new outlet for rejected concepts or terminated shows.

The judgment will not affect a network's ability to acquire certain rights for nonnetwork broadcast and for the distribution of programs abroad. The networks will

continue to be able to recover money advanced in connection with the development or production of a television network program.

The CBS and ABC judgments include no provisions concerning exclusivity for the broadcast of theatrical feature films as against pay television.

United States of America v. CBS Inc., Civil Action No. 74-3599-RJK (C.D.Cal., July 31, 1980); United States of America v. American Broadcasting Companies, Inc., Civil Action No. 74-3600-RJK (C.D. Cal. 1980) [ELR 2:11:1]

FCC refuses to renew license of San Diego radio station because of owner's failure to satisfy programming promises

Soon after acquiring San Diego station KDIG-FM (now KIFM) in 1970, West Coast Media, Inc. filed a license renewal application with the FCC. KDIG proposed to broadcast 5.83% news, 1.53% public affairs and 1.53% "other programming exclusive of entertainment and sports." In December 1971, the station sought to amend its proposal, citing financial losses as the reason for temporarily eliminating all news and other non-entertainment programming except public affairs. However, West Coast promised to broadcast at least 1.1% public affairs programming and to increase significantly its news, religious and instructional programs. The FCC, modifying the decision of an Administrative Law Judge, has concluded that West Coast did not intend to fulfill its programming promises when they were made, and had not demonstrated good faith efforts to carry out such promises. West Coast's 1974 application

for renewal of the license of station KDIG-FM has therefore been denied.

The Administrative Law Judge found that KDIG failed to establish that its programming promises had been met. He noted that a 3-hour religious show had been improperly classified by the station as a public affairs show, and he rejected West Coast's claim that its financial condition prevented the production of news and public affairs programs. The ALJ also characterized West Coast's description of its programming in its 1974 renewal application as "inherently misleading." He found that West Coast had not met the burden of proving that its nonentertainment programming was "reasonably responsive to community needs and problems," and that the station had not operated fully in the public interest during the 1971-1974 license period. The ALJ granted KDIG a one-year renewal term despite these findings because West Coast's owners had only recently

entered the broadcasting field and because there had not been a deliberate attempt to avoid performance.

The FCC disagreed with the ALJ's conclusion, however, and determined that West Coast had failed to make reasonable and good faith efforts "to comply with the spirit or the letter of its programming promises," that certain efforts made toward the end of the license term did not mitigate the earlier failure to provide nonentertainment programming, and that it had not been shown that nonperformance was due to factors beyond West Coast's control. The Commission noted that only 0.93% of news was presented from December 1971 through July 1972 - substantially below the 5.83% promised in the renewal application. And during August 1972 through April 1974, West Coast carried no public service programming whatsoever. Further, due to the firing of employees by KDIG, there was insufficient staff available to produce the promised programming.

West Coast's contention that it lacked the financial ability to produce additional programming was rejected by the FCC. The promise to carry at least 1.1% public affairs programming was made despite the station's losses and there had been no showing of an unexpected worsening of KDIG's finances. Rather, it appeared that there had been a disproportionate allocation of financial resources to another station owned by West Coast in Garden Grove, California in disregard of West Coast's responsibility to provide a local outlet for the San Diego community.

In view of these factors, the FCC found that there was "no justification to give an inexperienced broadcaster the advantage of performing below minimal renewal standards for a license term without suffering the same consequences which experienced broadcasters would incur."

KDIG was also found to have been nonresponsive to the "problems, needs and interests" of San Diego due to the lack of nonentertainment programming, an additional basis for the denial of its renewal application.

In re Application of West Coast Media, Inc. for Renewal of License of Station KDIG-FM (now KIFM), San Diego, California, Before the Federal Communications Commission, Docket No. 20971 (July 24, 1980) [ELR 2:11:2]

Actors Equity system of franchising theatrical agents is immune from antitrust challenge

Actors Equity's system of "franchising" theatrical agents is immune from challenge under the antitrust laws, a Federal Court of Appeals has held in an opinion

affirming a District Court ruling that Equity's practices are protected by the "statutory" labor exemption.

In furtherance of its goal of maintaining minimum wages for its members, Actors Equity "encourages" theatrical agents to pay a fee and agree to abide by certain restrictions in return for certification as "franchised" agents. Among the restrictions imposed on franchised agents are the denial of commissions on "scale wages" set by the collective bargaining agreement between Equity and theatrical producers, the limitation of agent's commissions to 10 percent, and the requirement that franchised agents must permit actors to terminate agency contracts if the agent is unsuccessful in procuring employment within a specified period of time.

A group of theatrical agents brought suit to challenge Equity's practice as a violation of federal antitrust laws. In determining whether the franchise system is protected by the "statutory" labor exemption, the court discussed

whether the system "has involved any combination between Equity and any non-labor groups' or persons who are not 'parties to a labor dispute'." If it had, then, under United States v. Hutcheson, 312 U.S. 219 (1941), the protection of the exemption would not apply.

The agents contended that the requirements in Actors Equity's collective bargaining agreement that all standard employment contracts must include a space for the agent's name and also that this line be filled in is evidence of an agreement by the producers to help Equity police its franchise system. The court held, however, that the District Court was not clearly erroneous in rejecting this argument. The District Court found that executed contracts often left blank the line for the agent's name and that Equity honored such contracts.

The court also found that unilateral pronouncements by Equity such as "only franchised agents may negotiate employment deals for Equity performers," and

expressions by Equity to its membership made during negotiations between Equity and the producers that producers had an "obligation" to avoid using unfranchised agents, are not evidence of a combination between Equity and the producers with regard to agent franchising, because they may mean no more than that Equity members are forbidden from dealing with unfranchised agents. The court based its conclusion on the fact that no producer testified that he had considered himself bound by the union's statements, that he had been pressured not to deal with unfranchised agents, or that he had reported unfranchised agents to the union.

The existence of a trade association of agents franchised by Equity which was not a party to the litigation was held not to divest Equity's franchise system from the protection of the statutory exemption, because in the court's view, the organization of franchised agents is a "labor group." "Such agents must be considered a 'labor

group' because the union cannot eliminate wage competition among its members without the regulation of the fees of the agents," stated the court.

The court concluded that the goal being pursued by Equity in utilizing its franchising system is within the area of the union's legitimate self-interest. In addition, the court decided that the franchise fee charged by the union is commensurate with Equity's expenses in administering the system and therefore is appropriately connected with the goals of the national labor policy which justifies the antitrust exemption for labor.

Representatives of both the Screen Actors Guild and the American Federation of Television and Radio Artists filed amicus curiae ("friend of the court") briefs.

H.A. Artists & Associates, Inc. v. Actors Equity Association, 622 F.2d 647 (2d Cir. 1980) [ELR 2:11:3]

Obscenity charges against exhibitors of "Caligula" are dismissed because of film's "redeeming political value"

The film "Caligula" will not be "banned in Boston" as a result of the decision by a Boston Municipal Court judge that the film was shown to have "redeeming political value."

The court, applying Massachusetts' definition of obscenity (which derived from the decision of the United States Supreme Court in Miller v. California, 413 U.S. 15), found that "Caligula" did appeal to the prurient interest of the average person, and that it depicted sexual conduct in a patently offensive way. It also found that the film lacked serious scientific value and that it lacked literary and artistic values, because it did not "lift the

spirit ... improve the mind ... [or] enrich the human personality or develop character."

However, Penthouse International, Ltd. and Newsconcorp, Inc., the exhibitors of the film, presented a professor of political science who testified that the film contained a political theme - that absolute power corrupts absolutely - in an historical context "as reported by ancient Roman historians." The testimony went unchallenged by the prosecution. The court therefore concluded that the prosecution had failed to establish beyond a reasonable doubt that "Caligula" lacked serious political value and was not entitled to the protection of the First Amendment.

The Saxon Theatre Corporation of Boston was found not guilty of disseminating obscene matter since it had merely leased its theater premises to Newsconcorp on the date "Caligula" was exhibited and was "in no sense" the exhibitor of the film.

Commonwealth v. Saxon Theatre Corp. of Boston, Boston Municipal Court, Department of the Trial Court of Massachusetts, Criminal Division (August 1980) [ELR 2:11:4]

Copyright "fair use" doctrine permitted Miami newspaper to incorporate reproductions of past covers of "TV Guide" into its advertising campaign

A Federal Court of Appeals has ruled that a newspaper publisher did not infringe Triangle Publications' copyrights by displaying TV Guide covers in the paper's own advertisements.

The lawsuit stemmed from a promotional campaign for a new television booklet contained in the Sunday edition of the Knight-Ridder published Miami Herald. Each

promotional display contained a reproduction of a TV Guide cover along with a picture of the Herald's new television supplement. Television commercials compared TV Guide with the Herald's guide and stressed the advantages of the latter.

TV Guide objected to the reproductions of its covers and filed suit for an injunction, claiming that Knight-Ridder had infringed the copyright held on each individual magazine cover.

Both the District Court and the Court of Appeals arrived at the same conclusion - that an injunction was not in order. But the courts did so for different reasons.

The lower court based its decision on the First Amendment protection granted to commercial speech, reasoning that the Herald's use of TV Guide was constitutionally protected, and therefore, its interests prevailed over Triangle's copyright interests.

The Court of Appeals, however, chose not to address the constitutional question. Instead, its decision was predicated on the doctrine of "fair use."

While the lower court found the Herald's use to be unfair but nevertheless constitutionally privileged, the Court of Appeals was of the opinion that the Herald's use of the TV Guide covers was indeed a fair one.

The court applied the fair use doctrine which is incorporated in the Copyright Act. Great emphasis was placed on the effect of the Herald's use of TV Guide covers on the commercial value of TV Guide itself. The court stated that Triangle Publications had failed to show any effect on the value of its copyright. For instance, it found no reason to believe that TV Guide would lose a significant share of its present market as a result of the Herald's ads.

The court noted that the District Court had erred in failing to apply this important principle. The lower court

had relied solely on the fact that the TV Guide covers were used to obtain commercial advantage in concluding that the Herald's use was not a fair one.

The court stated that while commercial use of another's copyrighted product is indicative of an unfair practice, in this case the Herald had no intention of passing off TV Guide as its own product. The Herald had merely engaged in the commonlyaccepted practice of comparative advertising.

Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 621 F.2d 1318 (5th Cir. 1980) [ELR 2:11:4]

NCAA has standing to challenge HEW regulations prohibiting sex discrimination in intercollegiate athletics

Title IX of the Education Amendments of 1972 prohibits sex discrimination in all federally supported education programs, including athletics (20 USC section 1681). In 1975, the Department of Health, Education and Welfare issued regulations implementing Title IX (45 CFR Part 86). Several sections of those regulations dealt with sex discrimination in intercollegiate athletics in particular. (See ELR 1:24:5.)

The National Collegiate Athletic Association filed suit against HEW in 1978 challenging HEW's authority to issue those sections of the regulations. Motions to dismiss were filed by HEW and by three organizations which intervened on HEW's side of the case, the Association for Intercollegiate Athletics for Women, the National Education Association and the United States National Student Association. A Federal District Court in Kansas granted their motions, holding that the NCAA did not have standing to file the suit.

A Federal Court of Appeals has reversed that decision, however, and has sent the case back to the District Court for further proceedings. The Court of Appeals agreed with the District Court that the NCAA did not have standing to bring the suit on its own behalf, even though the NCAA alleged that as a result of the challenged regulations, it would lose members and be impaired in its athletic rulemaking functions. The Court of Appeals found that such injuries were "speculative."

On the other hand, the Court of Appeals held that the NCAA does have standing to sue on behalf of its members. Its stated purposes as an association make it a suitable proponent of its members' interests, the court held. And the court found that its members have sustained injury because of the requirements imposed on them by the HEW regulations at issue in the case. Said the court, "... the member colleges are prevented from developing their intercollegiate sports programs as they see fit."

HEW and the AIAW argued that the court should not assume that any of the NCAA's members supports the NCAA's position in the case, because many of those members are also members of AIAW. The Court of Appeals acknowledged that there would be no "case or controversy - and thus the court would not have jurisdiction - "if unofficial contingents of the colleges and universities are seen cheering both sides of the litigation, while governing bodies of the institutions sit as spectators above the 'fight'." In fact, the court held that if more members of the NCAA are against its position than in favor of it, the NCAA would not have standing. However, said the court, the NCAA's complaint alleged that a majority of its members supported the case, and thus the complaint should not have been dismissed. "Sham allegations of membership support may be sought out by a motion for summary judgment," the court noted.

National Collegiate Athletic Association v. Califano, 622 F.2d 1382 (10th Cir. 1980) [ELR 2:11:5]

Sale of master film strip negatives requires payment of California sales tax

The California Supreme Court has ruled that the sale of master film strip negatives and recordings used to manufacture audiovisual training materials requires the payment of sales tax. The ruling was issued in connection with a suit filed by Simplicity Pattern Company to recover almost $35,000 in sales taxes and interest paid by it on account of its transfer of master negatives and recordings having a book value of almost $624,000. The transfer was part of Simplicity's sale in 1971 of the assets of a wholly owned subsidiary in exchange for a portion of the common stock of the buyer's parent

corporation. Included in the book value of the negatives and recordings were such things as the costs of raw film and tape, research, artwork, salaries of creative personnel, and overhead.

California imposes a sales tax on "the privilege of selling tangible personal property at retail." Simplicity contended that it did not owe sales taxes, because, it said, the master film negatives and recordings were not tangible property. This is so, Simplicity argued, because the purchaser's primary interest was not in the physical objects themselves, but rather in the right to exploit the intellectual products they embodied. Intellectual property is "intangible." In addition, a California Board of Equalization regulation provides that if the "true object" of a transaction is the performance of a service, then the transfer of tangible personal property "incidental" to the performance of that service is not taxable.

The California Supreme Court ruled, however, that in this case, Simplicity's sale of the completed master negatives and recordings was not incidental to its performing any services, but rather was part of the sale of the assets of a going business.

The court distinguished the transfer of a book manuscript from its author to a publisher - which is not taxable - from the transaction in this case, because a manuscript is used solely for its intellectual content. In this case, film strips and recordings were to be manufactured directly from the masters Simplicity had sold. Thus, those masters were analogous to printing plates, while "a manuscript furnishes only verbal guidance to editors and typesetters."

Board of Equalization regulations specifically provide that motion picture producers do not have to pay sales taxes on amounts received for exhibition and reproduction rights, nor do motion picture producers have to pay

sales taxes for the outright transfer of a movie negative, print and all rights connected with the movie, if the transfer is made prior to the movie's release date. The court held that this exemption was of no assistance to Simplicity in this case, however, because the masters involved in this case were not motion picture masters, and because the transaction in question did not take place prior to the release date of the filmstrips involved.

Although sales tax does not apply to sales of tangible personal property to persons who buy it for the purpose of incorporating it into manufactured articles to be sold, the master negatives and recordings transferred in this case were not to be incorporated physically into the audiovisual training materials to be made from them and then sold to the buyer's own customers.

Finally, the court rejected Simplicity's contention that the transaction should have been tax-free because it could have been handled as a statutory merger which is

exempt from sales taxes. Said the court, "... tax consequences sometimes vary according to the forms of transactions that nonetheless accomplish substantially the same results."

Although the case did not involve entertainment properties as such, it is a case which the entertainment industry, and especially the recording industry, has been watching closely. This is so because although the movie producers' exemption from the sales tax law was adopted by the Board of Equalization shortly after the California sales tax law became effective in 1933, the sale, lease or use of master sound recordings was subject to sales (or use) taxes until 1976. It was not until that year that the sale, lease or use of master sound recordings became exempt from California's sales and use tax laws; and a number of cases challenging the prior practice of assessing sales or use taxes on the pre-1976

sale or use of sound recordings are still pending in the courts.

Simplicity Pattern Co. v. State Board of Equalization, 27 Cal.3d 900 (1980) [ELR 2:11:5]

RCA recovers payments made under a terminated record agreement from Arista Records, the new distributor

A record distribution agreement between Buddah Records, Inc. and RCA Corporation provided that RCA would pay directly to a division of GRT Corporation the sum of $250,000 in 24 equal monthly installments. Six months later, RCA and Buddah terminated their original agreement and the Arista Division of Columbia Pictures Industries became the distributor of Buddah Records

and tapes. Arista agreed to assume RCA's obligation to GRT and to indemnify RCA for any loss due to Arista's failure to make any of the required payments. Approximately one year later, Arista, contending that GRT was indebted to it in connection with an unrelated transaction, and that it was entitled to an offset, refused to make any further payments to GRT. GRT, which was not a party to the termination agreement, demanded and received payment from RCA. RCA then requested, but was refused, reimbursement from Arista.

The Special Term of the State Supreme Court in New York county denied RCA's motion for summary judgment on the ground that an issue of fact had been raised as to whether GRT, by accepting payments from Arista, waived its right to collect from RCA.

The Appellate Division of the Supreme Court has reversed this ruling, however. That court noted that "[s]o long as GRT did not release RCA from the obligation to

make the payments directly to it ... that obligation remained enforceable." The court also pointed out that Arista, by agreeing to reimburse RCA, recognized that RCA still remained liable under the original agreement. RCA was granted summary judgment and the court directed an assessment of attorneys fees.

A dissenting opinion observed that RCA would have been protected by the indemnification agreement and that the company had acted as a "volunteer" in making the payment to GRT. The dissent therefore would have denied summary judgment, finding that a factual issue existed as to Arista's good faith with respect to its offset claim against GRT.

RCA Corp. v. Columbia Pictures Industries, 428 N.Y.S.2d 250 (App.Div. 1980) [ELR 2:11:6]

Briefly Noted:

Book Publishing.

Gulf & Western brought suit against Harlequin Enterprises, a Canadian publisher of paperback books, alleging breach of the book distribution agreement under which Gulf & Western acted as the exclusive distributor of Harlequin's books. An appellate division of a New York Supreme Court denied cross motions for summary judgment, on the ground that a material issue of fact was presented as to whether Harlequin rightfully repudiated the agreement three months before its expiration date because Gulf & Western was going into competition with it. The court found that the provisions upon which the defendant relied contained latent ambiguity.

Gulf & Western Corporation v. Harlequin Enterprises Limited, 427 N.Y.S.2d 430 (1980) [ELR 2:11:6]

Copyright Infringement.

An action for copyright infringement and unfair competition in which it was alleged that Walt Disney Productions, the producer of the film "The Cat From Outer Space," had infringed certain copyrighted materials, including the song "Kitty Kat Konvention," has been dismissed by a Federal District Court in Colorado. No direct evidence of copying was introduced; and the fact that the writer of the allegedly infringed materials had submitted material to CBS was found insufficient to support an inference that Ted Key, the author of the story and screenplay on which the Disney film was based, had had access to the material. The works in

question also were not found to be substantially similar except for the shared concept of a cat with the ability to speak or sing - an abstract idea not protectable by copyright in any event, according to the court. The unfair competition claim was dismissed as having no validity independent of the infringement claim.

Nordstrom v. Walt Disney Productions, Civil Action No. 79 M 2 (D.Colo., August 5, 1980) [ELR 2:11:7]

Copyright Infringement.

A Connecticut radio station has been found liable for copyright infringement because it broadcast 23 musical compositions without the payment of fees to ASCAP and without the permission of the ASCAP members who owned the individual copyrights. The fact that the

station may have been operating at a loss did not mean that the compositions were not performed for profit, according to a Federal District Court in Connecticut. And the general manager of the station was found jointly liable with the station, because he had the capacity to prevent the infringement by exercising control over the operations of the station and supervising the music director, but had failed to do so. Further, other stations with which the general manager was affiliated also had had "copyright difficulties." The court therefore enjoined any further infringement of the works in question and awarded statutory damages of $1,000 for each of the infringements and an allowance for attorneys' fees to the copyright holders.

Boz Scaggs Music v. KND Corp., 491 F.Supp. 908, CCH Copyright Law Reports, Para. 25,166 (D.Conn. 1980) [ELR 2:11:7]

Labor Law.

Members of a local union of motion picture projectionists brought an action against IATSE and various officers of the local alleging violation of their membership rights under the LaborManagement Reporting and Disclosure Procedure Act (29 U.S.C. sections 401-531). A Federal District Court denied plaintiffs' motion for preliminary in,junction, finding no probable success on the merits because plaintiffs were no longer "members" of IATSE within the definition of 29 U.S.C. section 402(o).

Basilicato v. International Alliance of the Theatrical Stage Employees and Moving Picture Machine

Operators of the United States and Canada, 479 F.Supp. 1232 (D.Conn. 1979) [ELR 2:11:7]

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Labor Law.

The National Labor Relations Board has determined that the Oriental/Middle Eastern dancers (belly dancers) performing in the El Sultan Room of a New York City nightclub were independent contractors rather than employees on the basis of the following factors: "the dancers provide their own costumes and makeup, choreograph their dances, determine the length of their shows, select the music for their dances, establish the order of appearances, change their schedules without consulting the Employer, are free to perform elsewhere and upon 14-day notification, may terminate their contracts with the Employer, receive payment for

performances in cash which includes no withholding of monies for Federal income tax or social security, and receive no direction or guidance from the Employer concerning the manner in which they dance except for the mandate that they observe common standards of decency in their performances." The Board therefore dismissed a union's petition for representation.

IBIS Enterprises, Inc. and SIBI Ventures, Inc. d/b/a Club Isis and El Sultan Room and The American Guild of Variety Artists, AFL-CIO, Before the National Labor Relations Board, Region 2, Case No. 2-RC-18724 (June 30, 1980) [ELR 2:11:7]

Obscenity.

A Wisconsin criminal obscenity statute has been declared unconstitutionally vague and overbroad by the Supreme Court of Wisconsin in an opinion which reversed the conviction of a movie theater operator for exhibiting allegedly obscene motion pictures. The statute previously "has survived constitutional scrutiny only through repeated saving judicial interpretations," stated the court; but it declined to further construe the statute to bring it within constitutional limits.

State v. Princess Cinema of Milwaukee, 292 N.W.2d 807 (Wis. 1980) [ELR 2:11:7]

Libel.

A former city attorney of a California community brought an action against a newspaper for the publication of allegedly libelous newspaper articles concerning his dismissal as city attorney and his involvement in a movement to recall members of the community's city council. A California Court of Appeal has affirmed the trial court's conclusion that the plaintiff was a public figure and held that the trial court had applied the proper standard in granting the newspaper's motion for nonsuit.

Weingarten v. Block, 102 Cal.App.3d 129, 162 Cal.Rptr. 701 (1980) [ELR 2:11:7]

Libel.

The single publication rule, which requires a plaintiff in a defamation suit to collect all of his damages in one action and which provides that the statute of limitations runs from the date of initial publication, has no bearing on venue, the Supreme Court of Georgia has held. "To restrict suit to the county in which the libel was first published would, in many cases, place an unfair burden on the plaintiff to sue for an injury which may not, in fact, exist at the place of trial," stated the court.

Carroll City/County Hospital Authority v. Cox Enterprises, 256 S.E.2d 443 (Ga. 1979) [ELR 2:11:8]

Libel.

In a libel action against a newspaper arising from the alleged misquotation of a notice of hearing concerning the plaintiffs temporary suspension from the practice of law, a Federal Court of Appeals has held that the plaintiff was not a public figure for purposes of defamation, but that the plaintiff failed to prove any actual damage resulting from the article containing the misquotation. The court thus affirmed the district court's dismissal of the plaintiff's libel complaint.

Littlefield v. For Dodge Messenger, 614 F.2d 581 (8th Cir. 1980) [ELR 2:11:8]

Racing Regulation.

The constitutionality of a Maryland regulation which sets standards for the issuance of horse racing licenses, including a provision allowing the Maryland Racing Commission to refuse to issue a license to one who the Commission finds "is consorting or associating with... bookmakers, touts, or persons of similar pursuits," has been upheld by a federal district court, The Commission's motion for summary judgment was granted against a complaint under a Federal Civil Rights Law (42 U.S.C. section 1983), alleging the improper denial of a "thoroughbred owner's license." The Commission discovered that the plaintiffs horse trainer "had a substantial record of difficulties with racing officials in several states." The court found that the regulation was not unconstitutionally vague, and that it did not deny freedom

of association, substantive or procedural due process, or equal protection.

Lewitus v. Colwell, 479 F.Supp. 439 (D.Md. 1979) [ELR 2:11:8]

DEPARTMENTS

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