RECENT CASES

Johnny Carson loses unfair competition, privacy and trademark lawsuit against manufacturer of Here's Johnny Portable Toilets

"Tonight" show host Johnny Carson brought an action seeking to enjoin Here's Johnny Portable Toilets, Inc. from using the phrase "Here's Johnny" as a corporate or trade name or in connection with the advertising or sale of portable toilets. The action, alleging unfair competition, invasion of commercial rights, invasion of privacy, deceptive advertising and common law trademark infringement, has been dismissed by a Federal District Court in Michigan.

The court noted that Carson had consistently used and popularized the phrase "Here's Johnny" as a method of introduction on the "Tonight Show" and for his other entertainment appearances. Although he had never registered a trademark or service mark in the phrase, Carson had also used it in advertisements for men's clothing marketed by Johnny Carson Apparel, Inc. The court observed that a substantial segment of the American public would associate "Here's Johnny" with Carson. Nevertheless, the court concluded that the use of the name Here's Johnny Portable Toilets would not be likely to cause confusion, mistake or deception among the public regarding the origin of the product.

The factors influencing the court included: the lack of strong and distinctive use, the unrelated, noncompetitive products involved, the fact that the use by the portable toilet distributor did not include a likeness of Carson, and dissimilar consumers. (The portable toilets are rented and sold within the business community while Carson apparel products are sold to male customers, and a mass audience tunes into Carson's entertainment services.) Further, the "inherent differences in the marketing and distributing channels are sufficient to greatly lessen the likelihood of confusion," according to the court.

The distributor did not attempt to "pass off" his product as that of Carson; he intended to use a phrase that was a "play on words" and was not precluded from doing so solely because Carson had popularized the phrase.

The court also found that since "Here's Johnny" was not the name of Johnny Carson or of Johnny Carson Apparel, Inc. relief would be denied for invasion of privacy and appropriation of the right of publicity.

Carson v. Here's Johnny Portable Toilets, Inc., Civil Action No. 77-70147 (E.D. Mich., Sept. 24,1980) [ELR 2:12:1]

Warner Bros. legally suspended directors during actors strike despite absence of specific force majeure provisions, DGA arbitrator decides

Warner Brothers was within its rights in suspending directors' employment and compensation by reason of the actor's strike despite the absence of specific "force majeure" provisions in Warner's deal memoranda with directors, decided Martin Gang, Esq. for the Arbitration Tribunal of the Directors Guild of America.

The arbitrator took judicial notice of "the custom and practice in the entertainment industry to include in long form director employment agreements a 'force majeure' clause." The arbitrator also noted the uncontroverted evidence introduced by Warner Brothers that "in each instance in which a deal memorandum is executed, it is followed as soon as reasonably practicable by a long form contract which contains a detailed 'force majeure' clause, including strikes as one of the causes permitting suspension of employment and compensation."

Section 6-101 of the DGA Basic Agreement provides in part:

"[T]he provision of this [Basic Agreement] shall, of course, be subject to any and all rights of suspension and/or termination which the Employer may have by contract or otherwise in the even of any incapacity or default of the Director, or, in the case of any interference, suspension or postponement of production by reason of strikes, acts of God, governmental action, regulations, or decrees, casualties, or any other causes provided for in the so-called "force majeure" clause of such Director's contract of employment or the force majeure provisions of this Basic Agreement."

"The legally binding arrangements between Warner and the Directors," stated the arbitrator, "does therefore include 'force majeure' provisions despite the fact that the words are not included in the Deal Memoranda, first by virtue of the custom and usage in the entertainment industry and second, by reason of the language referring to "the force majeure provisions of this BA." The arbitrator further stated that, "A fair reading of the language of Article 6 [of the Basic Agreement] gives Warner the right to suspend and/or terminate even though no formal contract was executed, since the words refer not only to rights "by contract" but also "the force majeure provisions of this BA."

Directors Guild of America, Inc. and Warner Bros., Inc., Arbitration Tribunal of Directors Guild of America, Case No. 00787 (Oct. 3, 1980) [ELR 2:12:2]

Phil Donahue show is denied exemption from FCC "equal time" rules governing broadcast appearances by political candidates

Multimedia Program Production's request that its syndicated "Donahue" show be considered a news interview program exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934 has been denied by the Complaints and Compliance Division of the FCC's Broadcast Bureau. The ruling was then sustained by a 4 to 3 vote of the FCC itself.

When a candidate for public office uses a broadcast station's facilities, the station's licensee must afford equal opportunities for such use to all other candidates for the office. However, appearances by a candidate on a bona fide newscast, news interview, news documentary or on-the-spot coverage of bona fide news events are exempt from this provision.

Multimedia claimed that the widely syndicated Phil Donahue show was a "unique news interview program generally directed to the in-depth exploration of newsworthy issues," that the program does not advance the interests of any of the interviewees, and that the interviewees are selected on the basis of newsworthiness. In determining whether a program is a bona fide news interview program, the FCC has considered the following factors: whether it is regularly scheduled; how long it has been broadcast; whether the broadcaster produces and controls the program; whether the broadcaster's decisions on the format, content and participants are based on his reasonable good faith journalistic judgment rather than on an intention to advance the candidacy of a particular person; and whether selection of persons to be interviewed and topics to be discussed are based on their newsworthiness.

The Broadcast Bureau noted that the Donahue show, as distinguished from shows such as "Meet The Press" or "Face the Nation," involves personal commentary by Phil Donahue and permits the expression of comments by members of the studio and viewing audience. If Multimedia's request were granted, this might broaden the scope of the exemption which has been restricted generally to programs involving a straightforward question and answer format in order to avoid any appearance of advancing the interest of any particular candidate.

It was also determined by the Broadcast Bureau that the Donahue program did not satisfy the "newsworthiness" factor because a majority of the guests were of general, rather than timely, interest to the audience. In a similar earlier ruling, the "Tomorrow" show was denied exempt status because there was found to be "no emphasis on the coverage of news." The Commission, in reviewing the "Tomorrow" ruling remarked that the show "appears to deal with newsworthy topics and individuals on an intermittent and not on a regularly scheduled basis." (Socialist Workers Party, 65 FCC 2d 229 (1976).)

The guest list and topics on the Donahue show were not significantly different from the "Tomorrow" situation and therefore the exemption from the equal opportunities provision was denied.

Multimedia Program Productions, Inc., Federal Communications Commission, Complaints and Compliance Division, Broadcast Bureau, C4-505, 8330-B (August 20, 1980) [ELR 2:12:2]

Libel lawsuits against television newscasters dismissed without trial

In an action for defamation filed by Steaks Unlimited, Inc., against a consumer affairs reporter and a television station, a Federal District Court granted the defendants' motion for summary judgment (previously reported ELR 1:10:15). Steaks had held a four-day sale of meat at several Zayre department stores in Pittsburgh and had engaged in widespread advertising to promote its sales. Steaks' beef arose out of defendants' televised news report which charged that Steaks' advertising and sales operations were a "total misrepresentation" and which described the meat as coming from "old tough animals" and as having been tenderized "with a variety of chemicals to make it palatable."

A Federal Court of Appeals has agreed with the District Court that Steaks is a public figure with respect to the controversy surrounding the news report. Steaks voluntarily injected itself into a matter of public interest and invited public attention, comment and criticism, said the court. "Steaks also possess regular and continuing access to the channels of communication ... [and] if it had so desired, Steaks could have purchased additional advertising in order to respond to or seek to refute [the reporter's] charges," stated the court.

The court then applied the Pennsylvania and First Amendment libel standards applicable to public figures and found that the defendants did not, as a matter of law, "broadcast false material with knowledge of its falsity or with reckless disregard of the truth." Upon a review of the affidavits submitted by the parties, the court concluded that the District Court did not err in granting defendants' motion for summary judgment.

A final issue considered by the Court of Appeals was whether the trial court committed reversible error in denying Steaks' discovery motion to compel the newscasters to produce outtakes of three filmed interviews conducted at Steaks' sales locations but not broadcast as part of the news report. Steaks claimed that this information is relevant to the question of whether the defendants acted with "knowing or reckless disregard of the truth." The court decided, however, that the Pennsylvania "shield law" conferred upon the newscasters a privilege to refuse to surrender the outtakes. The "shield law" provides that media defendants may not be required to disclose their sources of information. It protects all sources of information with the exception of information for which the privilege was waived by actual publication or public disclosure. Under In Re Taylor, 193 A.2d 181 (1963), the shield law is not limited to documents or recordings that might reveal the identity of a confidential source. Thus, the court reasoned that even those outtakes which would not necessarily reveal the identity of a source of information are privileged, because "the identity of many other persons may have been revealed in the questions and/or the answers."

In an unrelated case, a licensed real estate brokerage firm in Chicago brought an action for defamation against CBS. The action arose out of statements made in a "focus report" telecast on the 6:00 and 10:00 p.m. news reports of WBBM, a CBS station. The reports concerned the so-called real estate practices of "panic peddling" and "blockbusting."

Bravo Realty maintained two advertising billboards in the Chicago area. One featured a cartoon of a wooden outhouse and read, "The only house Bravo could never sell," and the other depicted a naked man running and read, "When it comes to selling homes, we're streakers."

During WBBM's 6:00 p.m. news telecast, Bravo's billboards were shown while the following words were spoken: "Ads like this are not illegal - but to residents here, they are unsettling, another reminder that the area is changing. Some sympathetic realtors have stopped advertising like this - and have quit soliciting homeowners.

Others refuse to stop." On the 10:00 p.m. news an abbreviated version of the report was broadcast. The reporter stated, "And with that, realtors moved in to prey on the fears of the homeowners left behind," at which point the billboard with the outhouse was shown and the narration continued, "telling them: everyone else is selling - and if you don't, you'll lose everything."

To these facts, an appellate court of Illinois applied the "innocent construction rule" which requires that in defamation cases, publications should "be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law."

Both broadcasts were susceptible of innocent construction, held the court. Viewing the report in its entirety, the court found numerous instances where the video and audio portions were incongruous. Thus, "a reasonable viewer could conclude that [Bravo's] signs merely constituted background footage of the Marquette Park area and were not used to illustrate the accompanying comments." "The brief visual juxtaposition of [Bravo's] sign, without further comment linking [Bravo] in particular to the described tactic, does not necessarily indicate that [Bravo] participated in or conducted unlawful or unethical real estate practices," stated the court.

Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980); Bravo Realty, Inc. v. C.B.S., Inc., 406 N.E.2d 61 (Ill.App. 1980) [ELR 2:12:3]

Organization may use Olympic Games trademarks to protest construction of prison at Lake Placid

Stop The Olympic Prison (STOP), an organization formed to marshal public opposition to the conversion of the Lake Placid Olympic Village into a prison, filed suit in federal court against the United States Olympic Committee (U.S.O.C.) seeking a declaratory judgment permitting its use of Olympic Games trademarks. The complaint alleged that STOP and its members have a First Amendment right to use the word "Olympic" and the five interlocking rings, universally recognized as a symbol of the Olympic Games, in expressing their opposition to the construction of the prison. STOP has hurdled U.S.O.C.'s counterclaims for violation of the Amateur Sports Act of 1978, trademark infringement, trademark dilution, disparagement and libel. Ruling in favor of STOP on these issues, the court found it unnecessary to address STOP's First Amendment claim.

STOP printed and distributed a poster consisting of the words "STOP THE OLYMPIC PRISON," a drawing of five vertical steel-grey bars upon which were superimposed the five interlocking ring Olympic symbol, and a silhouetted forearm clutching a flaming torch thrust through the bars and rings. The Executive Director of the U.S.O.C. requested in writing that STOP immediately cease and desist from using the word "Olympic" or the Olympic rings on any material under STOP's control. STOP refused to comply, and instead brought this action.

The Amateur Sports Act of 1978 provides that "any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition" certain enumerated words and symbols, including the word "Olympic" and the five interlocking ring symbol, shall be subject to a civil action by the U.S.O.C. for remedies provided in the Lanham Act. In addition, the Sports Act provides that the U.S.O.C. shall have the exclusive right to use these words and symbols. Despite such broad language, the court found that the Act cannot be interpreted to mean that only the U.S.O.C. and its licensees may use the word "olympic" and the enumerated symbols for any purpose whatsoever. Congress' objective, noted the court, appears to have been the prevention of deception or confusion, and it was not Congress' intent to provide a blanket prohibition of all uses of the Olympic words and symbols whether commercial or not. In this case, none of the posters were sold or distributed commercially and were available free of charge. Any money paid for them appeared to have been more in the nature of a contribution to STOP rather than a purchase price, found the court. Hence, the court concluded that the poster did not violate the Amateur Sports Act.

The court dismissed U.S.O.C.'s actions for trademark infringement and trademark dilution, concluding simply that the U.S.O.C. had failed to offer any evidence of possible confusion and therefore failed to prove injury sufficient to establish a right to an injunction.

The court noted that "It seems the defendant's real concern here is that the poster will cause the public to associate the Olympic Games and the U.S.O.C. with a federal prison." To the extent this stated a claim for disparagement under state law, the court dismissed it on the ground that the U.S.O.C. failed to prove that STOP's poster was false or misleading or in any way impugned the U.S.O.C. "If the poster implicates the U.S.O.C., it is only because the facts themselves do," stated the court.

With respect to the U.S.O.C.'s libel claim, the court found that "on the issue of whether Olympic athletes should be housed in a facility destined to become a prison, the U.S.O.C. is enough of a public figure to require it to prove 'actual malice' in order to recover for libel." The U.S.O.C. introduced no proof at all on the issue of whether STOP published its poster with "knowledge that it was false or with reckless disregard of whether it was false or not," said the court. In addition, the court refused to conclude that the poster was libelous per se; consequently, the U.S.O.C. was required to plead and prove special damages, which the court found it had not done.

The court found it unnecessary to address STOP's First Amendment claim, yet it briefly quoted Spencer v. Washington, 418 U.S. 405 (1974), in which the Supreme Court held that a college student's public display of an upside-down American flag, to which he had affixed a peace symbol, was a form of expression protected by the First Amendment: "There was no risk that appellant's acts would mislead viewers into assuming that the Government endorsed his viewpoint. To the contrary, he was plainly and peacefully protesting the fact that it did not."

Stop the Olympic Prison v. United States Olympic Committee, 489 F.Supp. 1112 (S.D.N.Y. 1980) [ELR 2:12:4]

Federal Court of Appeals judge in Michigan enjoins manufacture and sale of unauthorized pay-tv signal decoders

As previously reported (ELR 2:9:4), a Federal Court of Appeals judge in Michigan has issued a temporary restraining order prohibiting the manufacture and sale of unauthorized pay-tv signal decoders. The order is to remain in effect until the full Court of Appeals rules upon the motion of Chartwell Communications and National Subscription Television for an injunction pending the outcome of their appeal of a Federal District Court order refusing to enjoin the sale of unauthorized decoders by Detroit area video stores.

In her opinion issuing the temporary restraining order, Circuit Judge Cornelia Kennedy wrote that in her view, the unauthorized manufacture and sale of pay-tv decoders violates section 605 of the Federal Communications Act. The same conclusion has been reached in earlier cases, including Home Box Office v. Pay TV of Greater N.Y., 467 F.Supp. 525 (E.D.N.Y. 1979) (reported at ELR 1:11:6). However, just the opposite conclusion was reached in the recent case of National Subscription Television v. S & H TV (ELR 2:9:4), decided by a Los Angeles Federal District Judge and now on appeal.

According to Court of Appeals Judge Kennedy, "Subscription television is not intended for the use of the general public; it is only intended for the use of paying customers." And therefore it does not fall within an exception to section 605 which permits interception of broadcasts "for the use of the general public." According to Judge Kennedy, "Section 605 was intended to protect persons from having their communications received by those not entitled to receive them." And she concluded that this protection extends to pay-television broadcasters.

Judge Kennedy also found that National Subscription Television can operate its business only if it can restrict viewers to paying subscribers, and that each person who buys an unauthorized decoder will be forever lost as a paying subscriber. Judge Kennedy also concluded that the public interest required the granting of the injunction, because the FCC had provided for the licensing of subscription television stations. However, "If outsiders are allowed to sell decoders, the subscription television stations will not be able to sell subscriptions to pay for their programming, which would mean the demise of subscription television stations. Unless the court can protect the subscription television station's monetary base, there would be no point in allowing such stations to be licensed," Judge Kennedy ruled.

In an unrelated development, on October 1, 1980, California Governor Jerry Brown signed into law a bill prohibiting the sale of unauthorized decoders in California.

Chartwell Communications Group v. Westbrook, Case No. 80-1566 (6th Cir., August 15, 1980) [ELR 2:12:5]

Checks drawn to cover gambling losses remain unenforceable in Nevada

In two cases decided only eighteen days apart, the Supreme Court of Nevada has refused to overrule a long line of Nevada cases holding that debts incurred, and checks drawn, for gambling purposes are void and unenforceable, even in Nevada. The court stated that "if the law is to change, it must be done by legislative action."

In a case decided July 11, 1980, a check payable to Ormsby House, a hotel-casino located in Carson City, was assigned to Sea Air Support, Inc., which filed an action to collect. The district judge dismissed the action and the Supreme Court affirmed.

Sea Air claimed to be a "holder in due course," thereby immunizing it from the defense that the check is void and unenforceable. Under Nevada law, "A holder in due course is a holder who takes the (negotiable) instrument; (a) For value; and (b) In good faith; and (c) Without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." The court noted the fact that Sea Air promised to take "such legal action as may be necessary to enforce collection" of the debt, and the court concluded that "The promise to perform services in the future does not constitute taking for value." The court also stated that "Sea Air had at least constructive notice of a defense against collection because the check was payable to a casino, and Sea Air knew the check had been dishonored. Consequently, Sea Air is not a holder in due course."

In a case decided on July 29, 1980, the Nevada National Bank filed suit to recover the proceeds from several checks written by the defendant and subsequently negotiated to the bank. The checks were drawn to cover gambling losses incurred by the defendant during private "feeze out" games of "2l."

The bank also claimed holder in due course status to avoid the defense that renders checks drawn for gambling purposes unenforceable. In contrast with Sea Air Support, this case evidenced neither a "promise to perform services" nor notice of a defense against collection. Nevertheless, the Supreme Court of Nevada issued a writ directing the district judge to grant the defendant's motion for summary judgment.

Citing Sea Air Support, the court stated that "A holder in due course is not immune to real defenses; that is, those defenses which render the check, and the underlying obligation created thereby, entirely void ... Because the [law] renders the checks herein void ab initio, the defense may be asserted against the Nevada National Bank."

Sea Air Support, Inc. v. Herrmann, 613 P.2d 413 (Nev. 1980); Sandler v. District Court (Nevada National Bank), 614 P.2d 10 (Nev. 1980) [ELR 2:12:5]

Broadcaster who was improperly enjoined from working for a competing television station was entitled to recover damages against injunction bond,

even though original employer had filed suit in good faith

When a KSTP-TV employee resigned from the station to begin work at WCCO-TV, KSTP brought an action alleging that a noncompetition clause in the employee's contract precluded such local employment with a competitor so soon after termination. KSTP obtained a temporary restraining order enjoining the employee from working for WCCO-TV. As a condition of the restraining order, KSTP posted a $7,500 injunction bond. The trial court ruled on behalf of the employee, refused to issue a preliminary injunction and dissolved the restraining order. But the employee was denied recovery on the injunction bond for damages he incurred as a result of having been wrongfully barred from employment.

The Supreme Court of Minnesota has upheld the employee's right to recover on the bond without the necessity of showing that KSTP had acted in bad faith in bringing its action. The court noted that the purpose of a bond is to require a party seeking a restraining order to pay for the harm caused by its erroneous granting without subjecting the party to open or indeterminate liability. (It is only when malice can be shown that damages above the amount of the bond may be obtained.)

KSTP's contention that the employee had failed to mitigate damages also was rejected; he was not required to look for work other than locally in the field of broadcasting and he had been enjoined from such employment. The employee was not obligated to accept an offer of reemployment with KSTP.

In reversing and remanding the matter to the trial court for an assessment of damages, the court also found that the recovery on the injunction bond would not result in overcompensation for the employee's lost salary and benefits which exceeded the amount of the $7,500 bond.

Hubbard Broadcasting, Inc. v. Loescher, 291 N.W.2d 216 (Minn. 1980) [ELR 2:12:6]

Federal Court of Appeals reverses dismissal of defamation lawsuit filed by individual with same name as fictional character

Orlando Petrocelli, the author of a novel entitled "Match Set" which related the somewhat lurid and unscrupulous adventures of a female transsexual professional tennis player, chose to name the story's central character "Melanie Geisler." An individual named Melanie Geisler had worked at the same small publishing house as Petrocelli and they had become acquainted on a casual basis. Upon learning of the novel, Geisler brought an action in which she claimed that the use of the name "Melanie Geisler" together with certain common physical traits would cause reasonable people to understand that she was the character in "Match Set," acting as described. Geisler therefore stated causes of action for libel, invasion of privacy and violation of sections 50 and 51 of the New York Civil Rights Law.

A Federal District Court in New York City found that no reasonable reader could mistake Geisler for the fictional character and dismissed the action.

But a Federal Court of Appeals has vacated this judgment on the ground that Geisler had made a "colorable" claim that the novel identified her and described her by defamatory comment. The burden of establishing that the description was "of and concerning" Geisler, however, would require a demonstration that third parties apprehend the similarity between the real person and her literary cognate as something more than amusing coincidence or even conscious parallelism on a superficial plane. Rather, it is required that the reasonable reader must rationally suspect that the protagonist is in fact the plaintiff, notwithstanding the author's and publisher's assurances that the work is fiction.

The court noted that Geisler would be entitled to introduce extrinsic evidence to support her claims, and to present additional material to demonstrate that reasonable readers would tend to confuse the real and the fictional Melanie Geisler. The question of whether the alleged defamation was "of and concerning" Geisler would then be decided by the trier of fact.

Geisler v. Petrocelli, 616 F.2d 636 (2d Cir. 1980) [ELR 2:12:6]

Non-duplication provision in translator station's contract with local TV station held enforceable

In 1975, the owners of KAAL-TV, a Minnesota television station, entered into a contract with a television translator station permitting the latter to rebroadcast KAAL's television signals to households in a neighboring locality which would not otherwise receive those signals. A provision in the contract proscribed the translator's rebroadcast of any signal which duplicated KAAL's network programming, which is that of the ABC television network. When the contract was executed, the translator station also was carrying the signal of KSTP-TV of St. Paul, Minnesota. At that time KSTP was affiliated with NBC, but in 1979, KSTP changed its affiliation to ABC.

Fearing a lawsuit by either KAAL or KSTP regardless of its decision, the translator station initially dropped KSTP's signal. KSTP then offered and agreed to indemnify the translator station against KAAL. The translator recommenced broadcast of KSTP's signal and thereafter KAAL brought suit to enforce the "non-duplication" provision of its contract.

The trial court found that failure to recognize the non-duplication provision would result in a loss of viewers in KAAL's total market in Watonwan County, the area served by the translator station; that such loss would have an adverse impact upon KAAL's ability to sell advertising time and the rates at which it was sold; and that KAAL had sustained and would continue to sustain irreparable injury. The Minnesota Supreme Court held that such findings were supported by the evidence, and affirmed, among other things, the trial court's order requiring the translator station to comply with the contract for the balance of its term.

KAAL presented at trial a Nielsen survey taken on a day when both KAAL and KSTP were carrying ABC programming and both were broadcast by the defendant translator station. KAAL's consultant testified that duplication of KAAL by KSTP would result in the loss of half of KAAL's share of the market in Watonwan County. The court found this result to be "backed by logic," and stated that "It seems obvious that if two stations are showing the same program, viewers will be divided between the two."

The translator station contended that the audience loss to KAAL was insignificant. According to evidence presented by KAAL's consultant, KSTP's duplication could cause KAAL to lose 624 homes. This, argued defendant, is only a small portion of KAAL's Total Service Area (TSA) of about 440,000 households. In addition, the TSA is not used for ratings purposes; only the Area of Dominant influence (ADI), (i.e., those counties where one of the market area stations is the dominant station) is useful for actual ratings. Since Watonwan County is not in KAAL's ADI, any duplication of signal there would not affect the ratings received. The court, however, pointed to evidence presented at trial that showed many advertisers also rely on the total number of households which a station can deliver, which is calculated for the TSA. Further, said the court, "if the county was insignificant, it would not seem that KSTP would go to the expense of indemnifying [the translator station] and representing it so vigorously in an effort to get itself into the county."

Other objections, including questions of "primary jurisdiction" vis a vis the Federal Communications Commission, antitrust, punitive damages and attorneys fees, were discussed and rejected by the court.

Minnesota-Iowa Television Company v. Watonwan T.V. Improvement Association, 294 N.W.2d 297 (Minn. 1980) [ELR 2:12:6]

Briefly Noted:

Libel.

When a defendant in a libel action (brought by a plaintiff who is required to prove "actual malice" under New York Times Co. v. Sullivan, 376 U.S. 254 (1964)) refuses to disclose his source of information within a reasonable time before trial, a presumption arises that the defendant has no source, the Supreme Court of New Hampshire has held. This presumption, said the court, is sufficient to show that the publication was "reckless" and therefore made with "actual malice." The court noted, however, that "there may be circumstances under which an appropriate order limiting outside access to the informant's name when disclosed would not be improper."

Downing v. Monitor Pub. Co., Inc., 415 A.2d 683 (N.H. 1980) [ELR 2:12:7]

Libel.

In a libel action by a high-ranking official of a union against a magazine, a Federal Court of Appeals has upheld an order compelling discovery of the identify of a journalist's source of information where (1) the information was relevant, (2) the alternative means of obtaining the information had been exhausted, and (3) there was a compelling interest in the information, since knowledge of the informant's identity was the only way for the official to establish malice. The matter was remanded with the request that the District Court "protect the informant by restricting the information about the informant's identity to counsel and requiring that it be used strictly for the litigation."

Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) [ELR 2:12:7]

Constitutional Law.

In an action to compel a newspaper to publish an advertisement prepared in response to a series of published articles dealing with the quality and care of plaintiff's nursing homes, a Wisconsin Court of Appeals affirmed an order dismissing the complaint, stating that a court cannot compel the publisher of a daily newspaper to accept and print an advertisement in the exact form submitted.

Wisconsin Association of Nursing Homes, Inc. v. The Journal Company, 285 N.W.2d 891 (1979) [ELR 2:12:7]

Previously Reported:

The United States Supreme Court has denied petitions for certiorari in the following previously reported cases. (References are to Volume, Issue and page numbers, in that order.) Writers Guild v. ABC (1:14:1); Vegod Corp. v. ABC (1:21:4).

The District Court opinion in Elsmere Music v. NBC (reported at 2:1:4) has been affirmed by the Court of Appeals in a per curiam opinion which said, "Believing that, in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody, and that the District Court correctly applied the doctrine of fair use, we affirm on Judge Geottel's thorough opinion." 623 F.2d 252 (2d Cir. 1980).

The New York Appellate Division opinion in Cohn v. NBC (reported at 1:4:2) has been affirmed by the New York Court of Appeals in a Memorandum opinion stating, "The order appealed from should be affirmed for the reasons stated in the opinion of Mr. Justice Fein at the Appellate Division." 430 N.Y.S.2d 265 (1980).

The following cases have been published: Beech Cinema v. 20th Century-Fox, 622 F.2d 1 106 (2:5: 1); U.S. v. Shubert, 491 F.Supp. 59 (2:6:2); In re Merrill Theatre Corp. Sales and Use Tax, 415 A.2d 1327 (2:6:5); Gibson v. CBS, 491 F.Supp. 583 (2:8:1); Rand v. New York Times, 430 N.Y.S.2d 271 (2:8:5); Burroughs v. MGM, 491 F.Supp. 1320 (2:9:1); Mister Vee Productions v. LeBlanc, 491 F.Supp. 493 (2:10:5); Follett v. Arbor House, CCH Copyright Law Reports, Para.

25,175 (2:8:2): Factors Etc. v. Pro Arts, CC H Copyright Law Reports, Para. 25,176 (2:9:3).
[ELR 2:12:7]

DEPARTMENTS

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