RECENT CASES

Pepto Bismol's three alarm meatball TV commercial does not defame Mario's Italian restaurants

"Mario's," a chain of Italian restaurants in the Louisville, Kentucky and southern Indiana area, was not libeled by a pharmaceutical manufacturer's television commercial for its stomach medicine, Pepto-Bismol.

In the words of District Judge Ballantine: "The pertinent part of the commercial depicts a firefighter, obviously in a fire station, describing to the audience his epigastric distress. He is unable to determine whether its onset should be attributed to a 2-alarm fire or Mario's 3-alarm meatballs. The reference to Mario is accompanied by a gesture toward a man in the background. The man is stirring a Macbethian kettle, adding ingredients without regard for measuring devices. Whatever the cause, the firefighter is laid low by 4-alarm indigestion, a condition which brings on a mal-de-mer green complexion and physical changes which render him almost amorphous. Ingestion of defendant's product miraculously restores the firefighter to his normal color, contour and condition of digestive serenity."

The court found that no reasonable viewer could construe this commercial as referring to plaintiff's restaurants. The commercial does not depict or refer to a restaurant nor are Mario's restaurants in any other way specifically referenced, said the court. "Clearly, a reasonable viewer of this commercial could only conclude that 'Mario' is the name of the firehouse cook in the background and that meatballs are the product of the questionable culinary skills of this same firehouse cook," stated the court.

The court granted the pharmaceutical manufacturer's motion for summary judgment and dismissed the case, because Mario's failed to show that the alleged libel could ever reasonably apply to any restaurant. The court further stated that even if the commercial referring to Mario's meatballs could be construed to refer to a restaurant, it would be just as applicable to all other restaurants bearing the name "Mario's" as to the plaintiff. The court noted that not only is Mario the first name of many individuals, it is also a common name for Italian restaurants. The court considered Pepto-Bismol's uncontroverted evidence that there are at least 391 restaurants, food services and related businesses in the U.S. bearing the name "Mario" or a very similar designation.

Mario's Enterprises, Inc. v. Morton-Norwich Products, Inc., 487 F.Supp. 1308 (W.D.Ky. 1980) [ELR 2:13:1]

New York appellate court increases amount awarded to dancers Valery and Galina Panov in suit against manager who improperly received both commissions and "impresario" fees

When ballet dancers Valery and Galina Panov emigrated from Russia to Israel in 1974, they entered into a contract with Maxim Gershunoff in which he agreed to act as their "exclusive impresario manager" in return for a 20% commission on fees received by the Panovs for all engagements which Gershunoff arranged. The Panovs, described by the court as "untaught babes" at the time they signed with Gershunoff, eventually discovered that he was on occasion receiving both an impresario's profit for producing events featuring the dancers as well as his manager's commission from the Panovs for the same events. But Gershunoff did not perform the services of an impresario, and his potential risks in connection with the production of any engagements were "minimal." When the Panovs sought to renegotiate their agreement, Gershunoff responded with an action against the dancers alleging breach of contract.

The Supreme Court of New York County dismissed Gershunoff's complaint and referred the matter to a referee to determine the amount due the Panovs on their counterclaim for an accounting of the receipts from engagements arranged by Gershunoff, and the value of engagement opportunities he had not brought to their attention. The referee reported damages to the Panovs of $255,500. The trial court refused, however, to grant the Panovs' motion to amend the amount of damages stated in their complaint ($112,500) to conform to the referee's figure.

The Appellate Division of the Supreme Court has reversed this decision. The court noted that the extent of damages resulting from Gershunoff's misconduct became apparent only during hearings before the referee. Most significantly, Gershunoff had failed to comply with the contractual requirement that he disclose and discuss with the Panovs his fees for performing impresario services. And, according to the trial court, Gershunoff had engaged in "positive acts of concealment and misrepresentation" in violation of his fiduciary obligation to the Panovs, recent emigrees who did not speak or read English, who were unfamiliar with business and who did not have independent legal representation. The award to the Panovs therefore was increased by the appellate court to $255,500 (with a setoff of approximately $18,000 for certain of Gershunoff's expenses),

Gershunoff v. Panov, 430 N.Y.S.2d 299 (1980) [ELR 2:13:2]

Trial required in copyright infringement suit filed by songwriter against writers and copyright owners of allegedly similar song

The question of whether two musical compositions are "strikingly similar" is an issue of fact that precludes the granting of summary judgment in a copyright infringement action, according to a Federal District Court in Pennsylvania.

The issue arose in an action brought by the assignees of the copyright to the song "Kept on Singing," written by Philip Lipari, against Danny Janssen and Bobby Hunt, the writers of the song "Keep on Singing," and against the assignees of that song's copyright. As in all infringement actions, the plaintiffs, in addition to proving ownership of the copyright, were required to establish proof of copying. Such proof would require a showing that the defendants had had access to "Kept on

Singing" and that there was substantial similarity between the two songs. Direct proof of access is unnecessary, however, if the two works are strikingly similar. As distinguished from "substantial" similarity, "striking" similarities are those that can only be explained by copying, rather than by "coincidence, independent creation or prior common source." In such a case "access may be inferred from the very existence of such marked similarities."

The court found that the evidence submitted in support of the motion for summary judgment (characterized as unacceptable hearsay and conjecture) did not demonstrate that the defendants had access to Lipari's song. But two expert witnesses had submitted reports that the similarities between the two songs were indeed striking. The court therefore ruled that a disputed question of fact existed regarding access and denied the defendants' motion for summary judgment as well as their Petition for Reconsideration.

The defendants had also contended that the copyright to "Kept on Singing" had been incorrectly registered with the U.S. Copyright Office; the assignees of the copyright apparently had claimed erroneously that they wrote the words and music of the song. This "unclean hands" defense was rejected by the court because any misrepresentations regarding authorship were immaterial and had not prejudiced the defendants or affected the validity of the copyright.

The defendants further alleged that "Kept on Singing" had been recorded before the song's copyright was registered, thereby losing its common law copyright. But Lipari, the holder of the common law copyright, claimed that any such recording occurred without authorization and that because of his lack of consent, the alleged "publication" would have no effect on the song's copyright protection. The court again found that the question of fact raised on this issue was sufficient to deny summary judgment.

(An earlier decision in this proceeding, involving the court's jurisdiction over the defendants, was reported in ELR 2:6:2.)

Testa v. Janssen, 492 F.Supp. 198 (W.D.Pa. 1980) [ELR 2:13:2]

Federal Court of Appeals upholds $350,000 damage award in Alioto libel suit against Look magazine

It took litigation before five courts, but the ex-Mayor of San Francisco has finally prevailed in his libel suit against the publishers of Look magazine.

The action stemmed from a 1969 article in Look linking Alioto to organized crime figures. Specifically, the article alleged that Alioto arranged to obtain loans for a reputed member of the Mafia.

The first time the case went to court, the jury was unable to reach a verdict. In the second trial, the jury found the article defamatory and false, but could not decide whether it was published with "actual malice," that is, with knowledge of its falsity or with reckless disregard for the truth. At that point, the trial judge made the malice determination, finding that Alioto had not clearly proved that Look published the defamatory falsehood knowingly or recklessly. The judge therefore issued judgment for Look.

Alioto appealed the ruling and a Federal Court of Appeals found sufficient evidence of malice to send the case back to the jury on that sole issue.

On remand, the jury was again unable to agree on a verdict. On the fourth trial, the court determined that Look's allegations were indeed published with reckless disregard for their truth, and awarded Alioto $350,000 in damages.

Look then appealed the damage award to a Federal Court of Appeals. But the court has found no merit in Look's contentions.

It was claimed that the second jury was improperly instructed that the disputed allegations were actually false. The court stated that Look's publishers had waived any right to challenge the instructions and the jury's factual findings by not raising these objections on the first appeal.

The court next dismissed Look's contention that the article was not viewed "as a whole" to determine whether it was "substantially true." Since the particular passage examined by the jury provided the gist" of the entire article, the court reasoned that Look had received a fair trial.

Look further claimed that the court's finding of malice was improper because it was based on the examination of the one specific allegation, rather than on the article "taken as a whole." As the court had previously reasoned, so long as the passage examined reflected the "gist" or "sting" of the article, there was no reason to disturb the lower court's finding.

And finally, the court ruled that the trial judge had "broad discretion" to hear evidence that might be inadmissable in a jury trial. Specifically, the court found nothing improper in the judge's allowing Alioto to testify regarding the article's impact on members of his family and on other persons.

Alioto v. Cowles Communications, Inc., 623 F.2d 616 (9th Cir. 1980) [ELR 2:13:3]

Libel lawsuit arising out of publication of parody of children's book "Eloise" is dismissed by New York appellate court

In 1955, a book of cartoons was published under the title Eloise. It was about a fictional six-year-old girl who lived with her nanny at New York City's Plaza Hotel. One of the cartoons showed a man bowing from the waist and the young girl curtseying in return. Underneath, the caption read:

I am a nuisance in the lobby
Mr. Salamone said so
He is the manager
I always say, "Good morning, Mr. Salamone" and he always says "Good morning, Eloise."

In 1976, MacMillan Publishing Company published a parody of Eloise in a book entitled Titters: The First Collection of Humor by Women. The parody has Eloise, now twenty-six, back at the Plaza in the men's room. She is shown to have just finished writing on a large mirror "Eloise Returns," above which appears the words "Mr. Salamone was a child molester!!"

Alphonse Salamone, the manager of the Plaza Hotel when Eloise was originally published and currently senior vice president of the Hilton Hotels Corporation, brought a libel action claiming damages for loss of reputation and for mental anguish. A New York appellate court dismissed Mr. Salamone's complaint because "he has suffered no damages that are compensable at law," reversing a trial court's order denying MacMillan's motion for summary judgment.

With regard to Mr. Salamone's claim for loss of reputation, the court noted that the law restricts compensation to "actual injury" and does not permit a presumption of damaged reputation unless it can be shown that publication was with "knowledge of falsity or reckless disregard for the truth." The court found no evidence of knowing or reckless disregard, and on that basis it dismissed Mr. Salamone's claim for damaged reputation.

Salamone's damage claim for mental anguish was similarly dismissed, since, under New York law, such damage is compensable only when it is concomitant with loss of reputation.

One judge, however, concurred only on the basis that the work is an "obvious parody and not intended to be taken seriously." His concurring opinion concluded, "Aside from the parody aspect, we cannot as a matter of law rule, out of hand, that the publication was not made in reckless disregard for the truth. The defendants made no attempt of any kind to see if there was a Mr.

Salamone at the hotel in question, an easily verifiable matter."

Salamone v. MacMillian Pub. Co., Inc., 429 N.Y.S.2d 441 (1980) [ELR 2:13:3]

Former entertainer did not shed public figure status totally despite passage of time and retreat into private life; N.Y. Times malice standard also applied to action by entertainer's well-known husband

A Federal Court of Appeals in Mississippi has held that Anita Brewer, a former entertainer who was romantically involved with Elvis Presley in the late 1950s, and her husband John Brewer, a wellknown former football player, were "at some time and for purposes of some articles, public figures", who were required to prove malice on the part of The Commercial Appeal of Memphis in connection with the newspaper's publication of an erroneous article about Anita Brewer.

The article, which appeared in the newspaper in 1972, described a "reunion" between Anita Brewer and Presley in Las Vegas and stated that Anita was divorced from John Brewer. The Brewers were not divorced and Anita contended that she was not in Las Vegas at the time of the alleged meeting with Presley. Three juries awarded damages to the Brewers. Lacking precedent under Mississippi libel law, the Court of Appeals nevertheless undertook to predict that the Brewers probably would be entitled to recover damages from the Commercial Appeal under state law. However, on the basis on federal constitutional issues, the Court concluded that the Brewers had not shown by clear and convincing evidence that the newspaper had published the complainedof article with knowledge of its falsity or reckless disregard for the truth.

The Brewers argued that they were not and had never been public figures since they had not taken part in "the resolution of public questions". The definition of a public figure as set forth in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), states, "The public figure designation may rest on either of two alternative bases. In some instances an individual may achieve such persuasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

The court agreed that a sports or entertainment career does not necessarily involve public controversy. But the

Supreme Court's emphasis in Gertz was on the seeking of public attention, rather than any involvement in a public controversy, as central to the definition of a public figure. And during their careers both of the Brewers had "vigorously and successfully sought the public's attention or gained notoriety for their achievements." Accordingly, the press was found to be entitled to the protection of the malice standard of New York Times v. Sullivan, 376 U.S. 254 (1964).

Further, the passage of time had not diminished the Brewer's public figure status because Anita Brewer's name continued to appear in articles and books about Presley. According to the court while the passage of time or intentional retreat might narrow the range of protected articles, The Commercial Appeal story related to one cause of Anita Brewer's fame - her relationship with Presley. The extensive public exposure of the Brewers was distinguished from the case "where a plaintiff's fame may be limited to prominence in a local community." (Time, Inc. v. Fireston, 424 U.S. 448 (1976)).

John Brewer also was held to a malice standard, particularly so as not to reduce, by marriage, the constitutional protection of the press to publish stories about his spouse.

After reviewing the preparation of the story, the court concluded that the newspaper's personnel involved had not had, and reasonably should not have had, any serious doubts about the accuracy of the story.

Therefore, the jury verdict and judgment for the Brewers was set aside.

Brewer v. Memphis Publishing Company, Inc. (5th Cir., Oct. 2, 1980) [ELR 2:13:4]

Length of radio programs includes commercials for purpose of determining minimum wage scale under Directors Guild collective bargaining agreement

The collective bargaining agreement between the Directors Guild of America, Inc. and Conceptual Visions, Inc., a producer of radio dramas, provided that the company would pay the directors it employed on the basis of the length of the program produced. Thus, a director performing services on a program longer than 45 minutes would be paid a higher minimum salary than the director of a program shorter than 45 minutes.

In an arbitration before the American Arbitration Association, the company contended that the length of a program in radio practice refers to the dramatic material only, without taking interruptions into account. But Arbitrator Orrin B. Evans observed that the company produced its programs with built-in breaks for commercials and that "[t]he programs are designed to hold the attention of the listener for a time span longer than the minutes required for the dramatic story itself."

Evans concluded that additional payments were therefore required to certain directors who had been compensated by the company on the invalid premise that they were working on programs that were shorter than 45 minutes.

In the Matter of the Arbitration between Directors Guild of America, Inc. and Conceptual Visions, Inc., American Arbitration Association Voluntary Labor Arbitration Tribunal, Case Number 72 30 0458 80 (August 26, 1980) [ELR 2:13:4]

Caesars World, Inc., obtains injunction prohibiting hairdresser from using name Caesars Palace

Hairdresser Caesar Crimi has been enjoined by a Federal District Court in New Jersey from conducting his beauty salon business under the name "Caesars Palace."

The name "Caesars Palace" was originated and adopted in 1965 by Desert Palace, Inc., a wholly owned subsidiary of Caesars World, Inc. Desert Palace had hired Seymour Gould who created the distinctive "romanesque" lettering style used in the printing of "Caesars Palace." On August 6, 1966 Desert Palace began operation of Caesars Palace Resort Hotel in Las Vegas, Nevada and the name "Caesars Palace" has been used in advertising and promotion of the resort ever since.

In 1967 Mr. Crimi, then employed in a New Jersey salon owned by another individual, visited Las Vegas and, at the suggestion of one of his customers, stayed at Caesars Palace. Soon after his return to New Jersey, Mr. Crimi established Caesar's Palace, Inc. and opened his own beauty salon under a sign which read "Caesars Palace." Later he moved to a second shop in South Orange, New Jersey doing business under the name "Caesar's Palace Coiffures" and bearing his original "Caesars Palace" sign.

When Caesars World, Inc. attempted to reserve a corporate name in New Jersey in 1977, it learned of the existence of Crimi's Caesar's Palace, Inc. After Crimi refused to comply with Caesars World request to "cease and desist," the latter filed an action against Crimi's firm for service mark infringement, unfair competition, and service mark dilution. Caesars World sought only injunctive relief, attorneys fees and costs; all claims for damages or an equitable accounting were waived.

Deciding the case on the merits and without a jury, the District Court found that the Caesars Palace" mark is arbitrary, unique and nondescriptive, citing Caesars World, Inc. v. Caesar's Palace, Inc., 179 U.S.P.Q. 14

(D. Neb. 1973). This made it "unnecessary for [Caesars World] to provide that the service marks have acquired secondary meaning in the mind of the public." In this regard, the court noted both the mark's unique romanesque lettering style and its grammatical error, namely, the omission of an apostrophe indicating the possessive form of "Caesar."

In determining that the "likelihood of confusion" was sufficient to find service mark infringement, the court considered the "obvious" degree of similarity between the marks. While in its corporate name, the beauty salon added the possessive apostrophe in Caesar's, it did not do so on the sign outside the shop, said the court.

The court noted that the most important factor in this case was Crimi's intent in adopting his corporate name and in using the romanesque lettering style on his signs. Crimi was clearly aware of Caesars World's trade name and service marks because of his visit to the Las Vegas hotel in 1967. The court labeled "extremely doubtful" Crimi's claim that the romanesque lettering on his signs was solely the doing of the signmaker.

The court also found "Caesars Palace" to be a 'strong mark" and therefore entitled to a greater degree of protection than that which would be afforded to a "weak mark."

In rejecting Crimi's claim that he had the right to use his own name, the court stated that "No person has the right to use his name in bad faith in order to unfairly compete with a prior user of the name."

In considering the extent of competition between the parties, the court noted that both Caesars World, Inc. and defendant Caesar's Palace, Inc. operate beauty salons. Although Caesars World's salon is arguably an incidental service, the court concluded that since Caesars World has established that its hotel has guests from throughout the country and particularly from the northern New Jersey area, its market includes the smaller sphere of Crimi's beauty salon.

The court ordered Crimi's beauty salon to cease doing business as "Caesars Palace," to change its corporate name, and to destroy all of its signs bearing that name. In using a new trade name, Crimi was ordered to refrain from using the word "Palace." He is allowed to use the word "Caesar," but only if it is followed by the name "Crimi." Further, the word "Caesar" may not be printed in the romanesque lettering style. The court suggested that, for example, Caesar Crimi's Coiffures or Caesar Crimi's Beauty Shop could be used, but not Crimi's Palace, Caesar Crimi's Palace, nor Caesar's or Caesars. The court denied Caesars World's application for attorneys fees and costs on condition that Crimi's firm complies with the terms of the injunctive relief granted.

Caesars World, Inc. v. Caesar's Palace, 490 F.Supp. 818 (D.N.J. 1980) [ELR 2:13:5]

Municipality may acquire, own and operate a cable TV system, Washington State supreme court rules

In 1967 and 1968, the city of Issaquah, Washington passed ordinances issuing cable television franchises to two firms which are now wholly owned subsidiaries of Teleprompter Corporation. Both franchises had twenty-year terms, but both were granted on condition that the city had the right to terminate the franchises and acquire by purchase or condemnation the property of the franchises for the use of the city itself. On February 22, 1977, the city passed an ordinance exercising this right of termination and purchase. The city subsequently filed a declaratory judgment action requesting the court (1) to declare the ordinance a valid exercise of the city's powers, and (2) to clarify the rights and duties of the parties under the franchise ordinance. The Supreme Court of Washington has affirmed a trial court's ruling that the city could lawfully terminate the franchise agreements, acquire the cable television systems, and operate them within its municipal borders.

Teleprompter contended that the acquisition, ownership, and operation of a cable television system exceeds the powers of the city, which is governed by the state's optional municipal code. The optional municipal code addresses, among other things, the regulation of "Television Reception Improvement Districts." The court found that the regulatory scheme does not include the regulation of "cable television systems, commonly known and referred to as Cable TV systems or CATV," but rather the regulation of "television translator stations" which function primarily as reception enhancers and, unlike cable systems, have no subscribers. Thus, local legislation enabling a city to enter the cable television arena would not be inconsistent with the express provisions of the code, stated the court.

Teleprompter pointed out that the optional municipal code also provides that a city may operate a utility only as authorized by the code and the code does not authorize the municipal ownership and operation of cable television systems. But the court found that cable television is not a public utility, a conclusion supported by Teleprompter's own frequent assertions of such at trial. Therefore, said the court, "Cable television activity by a municipality does not exceed the broad powers granted by the optional municipal code."

It was agreed that the city had no express or implied power in 1967 to operate a cable system. Teleprompter contended that in the absence of such power, the city had no authority to reserve the right, in the original franchise ordinance, to acquire Teleprompter's property under the conditions specified. The court rejected this argument on the ground that the reservation of the right to acquire the property could have been for a number of other purposes. And since "Municipal Franchise ordinances are contracts and are binding upon the municipality and the franchise according to the terms therein," the court held that "the conditions are an enforceable part of the franchise agreements."

The original franchise ordinances reserved to the city the right to acquire the franchises "by purchase or condemnation." Teleprompter asserted that the city cannot "purchase" but must take by eminent domain, which requires, among other things, a showing of "public use." The term "condemnation," it was argued, must be given effect whenever the franchisee is unwilling to convey by sale, since otherwise no city would ever elect to proceed by the more onerous condemnation proceeding, rendering meaningless the word "condemnation." The court disagreed, stating that the ordinance was "also a contract ... freely entered into by Teleprompter's predecessors. A fair reading of the plain terms of the ordinance indicates the city reserved the right to choose between purchase and condemnation." In this regard, the court made repeated note of the fact that the original ordinances were drafted by Teleprompter's predecessors and were enacted verbatim in form and style by the city council.

Finally, Teleprompter urged that city ownership and operation of a cable system violates the First Amendment. The court questioned Teleprompter's standing to assert First Amendment rights in this situation. Assuming without deciding that it does have standing, the court considered that if Teleprompter's argument is grounded in "a fear that city ownership of a cable system will result in censorship," this at most "raises a potential infringement of First Amendment rights." To this, the court concluded, "We do not decide constitutional questions in hypothetical situations."

City of Issaquah v. Teleprompter Corporation, 611 P.2d 741 (Wash. 1980) [ELR 2:13:6]

Briefly Noted:

Copyright.

In a prosecution for criminal copyright infringement, it is unnecessary for the government to prove the absence of a "first sale" by the victim copyright owners, a Federal Court of Appeals has held in a decision affirming the conviction of Ilyas Muhammed for selling bootleg tapes.

United States v. Muhammed, CCH Copyright Law Reports, Para. 25,148 (6th Cir. 1980) [ELR 2:13:6]

Copyright.

The author of a copyrighted newspaper cartoon obtained a default judgment against a candidate for public office for including the cartoon in a political brochure without permission. The cartoonist sought $20,000 in statutory damages, urging the court to increase the maximum statutory amount of $10,000 because the infringement was willful. Finding no evidence of willful infringement and only minimal damages sustained by the cartoonist, the court awarded the statutory minimum of $250. The cartoonist sought $2,500 in attorneys fees, but based upon consideration of the results accomplished, the plaintiff's actual damages, the defendant's possible profit and the amount of time necessary to obtain the default judgment, the court found $850 to be a reasonable award.

Doehrer v. Caldwell, CCH Copyright Law Reports, Para. 25,150 (N.D.Ill. 1980) [ELR 2:13:7]

Cable Television.

Section 102 of New York's Real Property Tax Law, which is "aimed principally at expanding the definition of real property with respect to utility companies," does not authorize the taxation of cable television equipment and transmission lines as real property, the New York Court of Appeals has held. Cable TV equipment is not, as a matter of law, "telephone or telegraph" equipment within the meaning of the statute the court found. The court was satisfied that "there are significant differences, in both structure and function, between cable television equipment and telephone and telegraph equipment - the former, for example, allowing only one-way communication."

Manhattan Cable TV Services v. Freyberg, 427 N.Y.S.2d 933 (1980) [ELR 2:13:7]

Cable Television.

Limited partnership interests in cable television systems are "securities" under the federal securities laws, a Federal Court of Appeals has held. The court affirmed an order permanently enjoining the owner of Intertie and Xanadex, cable television companies, from further violations of the registration and antifraud provisions of the securities laws and requiring him to mail copies of the court's order to present and future business associates and investors.

Securities and Exchange Commission v. Murphy, 626 F.2d 633 (9th Cir. 1980) [ELR 2:13:7]

Sports.

In 1974 Wilt Chamberlain filed suit against the NBA and the Los Angeles Lakers for alleged antitrust violations with respect to the option clause contained in his 1971 contract with the Lakers and the NBA's "compensation rule." This rule required any other team with whom a player might sign after the expiration of his option to compensate the player's former team for their loss. In Robertson v. National Basketball Ass'n, 556 F.2d 682 (2d Cir 1977), the Court of Appeals affirmed the settlement of a class action against the NBA which concerned the same questions. Chamberlain had authorized the bringing of that class action on his behalf and had accepted part of the settlement proceeds. On this appeal, the court held that Chamberlain's separate antitrust action is barred under the doctrine of res judicata and he is therefore bound by the terms of the class action settlement.

Robertson v. National Basketball Association, 622 F.2d 34 (2d Cir. 1980) [ELR 2:13:7]

Sports.

A 55-year old public relations director for the New England Patriots brought suit against the club for breach of contract and violation of the Age Discrimination in Employment Act for allegedly failing to promote him and ultimately discharging him by reason of his age. The former director stated a claim under the age discrimination act, a Federal District Court in Massachusetts has held in an opinion denying the club's motion to dismiss. Because the former director's contract provided for arbitration of all disputes between the parties, the football club moved to stay judicial proceedings in favor of arbitration. The court denied that motion as to the statutory age discrimination claim since the contract did not contain an anti-discrimination provision upon which to base an arbitrator's authority. Even if the contract contained such a provision, the court suggested that arbitration of the age discrimination issue still might be precluded because the former director's contractual and statutory rights may be "separate, independent and complimentary." The court dismissed, however, the breach of contract claims, ruling that those should be pursued in arbitration.

Home v. New England Patriots Football Club, Inc., 489 F.Supp. 465 (D.Mass. 1980) [ELR 2:13:7]

Obscenity.

Section 314 of the California Penal Code, prohibiting "indecent exposure" in a public place, does not require a showing that the defendant acted for the purpose of his or her own sexual gratification, a California Court of Appeal has held. The court upheld the conviction of a waitress and dancer in a beer bar who performed naked on a raised platform and displayed her private parts to customers.

People v. Conway, 103 Cal.App.3d Supp.7 (1979) [ELR 2:13:7]

Obscenity.

Preliminary injunctions prohibiting the Los Angeles Police Department from enforcing, prior to a trial on the merits, city ordinances regulating nude or semi-nude dancing were properly issued, a California Court of Appeal has held. "It is now well settled," stated the court, "that where a possible criminal prosecution threatens the exercise of constitutional rights protected by the First Amendment, the general rule against noninterference with criminal prosecutions is not applicable but that equity may intervene to prevent a criminal prosecution which could inhibit the free exercise of that constitutional right."

Lee v. Davis, 106 Cal.App.3d 407 (1980) [ELR 2:13:7]

Previously Reported:

The United States Supreme Court has asked the U.S. Department of Justice for its views on the blanket licensing practices of ASCAP and BMI. The Court will consider those views in deciding whether to bear an appeal by CBS from the dismissal of its antitrust case against the two organizations. Earlier decisions in the case were reported at ELR 1:1:1 and 1:24:1.

The United States Supreme Court heard oral argument on November 3, 1980 in WNCN Listeners Guild v. FCC, previously reported at 1:21:3, a case in which the Court of Appeals held that the FCC should consider proposed format changes in connection with its review of radio station license transfers.

The United States Supreme Court has declined to hear Midland Television Company v. Midessa Telecasting Company, Inc., previously reportd at 2:7:3, a case which held that cable television operators are not immune from inquiries into possible antitrust violations.

The following cases have been published: Robertson v. National Basketball Association, 625 F.2d 407 (2:8:4); Little, Brown and Company v. Bourne, 493 F.Supp. 544 (2:10:4).

[ELR 2:13:8]

DEPARTMENTS

In the Law Reviews:

Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act by Glenn A. Clark, 55 Notre Dame Lawyer 729-750 (1980)

Defamation: Conflict in the Definition of "Public Figure", 10 Seton Hall Law Review 822-847 (1980)

Media Lament - The Rise and Fall of Involuntary Public Figures by Mark L. Rosen, 54 St. John's Law Review 487518 (1980)

Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication, 58 Texas Law Review 623-646 (1980)

Obscenity Law in Ohio by Richard H. Harris, 13 Akron Law Review 520-539 (1980)
[ELR 2:13:8]