RECENT CASES

Federal District Court refuses to enjoin distribution of Ken Follett's "Key to Rebecca" despite alleged similarities between it and non-fiction book

The courts have been called upon again to consider the extent to which authors may use facts reported in previously published copyrighted sources. This time the case involves Ken Follett's best-selling novel "The Key to Rebecca," a thriller that recounts the exploits of an Egyptian spy during World War II and the efforts of a Cairo-based British Army officer to capture him. Apparently, the novel was based upon or inspired by the accomplishments of a real life spy, because in affidavits filed in this recent suit, Follett acknowledges reading a number of historical sources including a book entitled "The Cat and the Mice" by Leonard Mosley.

Mosley is the plaintiff in the case. His book is about an Abwehr spy named John Eppler whose World War II activities have been written about in at least eight books, including Eppler's own autobiography. In his complaint, Mosley alleges that "The Key to Rebecca" is substantially similar to his own book. Details concerning these alleged similarities are not described in the court's decision, however, because the court concluded that Follett did not copy or paraphrase Mosley's "expression" - that is, his exact words. Though facts that were reported in Mosley's book may have been in Follett's story too - the court did not say - the appearance of those facts would not have constituted copyright infringement, the court held. "In work devoted to historical subjects, a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another," the court ruled. In so holding, the court quoted with approval from Hoehling v. Universal City Studios, 618 F.2d 972 (2d Cir. 1980) (ELR 1:24:4), which held that Universal's movie "The Hindenburg" did not infringe an earlier historical account of the airship disaster.

In an effort to avoid the limited protection that is afforded to historical works, Mosley contended that his book included a number of characters and episodes "of his own creation" which appeared in Follett's book along with historical material. The court did not rule upon whether this contention was true, however, because the court determined that when Mosley's book was published, he had held it out as a work of fact, and that several reputable and knowledgeable writers, including Eppler himself, have treated Mosley's book as factual. Accordingly, said the court, Follett actually and reasonably relied on his belief that Mosley's book was fact, not Fiction.

Mosley v. Follett, CCH Copyright Law Reports, Para. 25,202 (S.D.N.Y. 1980) [ELR 2:16:1]

Production company not required to allocate to one movie any portion of advance received for distribution rights to several films, even though financier of that one movie was thereby deprived of share of advance

The licensing of motion pictures in groups or packages has long caused disputes concerning the proper allocation of the proceeds among the films in the package. Though such disputes are usually between producers and their distributors, the courts of the State of New

York recently have been required to resolve a dispute between a financier and the production company whose film it financed.

The financier in question was National Film Finance Corporation. It financed the production of a movie entitled "The Darwin Adventure" by Palomar Pictures International, Inc. The agreement between National Film Finance and Palomar provided that they would equally divide gross film rentals earned by the film. Gross film rentals were defined to include "advance payments ... unless they are returnable."

Palomar arranged for Twentieth Century-Fox to distribute six films, one of which was "The Darwin Adventure," and received an advance of $2 million for the package. Other films in the package included "Sleuth" and "The Heartbreak Kid." Palomar's agreement with Fox provided that Fox was "entitled to recoup its advance from the first monies accruing to Producer hereunder from any of the Pictures in any part of the world, and no sums are payable to Producer hereunder until the advance is fully recouped."

"The Darwin Adventure" was not profitable, though other films in the package were; and Palomar did not allocate any portion of the $2 million advance to it. A suit by National Film Finance resulted.

The Appellate Division of the New York Supreme Court has held that Palomar was within its rights in refusing to allocate any portion of the advance to "The Darwin Adventure," because any portion of the advance that may have been attributable to that film was "returnable" by virtue of Fox's right to recoup the entire advance from other films in the package.

National Film Finance also contended that Palomar had breached a provision of their agreement imposing a duty on Palomar to consult with National concerning any distribution agreement for the Darwin movie. This contention was rejected by the court on the grounds that it was not material and in any event had not been violated. Such a conclusion had been confirmed, the court said, "by the unmistakable reality" that National had purposefully waited to see whether the film would be successful before it sought to enforce its consultation rights.

National Film Finance Corp. v. Palomar Pictures International, Inc., 431 N.Y.S.2d 27 (App.Div. 1980) [ELR 2:16:2]

European Court of Justice rules that Common Market Treaty does not bar copyright infringement action against Belgian cable television companies which retransmitted, without authorization, a copyrighted film broadcast on German television

In July of 1969, Cine Vog Films, S.A., a Belgian film distribution company, acquired from producer Les Films la Boetie, S.A., the exclusive right to publicly show the film "Le Boucher" ("The Butcher") in Belgium, both theatrically and by television broadcast. The term of the agreement was seven years, commencing in May of 1970 with the first showing of the film in Belgian theaters. The right to broadcast the film on Belgian television, however, could not be exercised until 40 months after the first theatrical presentations in Belgium. At a later date, La Boetie granted German broadcast rights to the film to a German television station. When "Le Boucher" was broadcast in Germany on January 5, 1971, three Belgian cable television companies, known as the Coditel companies, picked up the program at their reception sites in Belgium and transmitted the film by cable to their subscribers in Belgium.

The Tribunal de Premiere Instance (Court of First Instance), Brussels, decided in June of 1975 that the Coditel companies were liable for copyright infringement and ordered them to pay damages to Cine Vog. (Cine Vog's breach of contract action against Les Films la Boetie was ruled to be unfounded.)

On appeal, the Cour d Appel in Brussels ruled that the Coditel companies had made a communication to the public of the film that was "separate" from that of the German television station; that such a communication required the authorization of Cine Vog; and that the broadcast authorization given by the copyright owner to the German broadcaster did not include the right to relay the film over a Belgian cable network. The Court based its decision on the Berne Convention on the Protection of Literary and Artistic Works (revised Brussels version of 26 June 1948 approved by the Belgian Law of 26 June 1951).

The Court also considered the significance of Article 59 of the Treaty of Rome (which established the European Economic Community). That Article reads: "Restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended."

Since a decision in favor of Cine Vog might result in restricting the freedom of a transmitting station established in a country bordering on Belgium to provide its services to the country of the persons for whom the service was intended, the Court stayed its proceedings in order to seek a preliminary ruling from the European Court of Justice in Luxembourg on the interpretation of Article 59.

The Court of Justice basically has upheld the right of a copyright owner of a film to make territorial assignments of its copyright without violating the "freedom to provide services" provision of Article 59. The Court ruled that: "the provisions of the Treaty relating to the freedom to provide services do not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right."

A copyright owner and his assigns may require fees for each separate showing or performance of a film because this is "part of the essential function of copyright in this type of artistic or literary work," according to the Court. Article 59 was not intended to limit national legislation for the protection of intellectual property unless such legislation is a means of "arbitarary discrimination or disguised restriction on trade between Member States."

In a related decision (only a summary of which is available), the European Court of Justice, in response to an inquiry by the Liege Criminal Court, has stated that a Belgian law forbidding the transmission of advertising by cable companies is not contrary to the European Economic Community Treaty. The Belgian cable companies involved in this case transmit a number of television stations carrying advertising, and the Liege court will not determine whether those companies will be required to cease transmitting these channels or to black out the advertising.

Compagnie Generale and Cine Vog Films, Case 62/79, Court of Justice of the European Communities (March 18, 1980) [ELR 2:16:2]

Musicians Union must attempt to accommodate the religious beliefs of a musician whose religion forbids union membership

Joe Lutcher, a professional musician, refused to pay dues to Musicians Union Local 47 because, as a member of the Seventh Day Adventist Church, he was forbidden to belong to a union. In 1974, Lutcher contracted to perform some concerts for the Los Angeles Unified School District; but the contract was not renewed. In 1975, he served as business and personnel manager of the Watts Community Orchestra.

The Church requested permission of the Union for Lutcher to perform with union musicians and offered to pay any delinquent dues and to pay to charity an amount equal to Lutcher's current dues. When the Union rejected this proposal, Lurcher brought an action against both the Union and the School District alleging discrimination on the basis of religion in violation of Title VII of the Civil Rights Act of 1964 and Sections 1983 and 1985 of Title 42 of the U.S. Code. A Federal District Court decision granting summary judgment to the defendants has been reversed in part by a Federal Court of Appeals in California.

The Court of Appeals pointed out that the statute's requirement that "an employer ... reasonably accommodate to an employee's or prospective employee's religious observance or practice" applies to unions even in the absence of a collective bargaining agreement with an employer who is jointly charged with discrimination. The union did not challenge Lutcher's allegation that he was denied the opportunity to perform with union musicians in the symphony and did not show that it had made "a good faith effort to accommodate Lutcher's religious beliefs, or that it would be unable to do so without undue hardship." The District Court award of summary judgment for the union defendants on the Title VII claim in connection with Lutcher's employment with the Symphony therefore was reversed.

The School District's motive in failing to renew Lutcher's contract was found to involve a genuine issue of material fact requiring further proceedings in order to determine whether the School District had violated Section 1983 and Lutcher's First Amendment right to freedom of religion.

Lutcher v. Musicians Union Local 47, Case No. 782909 (9th Cir., Dec. 8, 1980) [ELR 2:16:3]

American athletes had no legal right to compel the United States Olympic Committee to send a team to the 1980 summer Olympics in Moscow

The 1980 summer Olympics - and the failure of the United States to participate - are now history. At the time President Carter decided that the United States would not send a team to Moscow, because of the Soviet Union's then-recent invasion of Afghanistan, the wisdom of a U.S. boycott was widely debated. Some 25 American athletes and one member of the Executive Board of the United States Olympic Committee took that debate to court by filing a lawsuit against the USOC in Federal District Court in Washington, D.C. The court's decision that they had no legal right to compel the USOC to send a team to the summer Olympics has just recently been published.

The athletes asserted both statutory and constitutional claims against the USOC. Their statutory claim was that the USOC violated the Amateur Sports Act of 1978 when it resolved not to send a team to Moscow. The court disagreed, however. It found that nothing in that act requires the USOC to send a team to the Olympics. The court also found that nothing in that act gives athletes the right to compete in the Olympics. Although the act does contain a section known as the "Athlete's Bill of Rights," that section was intended to protect athletes only from jurisdictional squabbles between amateur athletic organizations, such as the NCAA and AAU, which in the past have caused athletes to lose their eligibility. It was not intended, however, to apply to disputes such as this one between athletes and the USOC itself, the court held.

The athletes also claimed a constitutional right to participate in the Olympics. The court found, however, that the USOC's decision not to send a team was not state action, because the USOC is independent from the federal government. Furthermore, the court ruled that even if the decision of the USOC had been state action, there is no constitutional right to participate in athletics.

In its conclusion, the court specifically stated that it was not expressing any view on the merits of the decision not to send a team to Moscow. It did say, however, "We do express our understanding of the deep disappointment and frustrations felt by thousands of American athletes. In doing so, we also recognize that the responsibilities of citizenship often fall more heavily on some than on others. Some are called to military duty. Others never serve. Some return from military service unscathed. Others never return. These are the simple, although harsh, facts of life, and they are immutable."

DeFrantz v. United States Olympic Committee, 492 F.Supp. 1181 (D.D.C. 1980) [ELR 2:16:4]

Federal District Court refuses to dismiss suit by Donald Chuy against NFL Players Association alleging violation of union's duty of fair representation

For decades, virtually all professional sports litigation was between players on the one hand and teams or leagues on the other. In recent years, however, team owners have begun to sue their own leagues. And recently, one player sued his own union.

The player in question is Donald Chuy, formerly of the Philadelphia Eagles. The union in question is the National Football League Players Association. This recent case is really an outgrowth of a breach of contract action Chuy filed and won against the Eagles several years ago. That earlier case was triggered when Chuy injured his shoulder in a game in 1969, which was the first year of a three year contract he had signed with the Eagles only months before. Although the Eagles paid Chuy for the balance of the 1969 season, they refused to pay him for 1970 and 197 1. A jury, however, sided with Chuy and awarded him his salary for those two years (as well as $70,000 on an emotional distress claim). A Federal Court of Appeals affirmed the jury's verdict in 1979. (ELR 1:11:4)

In his current suit against the NFL Players Association, Chuy seeks to recover the attorneys' fees he incurred in his prior suit against the Eagles. Chuy alleges that he was required to incur such fees only because the Players Association violated the duty of fair representation that it owed to him, because it refused in bad faith to pursue a grievance on his behalf against the Eagles, thus requiring him to retain counsel personally.

The NFL Players Association made a motion for judgment on the pleadings, that is, for a dismissal without trial. In many cases, unions have a legal duty to prosecute grievances on behalf of their members, because collective bargaining agreements frequently provide that grievance arbitrations are the sole method by which employees may assert alleged violations by employers. In this case, however, the Eagles made no such argument; and Chuy was in fact able to successfully assert his claim against the Eagles himself, without Player Association help.

The court that considered the Player Association's motion was concerned with this aspect of the case, and noted that "the primary evil that the duty of fair representation was designed to prevent in this type of situation - namely, that an employee with a valid claim against his employer may be prevented from recovering due to his union's actions or inactions as exclusive enforcer of the contract - has not been realized."

Nevertheless, the court was influenced by the fact that Chuy was not seeking to recover his unpaid salary from the Players Association as well as from the Eagles, but rather was merely seeking to recover his attorneys' fees for the earlier suit. "Awards of this nature have been sustained," the court observed.

The court then held that because control of the NFL grievance procedure was vested exclusively in the Players Association at certain stages of the proceedings, it did have a duty to represent Chuy fairly. If the Players Association had processed his grievance, it is possible Chuy would have been spared the cost of suing the Eagles himself, the court found. And if the Players Association did refuse to prosecute his grievance in bad faith, it did violate its duty to him. Therefore, the Player Association's motion was denied.

Chuy v. National Football League Players Association, 495 F.Supp. 137 (E.D.Pa. 1980) [ELR 2:16:4]

Status of newspaper editors as "'supervisors" for collective bargaining unit purposes is reviewed by Federal Court of Appeals

The editorial page editor of the Walla Walla UnionBulletin should have been excluded from a bargaining unit composed of the newspaper's "news room" employees because he was a "managerial" employee who exercised independent discretion and formulated policy independent of his employer. A Federal Court of Appeals noted that the editor, in addition to writing editorials and editing other articles appearing on the editorial page, was responsible for selecting syndicated columns and editorial cartoons and participated in meetings where editorial topics were approved. These responsibilities, while not "supervisory," placed the editor in a "position of potential conflict of interest between the employer and the union' and he was properly classified in management rather than as an employee, according to the court. An order of the National Labor Relations Board (239 NLRB 24 (1976)) ruling that the UnionBulletin had violated sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain with the newly-certified union of employees therefore has been upheld in part and denied enforcement in part by the court.

The status of the newspaper's photo, sports and wire editors was also disputed. The Union-Bulletin contended that these editors also were supervisory personnel who were improperly included in the unit. The NLRA, while not including a definition of a managerial employee, does define a "supervisory" employee in 29 U.S.C. section 152(11) as follows: "The term `supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances ... if in connection with the foregoing the exercise of such authority ... requires the use of independent judgment."

The editors in question, although exercising some responsibility in connection with hiring and grievances, were not found to have exhibited the requisite independent decision making and thus, were properly included as employees in the bargaining unit.

The court upheld a Board finding that the Union-Bulletin had committed an unfair labor practice in refusing to bargain with the unit including the editors whose status was disputed, The court stated that an employer could not avoid its obligation to bargain with a certified unit by arguing that some employees were improperly included unless the contested employees affected the unit's majority status.

The court concluded that the Board's order requiring the Union-Bulletin to bargain with the employee unit, excluding the editorial page editor, was enforceable.

Walla Walla Union-Bulletin, Inc. v. National Labor Relations Board, Case No. 78-3656 (9th Cir., Oct. 29, 1980) [ELR 2:16:5]

U.S. Supreme Court agrees to hear appeal by Hustler magazine publisher Larry Flynt; issue to be decided is whether Cleveland is guilty of unconstitutional "selective prosecution"'

The United States Supreme Court has agreed to hear an appeal by Larry Flynt stemming from a criminal complaint filed against him by the City of Cleveland in 1976 in which it was alleged that the July and August 1976 issues of Hustler magazine were obscene. The legal issue to be decided in the case is not whether those magazines were obscene, but rather, whether the City of Cleveland was itself guilty of unconstitutional "selective prosecution."

Flynt contends that Cleveland is guilty of selective prosecution, because during a trial court hearing on Flynt's motion to dismiss the complaint, the Cleveland official in charge of the city's obscenity prosecutions conceded that Cleveland had never before prosecuted a magazine like Hustler, even though other similar magazines had been under investigation for eight months. The official also conceded that such an extended investigation was unusual. Furthermore, although the official characterized the Hustler prosecution as a "test case," when he was asked whether further prosecutions would follow if this case were successful, he answered, "I don't know."

On the basis of this testimony, the trial court dismissed the complaint. An Ohio appellate court reversed the dismissal, however, and reinstated the complaint against Flynt, and that decision was affirmed by the Ohio Supreme Court, with one justice dissenting.

Under the Equal Protection Clause of the United States Constitution, some selectivity in law enforcement is permissible, though intentional or purposeful discrimination is not.

Although the U.S. Supreme Court agreed to hear Flynt's appeal of the Ohio decision, it declined to consider his appeal from a decision of the Georgia Court of Appeals affirming his conviction on eleven counts of distributing obscene material in that state. The items in question there consisted of eight issues of Hustler magazine and three issues of Chic magazine. The Georgia case did not involve questions concerning selective prosecution. Instead, that case involved several evidence questions, including the following:

- Whether the trial court should have permitted Flynt to introduce the results of a public opinion survey regarding nudity and sex and whether adults should have an opportunity to obtain such materials. The Georgia court held that the survey results had been properly excluded.

- Whether the jury should have been transported around the city to see locations where sexually explicit materials were available. The Georgia court held that Flynt's request that this be done had been pro perly denied.

- And whether Flynt had properly sought to introduce into evidence allegedly comparable materials for the jury's consideration. The Georgia court held that he had not.

State of Ohio v. Flynt, 407 N.E.2d 15 (Ohio 1980); cert. granted by U.S. Sup. Ct.; Flynt v. State of Georgia, 264 S.E.2d 669 (Ga.App. 1980) [ELR 2:16:6]

Football stadium owners not liable to spectator who was injured by unforeseeable criminal assaults by other spectators

A football spectator brought suit against the owner, lessee and security personnel of Soldier Field, home of the Chicago Bears, for injuries sustained when he was thrown over a railing and onto the ground below by two other spectators.

The injured man claimed that the stadium personnel had been negligent in failing to warn him of the danger of violent attacks by unruly spectators and in not providing adequate security to guard against such attacks. The trial court dismissed the case without a trial, however, specifically finding that "there was no duty on the part of the defendants to foresee the criminal act."

An Illinois appellate court has affirmed on the grounds that there had been no indication of any notice to stadium personnel that would have alerted them to the likelihood of the criminal assault. Generally, there is no duty to protect one against the criminal attacks of third persons, said the court. A duty does not arise unless there are sufficient facts to put the defendants on notice that an intervening criminal act is likely to occur. Here, the assailants' attack was unannounced and occurred without warning. There were no disruptions or acts of violence at Soldier Field on the day of the incident, and no prior incidents of violence that would have given notice to the defendants of the probability of such assaults. Consequently, the court found that the defendants owed no duty to protect the spectator from this type of harm under the circumstances of this case.

Gill v. Chicago Park District, 407 N.E.2d 671 (Ill.App. 1980) [ELR 2:16:6]

Briefly Noted:

Broadcasting.

When the prospective buyer of a television station failed to obtain FCC approval of the transfer of the station license within the contractually-stipulated one year period, the television station owners terminated the contract for the sale of the station. The Supreme Court of Wyoming has upheld a lower court decision denying the buyer's action for specific performance of the contract and awarding summary judgment to the station owners, holding that the owners had the right to terminate the sales agreement despite the buyer's contention that FCC approval would have been received within one month.

Strang Telecasting, Inc. v. Ernst, 610 P.2d 1011 (Wyo. 1980) [ELR 2:16:6]

First Amendment.

School officials who banned the distribution of a non-school sponsored publication on school property did not violate the First Amendment rights of the student publishers. The students had not been required to obtain prepublication or predistribution approval of the contents of the publication. And one of the reasons given by officials for halting distribution was the appearance, in violation of a County Publication Guideline, of an advertisement for a store selling drug paraphernalia. A Federal Court of Appeals in Maryland, upholding a Fed eral District Court decision on behalf of the defendant school officials, has held that the guidelines prohibiting the distribution of material which "encourages actions which endanger the health and safety of students" was not impermissibly vague and did not prohibit constitutionally protected conduct of the students. The Court of Appeals also noted that the fact that the advertisement was purely commercial was an additional reason for upholding the prohibition against distributing the publication on school property because commercial speech is not entitled to the same degree of protection as other types of speech.

Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980) [ELR 2:16:7]

Contracts and Unfair Competition.

A Federal District Court in New York City has held that a distributor of guitar instruction packages (consisting of books and records) breached its contract with the creator of the package when the distributor commenced selling the package without the creator's authorization. The contract in question was one by which the creator reacquired from the distributor the exclusive distribution rights that had formerly been given to the distributor. The creator had reacquired distribution rights from the distributor, because the creator felt he could do a better distribution job himself. Illness prevented him from doing so however, and the creator also failed to pay royalties due to his former distributor pursuant to the reacquisition agreement. Nevertheless, the court held that the dis- tributor did not have the right to purchase the packages directly from the record pressing company used by the creator, and did not have the right to sell the packages itself. In doing so, the court held that the distributor breached its contract with the creator and infringed his copyright and trademark. The creator's unfair competition claim against the record pressing company was dismissed, however. It had obtained written assurances from the distributor that the distributor was authorized to purchase the packages itself. Furthermore, the record pressing company had been unable to contact the creator to collect more than $10,000 in record pressing charges owed by the creator; and therefore, the pressing company had not been derelict in failing to contact him to verify the distributor's authority to buy direct.

Mort Wolson Associates, Inc. v. Blaine/Worthington Enterprises, Inc., CCH Copyright Law Reports, Para. 25,197 (S.D.N.Y. 1980) [ELR 2:16:7]

Trespass, Defamation and Civil Rights.

A television newscaster may have been guilty of trespassing when he went on to private property to film the police investigation of a reported shooting incident, a Wisconsin appellate court has held. However, the newscater had not violated the property owner's civil rights when the newscaster filmed a search of the property by law enforcement officials, because the newscaster had not been acting under color of law and because the search itself had not violated an of the property owner's rights. Although the newscaster had technically defamed the property owner by reporting that he had been charged with reckless use of a gun, because in fact he had not been, the property owner had not shown any actual injury from the defamation itself, the court held; and therefore the defamation and civil rights claims had been properly dismissed. The case was remanded to the trial court for trial on the issue of the damages caused by the trespass.

Prahl v. Brosamle, 295 N.W.2d 768 (Wisc.App. 1980) [ELR 2:16:7]

Cable Television.

The Florida Public Service Commission does not have authority to regulate pole attachment agreements between utilities and cable tele vision companies in that state, the Florida Supreme Court has held. The Florida Public Service Commission issued an order certifying that it did have such authority, but the order was challenged by Teleprompter Corporation. The Florida Supreme Court has held that the Public Service Commission of that state does not have general authority to regulate "public utilities," and that each time a public service has been made subject to the Commission's regulatory power, it has been done pursuant to legislative action. Because television and cable television were not even in existence when the Commission was first created, the court held that the legislature could not have intended the Commission to regulate cable television, and no specific authorization has been enacted giving the Commission power over cable television.

Teleprompter Corp. v. Hawkins, 384 So.2d 648 (Fla. 1980) [ELR 2:16:7]

Trademark.

Information Clearing House, Inc. owns the registered trademarks "FIND," used in connection with its business of providing computerized retrieval services on a subscription basis, and "FINDOUT," used for a newsletter relating to the furnishing of business information and research. The firm sought to enjoin the publication of Find Magazine, which is primarily distributed to members of the Jewish community and having an editorial mix designed to urge subscribers to "explore their roots." A Federal District Court in New York found no support for the claim that a substantial number of ordinary and prudent purchasers are likely to be misled or confused as to the source of the different products. Of particular importance in this case was the court's finding that there had been no evidence of any effort or contemplation on the part of Information Clearing House to expand into the magazine field. Although trademark holders can expect a reasonable right of expansion into closely related areas, said the court, "there is no corollary right to preclusive use of the mark against non-competitors operating in markets far removed from those of the trademark holder."

Information Clearing House v. Find Magazine, 492 F.Supp. 147 (S.D.N.Y. 1980) [ELR 2:16:7]

Tax.

Admission charges to Ice Capades shows are exempt from the New York State sales tax, the Appellate Division of the New York Supreme Court has held. New York's sales tax statute specifically exempts "dramatic or musical performances." Ice Capades and the New York State Department of Taxation and Finance disagreed about whether Ice Capades' shows were such performances. The court, relying on affidavits Filed by the Ice Capades which stressed the coordination of the movement of the skaters with musical scores, concluded that Ice Capades shows - as currently performed - are musical performances.

Metromedia, Inc. v. State Tax Commission, 430 N.Y.S.2d 698 (App.Div. 1980) [ELR 2:16:8]

Previously Reported:

The orders of the Copyright Royalty Tribunal staying distribution of 1978 cable royalties, and then rescinding that stay, previously reported in ELR 2:14:2, have been published at 45 Federal Register 71641 (October 29, 1980) and 45 Federal Register 79867 (December 2, 1980).

For reasons which have not been explained, the decision of the Fifth Circuit Court of Appeals in Triangle Publications v. Knight-Ridder Newspapers (2:11:4) which was published at 621 F.2d 1318 has been republished without change at 626 F.2d 1171.

[ELR 2:16:8]

NEW LEGISLATION AND REGULATIONS

FCC announces elimination of cable television rules concerning distant signal carriage and syndicated program exclusivity

The FCC has announced the elimination of its cable television rules regarding distant signal carriage and syndicated program exclusivity (ELR 1:3:5). The distant signal carriage rule allowed a cable system to carry only a certain number of signals based on the size of the market, the number of cable subscribers and the number of local television stations. The syndicated program exclusivity rule barred the carriage of programs also aired on local television stations, even if such programs were not aired by the cable system at the same time.

After a four year study, the FCC has concluded that the cable rules "artificially, restricted competition by denying consumers services that they [were] willing to pay for" and had the effect of restricting diversity in television programming by delaying new cable service in many communities. In a lengthy report explaining its change of regulatory policy, the FCC concluded that cable television "does not effect materially the quantity of local programming broadcast by local television stations" and that there was no evidence indicating that the elimination of the rules would have an adverse impact on the quantity or quality of television programming.

Cable systems still will be required to carry local signals, to comply with the sports exclusivity rule and to delete from distant signals any network programming that is simultaneously broadcast by a local station carried on the cable system.

The FCC declined to adopt a retransmission consent proposal which would have permitted a cable television station to carry distant signals of nonnetwork programs only with the consent of the originating station. Rather, the Commission determined that the relationship among cable systems, television broadcasters and the creators or owners of the programs broadcast should be regulated only by the Copyright Revision Act of 1976 which requires cable operators to pay a compulsory license fee to the Register of Copyrights for the right to carry distant signals.

The effective date of the Commission's decision has been stayed by a Federal Court of Appeals in New York pending appeals.

Cable Television Syndicated Program Exclusivity Rules, 45 Federal Register 60186 (Sept. 11, 1980) [ELR 2:16:3]

DEPARTMENTS

In the Law Reviews:

The Sale, Rental, and Reproduction of Motion Picture Videocassettes: Piracy or Privilege? by Joseph J. Beard, 15 New England Law Review 435-484 (1980)

Copyright and the Fine Artist by Donald M. Millinger, 48 George Washington Law Review 354-376 (1980)
[ELR 2:16:8]