RECENT CASES

Federal Court of Appeals rules that subscription television transmissions are not broadcasts for the general public and enjoins unauthorized sale of decoders.

The full Federal Court of Appeals in Michigan has ruled that Chartwell Communications Group and National Subscription Television are entitled to a preliminary injunction barring the unauthorized manufacture and sale of television signal decoders. This decision reverses a Federal District Court decision which had dismissed Chartwell's complaint on the ground that Section 605 of the Federal Communications Act does not imply a private cause of action (ELR 2:12:5; 2:9:4).

Section 605, which prohibits the unauthorized reception of television communications, does not apply to broadcasts for the use of the general public. While suggesting that the intent of the program transmitter to reach as many members of the general public as may be interested in the particular program would determine whether broadcast services were being provided, the FCC has not ruled specifically on the question of whether subscription TV is broadcasting for the purpose of Section 605.

In two cases cited by the defendants, subscription tv programs were found to be broadcasting because the programs were intended to appeal to a mass audience and were available to anyone wishing to pay the fee. (Ortho-O-Vison, Inc., v. Home Box Office, 474 F.Supp. 672 (S.D.N.Y. 1979) (ELR 1:11:6); National Subscription Television v. S & H TV, No. CV 80-829 LTL (C.D.Cal., Aug. 4,1980) (ELR 2:9:4).

However, the Court of Appeals observed that "there is an important distinction between making a service available to the general public and intending a program for the use of the general public ... The dual nature of STV is that while it may be available to the general public, it is intended for the exclusive use of paying subscribers. Availability and use are separate concepts."

According to the court, "the fact that subscription tv is transmitted in such a manner that the signal is meaningless without the use of special equipment negates a finding that STV is intended for the use of the general public." Thus, Chartwell's programming would be protected by Section 605. And the unauthorized sale of decoders violates the Act because such sales assist third parties in receiving unauthorized communications.

The court agreed that Chartwell had a private right of action under Section 605 since such an action would be consistent with the purpose of protecting television

communications and also was necessary to obtain adequate enforcement of the Act.

Pending further proceedings on remand, the Court of Appeals ordered that a preliminary injunction remain in effect, because there was a substantial likelihood that Chartwell would prevail on the merits of its claim and Chartwell would undergo irreparable harm if decoders were sold prior to the resolution of the action since each buyer of a decoder would be lost as a potential subscriber.

Chartwell Communications Group v. Westbrook, Case No. 80-1566 (6th Cir., Dec. 29, 1980) [ELR 2:19:1]

Computer chess program published without copyright notice entered public domain thereby frustrating infringement action by the program's developer

A computer chess program stored on a silicon memory chip and integrated into a CompuChess game was distributed and sold to the general public in 1977 without restriction and without bearing a copyright notice. A federal appeals court has upheld a district court's dismissal of a copyright infringement action by Data Cash Systems, the seller of the CompuChess game, against another chess game manufacturer who utilized an identical silicon chip embodying Data Cash's computer chess program. The court held that the program entered the public domain when it was published without a copyright notice.

The applicable law in this case was determined to be the Copyright Act of 1909, because the court found that the publication of the program occurred prior to the effective date of the new copyright law, January 1, 1978. In 1977, Data Cash sold over 2,500 CompuChess units

to the general public. Under the 1909 Act, publication without notice resulted in forfeiture of copyright. Nowhere on the silicon chips, the game board, the packaging, or the accompanying instructions was there a copyright notice. The printed readout copies generated by Data Cash were imprinted with a copyright notice, but these were on internal documents and did not inform the public of Data Cash's claim, said the court.

Data Cash contended that the public distribution of CompuChess was, at most, a limited publication, which would divest the proprietor of copyright even if made without notice. The court determined that the game was sold without restriction both as to persons and purpose and therefore it could not be called a limited publication.

Data Cash also claimed that it did not know it was possible to read the program, as defendants did, if one had only the silicon chip. The court responded that dedication is a question of law, not the intent of the proprietor.

The court also rejected Data Cash's argument that the absence of notice was the result of its "mistake" and thereby excused under section 21 of the 1909 Act. The court stated that "Even if we were to agree with [Data Cash] that the erroneous belief that the program could not be copied directly from the [silicon chip] was the sort of 'mistake' contemplated by Section 21, we cannot agree that the omission of notice was from a 'particular copy or copies' of the program." Section 21 does not prevent forfeiture where, as here, notice was omitted from all copies, said the court.

Data Cash might have provided a notice in case its assumption as to the technical limitations of others proved incorrect, the court noted. "It does not seem to be denied that a copyright notice could have been placed in the [program] so that one who read out the game could not miss seeing it, and we understand this is now done.

Of course a notice on the game board or the printed instructions would have presented no difficulty."

Data Cash Systems, Inc. v. JS&A Group, Inc., 628 F.2d 1038 (7th Cir. 1980) [ELR 2:19:2]

Tax Court denies deduction to television news announcer for clothes, makeup and haircuts

John B. Hynes, Jr. was a staff announcer and television news writer for WCVB-TV in Needham, Massachusetts. In the years 1973 through 1976, Hynes regularly appeared five days a week on the 6:00 and 11:00 p.m. newscasts for his station. He wore regular business clothing, but was limited to those colors and patterns which televise well. He frequently changed his shirt between the 6:00 and 11:00 telecast. He had his hair cut

every four weeks. Hynes was not reimbursed by the station for the cost of his wardrobe, dry cleaning, laundry, haircuts or makeup during the years involved.

Hynes deducted as a business expense amounts for his wardrobe, laundry, dry cleaning, haircuts and makeup. The IRS disallowed the deductions on the grounds that they were not ordinary and necessary business expenses.

The Tax Court, in analyzing the deductions for wardrobe, laundry and other expenses, noted that Internal Revenue Code section 162 authorizes a deduction for all ordinary and necessary expenditures in carrying on a trade or business. It also noted that Internal Revenue Code section 262 specifically denies deductions for personal, living or family expenses. The court also reiterated the well known fact that the burden of proof is on the taxpayer.

In considering whether a deduction was proper for a business wardrobe, the court cited a number of cases which generally have held those expenses to be non-deductible personal expenses. However, some cases have allowed a deduction for clothing which was useful only in the business environment. The court stated that three tests must be met for clothing to be deductible. These tests are: (1) the clothing is required or essential, (2) the clothing is not suitable for general or personal wear, and (3) the clothing is not, in fact, worn for general or personal wear. Although the court noted that Hynes was restricted to certain patterns or colors in his choice of clothing, the clothing was suitable for use in most professional capacities. The fact that Hynes chose not to wear such suits outside of his business did not make those clothes not suitable for his personal or private wear. Furthermore, Hynes could not establish that he had incurred excessive expenses in maintaining his

wardrobe. The court was unimpressed that he changed his shirt between the 6:00 and 11:00 broadcasts and noted that other professional people work long hours and change their shirts before going out in the evening.

The court also disallowed Hynes' deductions for haircuts and makeup, citing its earlier decision in Drake v. Commissioner, 52 TC 842 (1969). In that case, the court disallowed the expenses of haircuts to an enlisted man in the United States Army even though the Army may have required such grooming. Hynes presented the court with no evidence establishing what portion of the amounts deducted for haircuts and makeup were specifically allocable to the makeup, and, hence, the court disallowed the entire amount since the burden of proof was on Hynes.

Hynes v. Commissioner, 80(10) CCH Standard Federal Tax Reports, Para. 7932 [ELR 2:19:2]

Newspaper publisher William Loeb loses libel lawsuits filed by him against two other publications

William Loeb, the controversial publisher of the Manchester (New Hampshire) Union Leader, has lost two separate libel actions, one against the publishers of the Boston Globe and the other against the publisher of New Times magazine and two of its reporters.

His pleadings identified him as a "publisher who regularly takes strong public stands on controversial issues and who invites expression of contrary opinion." Both courts thus applied the requirement that Loeb show "actual malice," that is, knowing or reckless disregard for the truth. Both courts also held that the scope of actionable libel is limited to statements of fact, not opinion.

In his suit against the Boston Globe, Loeb alleged that a number of excerpts of Globe columns, editorials, and political cartoons amount to actionable libel against him. For example, he complained about a statement describing the Union Leader as "probably the worst newspaper in America" and about a statement that the publisher of the Union Leader "edits his newspaper like a 19th century yellow journal." The court quickly dismissed these statements as editorial opinions which are privileged. Other statements, such as the assertions that Loeb "never backed a Presidential winner," that "he runs a paper by paranoids for paranoids" and that he had once been fined $3,000,000 in a legal action, might arguably be considered statements of fact, conceded the court. The court found, however, that at least the first two statements were obviously used in a loose, figurative sense and cannot be construed as representations of fact. "It is impossible that the Globe's 'paranoid' and 'never

backed a presidential winner' commentaries would be taken seriously by readers as assertions of fact," stated the court. As to the report that Loeb had been fined $3,000,000 in an antitrust action, the court found Loeb's bare assertion of ill will on the part of the Globe to be insufficient evidence of actual malice.

The subject to Loeb's suit against New Times was an article entitled "Citizen Loeb," a profile of Loeb containing anecdotes and commentary by the authors and others who are uniformly critical of Loeb's personal characteristics, behavior, business practices, and political views. Loeb took exception to the innuendo in the author's description of what were essentially accurate facts.

In one instance, the article describes the exterior of Loeb's home and the security devices he employs to protect it. Loeb claims that the innuendos implicit in that description are that he is "a recluse in a fortress" whose "house pets are attack dogs" and that "Loeb lives

abnormally in fear." The article also reported that Loeb's legal career "abruptly ended when he failed to make it through Harvard law school." Loeb equated this statement with the representation that he was forced to leave the school because of academic barriers when, in fact, he left voluntarily.

The court regarded these and other assertions of innuendo as "strange, unreasonable and unjustified." "The statements that Loeb 'failed to make it through Harvard law school' is literally true, since he did not graduate," stated the court. "The phrase is somewhat ambiguous since the reason Loeb did not finish law school is not given. Nevertheless, the ambiguity cannot be stretched to convey a meaning not expressed," said the court.

In addition the court found no evidence that the defendants failed to carry out their duties as reporters in a conscientious and professional manner. Loeb himself was interviewed by the reporters, as were a substantial

number of other individuals, noted the court. Read in the context of the entire article, none of the statements is "so inherently improbable that only a reckless man would have put them in circulation," said the court. The court added that the minor errors allegedly contained in the article were not sufficient to warrant the finding of actual malice.

Two other libel suits against the Boston Globe, one by three of the Union Leader's eight editors and the other by twenty-four employees of the paper, were filed along with Loeb's case concerning some of the same allegedly libelous statements involved in Loeb's suit. The court dismissed both of these cases on the ground that, under the principles of "group libel" law, none of the editors or employees were able to show any "special application" of the alleged defamatory matter to themselves.

Loeb v. Boston Globe Newspaper Co., 489 F.Supp. 481 (D.Mass. 1980); Loeb v. New Times Communication Corp., 497 F.Supp. 85 (S.D.N.Y. 1980) [ELR 2:19:3]

New York conviction for record piracy upheld in part even though pirated records were manufactured in New Jersey

In what was purportedly the first prosecution of its kind under New York state law, Paul Winley was convicted by a jury of 22 counts of "[causing] ... the manufacture of 'unauthorized recording of sound' and 'advertisement and sale of unauthorized recording of sound.'" In response to a post-trial motion, the court dismissed twelve of the counts but upheld the other ten.

In March of 1979, James Rodriguez, an undercover detective for the New York Police Department, acting on

information received from the Recording Industry Association of America (RIAA), arranged to purchase 4,000 records at $1.50 a piece from Winley. As part of the transaction, Rodriguez met Winley in New York County and made a downpayment of $2,000.00, which Winley said was required by the pressing company before it would manufacture the records Rodriguez purportedly sought to purchase. After the downpayment was made, Winley made arrangements with a New Jersey-based pressing company and drove to New Jersey to pick up the records. Upon his return to New York, Winley met Rodriguez in Manhattan and delivered the records, at which time he was arrested.

The court had to contend with several factual as well as legal issues. In addition to the question of jurisdiction (brought about because the pirated records were manufactured in New Jersey), the court had to distinguish among several different recordings and the record

companies claiming ownership to them. Altogether, eleven out of twenty or more recordings contained in two albums were subjects of the indictment. CBS Records claimed ownership to three and Nashboro Recording Company claimed ownership to six Mahalia Jackson recordings. Savoy Records claimed ownership to two Reverend James Cleveland recordings.

With respect to the jurisdiction issue, the question, as the court saw it, was whether or not "conduct occurred within [New York] sufficient to establish an element of [the] offense" of illegally manufacturing records under New York law. The place the crime was consummated, according to the court, would not be "an impediment to prosecution." Focusing on the downpayment made by Rodriguez, the court found that "the jury could have properly concluded beyond a reasonable doubt, that but for this solicitation and receipt of funds, the records would not have been pressed," and the jury could have

concluded that "by securing the funds in New York from Detective Rodriguez for delivery to New Jersey, Winley engaged in conduct in [New York] sufficient to establish an element of [the] offense'." Accordingly, the court denied Winley's motion to set aside the verdict as to the manufacturing counts because of lack of jurisdiction.

In addition to the jurisdictional challenge, Winley also sought to set aside the verdict on several other grounds, one of which was entrapment. The court, however, did not look favorably on that claim due to "Winley's past history of pressing and selling these very recordings," and thus it denied Winley's motion to set aside the verdict on those grounds. However, the state's failure in some instances to prove that the pirated records were manufactured for profit or sold "without the consent of the owner" did result in the court's dismissal of twelve of the counts against Winley.

In reviewing the ownership requirement of the state statute, the court first noted that "all of the performances misappropriated by Winley were recorded before 1971 at which time ownership was determined by common law and not by copyright statute." [See, Goldstein v. California, 412 U.S. 546.] As a result, federal preemption was not an issue in the case. The court then went on to note that although, "ordinarily, it may be presumed that an artist who creates a performance is the owner [thereon ... usually ..., as appears to be the case in many of the songs with which we are dealing, those rights are determined by contract between the artist and the recording company." With this in mind, the court went on to examine the various contractual relationships between the artists and record companies concerned.

With respect to Reverend Cleveland's recordings, the court agreed with the jury's finding that Savoy Records was the owner by virtue of the testimony of a witness

present at Reverend Cleveland's signing of the "documents granting Savoy the exclusive right in perpetuity to reproduce those recordings." With respect to Nashboro Record Company's claim of ownership in the six Mahalia Jackson recordings, however, the court concluded that the state had not proven "beyond a reasonable doubt ... that Nashboro owned 'the original fixation of sounds embodied in the master phonograph record,'" because "the documents under which Nashboro claimed title appear merely to be agreements permitting Nashboro to purchase records in each year and distribute them throughout the United States," and because, in attempting to trace title in the records to the several grantors preceding Nashboro, "the owner was never adequately identified." Accordingly, the court dismissed the counts based on Nashboro's claim.

Finally, in looking to CBS's claim of ownership in the other Mahalia Jackson recordings, the court found that

the jury properly concluded that the agreements between Ms. Jackson and CBS "were sufficient to establish CBS's ownership of records beyond a reasonable doubt." The validity of the agreements was based on the authenticity of the signatures, which was established, in the case of the signature of the CBS official, by admission into evidence of the CBS contract file under the "business records rule" and, in Ms. Jackson's case, by the jury's inference of authenticity based on the circumstances surrounding the dealings between the parties. These circumstances included continuous performance under the agreements by both of the parties. Having established CBS's ownership interest in the records, the court upheld the first six counts of the indictment against Winley.

People v. Winley, 432 N.Y.S.2d 429 (Sup. 1980) [ELR 2:19:4]

States may constitutionally allow media coverage of courtroom proceedings, U.S. Supreme Court decides

An order of the Florida Supreme Court permitting electronic media and still photographers to cover state court judicial proceedings for public broadcast, even over the objection of the accused, has been upheld by the United States Supreme Court as a constitutional exercise by the Florida court of its supervisory authority. The experimental program was upheld by the Florida Supreme Court in Petition of the Post-Newsweek Stations, Fla., Inc., 347 So.2d 402 (Fla. 1979) (ELR 1: 10:6).

Noel Chandler and Robert Granger, two Miami Beach policemen who were charged with conspiracy to commit burglary and grand larceny, among other offenses, contended that in Estes v. Texas, 381 U.S. 532 (1964), the

United States Supreme Court had announced a per se constitutional rule that the televising of criminal trials was inherently a denial of due process. In Chandler, Chief Justice Burger rejected this reading of Estes and also declined to promulgate such a per se rule, stating that [T]he risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.

Safeguards against prejudice were included in the Florida program, because the defendant, at a pretrial hearing, could present objections to broadcast coverage so that the trial judge might minimize or eliminate any risks of prejudice. And objections by the accused to coverage during trial also were to be considered. However, Chandler and Granger had raised only "generalized allegations of prejudice" and had not shown that broadcast

coverage of their case "compromised the ability of the jury to judge fairly" or had an "adverse impact on the trial participants sufficient to constitute a denial of due process."

Justice Stewart, concurred in the result but would have "flatly overruled" the Estes decision, which he believed indeed had announced a per se rule. Justice White, also concurring, agreed that the Estes decision should have been specifically overruled.

Chandler v. Florida, Case No. 79-1260, U.S.Sup.Ct. (Jan. 26, 1981) [ELR 2:19:5]

Dismissal of libel action against Time, NBC and CBS for publications linking prominent jeweler to "mob boss" is affirmed because publications could be innocently construed

Harry Levinson, a jeweler of world-wide prominence though not a public figure, was linked to "mob boss" Anthony "Big Tuna" Accardo in an article appearing in Time magazine and in numerous television broadcasts aired by NBC and CBS. The publications also characterized Levinson as having displayed "uncooperative" behavior toward police officers who investigated a burglary of his jewelry store. Levinson brought a libel action in Illinois against Time, Inc., NBC, CBS, and three individuals, alleging that his "reputation, both as a citizen and as a jeweler, was thereby injured as was his standing in the community and in his business activities."

Levinson contended that because the publications falsely and adversely reflected on his abilities in his business, they constituted libel per se and he was not, therefore, required to allege or prove special damages.

The trial court apparently disagreed, dismissed Levinson's second amended complaint for legal insufficiency, and entered judgment for the defendants. Levinson appealed. Following the "rule of innocent construction," long adhered to by the Illinois courts, the appellate court has affirmed the judgment, concluding that the publications could be construed innocently as not reflecting adversely on Levinson's abilities in his business and were therefore not actionable as libel per se.

The appellate court initially noted that to be libelous per se, a publication must contain a false statement that imputes to the plaintiff "the commission of a crime," "infection with a loathsome disease," or "unfitness or want of integrity in performing the duties of an office or employment." The fourth and pertinent category, the court noted, comprises false statements that prejudice "a particular party in his profession or trade," or, similarly,

"adversely reflect on a particular party's abilities in his business."

Quoting from its earlier decision in Whitby v. Associates Discount Corp., 207 N.E.2d 482, 484 (Ill.App. 1965), the court then explained the innocent construction rule, which the Illinois courts invariably follow in determining whether the challenged language falls within any of the recognized categories of libel per se:

"If the false words, by their plain, ordinary meaning, and without resort to innuendo, impute anything within the first four offensive categories, the [libel] is one per se requiring no allegation or proof of special damages. If, however, a construction of the words is necessary to demonstrate injurious meaning, the [libel] cannot be per se, for a defamation can never be per se if the words themselves are capable of innocent construction."

The court further illustrated the innocent construction rule by quoting from John v. Tribune Co., 181 N.E.2d

105, 108 (1962), cert. denied, 371 U.S. 877, wherein the Illinois Supreme Court wrote: "That rule holds that the article is to 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."

Invoking the rule, the court rejected Levinson's arguments as "based upon selection of isolated words or phrases." Instead, the court considered the "natural and obvious meaning" of the statements as a whole, "stripped of all innuendo," and concluded that the language could be innocently construed as not adversely reflecting on Levinson's abilities in his business. Characterizing Levinson as an acquaintance or friend of a "mob boss" or noting that he may have "complained" to or "asked for help" from a "mob boss" does not, said the court, necessarily defame him, for "[friendship] and

acquaintance in such a situation may well exist without mutual culpability." As to reports of Levinson's "uncooperative" behavior toward the police, the court observed that "[c]ommon sense and understanding tell us that a great number of people may be uncooperative with the police for a great variety of innocent reasons."

Finally, Levinson contended that the jury alone should determine whether the challenged language is in fact susceptible of an innocent construction. The court swiftly rejected this contention and explained that courts must make a preliminary legal determination as to whether the language can be innocently construed. If a court determines. as a matter of law. that the language cannot be so construed, only then will the jury be called upon to consider whether it was in fact understood to be defamatory.

Levinson v. Time, Inc., 411 N.E.2d 1118 (Ill.App. 1980) [ELR 2:19:5]

Briefly Noted:

Copyright.

In a successful copyright infringement suit against James Brown, S & B Publishing Company and Polydor, Inc., the winning parties' lawyers were entitled to $3,000 in attorneys' fees calculated at a rate of only $35 to $50 per hour, a Federal District Court in Missouri has held. The court found unreasonable the lawyers' claims for 426.5 hours of time at the rate of $75 per hour. Counsel exhibited only limited knowledge in the area of copyright law, said the court, which contributed to

unnecessary duplication of effort and preparation for the relatively simple case which lasted a total of two days.

Moorish Vanguard Concert v. Brown, 498 F.Supp. 830 (E.D.Pa. 1980) [ELR 2:19:7]

Constitutional Law.

A Federal District Court in Wisconsin has refused to restrain a state criminal prosecution of a producer for attempting to present nude performances of sequences from the play "Equus" and the musical "Hair" in a Milwaukee performing arts center. The producer filed an action in Federal Court alleging denial of its First Amendments rights. Following the rule of Younger v. Harris, 401 U.S. 37 (1971), the court stated that "No good reason appears why the producer, if prosecuted,

will not be able to protect [its] rights under the federal Constitution in the state court proceedings."

Ziegman Productions v. City of Milwaukee, 496 F.Supp. 965 (E.D.Wisc. 1980) [ELR 2:19:7]

Defamation.

A town supervisor is not absolutely immune from liability for allegedly defamatory statements made during the course of an interview with a reporter from a local radio station, the Court of Appeals of New York has held. The court acknowledged that a town supervisor is absolutely immune from liability for remarks related to his responsibilities and made during the course of the performance of his duties. Here, the allegedly defamatory statements concerned the expenditure of public

funds and the possibility that a fraud had been committed upon the town by a town employee, However, the remarks were made to a radio station reporter during an interview that was not a part of the performance of the supervisor's public responsibilities. Therefore, the supervisor had a qualified privilege only, the court held in an opinion remanding the case to the trial court for further proceedings.

Clark v. McGee, 427 N.Y.S.2d 740 (1980) [ELR 2:19:7]

First Amendment.

The owners of several New York State establishments featuring topless dancing have obtained a summary judgment and injunction against the enforcement of the

New York State Alcoholic Beverage Control Law which prohibits all topless dancing at premises licensed by the State Liquor Authority. The New York Court of Appeals recognized the state's power "to control and regulate the sale of alcoholic beverages ... [in order to] ... protect the public from abuses related to alcohol," but noted that such power did not give the state the right ". . . to censor whatever occurs at premises authorized to sell alcohol." Citing several U.S. Supreme Court decisions, the Court of Appeals noted that nudity is "entitled to at least minimal protection under the First Amendment" and, as such, the state "must at least demonstrate that there is a rational connection between the activity sought to be prohibited and the state's legitimate concern in controlling liquor consumption." Upon examination of the case record, the Court of Appeals concluded that the state had failed to meet the "rational connection" criteria. Three justices dissented, arguing that the

constitutionality of a state's alcohol regulation laws is to be presumed and that the burden of rebutting such a presumption lies with the challenger.

Bellanca v. New York State Liquor Authority, 429 N.Y.S.2d 616 (Ct.App. 1980) [ELR 2:19:7]

First Amendment.

The Federal Court of Appeals for the District of Columbia has affirmed a District Court ruling dismissing a complaint brought by two individuals against the publisher of the Detroit News for allegedly conspiring with federal officials to violate the individuals' constitutional rights by publishing a series of articles containing material allegedly acquired by the Department of Justice in violation of the Fourth Amendment. The complaint,

which was dismissed "for failure to state a claim upon which relief can be granted," sought to impose liability on the private newspaper under the Bivens doctrine (403 U.S. 388) applicable to government officials. In affirming the District Court dismissal, the Court of Appeals agreed with the lower court's ruling that "...a private person [Newspaper] cannot violate the Fourth Amendment" and noted that "the Supreme Court has never discussed the possibility that Bivens liability would extend beyond federal officials..." Finally, the court noted that "finding the Newspaper liable in the present case would amount to holding a newspaper liable in damages for uncovering and publishing information that it deems newsworthy."

Zerilli v. Evening News Assn., 628 F.2d 217 (D.C.Cir. 1980) [ELR 2:19:7]

Racing Regulations.

An Idaho race track's policy of scheduling fewer quarterhorse races than thoroughbred races, and of positioning quarterhorse races on race cards at positions less likely to generate heavy betting, is valid, held the Supreme Court of Idaho. The practice, determined the court, does not deprive Idaho quarterhorse owners of property without due process or of equal protection under the laws and does not offend the legislative intent of the Idaho Horse Racing Act.

Idaho Quarterhorse Breeders vs. Ada County Fair Board, 612 P.2d 1186 (Idaho 1980) [ELR 2:19:8]

Trademark.

Science, the registered trademark for a magazine published by the American Association for the Advancement of Science (AAAS), would be infringed by the publication of a revised edition of Science Digest magazine with the word "Science" in its title in overwhelming prominence, a Federal District Court in Washington D.C. has held. The court rejected the argument that AAAS's mark "Science" is a generic term and was therefore improperly registered. AAAS' product is not literally "Science," but is about science, said the court, and, as such, it is not generic but descriptive and protectible. The court therefore restrained Hearst Corporation, the publisher of Science Digest, from displaying the word "Digest" in letters occupying less than 75% of the area occupied by "Science."

American Association for the Advancement of Science v. The Hearst Corporation, 206 USPQ 605 (D.D.C. 1980) [ELR 2:19:8]

Previously Reported:

The following cases have been published: Wilder Enterprises, Inc. v. Allied Artists Pictures, 632 F.2d 1135 (2:17:2); M.B.H. Enterprises, Inc. v. WOKY, Inc., 633 F.2d 50 (2:14:4); Morseburg v. Baylon, 207 USPQ 183 (2:9:6; 2:14:7).

According to news accounts, the complaint in Mosley v. Follett (2:16:1) has been dismissed voluntarily by Mosley without his having received any consideration from Follett or his publisher.
[ELR 2:19:8]

DEPARTMENTS

New Book:

"How to Start a Record or Independent Production Company" by Walter E. Hurst and William Storm Hale

Any lawyer who has ever put together a business venture will agree that there are numerous considerations involved. The more individuals and business activities concerned, the more complicated the packaging process becomes. In the phonograph record and music publishing business, it is not uncommon for large law firms or companies to rely on specialists in a given area - the tax and/or music departments in a law firm and the artists and/or promotion departments, in the case of a company, to name a few. Likewise, in the production of

motion pictures or television specials, where many times an entity is created specifically for one project, it is not uncommon to have a "team" of lawyers, accountants and creative personnel involved in all phases of planning and implementation. In view of the financial difficulties in which the record industry presently finds itself, it would behoove anyone planning to enter the business to become as informed as possible about all aspects of the record industry and to seek the services of specialists in the many fields affecting it. "How to Start a Record or Independent Production Company" does a good job of outlining many of the elements comprising the phonograph record and music publishing industries though it should not be considered a substitute for legal advice, accountant's services, and so forth.

"How to Start a Record or Independent Production Company" is a soft cover 96-page book, priced at $10, consisting of outline-type sample agreements depicting

various contractual relationships in the phonograph record industry, some reprinted forms (most notably copyright, fictitious business name statement, employment identification and the like), historical background on the phonograph record industry, hypothetical business situations, analytical pieces on particular contractual relationships in the industry and even some scattered cartoons. The book, which is a 7 Arts Press Entertainment-Industry Series publication, is authored by Walter E. Hurst, Esq. and William Storm Hale.

Although the book is intended for "managers, entertainers, agents, beginners, students, musicians, songwriters and roadies," as well as for businesspeople, lawyers and publishers, the book as a whole is too elementary for the experienced entertainment professional, whether legal or otherwise, and too sophisticated for the average entertainer or novice. Somewhere in between, however, there is a group of individuals who may find it helpful.

The businessperson or lawyer not involved in the field of entertainment might find this book a valuable first step toward entering the field. The book's "checklist-type" approach should help to enlighten these individuals as to what is in store for them. This approach, however, will only prove beneficial if the individual relying on the book has the background to understand and apply the legal and business principles affecting the phonograph record and music publishing industries, independently of such industries. For example, if an accountant or lawyer has incorporated or formed a partnership in the past for a business outside the phonograph record or publishing spheres, the book will help bring to the reader's attention certain provisions particular to the entertainment field which should be considered in drafting the agreements, setting up the books, and the like.

On the other hand, if the person relying on the book has little or no experience with business or law, the

book will be of little value to him or her. In either case, a more suitable title for the book might have been "Some of the Things You Should Know if You Want to Start a Record or Independent Production Company." [ELR 2:19:6]

In the Law Reviews:

Inheritability of the Right of Publicity Upon the Death of the Famous by Ben C. Adams, 33 Vanderbilt Law Review 1251-1264 (1980)

Employee Emancipation in California: The Seven-Year Itch Under the Labor Code Section 2855 by Henry I. Bushkin and Rauer L. Meyer, 56 California State Bar Journal 20-25 (1981)

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