RECENT CASES

Television station KNXT wins libel suit with help of California's statutory privilege of fair comment on matters of general public interest

A California statute which recognizes a privilege, in the absence of malice, of fair comment on matters of general public interest, has been applied to deny recovery to an automobile repair shop owner who was the subject of an allegedly defamatory news report broadcast by television station KNXT in Los Angeles. The news report showed the arrest of the auto shop owner, Peter Rollenhagen, on charges of failing to comply with a statutory requirement -that he prepare a written estimate prior to commencing repairs. Also shown were an interview with an aggrieved car owner, and part of an interview with Rollenhagen in which he claimed that approximately $160 worth of work on an investigator's car (which was in good running order except for a deliberately broken spark plug) was indeed necessary.

A trial court decision granted judgment notwithstanding the verdict to the defendants and this decision has been upheld by the California Court of Appeal in an opinion which has not been certified for publication.

The Court of Appeal noted that the qualified fair comment privilege of California Civil Code Section 47, subdivision 3 was constitutionally acceptable under Gertz v. Robert Welch, 418 U.S. 323 (1974), since it did not impose a standard of liability without fault in libel actions brought by private individuals. However, the statute does not adopt a negligence standard as apparently permitted by Gertz. Rather, the focus is on protecting fair comment, in the absence of malice, by any individual, "famous, infamous or unknown," on matters of public interest.

There was no evidence at trial that any of the defendants had "harbored hatred or ill-will" toward Rollenhagen or that CBS had any reasonable or probable cause not to believe in the truth of its broadcast. Any negligence "in the sense of oversight or unintentional error" in investigating the facts on which the story was based did not demonstrate the presence of malice which would overcome the privilege. The information furnished to CBS was broadcast only after Rollenhagen's statement denying any fraudulent practices was obtained.

The Court of Appeal distinguished the recent case of Rancho La Costa, Inc. v. Sup. Ct., 106 Cal.App.3d 646 (1980) (ELR 2:7:4), in which a claim of privilege was rejected when asserted by Penthouse Magazine in connection with a story reporting alleged gangster ownership of the La Costa resort. In La Costa, the court stated that the privilege of Section 47(3) would not apply to a defamatory article "published at large to a vast audience in a national magazine."

Seeking to harmonize its decision with that of the court in La Costa, the Court of Appeal noted that auto repair was a subject of general interest - the industry has been regulated extensively in order to protect the public - and that the story in question was broadcast only locally in the Southern California area. The court agreed with the La Costa decision to the extent that the rationale of the case appears to be that a publisher should not be able to define the scope of the privilege by its own determination of what it chooses to publish and that the court should consider the relationship between the publisher and the reader and the legitimacy of the public interest in the subject matter of the article.

The action of the trial court in basing its decision to grant a judgment NOV on Civil Code section 47(4) as well as on 47(3) was approved by the Court of Appeal. This section provides a privilege for publication or broadcast of "fair and true" reports of criminal proceedings in the absence of malice.

Rollenhagen v. City of Orange, Cal.Ct.App., 4 Civ. No. 21511 (Feb. 2, 1981) [ELR 2:21:1]

Licensing of Hopalong Cassidy films for television exhibition is enjoined as infringement of copyright in Cassidy books

In 1935, the late Clarence E. Mulford, author of a series of Hopalong Cassidy books, granted the right to make films based on the books to Prudential Studios Corporation. The copyrights in the films expired and Filmvideo Releasing Corporation, contending that the films were in the public domain, sought to license 23 of the films for television exhibition. Filmvideo's plans have gone "thataway." A Federal District Court in New York has ruled that the exhibition of the films would infringe the copyrights in the Cassidy books, and has enjoined Filmvideo from proceeding with licensing the films "for viewing in general or on television or home viewing via cassettes."

The copyright infringement claim was raised by Mulford's representatives and by the exclusive licensee, William Boyd Enterprises ("Boyd"), the successor to William Boyd, the actor who portrayed Hopalong Cassidy. Boyd pointed out that after a trial earlier in the proceedings, it had been determined that Mulford reserved all television rights in the copyrighted books and films. Furthermore, Boyd argued that even if such rights had not been reserved, the unauthorized exhibition of films which were so similar to the Hopalong Cassidy books would constitute infringement.

The court found that there was substantial similarity between eleven of the books and the films in the following areas: story line and characterization, including the use of character names and the development of characters; titles; general setting and place names; overall mood, message, general theme and total concept; incidents, situations, subplots, details. points of suspense and interest, sub-climaxes and climaxes. Although the remaining twelve books were not substantially similar to the films, Mulford's characters were sufficiently "delineated, developed and well known to the public to be copyrightable," and Filmvideo's proposed use of such characters "irrespective and independent of the similarity of the story line" was found to constitute infringement and therefore was barred.

Filmvideo Releasing Corporation v. Hastings, Case No. 75 Civ. 2248 (S.D.N.Y., Jan. 21, 1981) [ELR 2:21:2]

Unauthorized use of author's name and likeness and insertion of advertisements in promotional edition of book constituted invasion of privacy and copyright infringement

The unauthorized inclusion of advertisements in promotional copies of the housekeeping guide "All Around the House" by columnist Heloise Bowles (known as "Heloise"), and the erroneous suggestion that Heloise was associated with the distributor of the books constituted copyright infringement and invasion of privacy according to a Federal District Court in Texas.

The Shaklee Corporation, an organization of distributors of household products, purchased approximately

100,000 copies of "All Around the House" for use in a promotional campaign. An advertisement which appeared on the cover of the Shaklee edition stated "Heloise and Shaklee all around the house just naturally make your day easier." Advertisements for Shaklee products were added to the end of each chapter of the book, totalling 16 advertisements in all. An article in the distributor magazine implied that Heloise had endorsed Shaklee products.

Heloise had never endorsed any specific product in her career. And she had not granted permission for the use of her name, likeness, or book by Shaklee, although such permission was required for the premium or commercial use of Heloise's books under her contract with King Features Syndicate.

The court initially ruled that Texas law would apply and that under Texas law, Heloise's action for invasion of privacy through misappropriation of her name and likeness survived her death. Since Heloise's action for misappropriation did not depend on any element of falsity, the court rejected Shaklee's contention that Heloise was required to meet the actual malice standard of N. Y. Times Co. v. Sullivan, 376 U.S. 254 (1964), and Time, Inc. v. Hill, 385 U.S. 374 (1967). The use of Heloise's name and likeness went beyond identifying the author in order to advertise the book and constituted misappropriation, the court held.

Shaklee also committed unfair competition because it capitalized on Heloise's goodwill among her readers who were likely to believe that Heloise indeed had endorsed Shaklee or Shaklee products.

The advertising inserts apparently were authorized by King Features, the registered owner of the copyright in the book. However, Heloise had an equitable interest in the copyright to "All Around the House," according to the court, since she retained the right to require an assignment of the copyright to her at the end of her contract with King Features. Heloise was not aware that advertisements appeared in any promotional editions of her books. The court, in finding that Shaklee's addition of advertisements without authorization by Heloise was an infringement, cited Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14, a case involving ABC's editing of "Monty Python" programs. It was determined in Gilliam that a licensee infringes a copyright by exceeding his license and that an author should have control over the context and manner in which his or her work is presented.

The court awarded Heloise: $75,000 for the value of her endorsement, $25,000 as general damages for invasion of privacy through misappropriation, $35,000 as exemplary damages due to the intentional nature of Shaklee's conduct in using Heloise's name and

$3,894.73 as Shaklee's profits from copyright infringement.

Hearst Publications was held liable for the damages for copyright infringement since King Features, its wholly owned subsidiary, bad not advised Shaklee of the necessity to obtain Heloise's approval prior to inserting advertisements in its edition.

National Bank of Commerce v. Shaklee, CCH Copyright Law Reports, Para. 25,200 (W.D.Tex. 1980) [ELR 2:21:2]

California Supreme Court sets aside A.F. of M. arbitration award against concert promoter Bill Graham due to lack of neutral arbitrator

A contract between concert promoter Bill Graham and Scissor-Tail Music, Inc., musician Leon Russell's corporation, required that disputes between the parties be submitted to an arbitrator designated by the American Federation of Musicians. The contract has been declared "unconscionable and unenforceable" by the California Supreme Court. (The California Court of Appeal decision in the case, ELR 1:24:3, was vacated when a hearing was granted by the Supreme Court.)

Graham had agreed to promote several concerts featuring Russell. A disagreement arose regarding the allocation of the profits received from one of the concerts and the losses incurred at another concert. The contract - an A.F. of M. Form B Contract - did not set forth which party would bear net losses. Graham filed an action for breach of contract, declaratory relief and rescission. The trial court, however, granted Scissor-Tail's petition to compel arbitration of the dispute before the International

Executive Board of the A.F. of M. pursuant to the arbitration provision of the contract. Prior to conducting a hearing, the Board entered an award of approximately $53,000 against Graham. When Graham refused to pay the award, he was placed on a "defaulters list"-a list of persons with whom A.F. of M. members could not do business.

A hearing subsequently was held upon the request of the parties. The arbitrator - a former executive officer of the A.F. of M. - was appointed by the union president. Graham's request for a court reporter was denied. Graham presented evidence indicating that under industry custom and practice, he would not have borne the risk of loss for the Russell concerts. No contrary evidence was offered by Scissor-Tail. Nevertheless the referee's report recommended that Graham be ordered to pay $53,000 to Scissor-Tail. The Board entered its award accordingly and the award was confirmed by the trial court.

The California Supreme Court, in setting aside the award, noted that the contract was adhesive because, despite Graham's success and stature, "he was required by the realities of his business as a concert promoter to sign A.F. of M. form contracts with any concert artist with whom he wished to do business..." And the contract included nonnegotiable provisions regarding the manner and rate of compensation as well as requiring a union forum for arbitration.

The court acknowledged that the California Arbitration Act (section 1281 et. seq. of the Code of Civil Procedure) allows complete contractual autonomy in the choice of an arbitrator, including the right of the parties to designate an arbitrator who might not be totally "neutral." However, said the court, when an adhesive contract is involved, the party with lesser bargaining power might be deprived of "any realistic and fair opportunity to prevail in a dispute..." An agreement to arbitrate in such circumstances should be denied enforcement on the ground of unconscionability, the court held.

Another ground for denying enforcement of a provision to arbitrate would occur when the arbitration procedures deny a party "the common law right of fair procedure." Assurances of fair procedure were present in the A.F. of M. Constitution and Bylaws. But having the union of one of the parties to a contract appoint the arbitrator did not achieve the "minimum level of integrity" that is required when parties substitute arbitration for judicial proceedings.

Scissor-Tail's contention that federal labor law required enforcement of the contract regardless of the validity of the arbitration provision was rejected by the court, because the provision was not within an area of "paramount federal concern."

On remand, it was suggested that the trial court should assist the parties in finding a suitable arbitrator.

Graham v. Scissor-Tail, Inc., Case No. L.A. 31261, (Cal., Feb. 5, 1981) [ELR 2:21:3]

FCC must establish "clear & convincing" proof of fraudulent billing practices to warrant revocation of radio station license, but when proved, such practices warrant revocation or non-renewal of license and even criminal prosecution

In 1973, the Federal Communications Commission investigated the advertising sales and billing practices of Sea Island Broadcasting Corp., which operated WSIB, an AM radio station in Beaufort, South Carolina. Three years later, the commission revoked Sea Island's license, primarily on grounds that the owner and officers of Sea Island admittedly made deliberate misrepresentations and other misleading and deceptive statements to the Commission to conceal improper billing practices which, in effect, caused a national cooperative advertiser, Philco-Ford, to pay twice what it should have paid for advertising aired on WSIB.

Various improper billing practices are prohibited by the FCC in its "fraudulent billing rule" (47 C.F.R. section 73.1205). The rule provides that no broadcast licensee shall knowingly issue any documents that misrepresent the amounts charged for advertising, the nature, content or quality of the advertising, or the date or time of the broadcast. In its proceeding entitled In Re Matter of Fraudulent Billing Practices, 1 F.C.C.2d 1068 (1965), the FCC explained:

"The main ingredient of the practice is the furnishing of false information concerning broadcast advertising to any party contributing to the payment of such advertising, the purpose being to induce such party to pay more than the actual rate for the advertising."

Concluding that Sea Island had shown a "classic pattern" of furnishing such false information, and feeling compelled to impose the severe sanction of revocation, the Commission sought to justify its ruling by commenting:

"In short, the effective regulation of the communications industries under our jurisdiction is premised on our ability to depend on the accuracy and truthfulness of our licensee's representations to as. Once we find that we cannot rely on a licensee's representations to us, the only suitable penalty is revocation of the license."

Sea Island appealed on the ground that the Commission applied the wrong standard of proof. Sea Island argued, and the Federal Court of Appeals for the District of Columbia agreed, that had the Commission found only "Substantial evidence" of fraudulent billing, it clearly would have erred. Instead, Sea Island argued that the case was governed by Collins Securities Corp. v. SEC, 562 F.2d 820 (D.C.Cir. 1977), in which the court held that the SEC's revocation of a broker's license required "clear and convincing" proof, not merely "substantial evidence" or a "preponderance of the evidence," that the broker had violated the law. The FCC insisted, however, that the loss of a broadcast license does not amount to the potential deprivation of a livelihood as had been the case in Collins, because a former radio licensee may still obtain employment in the broadcast industry, and because the revocation of one license "would not necessarily result in the loss of any other broadcasting station's license held by such licensee."

The Court of Appeals has rejected the FCC's position, however, noting that "[t]he holder of multiple licenses may continue to hold one although another is revoked, but the fact of revocation of one license would not be ignored in case of a challenge to other licenses."

The Commission further argued that unlike SEC revocation proceedings, which are highly sophisticated, FCC revocation proceedings "usually involve relatively simple factual questions," and a rigorous standard of proof is therefore unnecessary. But, "[t]hat the revocation grounds may be simply proved," said the court, "is no reason for requiring less evidence of the violation. True, there is less danger of misapprehension of the issue, but correspondingly there should be little burden involved in making clear proof of fraud." The court similarly rejected the Commission's contention that a higher standard of proof will either "significantly burden" the Commission's regulatory authority or encourage or sanction "shady tactics by licensees." The court reasoned that "[t]here is a difference between the duty imposed on a licensee (the higher standard pertinent to a trustee) and the degree of proof required to convince the decision maker that there has been a violation of that duty." In the court's view, "the Commission must proceed on the basis of absolute trust and confidence in the representations made to it by its licensees," and must therefore make a "clear and convincing" finding of the licensee's violation before the sanction of revocation may be permissibly imposed.

The court thus held that "revocation of an FCC license is governed, at the agency level, by the 'clear and convincing' standard of proof set forth in the Collins decision for an SEC revocation of a broker's license." But the court noted that the lesser standard of proof is sufficient in "license revocation proceedings where nothing resembling a loss of livelihood is involved, as in the case of Amateur Band ('HAM') and Citizen Band ('CB') licensees."

"Where the Commission expressly applies the 'clear and convincing' standard," said the court, "the judicial function is only to see whether there is 'substantial evidence' to support the Commission's determination." Here, however, the Commission did not expressly apply the "clear and convincing" standard, and indeed resisted it on remand, but ultimately reported to the court that it would have made the same finding in using that standard. The court, though cautious, was "convinced that the Commission at all times considered the proof of [Sea Island's) derelictions to be clear and convincing." The Commission's order revoking Sea Island's license was therefore upheld.

In a similar case involving fraudulent billing practices, Berlin Communications, Inc., the licensee of AM station WBRL in Berlin, New Hampshire, was investigated by the Commission in 1974. The Commission found that Berlin had violated 47 C.F.R. Section 73.1205 by continuing the prior operator's practice of fraudulent billing of advertising accounts, and that such practices had resulted in overcharges of $22,390.81. The Commission therefore ultimately denied Berlin's application for renewal of its license.

On appeal to the Federal Court of Appeals for the District of Columbia, Berlin conceded that it violated the fraudulent billing rule, but objected to the severity of the sanction of non-renewal of its license. Berlin contended that the imposition of the sanction was inconsistent with precedent, and that the Commission failed to consider "mitigating factors." The court rejected Berlin's contentions and upheld the Commission's order.

The court distinguished three cases relied upon by Berlin in which the lighter sanction of monetary forfeiture was imposed for fraudulent billing. The licensee in Blackstone Broadcasting Corp., 52 F.C.C.2d 1106 (1975), double billed only two of its accounts, albeit for more than six years, and the overcharges were nominal and no false affidavits were issued. Berlin, on the other hand, "issued false affidavits in furtherance of a much more pervasive violation, involving twentytwo accounts and over $20,000." In Bluegrass Broadcasting Co., Inc., 43 F.C.C.2d 990 (1973), and Gateway Broadcasting Enterprises, Inc., 58 F.C.C.2d 63 (1976), principals of the licensees had no actual knowledge that their stations were double billing. In Bluegrass. "the principal was merely negligent in failing to stop a practice of which he was unaware; the principal in Gateway thought that false affidavits were accurate when he prepared them." "In stark contrast," said the court, the principal of Berlin "knew of his station's violation and authorized its continuation until the time of the FCC's investigation. This aiding and abetting is sufficient under 18U.S.C. Section 2 to constitute him a principal in the criminal violation of others." In distinguishing these three cases, the court commented:

"Cases in which the Commission imposed a lighter sanction than non-renewal of license involved less egregious violations of the double billing rule than did Berlin's flagrantly fraudulent billing practices that were intentionally continued over a three year period with the admitted knowledge of the principal owner of the license. In pointing out this distinction we do not necessarily approve of the lesser sanctions imposed by the Commission in other cases, but neither can we say that the sanction that we approve here for these egregious violations is inconsistent with Commission precedent."

The court next considered Berlin's claim that the Commission failed to consider mitigating factors that would require a softening of the sanction to be imposed. The alleged mitigating factors comprised (1) business necessities; (2) lack of injury to national advertisers; and (3) its principal's lack of participation. The court concluded "[a]fter even a sympathetic examination of Berlin's conduct, we fail to see any mitigating factors." Furthermore, "[t]he FCC must," emphasized the court, "fulfill its responsibility to the public by 'dealing vigorously with misrepresentation among those entrusted with a public broadcasting license.'"

In arguing "business necessity," Berlin noted that a local newspaper and other radio stations in town engaged in fraudulent billing and that Berlin was therefore forced by competitive pressures to engage in similar practices. The court observed, however, that "it is elementary that fraudulent conduct by licensees is not mitigated because of participation by others in the scheme, or the desire to protect business profits." Berlin also argued that the national advertisers' failure to request full restitution after they were sent notice of the fraudulent billing indicates a lack of injury that should be considered in mitigation of

Berlin's violation. Berlin further contended that the advertisers are themselves responsible for their losses, if any, because of their "lax practices" and "passive acceptance." The court rejected "Berlin's attempt to shift the blame for its acts to its victims. . ." "[N]or is it reasonable," said the court, "to regard the loss of more than $22,000 as non-injurious."

Lastly, Berlin argued that its principal knew of the fraudulent billing but was not directly involved in the daily creation of the fraudulent documents. The Commission found that the principal's failure to stop the practice was "tantamount to instituting intentionally the illegal billing activities." The court agreed, noting that, pursuant to 18 U.S.C. Section 2, "[h]e is a principal in the offense just the same as if he personally prepared the false affidavits. In its most favorable light "[the principal's] conduct is the 'active indifference' that the Commission views as 'unfavorably as an intentional abuse.'"

In conclusion, the court observed that "Berlin's conduct is incompatible not only with the standards expected by law of licensees of the airwaves, but is also incompatible with Federal and local criminal statutes." In particular, it appeared to the court that "Berlin and other violators of the double billing rule simultaneously offended 18 U.S.C. Section 1341, the Mail Fraud statute, the Conspiracy, 18 U.S.C. Section 371 and the local statutes proscribing the obtainment of money under false pretenses." The court urged the Commission to recognize double billing as the "serious criminal violation that it constitutes." The court asserted that the "Commission has a responsibility to refer such cases to the United States Attorney for consideration by the grand jury when the violation of the criminal laws is of the magnitude and as obvious as that on display here."

Sea Island Broadcasting Corp. of S.C. v. FCC, 627 F.2d 240 (D.C. Cir. 1980); Berlin Communications, Inc. v. FCC, 626 F.2d 869 (D.C. Cir. 1979) [ELR 2:21:4]

Exclusivity provision of cable television franchise is found unenforceable in California

A California Superior Court judge in San Diego has ruled that the City of Vista exceeded its statutory and constitutional authority in awarding an exclusive 20 year cable television franchise to the predecessor in interest of TM (Times Mirror) Cablevision of San Diego County.

TM brought an action against Daon Corporation in which it contended that Daon had violated TM's exclusive franchise by entering into an agreement with Pala Mesa Cablevision, Inc. to install and operate a cable television system in a residential area which was developed by Daon and annexed by the City of Vista in 1976.

Judge Anthony C. Joseph entered judgment for Daon, finding that California Government Code section 53066 did not authorize Vista to grant a cable television franchise which was expressly "exclusive." Judge Joseph ruled that the provision of the Vista franchise granting such exclusivity exceeded the authority of the city and was void and unenforceable. The judge also found that Article 11, Section 9 of the California Constitution, which seeks to encourage competition in the field of communications, also prevented Vista from awarding an exclusive cable television franchise and from awarding rights to any one party "in the use of the public streets and rightsof-way in the City of Vista."

Despite ruling against franchise exclusivity, the court upheld Vista's authority to regulate cable television operators doing business in the city.

TM Cablevision of San Diego County v. Daon Corporation, Case No. N 15067 (Cal.Super.Ct., San Diego County, Jan. 22, 1981) [ELR 2:21:6]

Briefly Noted:

Labor.

In a dispute concerning the editorial departments of four San Francisco publishing companiesPress Democrat Publishing, Times-Herald, Anphlett Printing, and Brown Newspaper Publishing-before the National Labor Relations Board, a Federal Court of Appeals in California has refused to rule whether the NLRB was correct in ordering the newspapers to disclose to a local union the aggregate amounts paid to independent correspondents for editorial product. The court said it was unable to determine if the NLRB properly exercised its discretion because of inconsistencies and the lack of an adequate explanation in the NRLB's decision. The court therefore sent the case back to the NLRB for clarification. Although the union requested identification of each published article written by a non-union correspondent during the specified time and the amount paid for each article, the NLRB ruled that only the aggregate amount paid to non-union correspondents was relevant for purposes of formulating wage proposals. The Board must now tell the federal court why.

Press Democrat Publishing Company v. NLRB, 629 F.2d 1320 (1980) [ELR 2:21:7]

Labor Relations.

Picketing carried on by members of N.A.B.E.T. at hotels where ABC planned to cover speeches was a secondary activity in violation of the National Labor Relations Act, a Federal Court of Ap peals has held. The picketing took place away from the gate reserved for network employees and did not occur at the "location" of the news, i.e., the television station; and the signs which were displayed and handbills which were distributed urged all customers not to enter the hotels. This was not protected consumer picketing which must be closely related to the primary dispute between the parties, the court ruled. The NLRB's petition for enforcement of its cease and desist order therefore was granted.

National Labor Relations Board v. National Association of Broadcast Employees and Technicians, AFL-CIO, Local 31, 631 F.2d 944 (D.C.Cir. 1980) [ELR 2:21:7]

Libel.

A libel and invasion of privacy suit filed by a Georgia Justice of the Peace, stemming from a newspaper article which identified his honor as the father of an arrestee charged with receiving two stolen trucks, was dismissed by a Georgia Court of Appeals on the grounds that the article was true. The magistrate is the father of the arrestee. The J.P. contended that the article was libelous by innuendo, because by its nature the article would be understood by readers as linking the arrest of his son to the magistrate's office and his fitness to hold such office. "Any hurtful innuendo," stated the court, "arising not from the words of the article but from the readers' subjective decision to impute the alleged sins of the son to the father is unfortunate and unwarranted but unactionable as a defamation." In rejecting the J.P.'s invasion of privacy claim, the court stated that "the law does not provide a remedy for every annoyance that occurs in everyday life." The article does no more than identify the arrestee as the J.P.'s son, and this can hardly be said to interfere with his privacy, said the court.

Reece v. Grissom, 267 S.E.2d 839 (Ga.App. 1980) [ELR 2:21:7]

Obscenity.

Two Louisiana criminal statutes which made it unlawful for property owners to knowingly lease or allow the use of their premises for obscenity have been held unconstitutional by the Supreme Court of Louisiana. the court declared the laws to be invalid prior restraints of expression. The statutes extended far beyond the target of the legislation, said the court. They "operate to discourage the letting of premises in connection with any materials which even arguably constitute obscenity and to encourage closing a bookstore even if a small part of its publications is obscene." The decision quashed criminal prosecutions against the owners of buildings which have been leased to bookstore operators.

State v. Franzone, 384 So.2d 409 (La. 1980) [ELR 2:21:7]

Obscenity.

The Supreme Court of Louisiana has acquitted the operator of an adult movie theater charged with violating the state's obscenity laws. The court found that the evidence introduced was insufficient to prove guilt. Guilt of obscenity requires proof of scienter, or knowledge of the contents of the material for exhibition. In order to prove scienter, the state introduced a lease which identified the defendant as the corporation which leased the premises where the films were shown. "The fact that the defendant may have leased the building does not prove that the defendant conducted the business therein or was aware of the nature of the business conducted therein," stated the court. Thus, the state failed to prove scienter, an essential element of the crime charged, and the court acquitted the defendant on the grounds that a second trial is precluded by the double jeopardy clause of the Fifth Amendment.

State v. Entertainment Specialists, Inc., 386 So.2d 653 (La. 1980)
[ELR 2:21:8]

Previously Reported:

The United States Supreme Court has declined to hear an appeal by CBS from the dismissal of its antitrust case-after more than a decade of litigation-against ASCAP and BMI. In 1979, the Supreme Court held that the blanket licensing practices of ASCAP and BMI were not illegal per se. (ELR 1:1:1). The case then went back to the lower courts where in 1980 it was held that CBS had failed to prove that such practices restrain trade at all. (ELR 1:24:1). [ELR 2:21:8]

NEW LEGISLATION AND REGULATIONS

Copyright Royalty Tribunal increases cable television and jukebox royalties

The Copyright Royalty Tribunal has increased the compulsory license royalties payable by cable television systems and jukebox operators.

The royalties that must be paid by cable television systems have been increase 21% over what they were previously. On the other hand, the amount of gross receipts that a cable system must collect before it is required to pay the minimum royalty also has been increased, by more than 33%. These increases were made pursuant to provisions of the Copyright Act of 1976 requiring cable royalties to be adjusted in order "to maintain the real constant dollar level of the royalty fee per subscriber," taking into account inflation since 1976 or changes in the average rates charged to subscribers for basic service. The effective date of these increases was February 4, 1981.

At the present time, jukebox operators pay a royalty fee of $8 per jukebox per year. By virtue of the regulation just adopted by the Copyright Royalty Tribunal, that rate will increase to $25 per year on January 1, 1982 and to $50 on January 1, 1984. On January 1, 1987, the $50 rate will be increased in proportion to the increase in the Consumer Price Index from February 1981 to August 1986. However, there will be no further changes in the rate thereafter until 1990, at which time a new adjustment proceeding may be initiated by copyright owners or jukebox operators if they petition the Copyright Royalty Tribunal to conduct one.

1980 Adjustments of Royalty Rates for Cable Systems and for Coin-Operated Phonorecord Players, 46 Federal Register 892; CCH Copyright Law Reports, Para. 12,801 & 13,040; 37 CFR section 308; 46 Federal Register 884, CCH Copyright Law Reports, Para. 12,601 & 13,309; 37 CFR section 306 (January 5, 1981) [ELR 2:21:6]

Copyright Royalty Tribunal increases compulsory license record royalty, and Copyright Office adopts regulations concerning obtaining compulsory licenses and required accountings

The Copyright Royalty Tribunal has adopted a rule increasing the compulsory license royalty payable by manufacturers and distributors of records of non-dramatic music, effective July 1, 1981. The rate has been 2.75 cents, or 0.5 cents per minute of playing time, whichever was greater. The new rate shall be 4 cents, or 0.75 cents per minute, whichever amount is greater. Those rates shall be increased each year commencing January 1, 1982, in proportion to the change in the average suggested retail list price of record albums. Changes in the suggested retail prices of albums are to be determined by the Tribunal from surveys or studies conducted by it, though the Tribunal is also to give consideration to the comments of those affected by the increases.

In a separate proceeding, the Copyright Office of the Library of Congress has adopted final regulations governing notices that must be given, and accountings that must be rendered, by those record manufacturers that elect to exercise their right to obtain a compulsory license for nondramatic music.

These new regulations, which became effective on December 29, 1980, differ from the prior "interim" regulations by reducing to nine months (from one year) the period of time that record manufacturers may claim a "reserve" for records that have been shipped but may be returned. The Copyright Office also adopted certain special accounting procedures that must be followed by manufacturers in calculating the compulsory license royalties that must be paid.

Adjustment of Royalty Payable Under Compulsory License for Records, 46 Federal Register 891; CCH Copyright Law Reports, Para. 12,701 & 13,041; 37 CFR section 307 (January 5, 1981); Compulsory License for Making and Distributing Records, 45 Federal

Register 79038; CCH Copyright Law Reports, Para. 12,036, 12,038 & 13,038; 37 CFR section 201.18 & 201.19 (November 28, 1980) [ELR 2:21:6]

DEPARTMENTS

New Book:

"The Musician's Manual - A Practical Career Guide" Mark E. Halloran, Editor

The original version of this book was published by the Beverly Hills Bar Association for distribution in connection with a symposium presented by its Barristers Committee for the Arts in the fall of 1979. It is an excellent basic introduction (for musicians as well as attorneys) to many practical and legal aspects of the music industry.

Among the topics covered are the selection and protection of group names, copyright registration, music unions and performing rights societies. Also included is a paragraph-by-paragraph annotation of a standard recording agreement-an especially valuable explanation for anyone new to the recording industry. The book has been republished for national distribution by Hawthorne/Dutton Publishing Company, 2 Park Avenue, New York, N.Y. 10016, at $9.95. [ELR 2:21:7]

In the Law Reviews:

Five Conflicts Over Income Distribution in the Motion Picture-Television Industry by John Cirace, 25 Villanova Law Review 417-457 (1980)

The Case for FTC Regulation of Television Advertising Directed Toward Children by Molly Pauker, 46 Brooklyn Law Review 513-546 (1980)

The Case Against Television in The Courtroom by Thomas H. Tongue and Robert W. Lintott, 16 Willamette Law Review 777-801 (1980)

Public Figure Defamations; Preserving Summary Judgment to Protect the First Amendment, 49 Fordham Law Review 112-132 (1980)

Whither the Limited-Purpose Public Figure?, 8 Hofstra Law Review 403-423 (1980)

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