RECENT CASES

CBS required to produce out-takes from a "60 Minutes" report; newspaper/reporter held in contempt for refusing to testify about conversation with a source

The United States Supreme Court has declined to hear an appeal from a ruling that requires CBS to tum over to a Federal District Court filmed out-takes from a "60 Minutes" report concerning fast food franchises.

Entitled "From Burgers to Bankruptcy," the 60 Minutes segment focused on the activities of Wild Bill's Family Restaurant. A month after the piece was broadcast, a federal grand jury returned indictments for conspiracy and fraud against several principles of Wild Bill. The defendants then served CBS with a subpoena asking

CBS to produce out-takes (filmed interviews that were not aired), investigators' notes, and other materials pertaining to the preparation of the 60 Minutes report.

In response to CBS' motion to quash the subpoena, the District Court recognized that there exists a qualified, but not absolute, privilege protecting journalists in their news gathering function. The court said that it had to determine whether the privilege should yield to the defendants' need for the information sought, and concluded that it could not make this determination without first seeing the information in CBS' possession. The court also noted that the subpoena as written was overbroad. Modifying the subpoena, the court ordered CBS to produce for an in camera (private) inspection all out-takes, notes and materials that contain statements made by any individuals the government intended to call as witnesses. The government was ordered to furnish CBS with a list of its intended witnesses.

In making that order, the trial court did not abuse its discretion, a Federal Court of Appeals ruled. The order did not provide for the release of any of the statements to the defendants before trial. Instead, the trial court would entertain a motion by the defendants for disclosure of such statements after each witness in question testified, and only then would the court balance the defendants' need for the statements against the journalist's qualified privilege.

The pre-trial production for in camera review was to aid the trial judge's preparation for such a ruling and was an attempt to avoid unnecessary delay and disruption of the trial, allowing the court to expedite the trial decision. The Court of Appeals struck down, however, the District Court's further order, a modification of a second subpoena issued to CBS, requiring CBS to hand over out-takes and notes in its possession containing statements made by all franchisees and potential franchisees of Wild Bill's, whether or not they were on the government's witness list. This, said the appellate court, constituted a broad request for material undercutting the strict limitation of discovery found in the Federal Rules of Criminal Procedure.

(CBS did turn over the out-takes in question on March 24, 1981.)

In a separate case arising out of the government's recent ABSCAM investigations, a Federal Court of Appeals was required to decide whether a journalist, summoned as a defense witness in a criminal proceeding, is requited to affirm or deny that she had a conversation with an individual that has already publicly testified that the conversation occurred, and whether she is required to reveal the substance of that conversation, omitting portions that specifically identify other sources. A federal trial judge declared the journalist to be in civil contempt for refusing to answer questions on the matter.

In attempting to strike the delicate balance between "freedom of the press and the obligation of all citizens to relevant testimony with respect to criminal conduct," the court applied the criteria, set out in Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979), that must be met before a reporter can be compelled to disclose a confidential source: it must be demonstrated that the information sought is crucial to the claim and that an effort has been made to obtain the information from other sources. The defendants had met their burden under this test, because only the reporter would be able to testify as to the defendants' credibility and motivation with respect to the conversation, and the defendants had unsuccessfully sought disclosure of "the Blumenthal report," a Department of Justice investigation into the source of the ABSCAM leaks. The Court of Appeals concluded that the reporter's qualified privilege to refuse to disclose the contents of conversations with the defendants must yield to their need for the material, and affirmed the civil contempt order.

The court expressed the view that the defendants probably should be required to prove less than that required in Riley, because here the defendants were seeking the reporter's version of a conversation already voluntarily disclosed by the self-confessed source, not the identity of the source itself. The court was unwilling, however, to develop the precise test for balancing the interest in these circumstances. One judge concurred in the result, but opined that once a reporter's source willingly identifies himself and consents to the disclosure of his communications, his expectation of confidentiality evaporates and the reporter's qualified privilege should no longer exist.

United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); United States v. Criden, 633 F.2d 346 (3d Cir. 1980) [ELR 2:22:1]

Columbia Pictures' refusal to deal with a Portland exhibitor who canceled engagement of "Close Encounters of the Third Kind" did not violate antitrust laws

On December 12, 1977, Tom Moyer Theatres in Portland advised Columbia Pictures Industries, Inc. that it would not begin exhibiting Columbia's film "Close Encounters of the Third Kind" on December 14th as scheduled. Pursuant to Moyer's contract with 20th Century-Fox, he planned to hold over the film then showing in the theater, "Star Wars." Moyer proposed to exhibit "Close Encounters" at another of his theaters, but

Columbia refused this arrangement. Moyer than obtained a restraining order prohibiting Columbia from "[i]nterfering with [the] substitute performance of showing "Close Encounters . . . "

Columbia removed Moyer from its bid list in Portland and sued him for breach of contract. Moyer counterclaimed, alleging that Columbia unlawfully refused to deal with him in Portland, Vancouver and Eugene. He contended that Columbia bad agreed to license its first run films to Larry Moyer Theatres, Moyer's principal competitor, and that the company refused to accept Moyer's bids for exhibition rights in the Portland area.

A Federal District Court in Oregon has denied summary judgment to Columbia on its breach of contract claim but has granted the company summary judgment on Moyer's antitrust claims.

Columbia argued that when Moyer bid on "Close Encounters," he agreed to the terms contained in

Columbia's Form S-30 entitled "Competitive Bid Application and Contract Upon Acceptance." This form stated that an exhibitor's failure to open a licensed film on the date specified in the agreement constituted a breach of the contract. Moyer testified that Form S-30 was never a part of the contract. Since the interpretations of the parties were "reasonable but conflicting," particularly on the issue of whether Moyer's obligation to perform was discharged under the doctrine of impossibility or prevention of performance, summary judgment was denied.

In turning to Moyer's antitrust claims, the court ruled that Moyer lacked standing to complain that the licensing agreement between Columbia and Larry Moyer Theatres was a tying arrangement. Moyer was found to have only a "potential contractual interest" in showing Columbia's first-run films rather than an actual interest directly threatened by Columbia's decision to deal only with Larry Moyer.

Moyer also claimed that Columbia's refusal to do business with him and its practice of licensing first run films to Larry Moyer was a group boycott which is a per se violation of the antitrust laws. But Columbia did not license films to Larry Moyer in order to put Tom Moyer out of business or to compel Moyer to adopt certain trade practices. The one-to-one relationship between Larry Moyer and Columbia was "neither per se illegal nor unreasonable under a rule of reason analysis" according to the court. Columbia's conduct was found to conform to the rule that a corporation "has the right to deal with whom it pleases and to select its customers, provided there is no effect which contravenes the antitrust laws." The alleged exclusive agreement or refusal to deal entered into between Larry Moyer and Columbia would be upheld under a rule of reason test in the absence of an anticompetitive purpose. And Columbia testified that it ceased doing business with Tom Moyer solely because of its dissatisfaction with Moyer's handling of the "Close Encounters" licensing.

The court also found that Columbia's actions, did not substantially affect competition in Portland. Tom Moyer was not foreclosed from the film market as a result of Columbia's refusal to deal with him. Further, even in the absence of an agreement between Larry Moyer and Columbia, it was not clear that other independent theater owners would have obtained a significant percentage of Columbia's first run films.

The argument that Columbia's films were a unique product such that Moyer would be unable to obtain an equivalent brand in the film marketplace also was unsuccessful. As distinguished from United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), Moyer and other exhibitors were free to seek substantially equivalent films produced by other distributors.

Moyer failed to demonstrate that Columbia had engaged in the type of concerted action required to establish the existence of a conspiracy to restrain trade in violation of the antitrust laws, ruled the court.

Columbia Pictures Industries, Inc., v. Thomas P Moyer, Case No. 77-1015 (D.Ore. 1981) [ELR 2:22:2]

Pennsylvania court voids prizefighter's management contract, because it violated state athletic code

An agreement between a prizefighter and his managers has been held void and unenforceable by a Pennsylvania appellate court in an opinion reversing a trial court order enjoining the boxer from fighting in violation of the agreement.

In 1976, Randall Cobb agreed in writing to render services as a prizefighter exclusively for his managers for a period of ten years, Under the agreement, the prizefighter and his managers were to divide evenly (50-50) all monies derived from the fight game and related activities, and the managers agreed to pay all training, traveling and other related expenses. The agreement further provided that any dispute arising under the contract was to be decided under Pennsylvania law.

In Pennsylvania, prizefighting is regulated by rules and regulations promulgated by the Pennsylvania Athletic Commission, formulated under the Pennsylvania Athletic Code. The managers contended, and the lower court agreed, that the Athletic Code was inapplicable in this case because it applies only to prizefights physically held in Pennsylvania.

The appellate court ruled however that the Code, the Commission, and its rules and regulations apply to more than just prizefights which may be staged in Pennsylvania, The appellate court cited no supporting authority but listed some of the areas with which the code is concerned: licenses and permits; contracts between mangers, promoters, and professional boxers; the establishment of a Medical Advisory Board; the posting of surety bonds; and provisions for hearings and penalties. There was no dispute in this case that the terms of the agreement were contrary to the specific requirements of the Code and the Commission's rules and regulations. For example, the contract failed to provide for a minimum guaranteed salary, and the parties failed to appear before the Commission to receive its approvalen parties which violates a provision of a statute, or which cannot be effectively performed without violating it, is illegal, unenforceable, and void ab initio said the court. Thus, the court concluded that the agreement executed by the parties in 1976 is unenforceable, freeing Cobb from all obligations thereunder.

Granby v. Cobb, 422 Atl.2d 889 (Pa.Super. 1980) [ELR 2:22:3]

Television station was privileged to report filing of criminal case against pharmacist accused of Medicaid fraud

Three television news reports concerning the criminal prosecution of a Seattle pharmacist for allegedly filing fraudulent Medicaid claims were privileged, the Washington Court of Appeals has held in a decision dismissing the pharmacist's defamation and invasion of privacy action against the television station's owner, KING Broadcasting Company.

A qualified or conditional privilege exists permitting newspapers to publish, and television and radio to report, legal proceedings provided the publication is a fair and accurate statement of the content of those proceedings, and is made without malice, said the court. The court determined that the three news reports were a substantially verbatim recounting of an information and affidavit of probable cause filed by the chief deputy prosecuting attorney of King County, Washington.

To overcome the qualified privilege, the pharmacist would have had to prove that the reports were broadcast without reasonable grounds for belief in their truth. The courts saw no such evidence in the records . Nor was the television station under any obligation to independently investigate prior to the broadcast the validity of the criminal charges made by the prosecutor. "Such an obligation would constitute a serious impediment to the dissemination of news and information guaranteed by the First and Fourteenth Amendments," stated the court.

One of the news broadcasts included a statement not directly taken from the court documents: "The King County prosecutor's office says it is the largest Medicaid fraud case ever filed in this state." The court noted that the authorities are roughly divided on the question whether reports on investigators' statements fall within the qualified privilege. The court, however, refused to decide that question "since here the statement made merely reiterated the material already in the record in the proceedings."

The pharmacist alleged that a 53 second film clip aired along with one of the news broadcasts resulted in "an unreasonable intrusion into his seclusion and physical solitude." The form of invasion of privacy complained of, said the court, is actionable only if the interference with seclusion is a substantial one resulting from conduct of a kind that would be highly offensive and objectionable to the ordinary person. The footage filmed by a KING cameraman from the exterior of the plaintiffs pharmacy includes shots of the exterior and interior as seen through the front window while the pharmacy was closed. The view of the interior included a view of an individual talking on the telephone. While the facial features of that individual were never distinguishable, the pharmacist claimed that he was the individual portrayed. The court determined that the film was shot from a place that was open to the public and recorded nothing other than that which any passerby would have seen. Nor was the pharmacist portrayed in an unreasonable manner, found the court. "It was not the film that put [the pharmacist] in an embarrassing or compromising situation, but the fact that the criminal charges had been filed against him," concluded the court.

Mark v. KING Broadcasting Company, 618 P.2d 512 (Wash.App. 1980) [ELR 2:22:3]

Plagiarism judgment reversed because trial court improperly excluded two relevant exhibits offered by complaining author

Charges of plagiarism and breach of contract were made in a Georgia suit between two collaborators of an unpublished manuscript. The trial court entered judgment against both parties, dismissing all claims and counterclaims. A Georgia Court of Appeals, stating that it "endeavored to read a record of no less than 611 pages; a trial transcript of no less than 2,428 pages, containing several voluminous novel transcripts (drafts and redrafts), plus the parties' briefs of 185 pages and exhibits thereto consisting of 75 additional pages," has reversed on evidentiary grounds.

In February 1973, Hazel Cartin, after completing a rough draft of an autobiographical novel entitled Elijah, contacted Paul Darcy Boies, a local author and experienced writer to assist her in having the book published. Boles commented that the work needed to be rewritten and offered to do so for $ 10,000. The parties entered into a contract under which Cartin paid Boles $5,000 to finish the book by September 1, 1973 and, upon acceptance of the novel by a publisher, Cartin agreed to pay Boles the second $5,000. It was agreed Boles would turn the novel over to his literary agent, all monies from the eventual publication of the book would be divided equally, and Cartin was to be known as the author.

Boles' rewriting of the manuscript was completed by October 1973. By January 1974, Elijah was being considered by one publisher and Boles was allegedly revising his latest novel, The Limner, which Cartin later claimed had plagiarized certain elements of Elijah. By September 1974 Cartin became disillusioned with her agreement with Boles and requested the return of the $5,000 she had paid him. Thereafter, Cartin sued Boles alleging breach of contract, return of literary property, breach of fiduciary relationship, tortious interference with contractual rights and prospective reward, fraud, infringement of common law rights, and unfair competition. Boles countersued alleging that Cartin had breached the contract.

The trial court found that the weight of the evidence was on the side of Boles. Cartin contended that Boles' work was not true to the spirit of her own. The court found that Boles was not obligated to complete an accurate biographical novel of Cartin's life, nor to please her in every particular, but to give Cartin's material "his best and most thorough effort." The court noted that at the time the work was forwarded to a publisher there was no substantial protest from Cartin. With regard to plagiarism, even though Cartin had shown certain parallels and similarities between Elijah and The Limner, the court found that Cartin had failed to carry the burden of proving plagiarism. As to Bole's counterclaim, the court recognized that he would have been entitled to an additional $5,000 from Cartin and a 50% interest in royalties, had Cartin enabled him to fully perform under the contract, but that any damages flowing from Cartin's alleged breach would be "too remote and speculative to warrant recovery."

A Georgia Court of Appeals reversed and ordered a new trial on the grounds that certain evidence which was excluded from trial should have been admitted. Cartin sought to admit into evidence two letters sent to her from a third party, predating the events under litigation. The letters mentioned two items specifically referred to in bole's novel The Limner. Cartin contended that the letters proved a similarity between her life and events in Boles' book. "Unless the finder of fact believes that this congruence is coincidental," stated the court, "an inference arises that the testimony of [Boles] that he had finished The Limner prior to having met [Cartin] is false. The trier of fact being thus authorized to have concluded that this portion of [Boles] testimony was impeached would have been authorized to disbelieve the remainder of [Boles] testimony." Had the evidence been admitted, concluded the court, "a different judgment might have resulted." As a result, the judgment was reversed and the case sent back to the trial court for a new trial.

Cartin v. Boles, 270 S.E.2d 799 (Ga.App. 1980) [ELR 2:22:4]

Radio station violated Equal Pay and Civil Rights Acts because it paid female talk show host less than similarly qualified male talk show host

A former radio talk show host has been awarded approximately $21,000 in damages and back pay as compensation for discriminatory employment practices engaged in by her employer. Alexandra Futran was paid $9,000 less than a male colleague performing equal work. The male program host did not have more broadcasting experience than Futran and he had not demonstrated that he could generate substantially greater endorsement revenue for the station. The disparity in salaries was sex-based, ruled the court, and violated the Equal Pay Act of 1963. The fact that it took less money to attract Futran and the station paid "what the market would bear" also was a discrimintory practice in violation of the Act.

The violations of the Equal Pay Act also violated Title VII of the Civil Rights Act of 1964 for which Futran was entitled to the difference between what she would have earned and the amount she actually did earn during the balance of her one year contract.

It was also found that Futran had been discriminated against on the basis of sex when she was asked to perform certain clerical duties that male program hosts were not required to perform, and that she was fired by the station in retaliation for her refusal to perform such clerical work.

Futran v. Ring Radio Co., 501 F.Supp. 734 (N.D.Ga. 1980) [ELR 2:22:5]

Major League Baseball Players' Association and Topps Chewing Gum found to have monopolized baseball card market

Baseball cards, said the court, are an education in baseball; this case is an education in baseball cards.

Topps Chewing gum, the producer of "Bazooka" bubble gum and the only significant seller of baseball cards in the United States, and the Major League Baseball Players' Association, the players' labor union and authorized licensor of the players' group merchandizing rights, have violated federal antitrust laws, a Federal District Court in Pennsylvania has held. The suit, brought by Fleer Corporation best-known for its "Double-Bubble" bubble gum, charged that Topps and the Players' Association have unlawfully restrained and monopolized trade in the market for baseball cards that are sold alone or in combination with a low cost premium.

For many years Topps has entered into baseball card contracts with virtually every new player entering professional baseball at either the minor or major league level. Each contract grants Topps exclusive rights to sell the players' name and picture "alone or in combination with chewing gum, candy and confections, or any of them." In the mid-1960s, the Players' Association, after scoring on a successful deal with Coca-Cola for placing players' pictures on the inside of bottle caps, began to regularly obtain commercial authorizations from its member-players under contracts by which each player grants the Players' Association the exclusive right to use his picture, name and signature with other players in a group. This includes group merchandizing rights not inconsistent with Topps contractual rights.

In 1966 Marvin Miller, the Players' Association's newly appointed full-time executive director, met with the president of Topps to discuss the terms of the Topps baseball card contracts. At that time, Topps paid each minor league player $5 for his signature on an initial contract, and $125 for each season he was in the major leagues for 31 days, or for any year in which his picture was used in a baseball card series. Topps paid no royalty however. Miller thought these terms were insufficient; Topps disagreed. Both sides emerged from their dugouts, bats in hand, but before the end of 1968, a contract was negotiated. When the dust settled, all contracts between Topps and major league players were amended to increase payments to the greater of $250 per year, or a prorata share of 8% of Topps's sales up to $4 billion, and 10% in excess of that amount. These royalties were paid directly to the Players' Association. In 1973, Topps and the Players' Association extended their royalty agreement for an additional 5 year period, from 1976 to 1981.

The Players' Association is Topps' chief competitor, said the court; although Topps holds the right to sell baseball cards alone or in combination with gum, candy or confections, the Players' Association has the right to market baseball cards in combination with nonconfectionary products. If a competitor, such as Fleer, wanted to compete with Topps by marketing a non-confectionary baseball card product, it could do so only by obtaining a group license from the Players' Association. The Association refuses to grant such licenses because it wishes to avoid lessening its royalty income from Topps products. The effort of this "odd combination of interlocking rights and conduct," said the court, "has been to exclude completely any meaningful competition to Topps."

The court held that Topps and the Players' Association have violated sections 1 and 2 of the Sherman Antitrust Act, but, in calculating damages, found that every conceivable evaluation of Fleer's losses in this case depends on "an unacceptable amount of speculation." It thus awarded Fleer only $1 in damages, trebled pursuant to the statute, to $3.

Nevertheless, by means of equitable relief, the court sought to place Fleer in essentially the position that it should have occupied before the start of the suit. Topps was permanently barred from enforcing or entering into any contract with any major or minor league player that reserves to Topps any exclusive rights to sell that players' picture.

The Players' Association was ordered to consider carefully, without regard for revenue derived from its agreements with Topps, any application it receives for licenses to market baseball cards and was ordered to grant at least one such license to which fleer was given the right of first refusal.

The court rejected Topps' collateral estoppel defense based on a 1965 Federal Trade Commission ruling that Topps did not monopolize the baseball card market. (In re Topps Chewing Gum, Inc., 67 FTC 749.) The court rejected this contention, because the Players' Association group licensing program did not yet exist in 1965 and conditions in the baseball card market have changed since the FTC made its findings.

Fleer Corporation v. Topps Chewing Gum, Inc., 501 F.Supp. 485 (E.D.Pa. 1980) [ELR 2:22:5]

Briefly Noted:

Copyright.

A Federal Court of Appeals has ruled that the book "Ghost Boat" did not infringe a common law copyright in the unpublished manuscript for the novel "Return to Nowhere" due to the lack of substantial similarity of copyrightable expression between the two works which contained only a "remote semblance of ideas."

O'Neill v. Dell Publishing, Co., Inc., 630 F.2d 685; CCH Copyright Law Reports, Para. 25,204 (1st Cir. 1980) [ELR 2:22:6]

Libel.

A physician and member of the Georgia Composite State Board of Medical Examiners was not libeled by an article and editorial in the Atlanta Constitution concerning ethics and fraud in the medical profession, even though the article included references to the Board and to an investigation of its members, the Georgia Court of Appeals has held.

Morton v. Stewart, 266 S.E.2d 230 (Ga.App. 1980) [ELR 2:22:6]

Libel.

An article in Forbes magazine describing the trade practices of certain Latin American merchants in Miami contained a photograph taken at Miami airport which depicted cartons of outward-bound merchandise. Bystanders Maxwell Fogel and his wife were included in the photo without their consent and they sued for defamation and invasion of privacy. The Fogels were not mentioned or identified in the article. A Federal District Court in Pennsylvania has granted summary judgment to Forbes, finding that the picture and the article were not reasonably capable of conveying the meaning of innuendo that the Fogels had engaged in the activities described in the article. Further the Fogels had failed to submit proof of special harm or special damages as required when a defamation case is not actionable per se.

The invasion of privacy claim was rejected since the photograph was taken at the Miami Airport. The false light invasion of privacy claim and any claim based on the appropriation of the Fogel's name or likenesses also were denied.

Fogel v. Forbes, Inc., 500 F.Supp. 1081 (E.D.Pa. 1980) [ELR 2:22:7]

First Amendment.

The Connecticut Liquor Commission suspended the liquor license of the Hartford Hilton Hotel due to the performance of the stage show "Oh: Calcutta" in the hotel's ballroom in violation of Commission regulations barring nudity in establishments licensed to serve liquor. The Connecticut Superior Court has ruled that the Commission's action was a "significant erosion of first amendment rights."

The court distinguished the case of California v. LaRue, 409 U.S. 109 (1972), reh. den. 410 U.S. 948 (1973), in which regulations similar to those of the Commission were held constitutional since they were enacted in an effort to prevent the "bacchanalian revelries" occasioned by performances of topless/bottomless dancers in bars and nightclubs licensed by California's Department of Alcoholic Beverage Control.

The Commission was found to have acted within its statutory authority because the hotel could have sold liquor to be consumed in the ballroom where the performances occurred. But inspectors testified that there were no facilities for serving liquor in the ballroom, that no liquor was served in the ballroom, and that an announcement was made at intermission that no one who left the mezzanine where the ballroom was located would be allowed to return. Further, according to the court, "Oh: Calcutta" fell into an area of speed "somewhere between 'Mary Poppins' and 'bacchanalian revelries,'" and was entitled to First Amendment protection even when presented in an establishment licensed to serve liquor.

Moore v. Connecticut Liquor Control Commission, 418 A.2d 955 (1980) [ELR 2:22:7]

Freedom of Information Act.

The CIA has been granted partial summary judgment in an action brought by journalist Victor Navasky under the Freedom of Information Act. Navasky sought disclosure of documents relating to alleged worldwide clandestine book publishing activities of the agency. The court refused to categorize the authors, publishers and books involved as "intelligence sources and methods" which would be exempt from disclosure in all circumstances. However, since the CIA had offered "plausible justifications of identifiable damage to the national security" with respect to foreign book publishing activities, the agency was not required to disclose information about such activities.

Navasky v. Central Intelligence Agency, 499 F.Supp. 269 (S.D.N.Y. 1980) [ELR 2:22:7]

Obscenity.

Refusing to admit into evidence nine magazines and one film offered to reflect the governing "contemporary community standards" was reversible error, a Texas Court of Criminal Appeals has held in an opinion overturning a conviction for the defendant's exhibition of an allegedly obscene double feature at a drive-in theater. The trial court permitted the introduction of 28 magazines, one film and a book purchased in various Texas locales, but the appeals court found these to be more innocuous than the materials excluded, thereby giving the jury an inaccurate portrait of contemporary community standards.

Berg v. State, 599 S.W.2d 802 (Tex.Cr.App. 1980) [ELR 2:22:7]

Tax.

The Tax Court has held that a nonprofit corporation that displayed "daring works" of art, which were selected because they represented modern trends in art and not because of their sales potential, was run for exempt purposes. The IRS had contended that the corporation was being run for the benefit of private individuals, because the corporation sold the paintings it displayed, retaining 20% of the proceeds for itself and distributing 80% to the artist. The Tax Court held, however, that the corporation's sales activities were secondary, because the net profits derived from the operation of the galleries were in fact minimal. The Tax Court therefore held that the corporation was entitled to tax exempt status.

Goldsboro Art League, Inc. v. Commissioner. 75 T.C. No. 28 (1980) [ELR 2:22:7]

Torts.

The Appellate Division of the New York Supreme Court has affirmed a trial court decision setting aside a 5-to-1 jury verdict awarding the plaintiff $25,000 in damages for injuries suffered by him as a result of a fall at the defendant's skating rink. In affirming the lower court decision, the Appellate Division found that the plaintiff failed to establish that the defendant had committed "any actionable negligence proximately causing accident and injuries." In a dissenting opinion, two justices argued that the issue of liability rested on findings of fact properly made by the jury (regarding the defendant's conduct in reopening the skating rink after reconditioning of the ice).

O'Brien v. Midtown Skating Club of New York, 430 N.Y.S.2d 621 (App.Div. 1980) [ELR 2:22:7]

Previously Reported:

The following cases have been published: Lutcher v. Musicians Union Local 47, 633 F.2d 880 (2:16:3); International Order of Job's Daughters v. Lindeburg And Company, 633 F.2d 912 (2:18:3); Boz Scaggs Music v. KND Corp., 208 USPQ 307 (2:11:7); Capital Films Corp. v. Charles Fries Productions, Inc., 208 USPQ 249 (2:17:1); Testa v. Janssen, 208 USPQ 213 (2:13:2);

Data Cash Systems, Inc. v. JS & A Group, 208 USPQ 197 (2:19:2); Weisberg v. U.S. Department of Justice, 207 USPQ 1080 (2:14:5); Los Angeles Memorial Coliseum Com'n. v. Nat. Football, 634 F.2d 1197 (2:17:5).

The decision of the Fifth Circuit Court of Appeals in Triangle Publications v. Knight-Ridder Newspapers (2:11:4, 2:16:8) which was republished at 626 F.2d 1171 included a dissenting opinion which did not appear in the decision as published at 621 F.2d 1318.[ELR 2:22:8]

NEW LEGISLATION AND REGULATIONS

FCC announces elimination of regulations governing radio station programming, commercials and record keeping

The FCC has announced that it will no longer regulate the amount of non-entertainment programming presented on commercial radio stations and will not restrict the number of commercial minutes broadcast per hour. Further, community ascertainment and program log keeping requirements for commercial radio stations have been eliminated. (Proposals for deregulation were set forth in the FCC's Notice of Inquiry and Notice of Proposed Rule Making, FCC 79-518, September, 1979, ELR 1:10:1)

Noting the tremendous growth in the number of radio stations over the past 50 years and the broad spectrum of listeners served, the FCC stated that it generally will rely on market-place forces to meet the public interest in achieving balanced programming and in determining "appropriate levels of commercialization." The FCC seeks to assure that broadcasters will have the maximum flexibility to be responsive to issues important to their listeners with the minimum amount of governmental interference. Fairness Doctrine, the Petition-to-Deny process and periodic license renewal will not be affected by deregulation, nor will FCC policies relating to equal employment opportunities or minority ownership. And since the FCC does not have, as many believe, requirements for broadcasting public service announcements, regular weather reports, or community service programming, such programming also will not be modified or eliminated by deregulation.

In the area of programming, radio stations, which formerly operated under guidelines calling for 8% non-entertainment programming, will now be asked to offer programming which is responsive to public issues. And each station need not provide "something for everyone," but rather may take into account the services provided by other radio stations in the community to groups other than a station's own listeners.

Formalized ascertainment requirements will give way to ascertainment procedures which assure that all significant segments of a community are contacted regarding "problems, needs and issues" to be addressed to the station. A list setting forth five to ten issues that the station covered during the year together with examples of responsive programming must be maintained by the licensee.

Limits on commercials have been eliminated in the expectation that audiences, advertisers and individual station owners, acting as a "self-regulating system," will curb advertising excesses. Diversity and experimentation in advertising presentations will be encouraged, possibly including the previously disapproved use of "program length" commercials.

Program log requirements also have been eliminated as a paperwork burden overly focused on technical compliance. Public files containing relevant program information such as the issues/program list will be required.

Deregulation was scheduled to go into effect on April 3, 1981. For further information, call Roger Holberg, Broadcast Bureau (202) 632-7792.

Federal Communications Commission, Deregulation of Radio, 46 Federal Register 13888 (February 24, 1981) [ELR 2:22:6]

DEPARTMENTS

In the Law Reviews:

Celebrity Endorsements: A Case for Alarm and Concern for the Future by Michael E. Jones, 15 New England Law Review 521-544 (1979-1980)

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

Legal Procedures for Protecting Group Names by David A. Weinstein, Performance Magazine, March 13, 1981, pg. 25

The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment, 13 University of Michigan Journal of Law Reform 541-570 (1980)

Intercollegiate Athletics and the Unrelated Business Income Tax by Richard L. Kaplan, 80 Columbia Law Review 1430-1473 (1980)

Copyright to Life: Toward Copyright Protection for Name and Likeness by David C. Byers, 56 California State Bar Journal 52-54 (1981)
[ELR 2:22:8]