RECENT CASES

ABC's exclusive right to televise World Figure Skating competition is upheld by Federal District Court

Exclusive coverage by ABC-TV of the 1981 World Figure Skating Championships has been upheld by a Federal District Court in Connecticut. The court decided that a local television news broadcaster had no special right of access to the event under the First Amendment.

The International Skating Union (ISU), a Swiss-based organization, granted exclusive television rights to Candid Productions in association with the American Broadcasting Company. These exclusive rights included "exclusivity against television news broadcasts of any length which would include video film or video tape coverage of any of the Championships prior to our telecast."

The Championships were placed by ISU with the Skating Club of Hartford. ISU informed local television stations of Candid's (and ABC'S) contractual exclusivity rights and proposed that local stations agree to refrain from broadcasting television footage of the event until ABC concludes its entire telecast of the Championships, in order to get into the Hartford Civic Center Coliseum.

Local television station WSSB-TV, a CBS affiliate, brought suit charging that the agreement represented an unconstitutional restriction on freedom of the press.

Since the Civic Center is not privately operated - if it were, it is clear that the contractual restriction would be constitutionally valid - "state action" existed. Thus, attention had to be given to limitations imposed by the First Amendment. The degree of constitutional scrutiny necessary depended on the capacity in which the City of

Hartford was functioning. The court found that in operating the Civic Center, Hartford was functioning in a proprietary rather than governmental capacity, and therefore, the constitutional test was whether the contractual restrictions were arbitrary or capricious.

In applying that test, the court weighed the nature of the forum and the conflicting interests involved. The court first noted that although entertainment is news, the entertainment here - an athletic event - is "on the periphery of protected speech (for purposes of a balancing of conflicting interests), as opposed, for example, to political speech, which is at the core of First Amendment protection." The court then noted that the severity of the restriction is minimal. "The general public has ready access to the event, the event will be reported by newspaper and radio media without any time or manner restriction, and even the local television stations can attend and report on the Championships as long as they do not immediately televise footage of the event," said the court.

The court concluded that the restrictions imposed were not arbitrary. Television broadcasting would have an unusual impact on the entertainment value of the event, because figure skating is a uniquely visual sport. "Newspaper and radio coverage will not diminish its commercial value; television broadcasting could do so."

Ironically the court supported its opinion with an argument made by the National Association of Broadcasters in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). That case involved a television station broadcast of an entire act of a commercial entertainer - a "Human Cannonball" - in violation of the performer's right of publicity. In briefing the case for the United States Supreme Court, the parties and the National Association of Broadcasters unqualifiedly agreed that

Zacchini could have contracted to protect the commercial value of his act.

Post Newsweek Stations-Connecticut Inc. v. Travelers Insurance Company, Skating Club of Hartford, and the City of Hartford, Civ. No. H-81-134 (D.Conn., March 2, 1981) [ELR 2:23:1]

Universal enjoins Montgomery Ward from using "Jaws" in connection with sale of food disposers

Montgomery Ward's unlicensed use of Universal City Studio's registered trademark and service mark JAWS in connection with Ward's sale of food disposers has been enjoined by a Federal District Court in Illinois. The marks JAWS and JAWS 2 had a "strong, widely recognized and vivid secondary meaning associated with

[Universal's) books and motion pictures," according to the court. And, when used on a particular product, the marks might create consumer demand for the product. Ward was found to have intended to capitalize on the secondary meaning of the marks in order to exploit Universal's good will.

Ward deliberately selected the name JAWS for its food disposers, and used a lettering style for its packaging, products and in its advertising which was "closely similar, if not identical" to the lettering style used by Universal. Ward also timed the name selection and its advertising campaigns to coincide with releases of the films. The court therefore ruled that Uni versal would be likely to succeed at trial in proving trademark infringement as well as misappropriation of merchandising properties and dilution of its trademarks.

Universal City Studios, Inc. v. Montgomery Ward Co., Inc., 207 USPQ 852 (N.D.Ill. 1980) [ELR 2:23:2]

Taxes paid by MCA to foreign countries on foreign film rentals and record royalties are not deductible for California franchise tax purposes

As part of its business activities, MCA, Inc. engages in the production and worldwide distribution of films and enters into licensing agreements with foreign exhibitors who pay rental fees for exhibition rights. MCA also receives record royalties from licenses for the sale of phonograph records. The company pays foreign taxes on the rentals and royalties received. In 1967, MCA sought to deduct the amount of the foreign taxes it paid from its California franchise tax. A Franchise Tax Board ruling disallowing the deduction has been upheld by the California Court of Appeal.

MCA argued that the taxes imposed by the governments of foreign countries were deductible, because they were based on the gross amount of rentals and royalties paid to MCA by foreign licensees and were not net income taxes. The Board, however, determined that the foreign taxes were "on or according to or measured by income" and therefore not deductible under section 24345 of the California Revenue and Taxation Code which allows the deduction of "(a) [t]axes or licenses paid or accrued during the income year except: ... (2) [t]axes on or according to or measured by income or profits ... imposed by the authority of ... [t]he Government of ... any foreign country ..."

The Board had allowed corporate taxpayers to deduct Canadian taxes until the early 1970s when it reversed its position and declared that taxes measured by gross income, which did not "encompass returns of capital through sales," were nondeductible. This position was adopted by the State Board of Equalization in 1973. And in 1977, the California Supreme Court in Beamer v. Franchise Tax Board, 19 Cal.3d 467, defined "income" as used in section 24345 to mean "gross income under general tax law." The Court of Appeal held that the decision in Beamer was controlling in MCA's case.

MCA had not shown that it had any cost of goods sold. And the fact that film rentals and record royalties constituted MCA's gross receipts "did not make the taxes any less taxes measured by gross income."

MCA, Inc. v. Franchise Tax Board, Cal.Ct.App., 2d Cir. No. 59021 (Jan. 26, 1981) [ELR 2:23:2]

Radio station's refusal to air advertisements for political candidate did not violate "equal opportunity" provision of Communications Act

Nick Belluso, a candidate for governor of Georgia in the 1978 Democratic primary, sought to purchase commercial broadcast time on radio station WTCG in Atlanta for political advertising before the primary. He informed the station that he planned to use hypnotic techniques in his advertisements. The station requested an exemption from the FCC from any obligation to provide Belluso with broadcast time, but the FCC refused to issue a ruling. The station rejected Belluso's advertisements and Belluso sued Turner Communications, WTCG's licensee, for damages for violating the equal opportunity provision of section 315(a) of the Communications Act and for violating the First Amendment.

A Federal Court of Appeals in Georgia has upheld the dismissal of the suit on the ground that section 315(a) does not create a private cause of action for damages and that no governmental action was involved which would give rise to a First Amendment violation. The court noted that the object of section 315(a) was "to protect bona fide candidates for public office from discrimination and unfair advantage in the use of broadcast facilities." Congress' intent appears to have been that FCC supervision rather than private actions for damages would be the means of implementing and enforcing the section.

Station WTCG was not a "government instrumentality" by virtue of being licensed to operate by the government and being required to operate in the public interest. and even if the station's actions were to be considered government action for First Amendment purposes, the court stated that there was "serious doubt that the plaintiff has a First Amendment right of access to defendant's broadcast facilities on which to base a damage claim."

Belluso v. Turner Communications Corp., 633 F.2d 393 (5th Cir. 1980) [ELR 2:23:3]

Caprice Records held liable for fraudulently inducing singer to enter into "custom record" contract

Caprice Records, Inc. is a Nashville based custom record company which sells record production services primarily to unknown, aspiring singers or artists. For a fee, Caprice provides musicians, vocalists, studio time, tape, mixing, mastering, a producer, record discs, and minimal promotional services. The promotional services provided are ordinarily insufficient to produce a commercially successful record, but understandably so, because a custom record company derives income and profits, if at all, almost exclusively from the sale of production services, not from the public success of its records. For example, for the fiscal year ending February 28, 1978, Caprice's record sales accounted for $1,036.89 out of a gross income of $761,644.26. The sale of production services accounted for $755,401.74.

In contrast, and according to the standard contract used in today's recording industry, ordinarily a record company initially pays all of the costs of producing and manufacturing the record and bears the cost of promotion and marketing essential to the success of any record. Under the standard contract, if a record fails, the company, not the artist, bears the loss. Caprice Records has few artists under standard contract. It is primarily in the business of custom records and contracts potential customers through radio and newspaper advertisement.

In August 1977, Peggy Brungard, a professional singer then appearing in local clubs in the Southwest under the name of Peggy Cole, answered such an advertisement. In a motel in Albuquerque, New Mexico, and accompanied by her husband, she successfully auditioned for Chuck Adams, a Caprice Records talent agent. Adams thereafter falsely represented that (1) Caprice was taking a financial risk in signing her; (2) it would actively promote her record; (3) it would release her record under its label when in fact it released it under an unknown affiliated label; (4) it was a large recording company with assets sufficient to build a huge music complex and to successfully promote new artists; and (5) it was in the business of selling records. Don Lewis, Caprice's president, made similar misrepresentations to Brungard.

Although unsophisticated in her knowledge of the recording industry, Brungard knew that to be even marginally successful a record requires significant promotion and that her investment was insufficient to finance such promotion. Misled by Adams' and Lewis' statements, and apparently without the aid of an attorney, Brungard signed a Caprice custom record contract in October 1977 and paid a $500 deposit against the $2,9666 fee for producing her record. She thereafter learned that Caprice was not promoting her record as she had anticipated it would, and, on July 20, 1978, she successfully sued Caprice, Don Lewis and Chuck Adams in Tennessee for fraudulently inducing her to sign the contract. The defendants appealed but were unsuccessful.

The appellate court initially noted that a tape recording of and testimony concerning contract negotiations between Brungard and Adams were properly admitted into evidence. The parole evidence rule, which provides generally that a contract as written cannot be modified by previous oral representations or agreements, applies to suits on a contract but not, as here, to a suit involving fraudulent misrepresentations that induce a contract.

The defendants insisted that the evidence, whether oral or otherwise, was insufficient to support a finding of fraud. After reviewing the trial judge's findings and the evidence, however, the court affirmed the judge's findings. The court noted that in Tennessee a person suing for misrepresentation in a commercial context need only prove that the challenged statements were made negligently. The court went further, however, and noted that "[al]though proof of actual fraud is not necessary to establish liability in this case, it is important with regard to the amount of actual damages to be awarded." Under the Tennessee Consumer Protection Act, which declares unlawful any representations to consumers that "services ... have characteristics, ... uses, benefits, or qualities that they do not have ..., " the court may award treble damages and reasonable attorney's fees against one who willfully and knowingly violates the Act. The court affirmed the award here of $7,998 in treble damages and $2,666 in attorney's fees, concluding that "[t]he evidence in this case overwhelmingly supports the ... finding that the deceptive practices were willful and knowing."

The defendants had made material misrepresentations concerning Caprice's business and its financial and corporate structure; Brungard relied thereon in signing the contract. "On this basis alone," said the court, Brungard "has proved her case." The defendants also misrepresented that they would promote and finance Brungard's record.

The court rejected Adams' and Lewis' contentions that they were not personally liable. As to Adams, the court simply reiterated the well-settled principle that " an agent cannot escape liability for tortious acts, including fraud or misrepresentation, against third persons simply because the agent was acting within the scope of the agency or at the direction of the employer." As to Lewis, the court ruled that "[a]n officer or director of a corporation who commits or participates in the commission of a tort is likewise liable to third parties regardless of the liability of a corporation." The court concluded "that Lewis knew and approved of the selling methods employed by Adams and that Lewis participated in the fraud."

Brungard v. Caprice Records, Inc. 608 S.W.2d 585 (Tenn.App. 1980) [ELR 2:23:3]

Harvard Law School student wins copyright infringement case against Washington legal publication

An article entitled "HLS Clerks Get Offers They (sigh) Can't Refuse" originally appeared in the Harvard Law Record, a newspaper published by students at Harvard Law School. The article was reprinted by the Legal Times of Washington in its October 15, 1979 issue. The article's author, a Harvard law student, brought suit for copyright infringement in federal court in Washington, D.C. A motion by Legal Times to dismiss for lack of subject matter jurisdiction has been denied, and the student's motion for summary judgment has been granted.

The Legal Times contended the court lacked jurisdiction because the student failed to record an Assignment of Copyright with the Copyright Office. Recordation of an assignment is a prerequisite to an assignee's bringing suit under the Copyright Act (17 U.S.C. Sec. 205). To prevail on this theory, the Legal Times would have had to show that the Record, and not the student, initially owned the copyright to the article. The Copyright Act provides that in the case of a "work made for hire," the employer or the person for whom the work was prepared owns the copyright. In contrast, the copyright to a "contribution to a collective work" belongs to the author. "It would be difficult to envision a case where it is more clear than it is here that the article was a contribution to a collective work and not a work made for hire," said the court. The student received no compensation for his article; the idea to write it was entirely his; he was not a party to an express contract for hire; he was free to engage in other writing activities for pay; he had no regular working hours; and neither the interviews nor the initial writing occurred at the Record's office.

To prove that the article was intended to be a work made for hire, the Legal Times pointed to the Record's execution of a document purporting to assign the copyright in the article to the student. The court, however, noted that the Copyright Office viewed the article as a contribution to a periodical and returned the assignment because it was unnecessary. Further, under section 201 of the Act, "In the absence of an express transfer of the copyright or any rights under it, the owner of copyright in the collective work" - in this case, the Record - "is presumed to have acquired only the privilege of reproducing and distributing the contribution" - the student's article - "as part of that particular collective work." Therefore, since the student's claim to the copyright was by virtue of authorship and not by virtue of transfer, it was immaterial that he did not record the assignment from the Record to him. The court viewed the purported assignment as having no legal effect because the Record never owned the copyright to the student's article and thus had no rights to assign.

In its defense, the Legal Times contended that since the student was not the copyright proprietor of the extensive quotations used in his article, he was not the proper party to bring suit; that since copying is not considered an infringement of a copyright where the copying is for news reporting, its republication of the article was protected by the fair use doctrine; and that it had a First Amendment right to reprint the student's article. The court responded that even if the student did not own the copyright to the quotations, he had permission to use the quotations and his copyright in the compilation protected his selection, arrangement, and ordering of them.

The use of copyrighted material in a news story may constitute a fair use. However, in this case it was not a fair use, because the republication was for commercial rather than educational purposes; almost the entire article was printed; and the reprinting eliminated the possibility that the student could sell his article to a legal newspaper such as the Legal Times. The Legal Times' claim that its use of the article was protected by the First Amendment was rejected, because it did not merely use the newsworthy facts in the student's article, it also appropriated his expressions of those facts.

Finally, the court rejected the contention that the Legal Times was misled by the blanket copyright notice in the name of the Harvard Law School Record Corporation. The court found that it was unreasonable for the managing editor of the Legal Times, David C. Beckwith - who is an attorney and had been the editor of the Law section of Time Magazine - to rely on vague oral permission from a former editor-inchief of The Record to republish materials originally published in The Record. Beckwith had a duty to inquire whether The Record owned the copyright to the student's article in order to claim he was misled and acted in good faith, said the court.

The court assumed that Beckwith honestly believed that he had permission to reprint the student's article. Nevertheless, since he admitted by affidavit he did not speak to anyone from the Harvard Law Record after the student's article appeared in that newspaper, be could not have obtained specific permission to reprint the article or inquire as to who owned the copyright in the article. On this basis, the court granted the student's motion for summary judgment. The question of damages remains to be determined.

Quinto v. Legal Times of Washington, Inc., CCH Copyright Law Reports, Para. 25,220 (D.D.C. 1981) [ELR 2:23:5]

Contract releasing motor speedway from liability to race car driver upheld; pit crew member held to have assumed risk of injury

Illinois courts have handed down two opinions concerning the liability of automobile racetracks to race car drivers and pit crew members.

A race car driver took action against a motor speedway for injuries sustained when a portion of the upper track embankment collapsed. The Supreme Court of Illinois dismissed the case, upholding the legality of an agreement signed by the driver releasing the racetrack from all liability for loss or damage caused by its negligence.

The driver contended that the collapse of the track embankment which caused his crash was completely outside the scope of his expectations and the sweeping language in the release. In response, the court pointed out that experienced race drivers are aware of a myriad of factors, obvious or unknown, which may singly or in combination result in unexpected and freakish racing accidents. "The parties may not have contemplated the precise occurrence which resulted in [the driver's] accident, but this does not render the exculpatory clause inoperable," said the court. "In adopting the broad language employed in the agreement, it seems reasonable to conclude that the parties contemplated the similarly broad range of accidents which occur in auto racing."

The court rejected the driver's charge that the release constituted an unenforceable contract of adhesion. (Contracts of adhesion are usually printed forms executed in "take it, or leave it" settings where there is a substantial disparity of the parties' bargaining positions.) "While it is obvious that [the driver] would not have been allowed to use the racetrack had he not signed the release, [he] was under no economic or other compulsion to sign the release in order to engage in amateur auto racing."

Four days before the driver's case was decided, an Illinois Appellate Court reversed an award of damages to a pit crew member who was struck by a "hobby" car operated by a novice driver. The court found that the man had assumed the risk of injury and, by his actions, sufficiently contributed to the accident so as to bar recovery. Holding that the trial court should have directed a verdict in favor of the racetrack, the Appellate Court stated, "Just as drivers are not deterred from participating by the danger of being injured in a crash, the pit crew members choose to station themselves near the track to give signals, accepting the obvious risk of being struck by a car."

The court also noted, without deciding, that the written release form which the pit crew member signed when he entered the racetrack probably provided another ground for reversal. On the form, in bold face letters, were the words, "waiver and release from liability and indemnity agreements," and on each signature line, "this is a release." The form language of the agreements was "so conspicuous that reasonable men could not reach different conclusions on [its] import and significance."

Schlessman v. Henson, 413 N.E.2d 1252 (Ill. 1980); Provence v. Doolin, 414 N.E.2d 786 (Ill.App. 1980) [ELR 2:23:6]

College guidebook did not defame Ithaca College despite book's emphasis on "sex, drugs and booze"

The Insider's Guide to the Colleges 1978-79, compiled and edited by the student staff of the Yale Daily News, did not defame Ithaca College, a New York state court has held, despite what the court described as the Guide's "somewhat sophomoric appraisal of a segment of [Ithaca's] student body."

The Guide, a 404 page paperback publication containing descriptive commentary about 230 American colleges and universities, advised its readers:

"Life at Ithaca is anything but harsh. (Watch out, though. The weather stinks, except in the summer when you're home.) The pub, located in the middle of campus, provides the center of social life for many students. Sex, drugs and booze are the staples of life. If Ithaca has a reputation as a party school, it is well deserved ... Sex is casual, and formal dating is unheard of, the pick-up scene thrives in Ithaca ... The use of pot is a foregone conclusion, and cocaine occasionally manages to wend its way into the hands of those who can afford it. Speed and downers are common, but acid enjoys a healthy disuse. The town is cram-packed with bars, theaters and cultural events."

Public figures claiming defamation must prove that the statements were made with knowledge of their falsity of with reckless disregard for the truth. Under New York law, private figures are only required to prove publication in a "grossly irresponsible manner." Although Ithaca

College characterized itself as a "private liberal arts college" and a "small liberal arts institution," the court viewed the school as a "public figure." The court determined that neither malice nor recklessness can be ascribed to the Guide, viewing the publication in the light of the prefatory statements of its limited source and level of knowledge. As indicated in its preface, the Guide, at most, "stepped on a goodly number of fingers, a few arms and legs, and in some cases whole torsos." The preface further observed that its contents are "apt to excite plenty of disagreement and downright disapproval," and the reader is admonished to "take our word with more than just a polite grain of salt."

Even applying the lesser standard of proof applicable to private figures, the court found that the Guide's admitted method of compiling data did not demonstrate "grossly irresponsible" conduct in publishing the alleged libel. Student contributors were chosen by the editors of the student newspaper of Ithaca College, who were furnished guidelines for the proposed evaluation, including repeated requests for accuracy and objectivity. In addition, Ithaca's own admissions office was informed of the intended publication of the current edition and it contributed statistical data for the intended article. The court thus determined that the "publication exercised 'reasonable efforts to insure accuracy' for the somewhat tongue in cheek statements of its conclusions."

The court also viewed the critical commentary as constitutionally protected opinion, rather than fact, and as such "must be assessed in the context of the article as a whole." The court said "the 'sex' and 'drugs' attributed to the campus life of [Ithaca] are neither unique nor unusual descriptions of campus life in other institutions, and such does not denigrate from the educational offerings of Ithaca College described in The Guide as 'good humanities and science offerings,' with an 'excellent music school [that] is very professional and demanding.'"

The court conceded that the student editors, by over-emphasizing social aspects of the college's life, may have minimized the school's virtues and attainments and may have injured the school's pride. "Although we recognize the hurt deemed inflicted," concluded the court, "a need for free comment concerning such educational institutions must take precedence."

Ithaca College v. Yale Daily News Publishing, 433 N.Y.S.2d 530 (1980) [ELR 2:23:6]

Briefly Noted:

Copyright.

Harper & Row, the publisher of former President Gerald Ford's memoirs, granted the exclusive right to Time, Inc., to prepublish selected portions of the memoirs. The Nation magazine, without authorization, allegedly obtained a copy of the manuscript of the Ford book and published an article prepared from the manuscript prior to the appearance of excerpts from the memoirs in Time.

Harper & Row contended that as a result of The Nation article, Time, Inc. canceled its publication agreement. Harper & Row therefore sued The Nation for copyright infringement, and for conversion and tortious interference with contract. The conversion and interference claims which were based on state law have been dismissed by a Federal District Court in New York.

The court initially determined that the unpublished Ford manuscript was a copyrightable work although some of it involved news events or matters within the public domain. The court then ruled that the state law claims were preempted under section 301 of the Copyright Act of 1976 since the rights asserted were "equivalent to the rights protected under the copyright laws, i.e. the exclusive right to reproduce and distribute a copyrightable work." The fact that the claim of interference with contract required the pleading of elements which were not required in a claim for copyright infringement did not significantly distinguish the rights involved.

Harper & Row, Publishers v. National Enterprises, 501 F.Supp. 848 (S.D.N.Y. 1980) [ELR 2:23:7]

Libel.

The New York Times v. Sullivan actual malice standard has been applied to deny recovery in an action for libel brought by John Ryan, a former officer of Southern

Bell Telephone Company against John Brooks, the author, of a corporate history of A.T. & T., and against Harper & Row, the book's publisher. One sentence of the 345 page book referred to political contributions made by Ryan who allegedly derived the funds "from salary kickbacks extorted from leading Southern Bell executives that had been concealed by the use of false vouchers." A jury award of $5,000 actual and $150,000 punitive damages has been reversed by a Federal Court of Appeals in North Carolina which found insufficient evidence of malice. The court noted that Brooks had consulted several reliable secondary sources. The use of the words "extortion" and "false vouchers" may have been incorrect but there was no evidence that Brooks had any reason to suspect the accuracy of his sources. Brooks' failure to read a newspaper interview with Ryan regarding the contributions was not reckless conduct amounting to malice, particularly in view of the fact that the sentence was such a small part of the entire work, the court held.

Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980) [ELR 2:23:7]

Previously Reported:

Warner Amex's QUBE cable system was able to cable cast Ohio State football games last season after all, even though it failed to obtain a preliminary injunction in its antitrust suit against ABC and the NCAA. (ELR 2:20:2) ELR Editorial Board member Philip Hochberg (whose firm has offices in Columbus as well as in Washington) advises that QUBE did buy out all of the unsold tickets to the football games of four smaller colleges near OSU. As previously reported, the District Court denied

QUBE's application for a preliminary injunction largely because it failed to show that it would suffer irreparable injury. The court reasoned that the only thing that stood between QUBE and the OSU games it wanted was QUBE's buying out unsold tickets to conflicting games - a suggestion QUBE then took. [ELR 2:23:8]

NEW LEGISLATION AND REGULATIONS

Copyright Royalty Tribunal explains reasons for increase in compulsory license record royalty

As previously reported (ELR 2:21:6), the Copyright Royalty Tribunal has increased the compulsory license royalty payable by manufacturers and distributors of nondramatic music, effective July 1, 1981. The Tribunal did not explain its reasons for increasing the royalty at the time it adopted the rule doing so. Shortly thereafter, however, the Tribunal did put its reasoning in writing. In its recently published explanation, the Tribunal noted that the compulsory licensing system was designed to prevent monopolization of musical compositions by providing for non-exclusive licenses, as a matter of right, to all who comply with its provisions and pay royalties. The copyright owner (who is usually the songwriter, or the music publisher) thus loses the exclusive right to commercially exploit its musical compositions. As compensation, and to provide the "economic incentive and the prospect of pecuniary reward" intended to "encourage the creation and dissemination of musical compositions," owners of registered copyrights in musical compositions are entitled to receive from compulsory licensees a fair return for their creative efforts.

The Tribunal found that copyright owners have been limited to a "price-fixed" mechanical rate "worth only a fraction of its former purchasing power," and that because the rate has been "seriously eroded by inflation," they do not receive the fair return to which they are entitled by law. Consequently, the current "2 3/4 cent statutory ceiling," said the Tribunal, "does not maximize the availability of commercially viable musical compositions to the public ." The Tribunal found that "industry wide statistics confirm the deteriorating market position of the copyright owner." For instance, in 1955, mechanical royalties were $11.04 million, slightly more than recording artist royalties of $10.21 million. (The recording artist generally receives a negotiated royalty from his or her record company for each record sold.) By 1979, mechanical royalties were $117.7 million, barely onefourth of recording artist royalties which totalled $465.2 million. Furthermore, "[t]he songwriter must have six songs recorded - if he is paid the full statutory rate of 2 3/4 cents - to earn the same purchasing power per song per record that Congress afforded his predecessors in 1909." With this and other evidence before it, the Tribunal concluded: [T]hat even if the Tribunal were to ignore Congress' instruction that the existing rate have no precedential weight in the current proceeding, the evidence in this proceeding demands an immediate upward adjustment of the royalty to not less than four cents merely to restore the 2 3/4 cents existing rate today to its effective purchasing power in 1974 dollars.

Mechanical royalties are paid at a higher rate abroad than in the United States, and the Tribunal found "no economic or policy justification for this disparity." Interestingly, in countries other than Canada and the Soviet Union, the royalty payable is expressed as a percentage of price, "to ensure that the statutory or negotiated rate maintains its purchasing power under inflationary pressure." "[B]oth here and abroad," the Tribunal observed, "the recorded music industry is dependent upon copyright owners for an essential input." yet "the market position of the copyright owner in the United States is much weaker than (that of] his colleagues abroad ... American copyright owners do not receive a fair return for the use of their creative efforts in their native land." The upward adjustment of the domestic rate is thus justified, the Tribunal concluded, "to make the price paid for a tune in the United States comparable [to] what is paid elsewhere."

The record companies insisted that an increase in the statutory rate will disrupt the industry, bankrupt several companies, require an unbearable price increase of $300 to $700 million to consumers, and that the compulsory license itself maximizes the availability of creative works to the public. The companies further insisted that increases in record sales adequately compensate for erosion in the value of the statutory rate. The Tribunal rejected these arguments as unsupported by the evidence, and noted that the pessimistic testimony provided by representatives of the major companies was "contradicted by equally optimistic statements issued by the same companies (and in one instance by the same individual) to other audiences, such as stockholders, securities analysts and trade groups." "It is not unknown," said the Tribunal, "for corporations to plead poverty to regulatory agencies while simultaneously making optimistic profit projections to their stockholders."

The record companies failed to convince the Tribunal that an increase in the mechanical royalty rate would force them to raise the suggested retail list prices. The Tribunal found "no reason to believe that record company price increases are dependent upon increases in mechanical royalties," and, as one witness testified, "[n]o specific cost results in a [price] increase. It's the aggregate of all of these costs that will generally contribute to a price increase." Even if some price increase

may result from the royalty adjustment, the Tribunal concluded that while it "must seek to minimize disruptive impacts, in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever. The fact that an increase in the rate will increase costs is not per se an argument against raising the rate. There have been benefits to others from cost and price increases in the past without any benefit to the copyright owner." The Tribunal adopted the rate increase in order to "afford songwriters a financial and not merely a psychic reward for their creative
efforts."

Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords, 46 Federal Register 10466; CCH Copyright Law Keports, Para. 13,042 (February 3, 1981) [ELR 2:23:4]

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