

RECENT CASES

Elvis Presley impersonation show may continue without authorization from Presley's Estate, but may not use Presley service marks in advertising or promotional material

The Estate of Elvis Presley has filed suit to enjoin Rob Russen's The Big El Show - a stage production patterned after an actual Elvis Presley stage show, featuring an individual (at one time, Larry Seth) who performs in the style of the late Elvis Presley. In a motion for a preliminary injunction brought before Federal District Judge Stanley Brotman in New Jersey, Presley's Estate charged Russen with infringement of the right of publicity, unfair competition, common law trademark infringement, and false designation of origin under Section 43(a)

of the Federal Trademark Act. In what is at least the fourth decision concerning the posthumous merchandising of Elvis Presley's name and likeness (ELR 2:9:3, 1:22:1), the court held that Russen may not use service marks owned by the estate - Elvis, Elvis in Concert, Elvis Presley, TCB (with or without the lightning bolt design), or pictures or drawings resembling the "Elvis pose" - or any other mark, including Russen's The Big El Show logo, that is displayed in connection with any of the Estate's service marks. However, Russen may continue presenting his Elvis show if appropriate steps are taken to inform the public that his production is not affiliated or sponsored by the Estate of Elvis Presley or those licensed by the Estate to provide Elvis Presley entertainment services.

The court's ruling in favor of the Presley Estate was not based on its right of publicity claim. Though the court concluded that the Estate would probably succeed on

the merits of that claim at trial, the court found insufficient evidence of irreparable harm to the Estate to justify granting a preliminary injunction based on that particular claim. Nevertheless, the court's discussion of the right of publicity, and its evaluation of New Jersey law, is not insignificant.

The right of publicity exists in New Jersey, ruled the court, and it descends to the estate at the death of the individual, at least where the individual had exercised the right during his lifetime. However, the right of publicity is not without limitation; it must be balanced against the First Amendment's guarantee of free speech and press, said the court. The test in this case was whether Russen's portrayal of Presley predominantly serves a social function valued by the protection of free speech. "If the portrayal mainly serves the purpose of contributing information, which is not false or defamatory, to the public debate of political or social issues or of providing

the free expression of creative talent which contributes to society's cultural enrichment, then the portrayal generally will be immune from liability. If, however, the portrayal functions primarily as a means of commercial exploitation, then such immunity will not be granted."

"After careful consideration of the activity," the court decided that "although The Big El Show contains an informational and entertainment element, the show is predominantly to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society." The production does provide information in that it illustrates a performance of a legendary figure in the entertainment industry, the court conceded. "However, in comparison to a biographical Film or play of Elvis Presley or a production tracing the role of Elvis Presley in the development of rock 'n roll, the information about Presley which The Big El Show provides is of limited value." True, "entertainment enjoys First

Amendment protection." However, "entertainment that is merely a copy or imitation, even if skillfully and accurately carried out, does not really have its own creative component and does not have a significant value of pure entertainment." The court noted that sporadic, occasional and good faith imitation of a famous person to achieve humor, to affect criticism, or to season a particular episode may be protected. In this case, however, there had been no showing that the production is intended to or acts as a parody, burlesque, satire, or criticism of Elvis Presley. (This decision, said the court, does not foreclose Russen from supplementing the record at the time of trial with further information bearing on the nature of his production.)

The court did find both probable success on the merits and irreparable injury in connection with the Presley Estate's claims of common law trademark infringement, unfair competition, and false designation of origin under

the Lanham Act. The court determined that, for purposes of a preliminary injunction, the Presley Estate has valid and protectable service marks in the names "Elvis," "Elvis in Concert," and "Elvis Presley," but not in the name "The King." The Estate also possesses a service mark in the logo "TCB" - meaning "Taking Care of Business" which had appeared on business cards, letterheads, jackets for personnel associated with Presley's stage shows, a ring worn by Presley while performing, and on the tails of Presley's airplanes. Also Presley's band was identified as the TCB Band.

In what may presage a new approach in name and likeness cases, the court also recognized a service mark in "a picture or illustration of Elvis Presley dressed in one of his characteristic jumpsuits and holding a microphone in a singing pose." The court found that the "Elvis pose," although "perhaps a descriptive mark in that it illustrates a service, has acquired secondary meaning through its

use in advertising and promoting of the entertainment services of Elvis Presley (as well as in identifying licensed products)."

Looking through "the eyes of ordinary purchasers, buying with ordinary caution," the court concluded that consumers viewing Russen's marks and logos are likely to believe that the Presley Estate sponsors The Big El Show production or licensed Russen to use the marks in connection with the show. The use of the name "The Big El Show," by itself does not create a likelihood of confusion, but its use in connection with the names, logos, and Elvis pose does create such confusion. The court therefore ruled that - apart from the service marks - Russen's show itself does not unfairly compete with the merchandising activities of the Presley Estate. The doctrine of unfair competition was not designed to attach strict liability to the good faith and non-confusing performance of an entertainment service, such as a concert

by a famous performer like Presley, particularly where the original performer is no longer living.

The court has allowed Russen to use a name and advertising material which suggests something about the production's contents, if he makes clear - in all advertising and promotional materials, programs, playbills, and record covers - to the public that his production is not in any way connected with the same people who provide Elvis Presley entertainment services. In addition, to properly apprise potential customers that the star of The Big El Show actually looks like Elvis Presley, Russen is allowed to use properly identified and legally obtained photographs of Elvis Presley to compare with photographs of the star of The Big El Show.

In balancing the equities, the court concluded that the relative hardship to Russen of the court's order is outweighed by the potential harm to Presley's Estate if Russen were not preliminarily enjoined from those

actions likely to cause confusion. Since the preliminary injunction will not prevent him from using the name "The Big El Show," or from presenting the production itself, the harm to Russen should not be significant, the court concluded.

Estate of Presley v. Russen, Civil No. 80-0951 (D.N.J., April 20, 1981) [ELR 3:2:1]

Carol Burnett's libel verdict against the National Enquirer is upheld by trial judge though reduced to \$800,000

A jury verdict awarding \$1.6 million to entertainer Carol Burnett in her highly-publicized libel action against the National Enquirer has been reduced to

\$800,000 by Judge Peter Smith of the California Superior Court for Los Angeles County.

Judge Smith determined that \$50,000 would be a "realistic recompense" to Burnett for her emotional distress and special damages. Thus, the punitive damage award of \$1.3 million was ruled "excessive" in that it did not bear a reasonable relationship to the \$50,000 compensatory damage award. Judge Smith concluded that punitive damages of \$750,000 would be sufficient to deter the National Enquirer from "further misconduct."

Judge Smith's opinion was noteworthy for its harsh characterization of the National Enquirer's conduct as "a form of legalized pandering designed to appeal to the reader's morbid sense of curiosity." The National Enquirer contended that its publication of an article describing Burnett's allegedly disruptive conduct in a restaurant was not libelous per se. However, the article was indisputably false and held Burnett up to ridicule,

ruled Judge Smith. The publication's claim that it had not acted with actual malice "borders on absurdity," stated the judge, who found that actual malice had been established not only by clear and convincing evidence, but beyond a reasonable doubt.

The National Enquirer's objection to the jury verdict on the basis of prejudicial publicity also was rejected. During his television show, Johnny Carson reacted strongly to a National Enquirer article about him which was published "on the eve of the trial." Two jurors who viewed or heard Carson's remarks were successfully challenged. The National Enquirer chose not to challenge any other jurors; and its motion for a mistrial was denied.

The "correction" published by the National Enquirer was determined to be ineffectual, inadequate and "another manifestation of bad faith and malice." The correction was "buried" at the bottom of a gossip column and the language used indicated that the reported incident

involving Burnett could have occurred despite the fact that both the president and the sole stockholder of the publication knew that none of the libelous material in the article could be substantiated.

In reaffirming the award, albeit reduced, to Burnett, Judge Smith noted that the fact that the article was communicated to 16 million readers was of "substantial significance" in measuring the extent of Burnett's emotional distress, particularly in view of her active involvement in anti-alcohol work. However, Burnett had not sought the services of a professional counselor, and although commending the entertainer for not seeking to inflate her damages, and without wishing to penalize her for self-treating, the judge found that there was insufficient evidence to support the jury's compensatory damages award of \$300,000.

In discussing punitive damages, Judge Smith again commented on the reprehensibility of the National

Enquirer's conduct in fabricating its article, its failure to publish an adequate correction and its apparent lack of remorse for its misdeeds. He pointed out that the First Amendment would not immunize the publication "from accountability when rules are broken, particularly in such a flagrant manner."

The National Enquirer's motion for judgement notwithstanding the verdict was denied. The motion for a new trial was granted unless Burnett accepted the court's reduction of damages, which she did.

Burnett v. National Enquirer, Los Angeles Daily Journal, May 18, 1981, page 4 [ELR 3:2:2]

Fictionalized television film about "The Guardian Angels" did not breach contract with the group's founder despite alleged inaccuracies

Dramatizations of current headline stories or historical events often combine fact and fiction in a form which has come to be known as a "fictionalization." Judge Edward J. Greenfield of the Supreme Court of New York County has discussed the rights created by an agreement to dramatize an individual's story in a recent decision in an action brought by Curtis Sliwa, the founder of "The Guardian Angels."

The Guardian Angels, a group of young people organized by Sliwa to deter crime in the New York City subway system, attracted widespread public and media attention. Sliwa eventually signed an agreement with the Highgate Pictures Division of the Learning Corporation of America pursuant to which Highgate was granted the right to produce a television film depicting Sliwa's story "in a fictionalized account or a tactual manner."

Judge Greenfield determined that Highgate had a choice of proceeding with either a fictionalized or a factual version of Sliwa's exploits, and that the company chose to produce a fictionalized version. Sliwa contended that Highgate's television film was not a fictionalized version. He alleged that by portraying certain ethnic groups in a bad light and by attributing the principal character's motivation to a personal vendetta, Highgate had distorted and perverted the actual story of the group, thereby breaching its contractual obligation.

While expressing admiration for the impressive accomplishments and idealistic motivation of Sliwa and The Guardian Angels, and while noting alleged disparities and inaccuracies in the television film, Judge Greenfield nevertheless refused to enjoin the showing of the film.

Judge Greenfield first observed that "[t]he essence of fiction is that it bears no real resemblance to actual persons or actual events, even though some of the things

portrayed in the work may have been inspired by reality." In a factual account "reality as best it can be perceived is to be portrayed to the reader or viewer in an objective fashion without changing or distorting what actually has occurred."

However, in a fictionalization "we start with an essential body of facts taken from the reality and we then proceed along the road so that what we wind up with is an end product somewhere between fact and fiction. The origin and inspiration of the work is clear, but not all characters, dialogue or events may wholly correspond to reality."

Writers are generally permitted considerable latitude in their work provided that it is not published with actual malice or in reckless disregard of the truth. An author's liberty to depict current events in any manner he chooses may be limited if he enters into an agreement with a participant in an event to prepare a

fictionalization of that event. An agreement to fictionalize enables a writer "to depart from reality ... to invent dialogue, to create characters, to devise incidents, to synthesize, to transpose, to simplify, to provide characterization and motivation which do not necessarily correspond with real life. But all the facts of an actual story may not be disregarded. The essence of the story must be portrayed since [t]he actual story is the skeleton ... a framework which [the author] is at liberty to flesh out, to clothe and to decorate in such fashion as he sees fit." The writer "may not take the skeleton of a dinosaur and portray it as a mouse."

The Sliwa-Highgate contract provided for a possible television series based on, or for sequels to, the film. The parties thus contemplated "further departures from reality," according to Judge Greenfield. Sliwa therefore was not entitled to object to the creation of dialogue or characters, or to the invention of situations or

motivations. Without offering an opinion on the aesthetic merits of the film, Judge Greenfield did "wonder" about some of the choices made by the writer which seemed to result in an "oversimplified or heavy-handed version of the events and characters." He also "questioned" why the producer chose to employ a writer ". . . who didn't know the Bronx from a banana." But the film did not distort the essential principle of *The Guardian Angels* - the use of voluntary, nonviolent, non-vigilante efforts to deter crime. The motivation ascribed to the main character and the portrayal of a particular ethnic group as the villain of the work were found to be legitimate dramatic devices.

Judge Greenfield ruled that in the absence of a showing that the contract had been violated and of clear and convincing evidence of irreparable injury if the film were shown, injunctive relief would be denied. He concluded by noting that the film's disclaimer, which stated

that the portrayal was fictitious, was inadequate. Judge Greenfield suggested the substitution of a more accurate descriptive prologue.

Sliwa v. Highgate Pictures, Inc., Index No. 24070/80, (N.Y. Sup. Ct., March 31, 1981) [ELR 3:2:3]

ASCAP members obtain injunction preventing radio play of their copyrighted songs in The Gap clothing stores

The Gap Stores, Inc. owns a well-known chain of some 420 clothing stores in which it plays radio music for its customers' enjoyment. In two of its stores in New York City, radios are connected to speakers that are recessed behind wire grids in the store's ceiling. The speakers are arranged to ensure the music is audible

throughout each store. There are four speakers in one store and seven in the other.

Several members of the American Society of Composers, Artists and Performers claimed that by playing its radios without a license, The Gap infringed the copyrights to the songs broadcast while the radios were in use, and a Federal District Court in New York City has agreed.

The Federal Copyright Act grants copyright owners the exclusive right to publicly perform, or authorize the performance of, their copyrighted works. Section 101 broadly defines "perform" to include the playing of a work "either directly or by means of any device or process." The Court noted that to be exempt (under Section 110(5) of the Copyright Act) The Gap would have had to satisfy three requirements: (1) its apparatus would have to have been a kind commonly used in private homes; (2) no direct charge could have been made to

listen to the performances; and (3) the transmissions could not be "further transmitted to the public." It was not contended that The Gap directly charges its customers for listening to the performances. The court thus limited its inquiry to the first and third requirements.

Although the reach of the Section 110(5) exemption has rarely been tested in the courts, the legislative history enabled the court in this lawsuit to ascertain what Congress intended by exempting performances via "commonly used" stereo equipment unless "further transmitted to the public." Prior to the enactment of the new Copyright Act in 1976, the United States Supreme Court in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), exempted under the 1909 Act the owner of one fast-food store in Pittsburgh who kept a radio receiver with four speakers in the ceiling turned on throughout the business day. In *Aiken*, the restaurant measured 1,055 square feet, with a commercial area

open to the public of 620 square feet. The House Committee sponsoring the 1976 Act expressly considered Aiken, stating that the basis of the decision "is completely overturned by the recent bill and its broad definition of 'perform' in section 101." the House Committee explained: Under the particular fact situation in the Aiken case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the

proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.

Applying the Committee's standard to this lawsuit, the court determined "it is clear that Congress did not intend to exempt establishments such as The Gap." "The Gap stores, with an average size of 3,500 square feet," said the court, "are substantially larger than the public area of 620 square feet in the fast-food store in issue in Aiken." the court thus concluded that "[b]y virtue of the size of The Gap stores, the radio transmissions received on the radio receivers and played via the recessed loudspeakers are 'further transmitted to the public.'" Furthermore, the court found that "the stereo apparatus used by the specified Gap stores, including built-in wiring and four or seven loudspeakers recessed in ceiling cavities, may be

considered to be .standard home receiving apparatus [converted] (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system."

Although the court determined there was a factual dispute between the parties' experts as to whether the particular components used were actually "commonly used in private homes," it concluded that "the rather elaborate sound system developed by The Gap, in conjunction with the size of the stores, places The Gap beyond the section 110(5) exemption."

The court found its conclusion further supported by the House Committee's conclusion that a small commercial establishment of the type involved in Aiken was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service. "It is clear on the basis of the uncontroverted affidavits of background music suppliers," said the court, "that The

Gap is 'of sufficient size to justify, as a practical matter, a subscription to a commercial background music service.'" The court thus granted the ASCAP members' motion for summary judgment and ordered an injunction preventing The Gap's further use of their copyrighted songs.

Sailor Music v. The Gap Stores, Inc., No. 79 Civ. 0059 (S.D.N.Y., Feb. 3, 1981) [ELR 3:2:4]

Sam Goody, Inc. is convicted of interstate shipment of stolen property consisting of sounds on phonorecords and tapes

On April 9, 1981, a jury in New York City found Sam Goody, Inc. and one of its vice presidents, Samuel Stolon, guilty of interstate transportation of stolen

property and criminal copyright infringement based upon their knowing purchase and shipment of more than 100,000 counterfeit 8-track and cassette tapes.

In pretrial proceedings, Goody had moved to dismiss the indictment on several grounds. Goody's motions were denied by a Federal District Court (in a written opinion that has been published only recently).

Goody was charged with violating the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C. section 1961, based upon the alleged commission of the underlying felony of violating 18 U.S.C. section 2314 which prohibits the interstate transportation of goods, wares or merchandise worth more than \$5,000 knowing they have been stolen, converted or taken by fraud. Twelve separate counts of copyright infringement in violation of 17 U.S.C. sections 106(3) and 506(a) also were alleged in the indictment.

Goody contended that section 2314 was inapplicable and that prosecution could occur only under U.S.C. section 2318 which makes the interstate transportation of recordings with counterfeit or forged labels a misdemeanor. The court rejected Goody's argument, stating that the availability of three separate criminal statutes under which the prosecution could occur did not require that only one statute be used to the exclusion of the others. The elements of the statutes vary as to value, the physical and legal character of the items involved, and the state of mind of the defendant, noted the court.

Goody also claimed that the intangible "aggregation of sounds" comprising a record or tape did not constitute goods, wares or merchandise that could be stolen, converted or taken by fraud through unauthorized duplication, within the meaning of section 2314. Goody argued that the actual tapes on which the unauthorized duplications of sound were recorded were not stolen.

The court pointed out that the focus of section 2314 has been on the commercial nature of the items involved rather than on the tangible or intangible nature of the items (citing *United States v. Berkwitz*, 619 F.2d 649, ELR 2:6:3). The revenue derived from the sale of counterfeit tapes is based on the joining of the sound and the tape resulting in an inseparable, single "subject of commerce," according to the court.

Convictions under section 2314 have been upheld for the interstate transportation of trade secrets, although copies were made with the defendants' own materials (*United States v. Bottone*, 365 F.2d 389, cert. denied, 358 U.S. 974), and for the transportation of unauthorized duplicates of copyrighted motion pictures (*United States v. Atherton*, 561 F.2d 747 and *United States v. Drebin*, 557 F.2d 1316, cert. denied, 436 U.S. 904). *Bottone* held that when an item derives its value from intangible concepts or intellectual property - whether

copyrighted or not - contained within it, no theft of the original tangible medium need occur at all, only the intangible component need be taken, and once it is transferred to a physical medium, albeit one legitimately owned by the taker, it becomes a distinct "good," "ware" or item of "merchandise" within the meaning of section 2314. The court also ruled that the terms "stolen, converted or taken by fraud" were intended to cover all forms of wrongful taking including the unauthorized duplication of musical works.

Goody further argued that the indictment should have been dismissed because RICO was designed to deal only with the infiltration of organized crime into legitimate business. The court noted that the types of organizations or persons subject to a RICO proceeding were not limited by the language of the statute. However, Stolon was found not guilty of the racketeering charge.

Goody's claim of prosecutorial misconduct involved the operation of a retail record store in Westbury, Long Island, as a "sting" by the FBI. Goody complained that the FBI improperly exercised its law enforcement authority and therefore evidence collected during the sting operation was tainted, requiring the dismissal of the indictment. The court ruled that the FBI had engaged in "permissible means of investigating reasonably suspected criminal activity, and that the endeavor "did not instigate, suggest or arrange the purported criminal activity," nor did it supply a necessary element of the crime" but merely provided an outlet for already stolen recording's.

United States v. Sam Goody, Inc., 506 F.Supp. 380;
CCH Copyright Law Reports, Para. 25,232 (E.D.N.Y.
1981) [ELR 3:2:5]

Sale of unauthorized pay-tv decoders violates Federal Communications Act, Court of Appeals rules

The tide has taken a significant turn in favor of pay-tv operators in their legal fight to prevent the sale of unauthorized decoders. A Federal Court of Appeals in San Francisco has ruled that the manufacture and sale of unauthorized decoders violates the Federal Communications Act. The ruling was made in a case filed by National Subscription Television, the owner of ON-TV, and by Oak Broadcasting, the licensee of the television station on which ON-TV's programming is broadcast in the Los Angeles area. The appellate court's decision reverses an order issued in August 1980 by Judge Lawrence Lydick of the Federal District Court in Los Angeles dismissing ON-TV's case altogether without a trial. (ELR 2:9:4)

The Communications Act provision at issue in the case is Section 605 which prohibits the unauthorized interception of radio and television broadcasts unless they are "for the use of the general public." The defendants - most of whom were electronics parts dealers who sold unauthorized decoders or kits from which they could be made - argued that ON-TV's broadcasts are for the general public and thus are not protected by Section 605.

The Court of Appeals disagreed. It acknowledged that "like any entrepreneur," pay-tv operators hope their product will be popular and will be "subscribed to by most, if not all, of the public." "Nevertheless," the Court of Appeals added, "it does not follow" that pay-tv is broadcast "for the use of the general public." Rather, the court ruled that pay-tv operators broadcast their programming "not for the use of anyone who is some how able to receive their signals, but only for the use of paying subscribers." The court also noted that protecting

pay-tv broadcasts under Section 605 "promotes express FCC policies." It does so because the FCC has determined that pay-tv is an alternative media whose existence promotes the public interest, and because the sale of unauthorized decoders threatens the economic vitality of the pay-tv industry.

Furthermore, the court even found that the sale of unauthorized decoders violates an FCC "consumer protection policy." FCC regulations require pay-tv operators to lease, rather than sell, decoders to their subscribers. The rule is said to protect subscribers from the "danger" of investing large sums of money in devices that are likely to become technologically obsolete in a short time. The rule is also intended to promote competition among pay-tv companies, because consumers who have purchased decoders may consider themselves "locked-in" to the one pay-tv service whose signals their devices can decode.

The Court of Appeals rejected the argument that the airways belong to the public and that ON-TV should not have a monopoly over them. It ruled that ON-TV does not have a monopoly because other paytv operators can compete in Los Angeles. And the court noted that although the public owns the airwaves, the FCC is charged with regulating them and has determined that the public interest is served by pay-tv. That interest would not be served by the demise of pay-tv - a demise which unauthorized decoders can bring about, the court observed. The court rejected - as being unpersuasive and without legal support - the argument that pay-tv operators should protect themselves with technology. It also rejected the argument that unauthorized decoders provide needed competition. This argument "proves too much" the court said, because the sale of unauthorized decoders could drive pay-tv operators out of business, thus eliminating the reason for decoders in the first

place. Finally, the court rejected the argument that the sale of unauthorized decoders does not constitute assistance with the interception of pay-tv signals. It held that the sale of decoders "clearly" constituted assisting people in receiving broadcasts to which they were not entitled.

This case is the second time in recent months that pay-tv operators have snatched victory from the jaws of defeat. Last December, a Federal Court of Appeals in Michigan reversed the dismissal of a suit filed by Chartwell Communications against a seller of unauthorized decoders. (ELR 2:19:1) The court's reasoning in that case was virtually identical to that of the Court of Appeals in San Francisco in the ON-TV case.

National Subscription Television v. S & H TV, Case No. 80-5655 (9th Cir., May 7, 1981) [ELR 3:2:6]

Court rejects anchorman's claim of retaliation; poor ratings were reason for his reassignment to general reporting

"The news business may indeed have its quirks and vagaries, in this age when the selection of a new anchor for the CBS Evening News is itself front page news, but consultants' reports and ratings routinely serve as the basis for personnel changes," a Federal District Court in Rhode Island has observed in denying a television reporter's motion seeking an order that WPRI-TV reassign him to anchor duties.

In August of 1978, after spending almost two years with WPRI-TV as a general assignments reporter, co-anchor and temporary anchor, Mark Haines became the regular anchor of WPRI's eleven o'clock news and the co-anchor of the six o'clock news, as well as executive producer of the six o'clock news. His wife, Barbara

Hamilton Haines, also worked for WPRI-TV as a general assignments reporter, weekend co-anchor, and occasional film critic. In the fall of 1978, Mrs. Haines, after coming across a coworker's paycheck stub which indicated that he was receiving a higher salary than she, concluded that she was being discriminated against on account of her sex. She subsequently filed discrimination charges with the Equal Employment Opportunity Commission and the U.S. Department of Labor, and eventually filed suit alleging violation of the Fair Labor Standards Act and Federal Civil Rights laws. Throughout this time, she had been receiving the assistance and advice of her husband, whose role as counselor and confidant was an active one.

On October 23, 1979, WPRI-TV informed Mr. Haines that he was being reassigned from anchor duties to general reporting as of November 5, 1979. In his suit, Haines alleged this reassignment violated the Fair Labor

Standards Act, which makes it illegal for an employer to retaliate against an employee, or spouse, who files charges or participates in an EEOC or labor department investigation. He also alleged that the reassignment was in breach of his employment contract with the station.

The court has denied Haines' motion for a preliminary injunction by which he sought an order that he be reassigned to other duties, because the court found Haines would probably fail to prove at trial that the employer's action was because of a discriminatory motive.

The television station contended that it reassigned Haines because of poor ratings and an unfavorable consultant's report. The consultant's report, which was prepared by Reymer and Gersin and which cost WPRI \$16,000, concluded that Mark Haines was a "liability" to the station, because he was not widely known, and those who knew him tended to prefer other newscasters, some finding Haines arrogant or cynical. The person in

charge of the report testified that no one at WPRI-TV asked her to evaluate Haines; the station's only specific concern was the effectiveness of their in-depth report.

Haines challenged the station's interpretation of the ratings and the reliability of the consultant's report. The court said its "task here is not to evaluate whether [Haines] should have been reassigned, but whether the station was actually motivated by the report and the ratings." Leaving aside the parties' varying interpretations of the Neilson and Arbitron statistics, the court simply believed the news director's and station manager's testimony that they actually thought that the ratings for Mark Haines' newscast were lower than they should have been. In the end, the court was convinced that poor ratings and the consultant's report were the actual motivation for the transfer, and not retaliation.

Though Haines' employment contract refers only a position as "news person," the court refused to fully

address the contract issues, stating "it is clear that Rhode Island law does not generally grant specific performance of personal service contracts, even at the employee's request." This position said the court, is bolstered "by the possible First Amendment ramifications of ordering a television station to employ a particular individual in a role with a least some editorial content and discretion."

Haines v. Knight-Ridder Broadcasting, Inc., CCH Labor Law Reports, Para. 33,976 (D.R.I. 1980) [ELR 3:2:6]

Briefly Noted:

Libel.

A New York State Senator's judgment against an up-state New York newspaper for its libelous news article and headline has been upheld by a New York Appellate Court. A jury found that a reporter had concocted a story declaring "Schermerhorn says NDDC can do without Blacks." The court found the evidence sufficient to sustain the jury's determination that a reporter composed the defamatory headline and article with "actual malice," i.e., with knowing or reckless disregard for the truth. The false story ultimately led to the first resolution in the history of the New York State Senate calling for the censure of a Senator. However, the newspaper's subsequent reporting of the legislature's floor debate when the

headline had been read three times - was accurately reported and thus not actionable.

Schermerhorn v. Rosenberg, 426 N.Y.S.2d 274 (1980)
[ELR 3:2:7]

Previously Reported:

The United States Supreme Court has dismissed an appeal by Hustler magazine publisher Larry Flynt in an obscenity prosecution case brought against him by the city of Cleveland. Last December, the Supreme Court agreed to hear Flynt's contention that Cleveland should be barred from prosecuting him, because the city itself was guilty of "selective prosecution." (ELR 2:16:6) After hearing the case, however, the Supreme Court decided

not to rule on the issue after all, because, the Court said, Flynt has not yet been tried on the obscenity charges.

DEPARTMENTS

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Press Rights and Government Power to Structure the Press by C. Edwin Baker, 34 University of Miami Law Review 819-889 (1980)

Commentary: The Limited Utility of the First Amendment as a Means of Securing Access by the Press and the Public to Proceedings in Criminal Cases by Edward

L. Barrett, Jr., 34 University of Miami Law Review
927-936 (1980)

When, If Ever. Should Trials be Held Behind Closed
Doors? by Joseph A. Boyd, Jr. and Paul A. Lehrman, 5
Nova Law Journal 1- 10 (1980)

Courtroom Closure and the Rights of the Free Press, 58
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Parody as Free Speech - The Replacement of the Fair
Use Doctrine by First Amendment Protection by Charles
C. Getsch, 3 Western New England Law Review 39-66
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Toward a Constitutional Theory of Expression: The
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of Individual Creativity by Jacqueline Shapiro, 34 University of Miami Law Review 1043-1075 (1980)

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