RECENT CASES

Pennsylvania blind-bidding statute is ruled unconstitutional; violates First Amendment and Supremacy Clause

Motion picture distributors may have received a long-awaited glimpse of the Grail in the form of a recent Federal District Court decision declaring that Pennsylvania's far-reaching "anti-blind-bidding" statute violates both the First Amendment and the Supremacy Clause of the United States Constitution.

The Pennsylvania Feature Motion Picture Fair Business Practices Law, which became effective in April of 1980, comprehensively regulates the licensing of copyrighted motion pictures for exhibition within the state. The Act absolutely prohibits "negotiating for, bidding

for, or agreeing to a license for the exhibition of a motion picture within Pennsylvania without a prior trade screening." This requires a picture to be in final form for exhibition prior to any license negotiations. Another significant provision prohibits all guarantees of minimum film rental when a license agreement provides for payment to the distributor based on a percentage of attendance box office receipts. The license may not be conditioned upon, or contain, any guarantee. Advance payments of film rentals by an exhibitor to a distributor also are prohibited, either as security for the performance of the license agreement or as an advance on rental payments due under the agreement.

The exhibition period also is regulated by the Act. Exclusive first runs of more than 42 days are banned unless there is a provision either to make the film available to other "second run" theaters in a given area or to re-bid the film.

The Act specifies bidding procedures in close detail, including the requirement that if all invited bids are rejected, the distributor nevertheless may not enter into a license agreement except by continuing the bidding process.

The court ruled that the Act was an indirect restraint on content in violation of the First Amendment and that it created risks of restricting protected creative expression. The exhibitors contended that the Act was "content-neutral," that is, it was not designed to censor speech based on content. But by regulating the licensing process - a means of distributing protected material to the public - the Act created risks both of delays in licensing and of increased financial uncertainty to distributors. Proof of such an infringing impact was not essential, the court ruled. It was apparent from the face of the statute that delays in distribution would result if licensing negotiations were barred until completion of the film or if re-

bids were required on the rejection of all initial bids. Also, by prohibiting guarantees, advances and exclusive first runs based on market demand, the Act increased financial risks to distributors and threatened potential investments in motion pictures. The exhibitors' participation in the financial risks of a film's lack of success had been significantly reduced, observed the court. For example, an exhibition period limited to 42 days might be insufficient for a picture to generate a profit.

In addition to its specific terms, the court found that the legislative purposes of the Act were not sufficiently "substantial," "significant," or "compelling" to justify its non-waivable and comprehensive provisions. Increasing public access to motion pictures, and protecting the private business interests of the exhibitors, which were among the stated purposes, were not the type of compelling public purposes which would justify the Act's far from "peripheral" restraints on expression.

The Act also was found to conflict with federal copyright law. There has been little direct case authority dealing with comprehensive regulation of copyright licensing by a state. The question of statutory preemption under section 301(a) of the 1976 Copyright Act was not decided. Rather, a conflict between two regulatory schemes, impermissible under the Supremacy Clause, was found. Section 106 of the 1976 Copyright Act protects the right of a copyright holder to profit from his creative efforts and to distribute his works to the public by sale or by rental, lease or lending. Pennsylvania's Act, by restricting the conditions under which a copyright holder may distribute and license his work, interfered with federally created rights under section 106 and with the copyright holder's control over the sale or commercial use of his work. Barring advances, prohibiting guarantees in combination with percentage payments, regulating the term of the license, and specifying bidding

terms all were "interferences" with section 106. Therefore, based both on the First Amendment and the Supremacy Clause, the court granted the distributors' motion for summary judgment.

The exhibitors had contended that summary judgment was inappropriate because of disputed and material facts regarding the disparity in economic power between distributors and exhibitors, and the distributors' purported abuse of the disparity when conducting licensing negotiations. Such economic facts were irrelevant, stated the court, because the Act, rather than addressing specific abuses, absolutely eliminates certain provisions from license agreements "regardless of the existence of any abuses or the existence of economic disparity between the parties, or whether the practices were coerced or mutually sought." Further, when First Amendment activities are involved, a determination of facial unconstitutionality may be based on the statute's potential for

harm. Thus, additional discovery and factual development would not have materially affected the decision of the First Amendment or Supremacy Clause claims.

The court distinguished the Pennsylvania statute from the Ohio statute regulating blind bidding which was upheld in Allied Artists Pictures Corp. v. Rhodes, 496 F.Supp. 408 (ELR 2:7:1). An advance payment was permitted in Ohio licensing agreements, and guarantees were prohibited only when licenses were conditioned upon a demand of a guarantee along with a percentage rental. The Ohio statute did not regulate the terms of the license and in general did not impose the substantial restrictions on a copyright holders' control over the commercial use of his work that were imposed by the Pennsylvania Act.

Associated Film Distribution Corporation v. Thornburgh, No. 80-1179 (E.D.Pa., August 24, 1981) [ELR 3:9:1]

Blind-bidding may violate Texas consumer protection law, Federal District Court rules in theater's suit against Warner Brothers seeking recovery of losses claimed during exhibition of "Swarm"

When the Statute of Anne was adopted in 1710, Austin, Texas was only a gleam in the eye of a conquistadore. But a Federal District Court in Austin has hearkened back to that era in denying summary judgment to Warner Brothers in an action involving a motion picture licensing agreement.

Presidio Enterprises claims treble damages, amounting to approximately $185,000, under the Texas Deceptive

Trade Practices Act for losses allegedly sustained in connection with its exhibition of the motion picture "Swarm." Presidio stated that it had booked "Swarm" without an advance screening based on Warners' strong recommendation of the film. Warner contended that Presidio was not a "consumer" and therefore lacked standing to sue under the Act.

The Act defines consumer as "an individual, partnership, corporation or government entity who seeks or acquires by purchase or lease, any goods or services." "Goods" is defined as "tangible chattels ... purchased or leased for use." The court noted that the licensing agreement itself was not a tangible chattel, but pointed out that Presidio had contracted for both the right to show a film and for physical receipt and use of the film for a set length of time. The fact that the agreement was entitled a "License Agreement" was not conclusive. References in the agreement to a "film rental" and "sublease" of the

print indicated that Warner "was at least aware of the lease characteristics of the agreement." The court concluded that a lease of the film was included in the License Agreement, The business relationship of the parties also demonstrated that the agreement was not solely a license.

Warner then argued that if a lease was involved, the lease did not form the basis of the complaint since the value of the content of the film rather than the actual physical quality of the film was in dispute. It was in answering this argument that the court briefly recounted the background of the Statute of Anne. The Statute gave authors the sole right of publication for 21 years upon registration of the title of the work. The court declared that the Statute and subsequent copyright legislation bestow a right to protection rather than a right of possession. Conveyances of copyrights generally are called assignments and licenses; conveyances of the remaining

rights of possession are called sales, leases and rentals. Presidio's complaint was based on alleged representations by Warner concerning the value of the right to possess the film. Therefore, the lease was the basis of the complaint, ruled the court. And Presidio's "use" of the film in its theater established that the company was a "consumer" entitled to bring suit under the Deceptive Trade Practices Act.

Presidio Enterprises, Inc. v. Warner Bros. Distributing Corporation, Case No. A-79-CA-290 (W.D. Tex., August 17, 1981) [ELR 3:9:2]

Supreme Court overturns punitive damages awarded to concert promoter because of city's cancellation of license for concert featuring Blood, Sweat and Tears

The United States Supreme Court has overturned a punitive damages award of $275,000 against the city of Newport, Rhode Island in connection with the city's cancellation of an entertainment license for a concert featuring the group Blood, Sweat and Tears. (The lower court's decision was reported at ELR 2:18:2) Members of the Newport city council had expressed concern that the appearances of Blood, Sweat and Tears - which was referred to by the council as a rock group, and by the promoters as a jazz band - would result in crowd disturbances.

On the day before the first scheduled performance, the council voted to cancel the city's agreement with Fact Concerts, the concert promoter, because certain minor technical safety precautions had not been completed. Fact obtained a restraining order barring any interference with the performance of the concert and the event

took place as scheduled, including the appearances of Blood Sweat and Tears. However, fewer than half of the available tickets were sold.

Fact alleged that the license cancellation amounted to content-based censorship and that its constitutional rights of free expression and due process were violated under color of state law. Damages were sought against the city and its officials under 42 U.S.C. section 1983, and under two state law claims including tortious interference with contractual relationships. In upholding the jury verdict awarding compensatory damages of $72,000 and punitive damages of $275,000 to Fact, a Federal District Court referred to the Supreme Court's recent decision in Monnell v. New York City Department of social Services, 436 U.S. 658. In Monnell, the question of whether municipalities may be held liable for punitive damages was left undecided except to suggest

that such damages might be awarded in appropriate circumstances.

In the Blood, Sweat and Tears case, Supreme Court Justice Blackmun reviewed the historical unwillingness of Congress and the courts to award punitive damages against a municipality and thereby burden "the very tax-payers and citizens for whose benefit the wrongdoer was being chastised." Compensatory damages, paid by the offending official himself would seem to be a more effective deterrent against abuses of power by municipal officials, stated Judge Blackmun. Absolute immunity from damages was the practice under common law and has not been changed by statute, ruled the court.

City of Newport v. Fact Concerts, Inc., Case No. 80-396, (U.S. Sup. Ct., June 26, 1981) [ELR 3:9:3]

FCC waives cross-ownership ban and permits CBS to acquire cable television systems

CBS Inc., under a limited waiver of Federal Communications Commission rules, will be permitted to own cable television systems having 90,000 or fewer subscribers in areas outside the local service areas of television stations licensed to CBS. Section 76.501 of the Commission's rules prohibits the common ownership of cable systems and national television networks. CBS requested a waiver of the section on the ground that its ownership of cable systems would contribute to the development of cable technology and programming without increasing ownership concentration in the highly competitive cable industry.

Many opposing petitions were filed with the FCC. The petitions objected to both the waiver itself and to the Commission's decision not to initiate a rulemaking

proceeding regarding network ownership of cable systems. It was also pointed out that the FCC presently is considering a proposal to require divestiture of all existing CATV/TV cross-ownership interests (ELR 2:5:4). The divestiture presumably would increase economic competition and diversity of media control -the hallowed rationales for prohibitions on crossownership. These goals would not be furthered by the waiver granted CBS, according to comments filed by, among others, Turner Broadcasting System, the Justice Department and the Motion Picture Association of America. The Justice Department pointed out that CBS might foreclose access to its cable systems to program suppliers whose product would compete for the same audience as that of a local CBS broadcast affiliate.

The FCC first declared that CBS was not requesting a fundamental change in the cross-ownership ban which would require consideration through the rulemaking

process. Only a limited number of cable subscribers were involved, and the potential for technical and programming advances was found to outweigh any potential adverse effects on competition and program diversity.

CBS proposed ownership of cable systems would not hinder the development of cable oriented networks on a national level, stated the FCC. Further, the FCC said, the company appears to be engaged in significant research of public benefit into telecommunications technology. While acknowledging the possibility of a reduction in program diversity, the FCC pointed out that the number of broadcast and nonbroadcast program options available to cable subscribers has increased greatly since the adoption of Rule 76.501, thereby "diluting" the Commissions' concern with network dominance.

CBS' cable operations also will be scrutinized by the local communities responsible for awarding franchises

and licenses. And CBS will be required to file an annual report with the FCC for a period of three years stating the locations of its systems and the results of its research and development activities.

In the Matter of CBS Inc., Petition for Special Relief Memorandum Opinion and Order, FCC 81-391 (August 4, 1981) [ELR 3:9:3]

FCC is ordered to bold bearings on proposed relocation of FM radio transmitter from Ogden, Utah to Salt Lake City

A Federal Court of Appeals in Washington, D.C. has ordered the FCC to conduct hearings before it permits the relocation of FM radio transmitters that would be inconsistent with the FCC's "table of assignments." The

table allocates FM radio frequencies among neighboring regions in order to avoid an excessive concentration of stations in larger cities, and to insure service to smaller communities. Two radio stations which were licensed to operate in Ogden, Utah sought to relocate their transmitters to a site closer to Salt Lake City. The stations claimed that the relocation would eliminate transmission difficulties known as "multipath" problems. The FCC approved the relocation although Communications Investment Corp., the licensee of a station in Salt Lake City, contended that moving the transmitters was a de facto reallocation of Ogden stations.

The Court of Appeals ruled that because substantial and material factual questions regarding the transmitter relocation remained to be determined, the FCC was required to hold a hearing. And, in order to determine the motivation for the proposed relocation of the transmitter site, i.e., whether the Ogden licensees might be

redirecting service to the larger and more lucrative Salt Lake City market, the Commission was directed to consider such factual questions as the population of the cities involved, whether any portion of Ogden would lose coverage, whether the proposed site was used by stations assigned to the larger city, and whether the station shared common ownership with an AM station in the larger city.

The court also questioned whether the proposed transmitter site would minimize multipath interference, and concluded that the FCC's decision to act without a hearing was "plainly unreasonable." The Commission was chastised for the "summary and sub silentio overruling of a policy established through the rulemaking process."

A dissenting judge considered the stations' multipath problems to be sufficient justification for changing the transmitter location so as to provide improved service in Ogden.

Communications Investment Corp. v. Federal Communications Commission, 641 F.2d 954 (D.C.Cir. 1981) [ELR 3:9:4]

Marine Corps promotional organizations enjoined from using name and image of John Philip Sousa in connection with their marching band award

The Instrumentalist Company publishes a national music magazine devoted exclusively to school bands and, since 1955, has sponsored the "John Philip Sousa Band Award." Sousa's children originally authorized the award in 1954, and The Instrumentalist registered its federal trademark in the Sousa name in 1973.

Since 1967, the Marine Corps League and the Youth Foundation, both founded to promote and preserve the

traditions of the Marine Corps, have cosponsored distinguished musician awards to outstanding high school musicians. Their "Semper Fidelis Award" is a certificate which includes a prominently displayed colored picture of John Philip Sousa. Sousa's name appears in small type at the base of the picture and on the reverse side of the certificate.

The Instrumentalist filed a lawsuit in Federal District Court in Illinois against the Marine Corps League and the Youth Foundation, claiming that the "Semper Fidelis Award" infringes The Instrumentalist's registered and common law trademark rights, constitutes unfair competition and violates the Illinois Anti-dilution statute. The court has issued a preliminary injunction preventing the defendants from making prominent use of Sousa's name or image in connection with awards made to high school band members.

The court initially observed that The Instrumentalist failed to submit evidence sufficient to establish, as it must, that consumers were likely to be so confused by the "Semper Fidelis Award" as to believe that that award was somehow connected or affiliated with, or sponsored by, The Instrumentalist. Because there was insufficient evidence to establish a likelihood of confusion, the trademark infringement and unfair competition claims were unsuccessful. Equally unsuccessful, said the court, was the federal claim that the "Semper Fidelis Award" would "dilute" the distinctiveness of the Sousa Award. The federal law of trademark infringement does not recognize a claim for "dilution."

Although The Instrumentalist did not submit evidence that showed a likelihood of confusion, it did satisfy the court that it is likely succeed with its claim under the Illinois Anti-dilution statute which '.was intended to operate only where relief is unavailable under traditional

theories of unfair competition, under which likelihood of confusion and the existence of competition are usually requisite elements." The Illinois Anti-dilution statute is intended to prevent the use of trademarks which may not be similar enough to cause confusion, but are similar enough to be "an infection which, if allowed to spread, will inevitably destroy the advertising value of the mark."

The court also found that The Instrumentalist amply demonstrated the difficulty it would encounter in proving damages that would fully compensate it for the loss of its good will that would necessarily follow the dilution of its trademark. Difficulty of adequately proving damages, the court wrote, "usually warrants a finding of lack of adequate remedy at law and the prospect of irreparable harm." The court thus concluded that a preliminary injunction is warranted, especially because the

defendants would encounter only minimal hardship in altering their award certificate.

Instrumentalist Co. v. Marine Corps League, 509 F.Supp. 323 (N.D. Ill. 1981) [ELR 3:9:4]

Agent for professional football player wins suit for commissions doe; player's reasons for refusing to pay are all rejected

A personal manager for professional athletes is not subject to the Investment Advisors Act of 1940, a Federal Court of Appeals has held in a decision allowing the manager, Leo Zinn, to recover commissions under his personal management contract with professional football player Lemar Parrish.

The Investment Advisors Act voids any contract for investment advice made by an unregistered advisor. An investment advisor is, under the Advisors Act, "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyzes or reports concerning securities."

A Federal trial court determined that Zinn was an investment advisor, because (1) the management contract stated that he would provide advice on "business investments," (2) Zinn assisted Parrish in purchasing and managing an apartment building for rental income, and (3) Zinn forwarded to Parrish the stock purchase recommendations of certain other individuals, after screening the suggestions himself

The Court of Appeals reversed, however, finding neither the execution of the management contract by Zinn nor his conduct thereunder made him an investment advisor.

The court found nothing in the management contract that obligated Zinn to provide advice on securities investments, as that term is defined in the Advisors Act. Though limited partnership interests in real estate are "securities," Zinn made no offer of such to Parrish, who became sole owner of the apartment building. Nor was Zinn engaged in a "common venture" with Parrish simply because he engaged in certain managerial tasks at Parrish's request with respect to the apartment building.

Concerning Zinn's screening the securities recommendations of others, the court ruled that "isolated transactions with a client as an incident to the main purpose of his management contract to negotiate football contracts

do not constitute engaging in the business of advising others on investment securities."

The Court of Appeals also reversed the lower court's determination that Zinn failed to perform the terms and conditions of his contract.

Parrish fully accepted Zinn's performance for the years 1970 through 1973 by remitting the 10% due Zinn under the contract. In 1974, Zinn negotiated a four-season contract for Parrish with the Cincinnati Bengals for a total of $250,000 plus a substantial signing bonus. Parrish claimed that Zinn should have obtained offers from the. World Football Leapt that would have placed him in a stronger negotiating position with the Bengals.

Calling this a "rather late claim," the court found Zinn's representation was more than reasonable, Zinn had entered into discussions with the Jacksonville Sharks, a WFL team, but decided not to pursue the matter once he ascertained that the Sharks were in a shaky financial

position. This proved sound, because the Sharks and the rest of the WFL folded in 1975 due to a lack of funds. Had Zinn obtained a contract for Parrish with a WFL team, he might have embroiled Parrish in costly litigation. The court found it impossible to fault Zinn in the performance of his contract. Parrish was at all times free to discharge Zinn as his agent before a new season began. Instead, he waited until Zinn had negotiated a series of contracts worth a quarter of a million dollars for him before letting Zinn know over the phone that his services were no longer required.

In summing up Zinn's performance under the contract, the court quoted Parrish's testimony:

"Q: Did you ever ask Zinn to do anything for you, to your knowledge, that he didn't try to do?"

"A: I shall say not, no."

The court remanded the case for further proceedings, including the calculation of damages and interest due Zinn.

Zinn v. Parrish, 644 F.2d 360 (7th Cir. 1981) [ELR 3:9:5]

Newspaper's rules of employee conduct may be the subject of collective bargaining

In the wake of Watergate, the Pottstown Mercury, a newspaper in suburban Philadelphia, established General Office Rules concerning employee conduct. The rules covered such matters as the confidentiality of copy, the use of company equipment for private purposes, and the abuse of alcoholic beverages. In 1974, the newspaper also promulgated a Code of Ethics "to

spell out the Mercury's standards of integrity, objectivity, and fairness, and to protect and enhance its quality and credibility." The Code prohibited the acceptance of gifts or special privileges and barred such conflicts of interest as secondary employment or the holding of political office.

The Newspaper Guild of Greater Philadelphia contended that the Rules and the Code should have been the subject of collective bargaining and that their adoption involved unilateral changes in terms and conditions of employment - an unfair labor practice. The Mercury regarded the regulations as a management prerogative.

An Administrative Law Judge found that the Rules and the Code were mandatory bargaining subjects. The NLRB upheld the ALJ with respect to the Office Rules. But the NLRB concluded that the Mercury had a duty to bargain only with respect to the penalty provisions of the Ethics Code. The substantive provisions of the Code

were ruled beyond the scope of mandatory bargaining, the NLRB concluded.

A Federal Court of Appeals in Washington, D.C. has ruled that the Mercury's claim that it was exempt from the National Labor Relations Act because it was an agency of the press was invalid; no interference with editorial content was involved. The court then stated that "the protection of the editorial integrity of a newspaper lies at the core of publishing control." Hence, collective bargaining was not mandatory on all aspects of the newspaper's Code and Office Rules. However, because certain rules affected the terms and conditions of employment more than others, the court remanded the matter to the NLRB to specify which rules might be the subject of bargaining.

Newspaper Guild of Greater Philadelphia v. National Labor Relations Board, 636 F.2d 550 (D.C.Cir. 1980) [ELR 3:9:6]

____

Court refuses to dismiss concert promoter's fraud suit against Nina Simone's lawyer, based on her failure to appear for scheduled concert, despite five-year delay in filing of action

A concert promoter has sued vocalist Nina Simone and her attorney Maxwell Cohen for the singer's failure to appear in concert for "Black Expo" at the Philadelphia Civic Center in 1973. A Federal District Court in Pennsylvania has dismissed the promoter's breach of contract claim because the statute of limitations period expired before he filed the lawsuit. However, the court ruled that the promoter's allegation that attorney Cohen knew the

singer would not perform at the time he accepted a money order as a partial deposit for the performance stated a cause of action for common law fraud, which carries a six year statute of limitations, within which the claim was properly filed.

The court applied the state's four year statute of limitations period to the promoter's breach of contract claim, resulting in its dismissal, because, if any contract existed, it was oral, not written. The money order accepted and endorsed by Cohen read, "If money order is cashed by Miss Simone or Mr. Cohen it will represent a commitment that Miss Simone will appear in concert Aug. 16, 73 for Black Expo at Civic Center, Phila." However, that was not the contract, ruled the court. "At best, the statement on the money order's face merely stated the terms upon which Cohen and Simone accepted the funds.... The contract was the parties' oral agreement regarding the date, time and place of performance, the

contract price, order and time of performance, audio equipment and sleeping arrangements for Simone."

Even if the money order was a contract, the breach of contract claim as against the attorney had to be dismissed, added the court. The language on the face of the money order "does not constitute any commitment for Cohen to appear at the Civic Center" nor does it "indicate that Cohen held himself out to be personally liable if Simone failed to appear."

The court determined that the applicable statute of limitations period for common law fraud in Pennsylvania was six years, not two years, as the singer and her lawyer contended. The Pennsylvania legislature had, by the Judiciary Act of 1976 which became effective June 27, 1978, established a new limitations scheme. Though a new two-year statute of limitations applied to a wide range of torts, it does not refer to fraud. In the absence of state law precedent since the Judiciary Act was

passed, or a clearly manifested legislative intent, the court refused to hold that a drastic change of the common law period from six years to two years was intended.

Culbreth v. Simone, 511 F.Supp. 906 (E.D.Pa. 1981) [ELR 3:9:6]

Briefly Noted:

Video Games.

Space Invaders may now captivate residents of Buffalo, New York since an Erie County judge has determined that a variety of video games are games of skill and are not the type of gambling devices barred by a city ordinance. The video games were characterized as

gambling devices because of their extended play feature. The court noted, however, that extended play was "recompense for some act done rather than a stake upon an uncertain event." Further, the ordinance had been applied in an arbitrary and capricious manner because four Space Invader games previously had been licensed for use in taverns. A pinball scandal which occurred 30 years ago had prompted the adoption of the ordinance. The court stated that "The time has come for the City of Buffalo to join its neighboring communities and to enter the electronic age of coin-operated amusements."

WNEK Vending & Amusements Co., Inc., v. City of Buffalo, 434 N.Y.S. 2d 608 (Sup. 1980) [ELR 3:9:7]

Reporter's Privilege.

Section 1070(b) of the California Evidence Code (which has been incorporated into the California Constitution in Article I, section 2(b)) is a "newsman's privilege" statute. It prevents the use of the contempt power against journalists who refuse to divulge their sources. This privilege has been recog- nized by a Federal District Court in California in a diversity-of-citizenship libel action against CBS, Inc. The court stated that although there is no absolute privilege under the First Amendment, "[i]n civil litigation, the public interest in nondisclosure of the journalist's confidential sources frequently outweighs the public interest in compelling disclosure." California's constitutional provision also reflects the "paramount public interest in maintaining the free flow of information to the public by enabling journalists to assure an otherwise reluctant supplier of information

that the supplier's identity will not be made public." Other factors considered by the court included the need for the information, the "dubious relevance" of some of the information sought, and the availability of other sources of information. However, in order to insure fairness to the parties, CBS will not be allowed to call as a trial witness any person whose identity has been protected from disclosure. CBS also will be barred from disclosing the identity of a source at trial and testifying that reliance was placed on information from that source, unless prior notification is given to the plaintiff.

Laurence University v. CBS Inc., Case No. CV 79-264 (C.D.Cal., Feb. 18, 1981) [ELR 3:9:7]

Copyright.

The new owners of a co-op advertising service brought suit against NBC alleging copyright infringement and other claims. NBC moved for summary judgment, contending that the coop lacked standing to sue for copyright infringement and that it failed to meet procedural requirements for filing an infringement action. A Federal District Court has upheld the coop's standing to sue, holding that although the advertising service did not acquire a right to sue on prior acts of infringement at the time it was assigned the allegedly infringed copyright, it acquired that right by express assignment while the infringement action was pending; and the acquisition related back to the filing of the complaint, so that the case was not barred by the statute of limitations.

Co-opportunities, Inc. v. National Broadcasting Company, Inc., 510 F.Supp. 43 (N.D.Cal. 1981) [ELR 3:9:7]

Racing Regulations.

The Director of Florida's Division of Pari-Mutuel Wagering revoked a horse trainer's license and fined her for violating an administrative rule which prohibits the racing of a horse with any narcotic. The horse trainer appealed from the administrative order, contending that because the term "narcotic" is not defined, the rules fail to establish a reasonable standard of permissible conduct, and are thus unconstitutionally vague. The Florida District Court of Appeal has affirmed the administrative order, holding that "the term 'narcotic' sufficiently designates prohibited substances to a trainer who has or

should have expertise not common to the common person."

Calfin v. State, Dept. of Business Regulation, 391 So.2d 739 (Fla.App. 1980) [ELR 3:9:7]

Obscenity.

The city of Federal Heights, Colorado ordered a bar owner to discontinue live nude entertainment in violation of a local zoning ordinance restricting such activity to "entertainment districts." The bar owner filed suit to restrain the city from enforcing its order. The Supreme Court of Colorado has ruled in his favor, holding that the zoning ordinance, in a city which had no "entertainment districts" and had limited the creation of such a

district to the enactment of an ordinance, was constitutionally overbroad.

Marco Lounge, Inc. v. City of Federal Heights, 625 P.2d 982 (Colo. 1981) [ELR 3:9:7]

Obscenity.

Six magazines and a book imported by a doctor were ruled obscene and subject to forfeiture pursuant to section 305 of the Tariff Act, 19 U.S.C. section 1305. The publications were conceded to be obscene under Miller v. California, 413 U.S. 15. But it was argued that section 1305 was not intended to prohibit the importation of materials for use by a doctor in his medical practice. The court found that the doctor failed to establish that the materials would be so used in connection with his

study of drug use and human sexuality. Judge Goodwin, in a concurring opinion, agreed that the doctor had not demonstrated clearly erroneous findings of fact by the lower court. But Judge Goodwin would have recognized, as the majority did not, the existence of a medical exception to section 1305. Such an exception would avoid having the court engage in speculations regarding the obscure "line between the prurient versus the scientific interests of various individuals who believe that there may be some value in studying unconventional depictions of human behavior for various scientific or pseudo scientific reasons."

United States v. Obscene Magazines, Book and Advertising Materials, Case No. 79-3300 (9th Cir., Aug 10, 1981) [ELR 3:9:7]

Libel.

Private figures need only prove negligence in libel cases against the media in Utah, that state's Supreme Court has ruled in a recent case against television station KSL in Salt Lake City. The case was triggered by an "Action Report" on KSL's evening news in which Garth Seegmiller, a horse owner, was accused of possible cruelty to animals. Seegmiller testified that he had not been cruel to his animals and that the KSL broadcast had caused him substantial damages. At the conclusion of Seegmiller's presentation of his evidence, a trial court entered judgment for KSL. The trial court judge reasoned that cruelty to animals was a crime and therefore a matter of public interest. And thus, the trial judge ruled, KSL's report was privileged and could result in liability only if it had broadcast the report with malice. The Utah Supreme Court has reversed, however, and

has sent the case back for trial. It has ruled that KSL may be held liable if it departed from standards which exist, or which ought to exist, in the news media industry.

Seegmiller v. KSL, 7 Media Law Reporter 1012 (Utah 1981) [ELR 3:9:8]

DEPARTMENTS

In the Law Reviews:

The Struggle to Define Character in FCC License Renewal Decisions: RKO General, Inc.. 22 Boston College Law Review 409 (198 1)

Source Protection in Libel Suits after Herbert v. Lando, 81 Columbia Law Review 338 (1981)

The Chilling Effect in Press Cases Judicial Thumb on the Scales, 15 Harvard Civil Rights-Civil Liberties Law Review 685(1980)

Sports Liability: Blowing the Whistle on the Referees, 12 Pacific Law Journal 937 (198 1)

The Right of Publicity: Premature Burial for California Properly Rights of the Wake of Lugosi, 12 Pacific Law Journal 987(1981)

Recent Case: Libel and Slander: First Amendment Limi-talions: Business that Advertises Consumer Goods Be-comes a Public Figure: Steaks Unlimited v. Deaner, 85 Dickinson Law Review 371 (198 1)

[ELR 3:9:8]