RECENT CASES

Home video recording of television broadcasts violates Copyright Act, Federal Court of Appeals rules in "Betamax case"

In a case of tremendous significance to the entire entertainment industry, a Federal Court of Appeals in California has ruled that off-the-air video tape recording of television broadcasts - even for private, non-commercial purposes - violates the Copyright Act. In so ruling, the appellate court reversed an earlier decision to the contrary handed down in 1979 by a Federal District Court in Los Angeles. (ELR 1:11:1)

The 1976 Copyright Act provides that copyright owners have monopoly power over all reproductions of their works, subject to certain statutory exceptions. In a case brought by Universal City Studios and Walt Disney Productions against Sony Corporation, which is the manufacturer of Betamax videotape recorders, the Federal District Court bad ruled that there was also an implied video recording exception in the Copyright Act.

However, it seemed to be quite clear to the Court of Appeals that exceptions to the copyright owner's broad grant of rights should originate with Congress rather than the courts, and that the District Court had misread the legislative history of the Copyright Act and had erred in implying a video recording exception.

The Court of Appeals pointed out that "special solicitude" has been given to audiovisual works by Congress. The legislative history for the 1971 act which granted copyright protection to sound recordings for the first time did say that Congress did not intend "to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and and with no purpose of reproducing or otherwise capitalizing commercially on it." However, the legislative history specifically emphasized that "This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyrights in recorded musical compositions over the past 20 years." The same was not, and could not have been, said about home video recording, which was not a common practice in 1971. Thus the appellate court found no statutory or legislative language indicating that home video recording was an exception to the usual rule that copyright owners have the exclusive right to copy their own material. (It is however possible that such clear legislative language will find its way into the law, because several bills which would exempt non-commercial video recording have been introduced in Congress subsequent to the court's decision.)

The "nebulous" fair use doctrine also failed to exempt off-the-air video recording from the Copyright Act. On the basis of case law and the general copyright scheme, the appellate court noted that "fair use... generally allows a second author to use a first author's work but does not permit a second author to reproduce a copyrighted work for its intrinsic purpose." In other words, it is not a fair use to reproduce a work in the same mode and for the same purpose as the original.

Further, the four factors for determining whether fair use applies to an instance of copying, as set forth in section 107 of the Act, were not met by Sony. Off-the-air recording does not necessarily aid in criticism, research or other independent work. The court noted that the non-commercial nature of the use was irrelevant because the statute does not draw a commercial/ non-commercial distinction. Rather it contrasts commercial and nonprofit educational purposes. According to the court, "The fact that the infringing activity takes place in the home does not warrant a blanket exemption from any liability."

The second fair use factor involves the nature of the copyright work, with some indication that the public is granted greater access to informational as opposed to creative works. The third factor - the amount and substantiality of the portions used in relation to the copyrighted work as a whole - weighed against a finding of fair use by Sony. The District Court had concluded that the taking of an entire work could still constitute fair use, because there was no reduction in the market for the copyrighted work. But the Court of Appeals called this conclusion "completely wrong." It accepted the view that excessive copying precludes fair use. The fourth factor - the effect of the use upon the potential market for, or value of the copyrighted work - also weighed against Sony because of the likelihood that home recording would tend to prejudice potential sales of the copyright owner's work.

The contention that the video recorder was a "staple of commerce," such as typewriter or a camera, was rejected. Video tape recorders have no "substantial non-infringing use," the court said. Furthermore, Sony knew that the Betamax would be used to reproduce copyrighted materials; the company intended and encouraged such use and thus materially contributed to the infringing conduct.

In remanding the matter, the appellate court suggested that the District Court consider an award of statutory damages or other equitable remedies, particularly injunctive relief in view of the likelihood of continuing violations.

The District Court's finding that retailers did not infringe the Copyright Act when demonstrating the operation of the Betamax machine was upheld, however.

Universal City Studios, Inc. v. Sony Corporation of America, 659 F.2d 963 (9th Cir. 1981) [ELR 3:13:1]

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Pro Arts wins right to distribute unauthorized Elvis Presley poster; Factors' exclusive rights expired when Presley died, under Tennessee law, which Court of Appeals applied in second appeal of case

The celebrated legal battle between Factors Etc., Inc., which is the holder of an exclusive license to merchandise Elvis Presley's name and likeness, and Pro Arts, Inc., which is a manufacturer of an unauthorized "memorial" poster bearing Presley's photograph, has taken an unexpected turn on its second trip to the Federal Court of Appeals in New York.

In 1977, Factors obtained a preliminary injunction restraining Pro Arts' manufacture and distribution of the

Presley memorial poster. The Court of Appeals affirmed that decision in 1980 (Factors I); and later that year, on remand, the District Court made the injunction permanent. (ELR 2:9:3)

In a surprising reversal, however, the Court of Appeals has vacated the permanent injunction, thus allowing Pro Arts to resume its manufacture and distribution of Elvis Presley posters, even in New York.

A divided Court of Appeals for the Second Circuit said it was not faced with the question of whether a person has a protected interest in publicizing his name and likeness after his death. Instead, what divided the court and formed the basis of its decision was "the more esoteric question, apparently of first impression, concerning the deference a Federal Court exercising diversity jurisdiction should give to a ruling by a Court of Appeals deciding the law of a state within its circuit."

Specifically, the court pondered whether it should defer to the ruling of the Sixth Circuit Court of Appeals in Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956 (1980). (ELR 1:22:1) In that case, the Sixth Circuit threw Elvis Presley's name and likeness into the public domain, deciding that, in Tennessee, the right to control the commercial use of one's name and likeness may be enforced by a person only during his lifetime.

The Second Circuit has decided to accept Memphis Development as controlling authority in this case. The pivotal finding in its reversal came in the court's reexamination of its choice-of-law ruling in Factors I. On the first appeal, the court looked to the law of New York - where the sale of the allegedly infringing poster occurred. This time, the court considered that Tennessee was where Elvis Presley lived and where the agreement by which Factors had obtained its license was signed.

Moreover, Factors' license agreement provided it was to be construed in accordance with Tennessee law. "These facts," said the court, "would persuade a New York court to look to the law of Tennessee."

The problem was that there was no law of Tennessee on whether one's right of publicity survives one's death. In Memphis Development, the Sixth Circuit ruled only on what it believed to be the law of Tennessee, without any Tennessee statutory or decisional law to guide its resolution, and with "no way to assess" the predisposition of the Tennessee courts.

Writing for the majority, Circuit Judge Newman conceded that reasonable minds may differ as to the preferable course that the common law of Tennessee ought to follow on the right of publicity issue. "The writer would probably uphold a descendible right of publicity, were he serving on the Tennessee Supreme Court, and perhaps if he served on the Sixth Circuit when Memphis

Development was decided." Yet, the court was concerned that if it disregarded the Sixth Circuit's view, Tennessee residents would be left with conflicting guidance as to whether their publicity rights are to be valued only for a lifetime or beyond.

Circuit Judge Mansfield, dissenting, saw no warrant for "blindly following" the Memphis Development decision any more than the court would defer to the decision of any other circuit court with which it might disagree or conflict. "Our development and formation of lasting rules of common law depends heavily on healthy differences of opinion," said Judge Mansfield. "Soundness must not be sacrificed on the alter of consistency."

Factors Etc., Inc. v. Pro Arts, Inc. 652 F.2d 278 (2d Cir. 1980) [ELR 3:13:2]

Federal copyright protection for "Hooray for Hollywood" began when the film was commercially distributed to movie theaters; prerelease screenings did not constitute a "publication"

Under the Copyright Act of 1909, statutory copyright protection commenced on the first "publication" of a work. Publication was not defined in the Copyright Act of 1909, however, and has been an "arcane and unsettled area of the law." Recently, and appropriately, the film "Hooray for Hollywood" played the leading role in a lawsuit in which it was determined that "publication of a motion picture does not occur until the film is in commercial distribution - when copies of a film are placed in the regional exchanges for distribution to theater operators."

A declaratory judgment action had been brought by American Vitagraph, Inc., which, in 1975, sold the film

"Hooray for Hollywood" to Ronald Levy. Vitagraph received a non-recourse promissory note to be paid from the net income of the film. The company retained a security interest in the film to secure payment of the note, and the agreement provided that title to the film was to revest in Vitagraph in eight years if the note were not paid. Levy obtained an assignment of all rights to the film, including the copyright.

Vitagraph contended that Levy placed the film in the public domain by publishing it without the proper copyright notice. Damages were sought on the ground that Levy thereby had impaired Vitagraph's security interest in the film.

A Federal District Court agreed with Vitagraph that the film's copyright protection was destroyed by acts of "divestive publication" prior to the film's general release in 1976. But the Court of Appeals has reversed this decision and has ruled that certain pre-1976 screenings of the film were not publications, and that the film never lost its common law copyright until the 1976 general release when statutory copyright was obtained in compliance with the requisite formalities.

Vitagraph claimed that it had obtained a statutory copyright when Levy, in late 1975, screened a copy of the film bearing a copyright notice in Vitagraph's name. However, the film was screened for one week only and then returned to Vitagraph for additional editing. The Court of Appeals called this showing a limited screening to "gauge audience reaction to the film. The movie was not distributed at this time to any other exhibitor nor were any copies of the film sold." The film used was not the permanent type of film print used when a movie is released for general distribution. Thus, no commercial exploitation was found to have occurred in 1975 although a small admission fee was charged.

Citing Nimmer on Copyright, the court noted the principle that performance is not a publication and that "projection or exhibition of a motion picture in theatres or elsewhere does not in itself constitute a publication." In the view of commentators and the court, publication would occur when prints of a film are distributed on an unrestricted and commercial basis via leases to theater operators for public exhibition. Section 101 of the Copyright Act of 1976 states that "offering to distribute copies" of motion pictures "to a group of persons for purposes of ... public performance ... constitutes publication." The Court of Appeals agreed with Professor Nimmer that this definition codifies the "unstated definition" of motion picture publication under the 1909 Act. Apparently, the only case supporting this view was Blanc v. Lantz, 83 U.S.P.Q 137, in which Blanc sought damages for the alleged infringement of his common law rights to a musical laugh on the soundtracks of Woody

Woodpecker cartoons. There the court held that "the distribution and exhibition in commercial theatres throughout the world ... constitutes so general a publication of the contents of the film and its sound track as to result in the loss of common law copyright."

Other pre-release screenings of the film to the trade similarly did not constitute publication of the film since the screenings were held for a select group and for the limited purpose of generating distributor interest in the film. Even if shown with a defective copyright notice, the defect would not have triggered copyright divestment as no publication occurred.

The District Court also had held that the general release of the film in 1976 with a copyright notice in the name of Cinamco (Levy's company.) injected the film into the public domain because there had been no recordation of the copyright assignment. The Court of Appeals held that this conclusion was wrong as a matter of law, since Cinamco, the assignee of a common law copyright, was required to, and did, use its name in the copyright notice at the time of publication. Statutory copyright therefore was properly secured, and Vitagraph's security interest in the film was not been impaired.

American Vitagraph, Inc. v. Levy, Case No. 79-3555, (9th Cir., Oct. 23, 1981) [ELR 3:13:3]

Club owner challenging BMI's rate structure is denied certification as class representative

The melody lingers on in Delaware where a Federal District Court has issued another procedural ruling in a copyright infringement action brought by BMI against Moor-Law, Inc., the owner of the Triple Nickel Saloon (see ELR 1:22:2). In a counterclaim, Moor-Law alleged that BMI and its licensor copyright holders unreasonably restrained trade by refusing to offer Moor-Law a "small blanket license." BMI generally charges a rate based upon a licensee's total entertainment expenses, rather than upon the frequency of a licensee's use of compositions in the BMI repertoire. A small blanket license would cover the performance of only certain categories of music from the catalog such as "country and western" works. Moor-Law also alleged that BMI had conspired with ASCAP to fix prices and had attempted to monopolize the licensing of copyrights in country and western music.

Moor-Law sought to assert its claims on behalf of two classes which purportedly were injured as a result of the claimed illegal acts - one class consisting of restaurants and clubs in Pennsylvania, New Jersey, Delaware and Maryland which presented acts performing country music; and the other class consisting of those parties in the same states who had been offered licenses under BMI's General Licensing Program.

The court chose to postpone its certification of either class until it reached a decision concerning BMI's obligation to grant the elusive small license. Judge Stapleton pointed out that the second proposed class appeared to contain class members with conflicting interests, because some clubs might benefit from a payment system based on the percentage structure. Further, the category described as "country and western music" did not appear to be sufficiently definite for use in granting a license. A completed liability trial would provide assistance in reaching a more objective identification of class members possessing the requisite community of interests, stated the court.

BMI v. Moor-Law Inc., CCH Copyright Law Reports Para. 25,216 (D. Del. 1980) [ELR 3:13:4]

REO Speedwagon T-shirts must be returned to sellers who were not named in restraining order barring unauthorized sale of merchandise

REO Speedwagon was slowed down in Chicago when a Federal District Court denied the request of the group and its exclusive merchandising licensee for a temporary restraining order against unidentified persons who would be selling unauthorized merchandise bearing the group's likeness in the vicinity of the Chicago Amphitheater.

The court ruled that the claim failed to present a "case or controversy" within the meaning of Article III of the U.S. Constitution because the claim alleged a future violation of the rights of REO Speedwagon and Winterland Concessions by then unknown persons.

When the complaint was later amended to include two named defendants, the court issued a TRO and an order authorizing the seizure of "infringing merchandise." However, REO Speedwagon T-shirts also were seized from three individuals who had not been named in the complaint. During an evidentiary hearing that was held promptly after the seizure, the court ruled that there was no proof that those individuals were acting in concert with, or were aiding and abetting the named defendants. The seized T-shirts therefore were ordered returned to them.

Winterland Concessions Co. v. Geisel, 511 F.Supp. 310 (N.D.Ill. 1981) [ELR 3:13:4]

Simon & Schuster enjoined from using cover design for its "Silhouette Romance" series, because design was confusingly similar to covers of "Harlequin Presents' series

In April of 1980, Simon & Schuster began publication of a fiction series in paperback, known as the "Silhouette Romances." Simon & Schuster previously had been the exclusive U.S. distributor of the highly successful "Harlequin Presents" romantic fiction series published by Harlequin Enterprises. However, in early 1979, Harlequin notified Simon & Schuster that it planned to let the distribution agreement expire in January of 1980. About one month before Simon & Schuster's "Silhouette Romances" appeared, Harlequin filed a lawsuit for trade dress infringement, alleging that the Silhouette Romance cover design was almost identical to the "Harlequin Presents" series.

A Federal District Court in New York City granted a preliminary injunction to Harlequin ordering Simon & Schuster to cease using its cover format; and this order has been upheld by a Federal Court of Appeals.

The District Court found substantial similarity between the covers of the two series. The paperbacks were bound with glossy white covers, were of identical dimensions, contained price information in the same location, retailed for $1.50, and used similarly colored colophons, typescript and design. This combination of features would lead an ordinary buyer to believe that both products came from the same publisher, stated the court. It also was determined that there was actual confusion between the two covers because there had been "extraordinary" number of Silhouette returns sent to Harlequin by retailers. And evidence indicated that Simon & Schuster deliberately imitated the Harlequin cover.

The Harlequin cover was found to have achieved a secondary meaning for romance readers who had come to associate the cover with a particular series and publisher. However, New York law protects trade dress from deliberate copying even if the design in question has not acquired a secondary meaning.

Harlequin's delay in seeking injunctive relief until three months after the Simon & Schuster series appeared did not constitute laches, because an infringement action had been instituted before the Silhouette Romance series was marketed. Laches also was unavailing as a bar to relief because Simon & Schuster intended the infringement. Further, Simon & Schuster were permitted to continue sales of the books which had already been published with the infringing cover.

Harlequin Enterprises Limited v. Gulf & Western Corp., 644 F.2d 946 (2d Cir. 1981) [ELR 3:13:4]

Cable distribution in U.S. of American television programs broadcast in Canada prior to U.S. showing did not harm Seattle television station

After various proceedings during the past eight years, a Federal Court of Appeals in Washington, D.C. has upheld an FCC decision concerning the prebroadcasting of American programs on Canadian television (ELR 1:16:4). The FCC had refused to grant protection to station KIRO in Seattle against competing Seattle cable systems showing American network programs when the programs aired on Canadian television prior to their release in the United States. The cable systems successfully argued that KIRO would not suffer significant harm from the showing of prereleased programs, because it appeared that no more than 1.9 percent audience diversion was likely during prime time, and that no more than 1.4 percent of KIRO's revenues would be lost if the practice continued.

The court questioned whether the FCC was correct in denying KIRO a presumption of harm when this presumption is afforded to stations confronted with the simultaneous duplication of programming by a cable system. Nevertheless without deciding this issue. the court determined that KIRO would not have been entitled to relief even with a presumption of harm, given the evidence presented by the Seattle cable systems.

KIRO, Inc. v. F.C.C., 631 F.2d 900 (D.C. Cir. 1980) [ELR 3:13:5]

Alexander Solzhenitsyn's published statements regarding former associates were opinions and not libelous

In "The Oak and The Calf," author Alexander Solzhenitsyn described his literary career in the Soviet Union and the means by which his works were published in the West. Certain statements in the book regarding Olga Carlisle and her husband, both of whom assisted in the publication of Solzhenitsyn's works, were opinions and did not libel the couple, according to an opinion by Judge William W. Schwarzer of the Federal District Court in San Francisco.

In order to determine whether a statement is an opinion or is actionable libel, a court must consider the context in which the statement appears, note any cautionary terms, and observe the circumstances surrounding the statement including the medium of publication and the intended audience, stated Judge Schwarzer.

In Solzhenitsyn's 568 page book, one footnote and one parenthetical statement mentioned the Carlisles. Solzhenitsyn and the Carlisles were engaged in an ongoing argument concerning the importance of the Carlisles' role as publication intermediaries. The footnote reference offered Solzhenitsyn's response to the Carlisles' account of the parties' relationship. Solzhenitsyn's comments were responses "in the course of a debate," and concerned a matter of "great international interest, involving enormous political and social implications." In one statement, Solzhenitsyn discounted Olga Carlisle's sacrifice and risk. The court noted that the statement was sarcastic and critical and, at most, suggested that the Carlisles were greedy. But this was a protected opinion. And even if it were a statement of fact, it was not defamatory, because a reasonable person would not conclude that the Carlisles were incompetent, or that they had engaged in unlawful conduct or had committed a breach of trust. Solzhenitsyn's other references to the Carlisles also were ruled not defamatory as a matter of law, and summary judgment was granted to the author and to Harper & Row.

Carlisle v. Harper & Row, Case. No. 80-3975 (N.D.Cal., July 23, 1981) [ELR 3:13:5]

AT&T's refusal to allow multiple cable television attachments to its telephone poles held to violate antitrust laws

The now-abandoned policy of AT&T and its wholly-owned company, Northwestern Bell Telephone, of entering into a pole attachment agreement with only the first authorized CATV operator in an area has, at last, been ruled anticompetitive and in violation of Sections 1 and 2 of the Sherman Act by a Federal District Court in South Dakota. (The matter was before the District Court on remand; previous rulings in the case were reported in ELR 2:2:6 and 1:8:6.)

The court ruled that the purpose and effect of the one-per-pole policy appeared to be to unreasonably restrain competition in the construction of cable television distribution facilities and the distribution of cable television signals, thereby obtaining greater revenue from operators who used AT&T's own equipment, and also deterring independent operators such as TV Signal, from entering the CATV and broadband communications fields. Increased system and installation costs to cable television companies such as TV Signal were attributable to the policy. This higher market entry cost furthered the anti-competitive purpose of the policy by requiring a discouragingly high level of start-up capital.

It was also determined that although Northwestern Bell was a wholly-owned subsidiary of AT&T, the companies were separate entities operated by separate management groups and were legally capable of conspiring, and did conspire, to restrain trade. The evidence presented indicated that the one-per-pole policy" was suffused with anti-competitive intent."

The Section 2 violation was based upon a finding that AT&T had used its monopoly power in the use of telephone and utility poles to gain a competitive advantage in the CATV signal distribution market.

TV Signal Co. of Aberdeen v. American Telephone & Telegraph, 1981-1 Trade Cases, Para. 63,944 (D.S.D. 1981) [ELR 3:13:6]

Antitrust and breach of contract actions between Canadian hockey team and NHL should be heard in United States District Court, not Canadian court, U.S. court rules

A face-off between the owners of the Seattle Totems, an ice hockey team in the now-defunct Western Hockey League, and Northwest Sports, owners of the Vancouver Canucks of the National Hockey League, should remain entirely in a United States Federal Court, and not partially in Canadian Courts, a Federal Court of Appeals has ruled.

The Totems had brought suit in Federal Court, charging the NHL, Northwest Sports, and others with unlawful monopolization of the ice hockey industry in North America and sought to have certain contracts between the Totems and Northwest Sports declared void and unenforceable. These contracts called for the sale of 55%

of the Seattle Totems to Northwest Sports. They were executed in Vancouver, British Columbia and provided that they were to be interpreted in accordance with the laws of the Province of British Columbia.

More than two years after the Totems filed its antitrust action, Northwest Sports filed suit in British Columbia for breach of those same agreements. The Totems moved to enjoin the Canadian action on the grounds that, under the Federal Rules of Civil Procedure, Northwest Sports' breach of contract claim constituted a compulsory counterclaim to the Totems antitrust complaint and had to be pleaded in the pending federal antitrust action in the United States. The Federal District Court agreed and granted the injunction.

On appeal, Northwest Sports contended that Canadian law, and not the Federal Rules of Civil Procedure, was controlling, because (1) the parties designated Canadian law to be applied to the contract, and (2) Canada was the jurisdiction with the most significant relationship to the transaction. Since Canadian law would not require Northwest Sports to plead its contract claim as part of the pending antitrust suit, Northwest Sports argued that the District Court abused its discretion in restraining it from proceeding in Canadian courts.

A Court of Appeals has held that Northwest Sports was properly enjoined from prosecuting its contract claim in Canada. The court determined that the controlling choice-of-law principle was that a court's own local rules should be applied to determine how litigation should be conducted. Northwest Sports "failed to demonstrate why this principle is inapplicable in this case."

The issue, said the court, is not whether Canadian law governs the interpretation or validity of the agree ments, but rather whether all claims arising out of these agreements should be heard in a single forum. The court concluded that deciding the issues in two separate actions would likely result in unnecessary delay and substantial inconvenience and expense to the parties, and even inconsistent rulings or a race to judgment.

Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852 (9th Cir. 1981) [ELR 3:13:6]

Briefly Noted:

Communications.

A Federal Court of Appeals in Washington, D.C. has upheld an FCC decision barring a radio station licensee's proposed "distress sale" of its license after an administrative law judge had initially denied the licensee's application for renewal. The court found that the FCC's decision was consistent with longstanding policy not to allow license transfers after revocation proceedings or applications for renewal have progressed to initial decision, because "a licensee ... has nothing to assign or transfer unless and until he has established his own qualifications." The court determined that the FCC's application of the policy rationale of maintaining the deterrent effect of license revocation by preventing a suspected wrongdoer from transferring his license to evade sanctions, was applicable to this licensee.

Stereo Broadcasters, Inc. v. FCC, 652 F.2d 1026 (D.C.Cir. 1981) [ELR 3:13:6]

Sports.

A tennis pro who was known only by country club members who participated in the club's tennis program and who did not become involved in public controversy is not a public figure for the purposes of a libel action, even though the country club prominently advertised the pro's name and picture in country club ads, according to a Florida District Court of Appeal. The court further held that when statements made in the local newspaper's tennis column about the pro's dismissal were addressed to an audience that admittedly was already aware of his dismissal, and when the reporter's statements in the article were drawn from the pro's reputation in the community, then the reporter's statements were privileged pure opinion and not defamatory.

From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla.App. 1981) [ELR 3:13:7]

Constitutional Law.

An Illinois Appellate Court has held that since restrictions on the issuance of licenses to operate movie theaters contained in a theater license ordinance were all unconstitutional, and were not severable from the provision requiring theater owners to obtain a license, the entire licensing ordinance was invalid. The restrictions found to be unconstitutional were provisions: requiring an applicant to reveal to the licensing authority whether a previous license issued to him had been suspended or revoked and whether he had been convicted of a felony; prohibiting the issuance of a license to a person who is "not of good character and reputation in the community," who has had a previous license revoked, or who has been convicted of offenses relating to morality; and granting the mayor the power to order unrestricted inspections of licensed theaters and to suspend or revoke the license of one who permits an unlawful or immoral "practice" on the premises.

City of Springfield v. Hall, 417 N.E.2d 1059 (Ill.App. 1981) [ELR 3:13:7]

Agency.

A Louisiana Court of Appeals has held that where a corporation's sales manager directs a radio station advertising salesman to a third party ad agency to arrange for advertising, the ad agency is the agent of the corporation even though the ad agency's commission consisted of a fifteen per cent "agency discount" from the radio station. The court found that since the advertising agency acted as the corporation's agent, the corporation was bound as a principal to pay off the debt owed to the radio station even though the corporation had already paid the ad agency and the ad agency failed to forward payment to the radio station.

Swanco Broadcasting v. Red Janitorial Service, 400 So.2d 301 (La.App. 1981) [ELR 3:13:7]

Copyright.

A Federal District Court in New York has held that a book consists "preponderantly of nondramatic literary material" if more than half of the surface area of its pages consists of text (not including the margins). Such determinations are necessary whenever English language books are imported into the United States from abroad, because under the "manufacturing clause" of the Copyright Act, copyrighted English-language books must be manufactured in the U.S. or Canada if they consist "preponderantly of nondramatic literary material." Neither the Act nor regulations define "preponderantly." At issue in this particular case was a volume entitled "World Guide to Nude Beaches and Recreation." It was written by an American author but was printed in Italy. An official of the U.S. Customs Service determined that the book was "preponderantly" text, and thus he refused to allow its importation. Although more than half of the book consisted of photographs, the customs official determined that in his opinion, the text was more important. The court was extremely critical of the subjective nature of the official's deci sion, saying that if one picture is worth a thousand words, it would be beyond dispute that the pictures were more important. Furthermore, the court pointed out that the pictures were of major importance in conveying a sense of what "nude beaches" are, and were clearly a factor in increasing sales. The court did not seek to substitute its own subjective analysis for which part of the book was more important, however. Instead, the court ruled that "preponderant" means more than half of the page area. Only such an objective standard provides authors and publishers with the guidance they need, and U.S. and Canadian printers with the protection Congress intended to afford them, the court reasoned.

Stonehill Communications, Inc. v. Martuge, CCH Copyright Law Reports, Para. 25,254 (S.D.N.Y. 1981) [ELR 3:13:7]

Copyright.

The owner of a club in which copyrighted music was performed without a license was not entitled to a jury trial in a copyright infringement action against him, where the copyright owners waived any claim for damages in excess of the statutory minimum. A Federal Court of Appeals has held that under these circumstances, the entire case was equitable in nature, and therefore the club's owner had no constitutional or statutory right to a jury trial. The appellate court also affirmed an award of attorneys' fees in the sum of $2,100 in favor of the copyright owners, saying that the amount was not excessive even though only one hearing had been necessary to dispose of the case.

Twentieth Century Musk Corp. v. Firth, CCH Copyright Law Reports, Para. 25,260 (5th Cir. 1981) [ELR 3:13:7]

Copyright.

A Federal District Court in Missouri has held that statutory damages in a copyright infringement action are an equitable remedy, and therefore, the defendants are not entitled to a jury trial. The plaintiffs had brought suit alleging that the defendants had infringed their copyrighted songs by performing them in public. The court denied the defendants' request for a jury trial, pointing to the discretionary language of 17 U.S.C. Para. 504(c) in holding statutory relief to be equitable in nature.

Rodgers v. Breckenridge Hotels Corp., 512 F.Supp. 1326 (E.D.Mo. 1981) [ELR 3:13:7]

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