

RECENT CASES

Model obtains injunction barring unauthorized sale of poster; New York Civil Rights Law held to protect a public figure's right to publicity as well as right of privacy

Generally, when a public figure brings an action for the unauthorized use of his or her name or likeness, the claim is based on invasion of the celebrity's right of publicity. In New York, sections 50 and 51 of the state's Civil Rights Law prohibit the unauthorized commercial use of a person's name or likeness. Claims under the statute are based on invasion of the individual's right of privacy. Because public figures are newsworthy and a "legitimate public interest" exists about their activities, public figures have only a limited expectation of

privacy, and have encountered difficulty in bringing claims under sections 50 and 51. And since New York has not explicitly recognized a descendible and assignable right of publicity under the common law, an impasse loomed until a recent case in which a New York appellate court ruled that a model was indeed entitled to bring an action seeking to bar the unconsented-to sale of posters bearing her photograph.

Model Christie Brinkley had agreed to participate in a poster project arranged by John Casablancas, the president of the agency which represented Brinkley at the time. Casablancas licensed the production and distribution of the photograph to Galaxy Publishing Corp. However, Galaxy's right to publish and sell the posters was conditioned on its obtaining Brinkley's consent. Brinkley took part in a photographic session for the poster; the session also was being filmed for use in a Home Box Office documentary. Brinkley subsequently reviewed

prints and proofs of photographs taken during the session. However, without obtaining Brinkley's written release, Galaxy began distributing its poster.

Galaxy contended that by participating in the HBO television show, Brinkley waived her right of privacy with respect to any photographs taken during that public performance. Galaxy cited the case of *AnnMargret v. High Society Magazine, Inc.*, 498 F.Supp. 401 (ELR 2:10:4) in which High Society published a photograph of Ann-Margret taken from a scene in a motion picture in which she appeared partially nude. The District Court found that the publication of the photograph was not an invasion of privacy and that the manner of the actress' participation in the film was a newsworthy event. The New York appellate court noted that these factors did not apply to Galaxy's use of Brinkley's photograph, because the photograph did not involve a subject of general interest, and was not part of the HBO documentary.

A never-before published photograph of Brinkley was used, not a segment or frame from a filmed performance.

Was the unconsented-to distribution a claim within the ambit of section 50 and 51? The Second Circuit has surmised that a right of publicity exists in New York independent of the statutory right of privacy. In *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (ELR 2:9:3), the court commented that "a plaintiff asserting the right of privacy seeks to minimize the intrusion or publication of the damaging matter. In contrast, the right of publicity plaintiff does not necessarily object to the commercial exploitation - as long as the exploitation is at his behest and he is receiving the profits." While noting this distinction, the Brinkley court stated that "Irrespective of whether a separate and distinct common law right of publicity exists in this state, we believe that the so-called right of publicity is subsumed in sections 50 and

51 of the Civil Rights Law to the extent that even a public figure has a privacy interest which finds recognition in the statute and for the violation of which ... monetary redress is provided." The damage suffered by a public figure is compensable even if an unauthorized use of his or her name or likeness causes injury to a "property" interest. Galaxy's admitted failure to obtain Brinkley's consent entitled Brinkley to a permanent injunction prohibiting further sales of the poster, and to compensatory and exemplary damages.

However, Brinkley's claims against Casablancas (based on Casablancas' delivery of her photograph to Galaxy) were dismissed. Brinkley was aware of and had not objected to, the fact that Galaxy had received the photographs and was preparing proofs of the poster.

Two retailers were not found liable for selling the poster, because the retailers had no knowledge of Brinkley's lack of consent and had no reason to inquire

further about the poster. The retailers therefore had not "used" Brinkley's name or picture within the meaning of sections 50 and 51. Judge Kupferman concurred in the court's decision but cautioned that a retailer with a substantial amount of unauthorized material should not be relieved of liability solely because of a lack of knowledge. There might be a duty to inquire in such a situation, he said.

Brinkley v. Casablancas, 438 N.Y.S.2d 1004 (App.Div. 1981) [ELR 3:15:1]

Suit against Penthouse Magazine by Reverend Jerry Falwell, based on publication of allegedly unauthorized interview, is dismissed

"Stated succinctly, Reverend Falwell does not approve of Penthouse Magazine," a Federal District Court in Lynchburg, Virginia has observed. This understatement was made by the court in a suit Falwell has filed against the magazine for publishing an allegedly unauthorized interview.

The interview in question was conducted by two freelance journalists and appeared in the March 1981 issue of Penthouse. In his suit, Falwell charged that the interview appeared without his consent and contrary to specific conditions he had given orally to the two journalists.

On January 30, 1981, Falwell obtained an order temporarily halting the distribution of the March issue until February 2, 1981, when the court dissolved the restraining order and allowed Penthouse to distribute the issue with the Falwell interview in it. Nevertheless, the case

remained before the court for consideration of Falwell's claim for damages.

Falwell alleged five legal theories, "false light" invasion of privacy; commercialization of personality; infringement of common law copyright; defamation; and conspiracy to willfully injure him in his trade or profession. In response to a Penthouse motion, the court has dismissed all five counts.

Falwell's "false light" invasion of privacy and commercialism of personality claims were dismissed on the grounds that the state of Virginia does not recognize these theories at common law. The only remedy for invasion of privacy in that state is under a Virginia statute which only prohibits the unauthorized use of a person's name or likeness for advertising or trade purposes. In this case, the court determined that the Falwell interview did not qualify as an advertising or trade purpose.

The court dismissed Falwell's common law copyright claim on the ground that his responses to interview questions were too general and abstract to be a protectible literary or intellectual creation. The defamation count was dismissed because Falwell, who is a public figure, could not prove that Penthouse knowingly or recklessly published a falsehood. Falwell conceded that the interview, as published, was accurate, truthful and totally consistent with the statements he had made to the journalists. However, Falwell contended that the appearance of the interview in Penthouse was inconsistent with his ministry. The court found that although publication of the interview may have falsely implied that he had cooperated with the magazine, this, standing alone, does not constitute a basis for a defamation claim.

The court considered Falwell's claim that he had been injured in his business or trade "with reservation and regret ... inasmuch as it necessarily equates business

activity with the work of an outreach ministry." The court avoided, however, the question of whether a ministry is a "trade or business" under the Virginia conspiracy statute, because it found no facts or circumstances which even remotely suggested that the two journalists and Penthouse had conspired for the specific purpose of injuring Falwell.

Though Falwell's case was dismissed, the court's order provided that the dismissal would be without prejudice so that Falwell may reallege a count for breach of contract which the court believed to be "the true crux of the controversy."

Falwell v. Penthouse International, Ltd., 521 F.Supp. 1204 (W.D.Va. 1981) [ELR 3:15:2]

Libel suit by city against ABC, based on documentary "The Killing Ground," is dismissed

There have been relatively few reported cases involving libel claims made by cities. Most libel suits are filed by individuals, but last year, the Village of Grafton in Ohio did file such a case against the ABC television network. The suit was triggered by an hour-long documentary entitled "The Killing Ground." It was carried in Ohio by station WEWS-TV. The program dealt with the problem of hazardous chemical waste dumps in the United States and focused on several dumps in particular. While none of the featured dumps was located in Grafton, the documentary concluded with a list or "crawl" of 54 locations which a narrator said were the locations of some of the most dangerous dumping grounds in the country, "according to government sources." Grafton was one of the cities in that list.

In its complaint, Grafton alleged that ABC intended to mean that the city invited polluters to operate within its limits, that it failed to enforce any type of anti-pollution standards, and that it created or allowed an unwholesome environment in which to live or do business. The city's complaint sought \$500,000 in compensatory damages and another \$500,000 in punitive damages.

ABC denied Grafton's allegations and filed a motion to dismiss the case. The trial court granted that motion, and the Ohio Court of Appeals has affirmed. It did so on three grounds.

First, the Court of Appeals held that the statement made in the documentary was privileged, because it was made about a city. In so ruling, the court relied upon the leading case of *Chicago v. Tribune Co.*, 139 N.E. 86 (1923), in which the Illinois Supreme Court ruled that a libel action against a city would be "out of tune with the

American spirit, and has no place in American jurisprudence."

The Ohio appellate court also ruled that a municipal corporation such as the Village of Grafton is not a person and thus has no reputation which may be defamed.

Finally, the court noted that ABC obtained its information from a report issued by the U.S. Environmental Protection Agency. Though the information turned out to be erroneous, ABC did no more than make a truthful report of the material contained in that federal government report. Thus the statement was privileged under the common law doctrine of "record privilege" which is the privilege to report governmental proceedings even though they may contain defamatory statements.

Grafton v. ABC, 7 Media Law Reporter 1134 (Ohio App. 1980) [ELR 3:15:3]

ABC deal with producer of "Hollywood Palace" conveyed interest in title and format of program only, not tapes of past shows or literary property in them

The importance of being precise in drafting entertainment contracts has been demonstrated again in a lawsuit waged over whether the absence of the word "of" in an agreement showed that the parties intended to convey certain rights in a television show.

In 1968, under a Federal Communications Commission directive imposing limits on the television producing activities of the major networks, the American Broadcasting Company transferred an interest it shared in the television program "Hollywood Palace" back to the series' producer, Zodiac Enterprises. Determining just how much of an interest ABC actually conveyed to Zodiac required a New York appellate court to interpret the following sentence in paragraph 1 (a) of the parties'

contract: "We [ABC] hereby quitclaim to you [Zodiac] ownership of the title `Hollywood Palace' and to the format of said series and the programs therein."

Zodiac contended that this assignment transferred to it (a) the title, (b) the format, and (c) the programs, including the intangible literary property in the programs and the physical tapes and prints in which that property was embodied. ABC contended that only the title and format were transferred, because, it said, the phrase "of said series and the programs therein" only modified the word "format" just as though the phrase had read, "the format of said series and [of] the programs therein."

In a 3 to 2 decision, the Appellate Division of the New York Supreme Court has ruled in favor of ABC. It has found that paragraph 1(a) transferred neither the literary property nor the tapes, but only the title and format. Thus, the court granted ABC's motion for summary judgment and has dismissed Zodiac's case.

The majority opinion emphasized that paragraph 1(a) must be interpreted in view of the language contained in the rest of the contract. The majority specifically noted that paragraph 1(b) of the contract contained a number of references relating to the ownership of "said title and/or format" and to indemnification with respect to "such title and format." These references to "said" and "such" title and format were references to what was transferred by paragraph 1(a), said the majority, making it clear that paragraph 1(a) transferred only the title and format and not the programs themselves.

Justice Kupferman, in dissent, pointed out that the agreement was drafted by ABC which therefore should not have been allowed to "take refuge in ambiguity." Justice Ross, who also dissented, said that the contract's ambiguity raised a triable issue of fact which should have been determined at a trial, rather than by a motion for summary judgment.

In remarks which were not essential to the determination of the case, the majority suggested that even if Zodiac's interpretation were accepted, Zodiac would not be entitled to the physical tapes of the shows. "On its face, the word 'programs' would seem to be more appropriately a reference to the intangible literary property involved rather than to the physical recordings." The parties' original agreement confirmed this by separately referring to "programs" and "recordings of the programs," the majority said. But Justice Kupferman concluded that if the agreement were construed to convey the literary property in the series, the physical recordings would have been transferred as well. "The rights retained, if any, may not be used to invade the rights transferred ... and there is an implied covenant with respect to the quitclaim of good faith and fair dealing," he said in his dissent.

Zodiac Enterprises, Inc. v. American Broadcasting Companies, Inc., 440 N.Y.S.2d 240 (App.Div. 1981)
[ELR 3:15:3]

Television station reporter did not act as an agent of the police when he agreed to postpone disclosure of information about a suspect in the Hillside Strangler case

A television news reporter's agreement with Los Angeles police officials to postpone the disclosure of information about the Hillside Strangler investigation did not constitute "state action," a Federal District Court in Massachusetts has ruled in a civil rights action brought by a suspect in the murder case.

Michael Taibbi, a newscaster with WCVB-TV Channel 5 (ABC's Boston affiliate), received information

concerning the possibility that Peter Mark Jones was involved with the Hillside murders. Taibbi agreed not to publicize the "tip" (which was already known to the LAPD), and the LAPD promised to allow Taibbi to film the arrest of Jones, if made. Jones eventually was arrested and WCVB broadcast Taibbi's film and several reports about the case. During one report, it was stated that Jones had been charged "with two counts of first degree murder." Jones had not been charged with any crime; he was only held on suspicion and then released for lack of evidence.

Jones argued that Taibbi and Channel 5 acted as agents of the LAPD in an "unholy alliance," defaming him and violating his privacy when they broadcast the film of his arrest. But the court ruled that the defendants did not act under color of state law. Taibbi and the LAPD may have had a "coincidence of interest" in Jones but not a "concert of involvement." The LAPD did not determine what

Taibbi would film, and Taibbi had no part in the circumstances of Jones' arrest. Taibbi's decision to delay publication balanced his "First Amendment responsibilities as a reporter with his at least equally compelling responsibilities as a citizen," stated the court in granting the motions of Taibbi and Channel 5 for summary judgment on the civil rights claim. Jones' state law claims for defamation and invasion of privacy were remanded to the Norfolk Superior Court.

Jones v. Taibbi, Case No. CA 79-821-T (D.Mass., March 5, 1981) [ELR 3:15:4]

Syndication of "Star Trek" television series without copyright notices did not put shows in the public domain

The popular "Star Trek" series, which was produced between 1966 and 1968, has been re-run by more than 140 television stations in the United States. In an action brought by Paramount Pictures to enjoin All-Star Video's allegedly unauthorized sale of "Star Trek" video cassettes, a Federal District Court in New York has ruled that the syndication of the "Star Trek" episodes was a limited publication which did not divest Paramount's common law copyright in the shows.

All-Star Video claimed that by distributing the "Star Trek" television shows throughout the country without a copyright notice, Paramount dedicated the work to the public domain, thereby rendering invalid the copyrights in the shows which were registered by Paramount in 1980. All-Star pointed out that Paramount brought its action under the Copyright Act of 1976. The 1976 Act defines publication as "the distribution of copies ... of a work to the public by sale or other transfer of

ownership, or by rental, lease or lending. The offering to distribute copies ... to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication ..."

Initially, the court corrected All-Star's reliance on the Copyright Act of 1976. Because All-Star claimed that the Star Trek episodes were published prior to 1978 (the effective date of the Copyright Act of 1976), case law interpreting the less-than-explicit definition of publication in the 1909 Copyright Act would be determinative.

In the case of *Burke v. National Broadcasting Co., Inc.*, 598 F.2d 688 (ELR 1:7:3), the First Circuit described general publication as occurring "when a work is made available to members of the public at large without regard to who they are or what they propose to do with it. A general publication is such dissemination of the work itself among the public as justifies the belief that it has been dedicated to the public and rendered common

property." However, Professor Nimmer has stated that leasing or distributing film prints for exhibition amounts to a publication. By placing film prints in regional distribution offices for rental to anyone, the creator of the work relinquishes control with the result that there occurs a general publication, according to Nimmer. Rather than focusing on the act of leasing a print for exhibition, the Paramount court agreed with the First Circuit that the most significant question is whether a copyright proprietor has limited publication to both the class of persons with access to the material and the use made of the material. Paramount's licensing agreements with individual television stations for the exhibition of the "Star Trek" episodes restricted broadcasts to non-paying audiences, required the licensees not to part with possession of the print and not to allow the copying of the prints. This retention of rights protected Paramount's common law copyright in the "Star Trek" series, held the court in

granting partial summary judgment to Paramount. Paramount obtained full copyright protection when it registered the series and All-Star's conduct infringed a valid copyright.

Paramount Pictures Corp. v. Rubinowitz, Case No. CV 81 0925 (E.D.N.Y., June 26, 1981) [ELR 3:15:4]

Blackjack player Ken Uston cannot be barred from playing in Atlantic City casinos, New Jersey appellate court rules

A New Jersey appellate court has dealt a winning hand to nationally-known blackjack player Ken Uston who had been barred from playing by Resorts International Hotel solely because he is a professional card counter. The court ruled that New Jersey gambling casinos may

not blacklist or exclude blackjack players who use card counting systems.

When Uston was prevented from playing blackjack at Resorts in January of 1979, he appealed to the New Jersey Casino Control Commission. The Commission ruled that the hotel had a common law right to exclude any person it chose, for whatever reason it chose.

The appellate court has overturned the Commission's ruling on the grounds that the New Jersey Casino Control Act gives the Commission the exclusive authority to exclude people from casinos, and thus the Act implicitly denies casinos themselves the right to do so, even though the Commission has not yet exercised its authority on this issue.

The Casino Control Act empowers the Commission to compile a list of people to be excluded from casinos and to establish standards for exclusion. The court expressly left open whether the Commission may establish

standards that would exclude card counters from blackjack tables in New Jersey casinos.

The court ordered Resorts International to admit Uston to its casino and to permit him to play blackjack.

Uston v. Resorts International Hotel, Inc., 431 A.2d 173 (N.J.Super.A.D. 1981) [ELR 3:15:5]

Sam Goody officials who were convicted of interstate transportation of stolen goods are awarded a new trial

In April of 1981, various officials of record retailer Sam Goody, Inc., were convicted on charges of interstate transportation of stolen property and criminal copyright violations (ELR 3:2:5). A Federal District Court has denied the defendants' motions for acquittal,

because it ruled that the evidence presented was sufficient to sustain the findings that the defendants knew that the transported tapes and cassettes were counterfeit, that the tapes and cassettes were shipped in interstate commerce, that the value of the sound recordings exceeded the requisite amount and that the copyrights in question were valid. However, the defendants' motions for a new trial were granted.

The court found that the "racketeering" implication of the RICO count under 18 U.S.C. section 1961, may have had a prejudicial effect on the jury even though the defendants were not convicted on this count. The false testimony of a government agent and "the possible cumulative adverse affect that the various unproven charges may have had" in tainting the jury's deliberations also were cited by the court. Judge Platt particularly objected to the prosecutor's failure to promptly correct a government agent who testified that he had

destroyed notes taken during interviews with government informants. The agent actually had not taken notes and could not recall what happened during the interviews.

United States v. Sam Goody, Inc., 518 F.Supp. 1223 (E.D.N.Y. 1981) [ELR 3:15:5]

Major League Baseball Players Association and Topps Chewing Gum did not monopolize baseball card business, Court of Appeals rules

The baseball card case has been flipped back to the Federal District Court by the Court of Appeals which has directed that a judgment be entered in favor of Topps Chewing Gum and the Major League Baseball Players Association. The Court of Appeals has held that

the licensing agreements between the Players Association and Topps do not violate the antitrust laws.

The lawsuit was filed by Fler Corporation which is best known for its "Double Bubble" bubble gum. Fler charged that the Players Association and Topps had monopolized the market for baseball cards. The District Court had agreed with Fler, because it found that Fler could compete with Topps only by obtaining a group license from the Players Association - a license the Association had refused to grant in order to avoid diminishing its royalty income from Topps. The District Court concluded that the effect of this had been "to exclude completely any meaningful competition to Topps." (ELR 2:22:5)

The Court of Appeals, however, decided that merely because Topps had managed to obtain licenses with all major league baseball players, that did not mean that the aggregate of those licensing agreements constituted an

unlawful combination in restraint of trade. The Court of Appeals noted that a rival gum manufacturer could compete head-to-head with Topps by obtaining licenses from professional baseball players while they were still in the minor leagues. Though such a program might take six or seven years to bear fruit, that did not make Topps' agreements anti-competitive, the appellate court ruled. It is simply a function of modern-day baseball.

The Court of Appeals also found no evidence that Topps and the Players Association had acted in concert to restrain trade. In fact, the court pointed out that in 1966, Fleer had left the trading card business by selling all of its then-existing licensing agreements with major league players to Topps, thus enhancing Topps' aggregation of licenses.

Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981) [ELR 3:15:5]

Author of "The Zionist Connection" infringed his publisher's copyright by printing and selling copies of the book himself.

Authors' complaints about their publishers' marketing efforts are not unusual. Alfred Lilienthal, the author of "The Zionist Connection," put his money where his complaints were, and when his original publisher, Dodd, Mead & Co., failed to print and distribute his book to his satisfaction, he printed and sold it himself

When Dodd Mead learned that Lilienthal had published his book himself, it was no less displeased with him, than he was with it. Dodd Mead responded with a copyright infringement action against Lilienthal in Federal District Court in New York City. Although the book's copyright had been registered in Lilienthal's name

by Dodd Mead itself, the publishing contract between them provided that Dodd Mead would have the exclusive right to print, publish and sell the book. Under the new Copyright Act, this contract gave Dodd Mead the copyright to the book publishing rights.

Last year, the court granted Dodd Mead a preliminary injunction barring Lilienthal from printing or selling any copies of his book himself. (ELR 2:15:4) This year, Dodd Mead and Lilienthal both made motions for summary judgment. The court has granted Dodd Mead's motion, has denied Lilienthal's and has issued a permanent injunction against the author.

Lilienthal sought to justify his own printing of the book by contending that his contract with Dodd Mead gave him the right to buy copies of it at a substantial discount, and that Dodd Mead had said that it did not intend to reprint the book even though no more were available. Lilienthal asserted that under the Uniform Commercial

Code, he had a right to "cover" by substituting books printed at his own expense. However, said the court, Lilienthal failed to demonstrate that Dodd Mead had in fact failed to meet specific orders for the book placed by him. Instead, it appeared that his grievance really was that Dodd Mead had not printed enough copies of the book to keep up with the public's demand. If this were so, the court noted, the publishing contract itself gave Lilienthal the right to request a reprinting, and the right to terminate the contract if Dodd Mead thereafter failed to reprint the book. Unfortunately, said the court, it did not appear that Lilienthal pursued this avenue.

Lilienthal also contended that his First Amendment rights were being abridged by Dodd Mead's enforcement of the copyright. The court disagreed, however. It said that he was not prevented from expressing his opinions or ideas. Rather, he was simply being prevented from reproducing and selling a written work which

Dodd Mead had acquired the exclusive rights to distribute. "There is no first amendment right on the part of Lilienthal to so egregiously breach an exclusive publication contract which he freely entered into," the court concluded.

Dodd, Mead & Co. v. Lilienthal, CCH Copyright Law Reports. Para. 25,251 (S.D.N.Y. 1981) [ELR 3:15:6]

Termination of woman radio station employee did not involve discrimination or sexual harassment

When Beverly Walter's talk show on radio station KFGO in Fargo, North Dakota was canceled, she was offered the position of Promotions Director. Walter refused to accept the new position, however, and instead brought an action against the station contending that she

was discharged on the basis of age and sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. Walter was 44 years old when she left the station and therefore was within the protected age group under the 1967 Act. However, the court found that Walter had not established that the position at KFGO remained open and was filled by another individual. Rather the position appeared to have been created in an attempt to accommodate Walter. But "no inference of discrimination arises where there is no position to be filled." And while two other individuals over 40 were discharged, nine persons under 40 also were discharged and three persons over 40 were hired.

The court stated that "The very nature of the entertainment business dictates a relatively large employee turnover as part and parcel of a station's quest to reach the top of the ratings and once there to remain there."

Walter's claim of sexual harassment also was rejected by the court since certain purported advances by the station's general manager did not mean that unwarranted sexual conduct was a "term or condition" of Walter's employment. Management decisions as to Walter's salary, benefits, promotions and employment were not conditioned on her response to the alleged sexual overtures by management. And the station manager's conduct did not interfere with Walter's work performance or create "an intimidating, hostile or offensive working environment."

The court concluded by noting that the fact that Walter was paid a lower salary than male coworkers performing similar duties was due to the disparity in their experience and educational background and was not based on sex.

Walter v. KFGO Radio, 518 F.Supp. 1309 (D.N.Dak. 1981) [ELR 3:15:6]

Briefly Noted:

Contracts.

The Superior Court of New Jersey has held that because Penthouse magazine had been informed by a Kodak film processor of a policy not to process or return transparencies depicting lewd exhibitions of genitals, Penthouse could not require Kodak to process pictures considered lewd by Kodak. The court rejected Penthouse's First Amendment claims as inapplicable because no state action was involved and because Kodak did not censor or restrict what Penthouse published. The court focused instead on contract issues, holding that Kodak

has the right to select its customers and refuse service to anyone for reasons sufficient to itself, provided the standards imposed are applied objectively and uniformly.

Penthouse International, Ltd. v. Eastman Kodak Company, 430 A.2d 971 (N.J.Super.Ch. 1980) [ELR 3:15:7]

Broadcast Regulation.

A Federal Court of Appeals has reversed an F.C.C. decision denying a broadcaster's request to conform the call signs of two of its stations. The court held that where the F.C.C. in other almost identical cases had granted applications to conform a call sign of one station to another of common ownership, such cases had precedential value, and the F.C.C., by disregarding such precedents, had acted arbitrarily and capriciously.

Doubleday Broadcasting, Co., Inc. v. F.C.C., 655 F.2d 417 (D.C. Cir. 1981) [ELR 3:15:7]

Invasion of Privacy.

An April 1977 issue of Hustler Magazine which contained a bare breasted version of the painting "Great American Gothic" did not invade the privacy or violate the right of publicity of Nan Wood Graham who had modeled for the painting approximately 47 years prior to the magazine's parody. A Los Angeles Superior Court judge found that the Hustler portrait "was not the exploitation of [Ms. Graham's] likeness but a satire of a painting in the public domain. The painting generally is treated as a classic work of art and the public no longer associates the models with particular identifiable

individuals." Further, Ms. Graham's face did not possess the same commercial value as that of a Mohammed Ali or Cary Grant, stated the court, in granting summary judgment to the magazine.

Graham v. Hustler Magazine, Case No. 195106
(L.A.Sup.Ct., Oct. 20, 1981) [ELR 3:15:7]

Antitrust.

A New York appellate court has held that even if licensing agreements between ASCAP and a group of television stations did violate the antitrust laws, such a violation would not be a defense to ASCAP's suit to collect licensing fees due under those contracts. The court specifically stated that it was not deciding whether the contracts did violate the antitrust laws, though the court

did note that the Supreme Court has ruled that they are not invalid on their face. *BMI v. CBS*, 441 U.S. 1 (ELR 1:1:1). Instead, the court merely cited the well-established proposition that the antitrust laws are not a defense to an action for services rendered, unless the plaintiff must prove it acted illegally in order to prove its own case.

ASCAP v. Spanish International Communications Corp., 439 N.Y.S.2d 389 (App.Div. 1981) [ELR 3:15:7]

Libel.

Reliance on memory, rather than research, is sufficient to require a trial on whether the writer had "actual malice" when writing an editorial that was later admitted to be false, the New York Court of Appeals has ruled. In a

pretrial examination, the newspaper's editor admitted that reliance on memory does not meet the standards of the journalism profession. Although a retraction was promptly published, and might be considered evidence of lack of malice, the retraction would not be sufficient as a matter of law to overcome a finding of malice in all cases, the court ruled.

Kerwick v. Orange County Publications, 438 N.Y.S.2d 778 (1981) [ELR 3:15:7]

Golf Injury.

A golfer whose errant golf ball struck the forehead of an individual who was located in a practice area located approximately 200 yards down and to the side of the fairway did not have a duty to give warning before

striking the golf ball when it appeared that no one was in a foreseeably dangerous area. The golfer shouted "fore" when he saw that his tee shot was deviating from its intended path; this provided an immediate and adequate warning of danger. The argument that golfers should be held strictly liable without fault to persons who are injured by their golfing was rejected, and the court dismissed the action.

Carrigan v. Roussell, 426 A.2d 517 (N.J.App. 1981)
[ELR 3:15:7]

DEPARTMENTS

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