RECENT CASES

ABC fails to enjoin sportscaster Warner Wolf from jumping to CBS, despite Wolf's breach of right of first refusal provision in his ABC contract

ABC has suffered the agony of defeat for the third time in its action to enjoin Warner Wolf from jumping to CBS. A New York trial court dismissed ABC's complaint against the sportscaster in 1980, and that dismissal was upheld by the Appellate Division later that year. (ELR 2:14:1) Now the Court of Appeals, New York's highest court, has affirmed the dismissal again, even though it agreed that Wolf breached his agreement to negotiate in good faith with ABC.

Wolf's obligation to bargain with ABC was set forth in a 1978 employment agreement between the sportscaster and the network which provided for a 90-day "good faith" negotiation period prior to its March 5, 1980 expiration date. For the initial 45 days of this period, ABC was to have the exclusive right to negotiate an extension of its contract for Wolf's services. If the parties did not reach an agreement regarding an extension during the 90 days, ABC would then have an additional three month "first refusal" period. During these three months, Wolf agreed not to accept any offers to work as a sportscaster or program host unless and until ABC had an opportunity to review any offer and determine whether the company wished to employ Wolf on substantially similar terms.

ABC and Wolf began negotiations in September of 1979. However, unknown to ABC, Wolf met with representatives of CBS in October of 1979. And in February of 1980, he signed two contracts with CBS. The "sportscaster" contract actually consisted of a proposed contract accompanied by an irrevocable option by which (in return for $100 paid by Wolf to CBS) CBS agreed to hold open its offer of employment to Wolf until June 4, 1980 (the date on which ABC's contractual first refusal right terminated). At the same time, Wolf signed a "producer" contract to take effect on March 6, 1980. This contract provided for the production of 16 sports programs by Wolf. An "exclusivity" clause in the producer contract prevented Wolf from performing services "of any nature" other than for CBS during the two year term of the contract. Wolf's $400,000 first year salary was divided equally between the sportscaster and producer contracts.

Wolf continued to negotiate with ABC during February of 1980 without mentioning either CBS contract and without disclosing the fact that the exclusivity provision of the producer contract would preclude the extension of his employment contract with ABC. On February 22, 1980, Wolf contracted with ABC to continue working for WABC-TV during the 90 day first refusal period from March 6, 1980 through May 28, 1980. However, on May 6, 1980, when Wolf's switch to CBS was confirmed by public reports, ABC brought an action seeking to bar Wolf from working at WCBS-TV and seeking specific performance of the first refusal provision of the ABC employment contract.

The Court of Appeals acknowledged that Wolf had breached his obligation to negotiate in good faith, because on February 4, 1980, when Wolf signed a "producer" contract with CBS giving it the exclusive right to his services beginning March 6th, the sportscaster became unable to extend his contract with ABC. Thus, any negotiations he engaged in with ABC thereafter were meaningless and could not have been in good faith.

However, the court determined that Wolf had not violated the first refusal provision of his ABC contract. By its own terms, the right of first refusal did not apply to offers accepted by Wolf prior to the March 5th expiration of his ABC contract. Thus, the court reasoned that Wolf could not have breached the right of first refusal by accepting an offer on February 4th, which was during the term of his employment with ABC and before the beginning of the first refusal period. Further, because the "sportscaster" contract with CBS consisted only of an option which Wolf could exercise, Wolf's acceptance of CBS's offer did not occur until after the expiration of the first refusal period.

The court refused to enjoin Wolf from working for CBS, because Wolf's term of employment with ABC had expired. The court said that it would grant relief under such circumstances only to prevent injury from unfair competition or similar tortious behavior or to enforce an express and valid non-competition clause. In this case, there was no express non-competition clause in Wolf s ABC contract, nor injury from tortious conduct. "In short," said the court, "ABC seeks to premise equitable relief after termination of the employment upon a simple, albeit serious, breach of a general contract negotiation clause. To grant an injunction in that situation would be to unduly interfere with an individual's livelihood and to inhibit free competition where there is no corresponding injury to the employer other than the loss of a competitive edge."

American Broadcasting Companies, Inc. v. Wolf, 438 N.Y.S.2d 482, 420 N.E.2d 363 (N.Y. 1981) [ELR 3:16:1]

Claim that attack on nine-year-old girl was motivated by NBC's broadcast of the television movie

"Born Innocent" has been dismissed due to lack of proof that NBC "incited" criminal conduct

A judgment of nonsuit has been affirmed in an action brought against the National Broadcasting Company and the Chronicle Broadcasting Company in which it was alleged that a rape scene in the television movie "Born Innocent" motivated a similar attack on a nine-year-old girl named Olivia in San Francisco. In an earlier proceeding, an appellate court had ruled that the matter should be tried before a jury. With a jury at last impanelled, Olivia's attorney, in his opening statement, indicated that the evidence would establish "negligence and recklessness" by the broadcasters. Olivia offered to demonstrate that NBC televised the film without a proper warning as to its content and that NBC should have known that "susceptible" persons might imitate the crimes depicted in the film.

A motion for nonsuit followed and was granted on the ground that the jury would not be able to find that the film "incited" the violent acts committed against Olivia. If, as conceded by Olivia, NBC did not encourage or advocate violent acts, then its broadcast was protected speech. Imposing liability on the basis of simple negligence might lead to self-censorship and seriously inhibit broadcasters in airing controversial programs, stated the court.

The case of Weirum v. RKO General, Inc. 15 Cal.3d 40 (1975), was distinguished. In Weirum, the California Supreme Court upheld a finding that a Los Angeles radio station was responsible for the wrongful death of a driver killed by two teenagers participating in a contest sponsored by the station. In that case, "the youthful contestants' reckless conduct was stimulated by the broadcast" and by repeated importuning to race to a particular location. Thus, in that case, contestants were urged to act in an inherently dangerous manner with foreseeable results.

Olivia N. v. National Broadcasting Co., Inc., Case 1 Civ. No. 46981 (CaL.Ct.App., Dec.7, 1981) [ELR 3:16:2]

Court of Appeals affirms denial of renewal of RKO's license for Boston television Station, but remands proceedings concerning Los Angeles and New York stations

While expressing "discomfiture" at the need to order further action in the RKO television station license renewal proceedings, which have been going on tor more than 15 years, Federal Court of Appeals Judge Abner Mikva has remanded the Los Angeles and New York

City proceedings back to the FCC because of its failure to provide "a principled explanation for RKO's disqualification as a licensee of those stations." However, the court did uphold the FCC's denial of the renewal of RKO's license for station WNAC-TV in Boston on the ground that RKO did not comply with its obligation to disclose information to the Commission bearing on its qualifications as a licensee.

The "sorry chapter in American communications law" began in 1965 when RKO applied for a license renewal for station KHJ in Los Angeles. The outcome of the Los Angeles proceeding eventually was conditioned on the license renewal proceeding for station WNAC in Boston. In 1980, the Commission issued its order denying license renewals for WNAC, KHJ and WOR-TV in New York (ELR 2:5:4). In a sometimes scathing opinion, the Court of Appeals has rejected two of the three grounds cited by the FCC as the basis for its action, and has only narrowly upheld the third ground.

The FCC had placed particular emphasis on RKO's participation in possibly anticompetitive reciprocal trade practices. The Commission found that General Tire, RKO's parent company, often conditioned its purchase of goods and services on the expectation that the seller would purchase advertising time on RKO stations. The FCC now has proclaimed that reciprocity by licensees is a prohibited practice due to its effect on skewing the relationship between advertising purchases and program selection. But the court pointed out that the reciprocal trade practices engaged in by General Tire and RKO allegedly occurred between 1961 and 1964, at a time when it was unclear whether "non-coercive unleveraged reciprocal agreements" were anticompetitive and a violation of section 1 of the Sherman Act in every case. The FCC had considered RKO's conduct prior to 1965 because the KHJ license renewal application concerned the 1965-1968 term. However, the FCC was not entitled to retroactively apply its determination that reciprocal trade practices are adverse to the public interest and a ground for disqualification, to conduct that ceased 15 years ago, stated the court.

Another ground given by the FCC for RKO's disqualification was the finding that the company submitted intentionally false financial reports to the Commission. The alleged inaccuracies occurred in the reporting of trade and barter transactions, information generally considered "of minor significance" by the FCC itself The court noted that the finding presumed that the inaccuracies were either deliberate and intentionally deceptive, or were made with "wanton, gross and callous disregard" for the truth. The FCC refused RKO a hearing although the company denied any such intent or disregard. The denial of a hearing has been found unlawful. The question of whether the reports were knowingly inaccurate and intended to mislead the Commission was a material question of fact and was decisionally significant. Thus, the court ruled that it was an error to refuse the company an opportunity to present live witness testimony in support of its position.

An added factor in the FCC's order, although not an independent ground for disqualification, was the non-broadcast misconduct of General Tire. General Tire's misconduct, which was the subject of a Securities and Exchange Commission investigation, ranged from alleged bribery and fraud abroad to maintaining secret cash funds. The conduct was viewed by the FCC as lending "substantial weight" to its decision to disqualify RKO on the other grounds. The Court of Appeals found nothing unlawful in the FCC's approach and noted that the importance of General Tire's misconduct had not been inflated. However, the court observed that the

Commission apparently requires a lesser showing of misconduct by individual owners of broadcast properties than by corporate owners in order to support disqualifications of a licensee. It was suggested that the Commission address and clarify this distinction.

In turning to the ultimate basis which "fully and independently" supported RKO's disqualification in Boston, that is, the company's lack of candor before the Commission between 1975 and 1977, the court noted that on several occasions, RKO did not inform the Commission of facts relating to the allegations and proceedings against General Tire and also failed to concede its inaccurate reporting of trade and barter revenues despite obvious indications of problems in this area. Section 1.65 of the Commission's Rules requires applicants to inform the Commission of any 'substantial change" regarding any matter that may be of decisional significance in a Commission proceeding involving the pending application. RKO was aware of the relevance of the increasingly serious proceedings against General Tire, whether or not RKO company officials had actual knowledge of the subsequently admitted illegal conduct, and did not inform the Commission of these facts. The Commission, as a licensing authority for more than 10,000 radio and television stations, depends on its licensees for the completeness and accuracy of their representations. Whether or not the Commission actually was misled by RKO was irrelevant.

RKO contended that the finding that it lacked candor was made without formal notice of a hearing. However, the Court of Appeals stated that RKO's conduct was "so egregious and so conspicuous that we cannot say the FCC's decision was an abuse of its authority." The evidence of a lack of candor was obvious from documents submitted by RKO to the FCC. An evidentiary hearing would not have furthered "the ends of justice," because no witnesses were denied a hearing and there were no further issues to try, particularly as RKO did not contend that it was candid with the Commission. The court also noted that no possibility of punishment was involved, because the denial of a renewal application is not a penal measure. Thus, because the misconduct occurred directly before the agency and was of an "undeniably blatant and unacceptable dimension," and because RKO had actual notice of the conduct at issue and had an opportunity to speak on its own behalf, the Commission's action concerning the Boston renewal did not abuse its discretion despite the lack of a formal hearing.

The court concluded by pointing out that its narrow basis for upholding the Boston disqualification did not support the denial of license renewals in Los Angeles and New York. Those proceedings had been conditioned on the outcome in Boston, but lack of candor was not a designated issue in the Boston proceeding. Further, RKO's misconduct did not occur directly before a trier of fact in either Los Angeles or New York City. The court observed that the FCC may find that RKO's lack of candor in Boston would be "inconsistent with a licensee holding a license anywhere." However, each station has a different broadcast history and policy, and on remand, each will be entitled to an opportunity to distinguish its policies from those of WNAC.

RKO General, Inc. v. Federal Communications Commission, Case No. 80-1696 (D.C.Cir., December 4, 1981) [ELR 3:16:2]

Polygram Records' failure to exercise an option on time for the exclusive services of The Atlanta

Rhythm Section left the group free to sign a recording agreement with CBS records

The Atlanta Rhythm Section did not breach an exclusive services agreement with Polygram Records, Inc., when the group entered into a recording agreement in May of 1981 with CBS Records, Inc., a Federal District Court in New York has ruled. Polygram, Buddy Buie Productions, Inc. (the production company which furnished the services of the five individual members of ARS) and ARS had entered into a recording agreement in 1973, which was superseded by an agreement in October of 1977. The term of the 1977 agreement - which required ARS to deliver four albums to Polygram - was to end 180 days after the delivery of the fourth album. Polygram was entitled to extend the agreement by sending notice to this effect to BBP 30 days prior to the date the agreement would otherwise expire.

ARS claimed that it delivered to Polygram a reference lacquer for a complete, edited and fully mixed master tape for the fourth album on June 11, 1980. A check for $150,000 was mailed to BBP by Polygram on that date. Polygram argued that the reference disc delivered by BBP on June 11th was "unapproved" and that an approved reference disc was not delivered until June 17, 1980. Polygram claimed to have mailed its notice that it was exercising an option on ARS' services on November 14, 1980 - a date which the company calculated to be in accordance with the agreement. According to Polygram, the agreement thereby was renewed for a further term and was in effect in May of 1981. However, on November 20, 1980, BBP notified Polygram that the option had not been timely exercised; and BBP received no response until January of 1981 when Polygram notified various record companies that Polygram had an exclusive recording agreement with ARS.

Although testimony was introduced that statements had been made concerning the "unapproved" status of the reference lacquer, the court found that the reference lacquer left with Polygram on June 11th and the master two-track tape were fully edited, mixed and leadered and that there was no further work to be done in order to produce the parts necessary to make commercial phonograph records. Polygram's payment of $150,000 as "the balance due upon delivery of the fourth LP," Polygram's failure to call company officials to testify at the trial, and the company's failure to explain its delay in responding to BBP's assertion that the option had not been timely exercised were found to create a preponderance of evidence on behalf of BBP. Polygram's action therefore was dismissed by the court.

Polygram Records, Inc. v. Buddy Buie Productions, Inc., 520 F.Supp. 248 (S.D.N.Y. 1981) [ELR 3:16:4]

Actors' Equity Association agrees to Consent Judgment relieving playwrights of liability for payments to showcase actors when production is restaged

When an Off-Off Broadway or showcase production of a play is re-staged on Broadway or reappears in another medium, are the original cast members entitied to compensation from the producer or author of the play" Under the Actors' Equity Association Funded Non-Profit Theater Code, the Equity Approved Showcase Code and the AEA Subsidiary Rights Agreement, showcase actors had to receive a bona fide offer from the producer of a Contract Production to appear in a subsequent stage, motion picture or television production of the play or receive a "Conversion Payment" from the producer. (A

Contract Production is one subject to the standard AEA Collective Bargaining Agreement.)

Six playwrights, including Michael Weller and David Mamet, brought an antitrust action questioning whether AEA was entitled to hold playwrights liable for any conversion payments. A Consent Judgment generally rejecting the imposition of liability for such payments upon playwrights recently was entered in the case.

Under the judgment, AEA may not require a playwright to sign any Code or agreement with AEA or its members and may not make the signing of a Code by a playwright a condition of permitting its members to appear in a Code production. AEA may not place liens against a play and may not require any payment or other obligation from a playwright to AEA or any actor. However, where a playwright is also a Code Producer, AEA may require the Playwright/Producer to comply with a Code producer's obligations. The Consent Judgment also describes the circumstances when a Playwright may be involved in a production without being deemed a Code Producer.

Pursuant to the Judgment, a committee of actors and playwrights will be formed to consider the conversion payments question further.

Weller v. Actors' Equity Association, S.D.N.Y. Case No. 80 Civ. 6084 (Consent Judgment, November 3, 1981) [ELR 3:16:4]

Distinctive design elements on Dukes of Hazzard car were infringed by competing toy car

The "General Lee," an orange Dodge Charger featured on the Warner Bros.' television series "The Dukes of Hazzard," has outmaneuvered "The Dixie Racer," a toy car manufactured by Gay Toys, Inc. A Federal Court of Appeal has found that Gay Toys deliberately used certain distinctive symbols which appeared on the General Lee, such as a Confederate flag decal and identifying door numerals, in order to increase the resemblance between the cars and to exploit the market created by Warner Bros.' efforts. The court ruled that there was sufficient likelihood of confusion as to the source and sponsorship of the Dixie Racer to constitute a violation of the Lanham Act, despite the fact that the General Lee's symbols were not registered trademarks. The court also ruled that Warner Bros.' might well establish the existence of such consumer confusion although the company itself was not the manufacturer of a toy car.

A District Court order denying a preliminary injunction therefore was reversed.

Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76 (2d Cir. 1981) [ELR 3:16:5]

Arizona State University football player's action against coach for assault and deprivation of civil rights is not barred by Eleventh Amendment

Kevin Rutledge's football career at Arizona State University was interrupted when he suffered injuries in an automobile accident in 1977. During an October 1978 game with the University of Washington, Rutledge, not yet totally recovered, apparently punted poorly. ASU football coach Frank Kush allegedly responded by shaking Rutledge's helmeted head from side to side and striking him with a fist in the mouth. Rutledge did not play in any other games that season. He subsequently transferred to the University of Nevada at Las Vegas, forsaking his ASU scholarship. Further, due to Kush's refusal to consent to the transfer, Rutledge was ineligible for financial aid during his first year at the University of Nevada.

Rutledge brought an action alleging that Kush and his assistant conspired to deprive him of an "advantageous business and educational relationship with ASU" and to induce him to give up his scholarship.

A Federal Court of Appeals has ruled that the Arizona Board of Regents and Arizona State University, which also were named as defendants, were immune from suit under the Eleventh Amendment. However, the court found that the Eleventh Amendment did not bar Rutledge's claims against the University's athletic director for his failure to supervise Kush or against Kush himself. The District Court had ruled that the Eleventh Amendment extended to Kush and other members of the athletic department since "the alleged acts were committed in the interest of the Arizona State University football program." This was not a sufficient identification with the state in order to confer immunity on the coaches, ruled the Court of Appeals. Rutledge also alleged that his civil rights had been violated under 42 U.S.C. section 1983 due to the purported assault by Kush, as well as his demotion from a starting position with the football team, "harassment, embarrassment and defamation," and deprivation without a hearing of his scholarship from ASU.

The court noted that redress for the assault charge was available and being pursued in Arizona state courts. Rutledge had no constitutional right to maintain his position on the football team, and neither the claim of harassment nor Kush's refusal to approve his transfer violated section 1983, ruled the court. Therefore, the matter was reversed in part and remanded for further proceedings, based on the general tort law of Arizona.

Rutledge v. Arizona Board of Regents, Case Nos. 80-5005 and 80-5130 (9th Cir., Nov. 12, 1981) [ELR 3:16:5]

Criminal charges against unauthorized distributor of pay television decoders are not dismissed

A Federal District Court in Michigan has refused to dismiss a criminal case charging Philip Westbrook and Robert Moser with conspiracy to intercept interstate radio communications and to sell devices interfering with radio communications, without conforming to FCC regulations, in violation of 47 U.S.C. sections 302a and 605. The court agreed with the Sixth Circuit's interpretation of section 605 in the recent decision of Chartwell Communications, Inc. v. Westbrook. In Chartwell, Judge Kennedy wrote: "Subscription television is not intended for the use of the general public; it is only intended for the use of paying customers." Therefore subscription programming does not fall within the exception of section 605 and is protected. (See ELR 2:19:1 and 2:12:5.)

Westbrook pointed out that the case against him was the first criminal prosecution in the country for the unauthorized manufacture or sale of subscription television decoders. Previous prosecutions under section 501 of the Communications Act, which provides a penalty of a $10,000 maximum fine, one year imprisonment or both, had involved the wiretapping of telephones. But the court stated that the act that STV transmissions are selectively received, as are other point-to-point communications systems, brings the transmissions within section 501 and its sanctions.

The only issue remaining for determination would be whether the defendants acted "willfully" and "knowingly."

United States of America v. Westbrook, 502 F.Supp. 588 (E.D.Mich. 1980) [ELR 3:16:5]

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"Executioner" series goes to Harlequin Books; author's agreement to negotiate in "good faith" with Pinnacle is ruled to be unenforceably vague

In 1976, Don Pendleton, the author of the highly successful series of men's action/adventure books entitled "The Executioner," entered into an agreement with Pinnacle Books, Inc. by which Pinnacle agreed to publish books 29 through 38 in the Executioner series. The agreement also provided that Pendleton would not offer rights in the series to any other publisher unless he and Pinnacle were unable, "after extending their best efforts," to agree on the terms of a new contract. Negotiations between Pinnacle and Pendleton regarding the extension of the agreement began in September of 1978 and continued until February of 1980. During this period, the Editorial Director of Pinnacle, who had been involved with the negotiations, left the company and joined Harlequin Books. In May of 1980, Pendleton signed an agreement to license the Series and its characters to Harlequin.

Pinnacle brought an action alleging that Harlequin had induced Pendleton to break off negotiations with Pinnacle just as the parties were reaching a final agreement on new contract terms. The action has been dismissed by a Federal District Court in New York on the ground that the "best efforts" clause in the agreement was too vague to be enforceable. No objective criteria were specified against which the parties' efforts to negotiate could be measured. The court noted that "best efforts" might mean that the parties would refrain from negotiating with others for a certain period of time. However, in the absence of express standards, the court could not determine whether a particular offer by Pinnacle or any other aspect of the negotiating procedure constituted "best efforts." Since there was no enforceable agreement, Pinnacle could not succeed on its claim of interference with contractual relations, the court ruled.

Pinnacle Books, Inc. v. Harlequin Enterprises, Inc., 519 F.Supp. 118 (S.D.N.Y. 1981) [ELR 3:16:6]

Injunction against Quadrangle Books is reversed, because "right of first refusal" in Quadrangle contract with Bookthrift is found to be ambiguous

When contracts wind up in litigation, it is often because of what was left out of them rather than what is in them. One such contract was between Bookthrift Inc. and Quadrangle Books. The contract concerned Bookthrift's distribution of the book "La Technique" by Jacques Pepin.

In the agreement, Bookthrift agreed to purchase as many as 10,000 copies of the book within 18 months from November 22, 1977, if Quadrangle asked it to do so. The agreement also provided that Quadrangle granted Bookthrift a right of first refusal with respect to reprint rights for hardcover copies of the book. The right of first refusal paragraph said nothing about any time limitations on that right.

In 1980, Quadrangle sold 35,000 reprinted hardcover copies of "La Technique" to Outlet Book Company without giving Bookthrift an opportunity to exercise its first refusal right. Bookthrift sought and obtained a preliminary injunction halting the sale as well as any further hardcover reprint sales of the book by Quadrangle.

Quadrangle appealed the ruling on the ground that Bookthrift's right of first refusal had expired in May of 1979 at the same time Bookthrift's obligation to buy copies of the book expired. In response, Bookthrift contended that since the right of first refusal paragraph of the agreement contained no expiration date, the right was independent of any other time limitation in the agreement.

The appellate court found the terms of the contract concerning the right of first refusal to be ambiguous. It therefore concluded that the preliminary injunction should not have been issued, because Bookthrift had not established a "clear right" to it. The court therefore reversed the injunction, thereby allowing Quadrangle to resume sales of the book, at least until a trial on the merits of the case is conducted.

Gulf & Western Corporation v. New York Times Co., 439 N.Y.S.2d 13 (App.Div. 1981) [ELR 3:16:6]

Viking denied summary judgment in case filed by judge who claims he was libeled by book entitled "The Abuse of Power"

It is commonly believed that a book cannot be judged by its cover. Legally speaking, that may no longer be true, because the New York Court of Appeals has done just that, according to one of its ustices. In a ruling that may have some influence on the manner in which controversial books are marketed in the future, that court has held that the one-year statute of limitations on a libel claim was triggered anew when Viking Penguin released a paperback edition of "The Abuse of Power," even though the pages of that edition were printed at the same time as the pages of the original hardcover edition. In fact, the pages of the paperback edition were intended for the original hardback edition, and were used in a paperback only because hardcover sales had been disappointing.

The case reached New York's highest court on a procedural issue that revolved around the timing of the plaintiffs complaint. The complaint was filed more than one year after the hardcover edition was published, but only two months after publication of the paperback edition. New York follows what is known as the "one publication rule" which holds that the statute of limitations on a libel claim begins when a book is first published, and does not begin again each time a copy of the book is sold. This rule is intended to protect writers and publishers from stale claims that otherwise could be filed merely because copies of the book remain available for sale for years. On the other hand, if a book is republished in a new edition, the statute of limitations does begin again, on the theory that the publisher has an opportunity to correct any errors at that time and should not be protected from its failure to do so.

In this case, a majority of the Court of Appeals concluded that the publication of the paperback edition of "The Abuse of Power" was a republication, even though original pages were used. One justice dissented, however, warning that as a result of the majority's decision, "a publisher seeking to avoid successive limitations periods will be forced to choose between limiting the number of copies in a first printing, or risking expensive revisions to copies not immediately sold in the hardcover format."

The authors of the book fared better than their publishers. Because they played no part in the decision to issue a paperback version, the court held that the statute of limitations as to them expired one year after publication of the original hardback version, and thus had run before the case was filed.

There has not yet been a ruling on the merits of the libel claim. In fact, no discovery had even been done before the case reached the Court of Appeals. The plaintiff in the case is Dominic Rinaldi, a retired justice of the New York State Supreme Court. He is a public figure insofar as this litigation is concerned and thus will have to prove that Viking published the book with "actual malice," that is, with knowledge that it contained a false statement about him or with reckless disregard for whether it contained a false statement.

Viking contended that it relied on the book's authors who were reputable writers - Jack Newfield and Paul du

Brul - who in turn had relied on information previously published in the New York Times. Rinaldi responded that even if Viking's reliance on the authors would have stood it in good stead as to the hardback edition, that reliance was misplaced once Rinaldi notified Viking of his complaints - something he did before the paperback version was published. Furthermore, as a result of his letter of complaint, a Viking editor wrote a note to the "corrections file" for subsequent printings of the book. The note never came to the attention of those production personnel involved in publishing the paperback version, however. Whether that failure was the result of recklessness is another factual issue in the case.

The court specifically declined to rule on these issues, however. Instead it held that Rinaldi was entitied to conduct discovery before they were ruled on. And thus the case was remanded to the trial court for further proceedings.

Rinaldi v. Viking Penguin, 7 Media Law Reporter 1202 (N.Y. 1981) [ELR 3:16:6]

Briefly Noted:

Cable Television Regulation.

A Federal District Court judge in Utah has declared that a Utah statute banning the presentation of indecent, although not necessarily obscene, material on cable television is unconstitutionally overbroad , and has permanently enjoined enforcement of the statute. The court stated that the statute "invaded" areas of free speech the Supreme Court (in Miller v. California, 413 U.S. 15) says you can't get into. According to the court, the basic flaw in the statute was its failure to incorporate any reference to contemporary community standards in making the determination whether particular programming was indecent.

Home Box Office, Inc. v. Wilkinson, Case No. C 81-033 1-J (D.Utah, November 16, 1981) [ELR 3:16:7]

Copyright Infringement.

The copyright owners of five musical compositions, including "I Never Promised You a Rose Garden" and "By the Time I Get to Phoenix," brought an action alleging that the compositions were performed publicly for profit, without the permission of the owners or their licensing agency, BMI, at the Stardust Club in Ottumwa, Iowa. A BMI representative testified that he was present at the Stardust on the evening of March 15, 1977 and heard the songs being performed. But Betty Durflinger, the owner of the Stardust at the time, claimed that the songs were not played on that date. The court noted that Durflinger had never obtained a license for the performance of copyrighted musical works and "probably did violate the copyright laws at some point in her operations." However, in dismissing the action, the court found that the copyright owners had failed to establish by a preponderance of the evidence that the songs were performed as alleged.

Broadcast Music, Inc. v. Durflinger, 210 USPQ 559 (S.D.Iowa 1980) [ELR 3:16:7]

Trademarks.

Summary judgment in a trademark action is inappropriate when the issue of likelihood of confusion between marks is "reasonably debatable," according to the Patent and Trademark Office Trademark Trial & Appeal Board. D.C. Comics, producers of "Action Comics," had opposed the registration of the trademark "Scholastic Action" by Scholastic Magazines, Inc., a publisher of educational magazines addressed to the junior-high and senior-high school markets. In denying Scholastic Magazine's motion for summary judgment, the court also rejected Scholastic Magazine's argument that even if the likelihood of confusion between the marks is assumed, D.C. Comics would not be damaged by the registration of the new mark because it is substantially similar to a mark previously registered by Scholastic Magazines for similar goods. The court held that since Scholastic Magazine's previously registered mark, "Double Action," was not "the same or substantially identical mark" for "the same or substantially identical goods," the existence of the prior mark does not preclude the possibility that D.C. Comics might be damaged by the new mark.

D.C. Comics, Inc. v. Scholastic Magazines, Inc., 210 U.S.P.Q. 299 (1980) [ELR 3:16:8]

Obscenity.

The Supreme Court of Florida has upheld the constitutionality of a Florida statute prohibiting the use of minors in pornography. A producer of pornographic movies involving minors challenged the statute as unconstitutionally vague. But the court found the statute "impervious to attack upon the grounds of vagueness, as a person of common intelligence and understanding has adequate notice of the conduct proscribed."

Griffin v. State, 396 So.2d 152 (Fla. 1981) [ELR 3:16:8]

DEPARTMENTS

Book Note:

Delson's Dictionary of Radio & Record Industry Terms by Walter E. Hurst & Donn Delson

Every industry has its own language, an understanding of which is essential to those who work in it or want to. This is no less true of the music business than others, and this 111-page, attractively bound volume is the right tool for those who need to understand the special language of the radio and record industry. The book defines business terms such as "daypart" and "make good" and abbreviations such as "O&O" and "OTO." It lists and describes industry organizations. It explains what people in various occupations do. And it defines quasi-legal terms such as "merchandising rights" and "public domain." An excellent reference. Paperbound. $11.95 plus sales tax for California residents plus $1.00 shipping and handling. Published and available from Bradson Press, 120 Longfellow Street, Thousand Oaks. CA 91360. [ELR 3:16:8]