RECENT CASES

Satellite retransmission of New York Mets games broadcast by superstation WOR-TV infringed Mets' copyrights

The New York Mets can claim a pre-season victory in an action for copyright infringement brought against Eastern Microwave, Inc., a communications common carrier.

EMI retransmits the signals of some 16 television stations, including WOR-TV in New York City, the broadcaster of the Mets' baseball games. Doubleday Sports, Inc., the owner of the Mets, annually contracts with WOR for the broadcast of approximately 100 Mets games per season. Doubleday objected to EMI's retransmission of the games to 600 cable television systems across the country, contending that the retransmission was an unauthorized public performance in violation of section 106 of the Copyright Act. A Federal District Court in Syracuse, New York has agreed.

EMI argued that the retransmission of a telecast to the receiving antenna of one of its cable system customers is not a performance open to the public. Cable systems do not "view" the programs transmitted they alter the signal and transmit it, in turn, to their subscribers. Their subscribers constitute the "public," according to EMI. But this was too narrow a definition of the word "public," stated the court. EMI's cable customers indeed are members of the "public," and the retransmission of a television signal to those cable systems therefore is a public performance, the court ruled. A contrary conclusion appears to have been reached in WGN Continental Broadcasting Co. v. United Video, Inc., 523 F.Supp. 403 (ELR 3:20:4), in which satellite retransmissions to cable system headends were held not to be performances to the public. But in the EMI-Mets case, the court ruled that limiting the meaning of the word "public" to the viewing public would require an express directive from Congress.

EMI also was not entitled to a "passive carrier" exemption under section 111(a)(3) of the Act, which provides that "the secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement ... if ... The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to this secondary transmission consist solely of providing wires, cable,. or other communications channels for the use of others."

While EMI does not control the content of WOR's programming, it controlled the selection of the primary transmission when it chose to retransmit WOR's signal rather than that of another station. EMI also selects the cable systems with which it will deal. And EMI, unlike AT&T does not merely supply wires, cables, or communications channels for the use of others. EMI markets its own product - the signal of WOR-TV.

Doubleday's motion for partial summary judgment dismissing EMI's action for declaratory relief therefore was granted by the court.

It has been reported that in response to the court's decision, the House Judiciary Subcommittee has approved legislation which specifies that resale carriers such as EMI are entitled to the "passive carrier" exemption. The controversy continues as to whether such carriers eventually will be required to pay copyright royalties.

Eastern Microwave, Inc. v. Doubleday Sports, Inc., Case No. 81-CV-303 (N.D.N.Y., March 12, 1982) [ELR 3:23:1]

Risque spoof of "Boogie Woogie Bugle Boy" infringed song's copyright; was not a fair use, Federal Court of Appeals rules

The stage show "Let My People Come," which was originally performed at the Village Gate cabaret in Greenwich Village, has been described by critics as an "erotic nude show" with "sex content raunchy enough to satisfy the most jaded porno palate." One of the songs performed in the show was a "take-off" on the Andrews Sisters rendition of the song "Boogie Woogie Bugle Boy." The show's version was called the "Cunnilingus Champion of Company C" and was performed without permission from the copyright owner of "Bugle Boy," MCA, Inc. MCA sued the show's producers for copyright infringement. Following a non-jury trial, a Federal District Court in New York awarded MCA $325,000 in damages. The Court of Appeals has reduced that award by nearly $70,000, but has affirmed the judgment in all other respects.

The producers of the show contended that they had made a "fair use" of MCA's copyrighted song and therefore were not required to obtain MCA's consent. The copyright law provides that the "fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringment of copyright." The producers argued that their take-off version was intended to be a burlesque or spoof of "Bugle Boy," citing Elsmere Musk Inc. v. National Broadcasting Co., 623 F.2d 252 (2d Cir. 1980) (ELR 2:1:4) in support of their position.

In that case, performers on the television comedy show Saturday Night Live rendered a take-off on New York City's advertising campaign which made popular the copyrighted song "I Love New York." As part of the take-off, the "not ready for prime time players" sang "I Love Sodom" to the tune of "I Love New York." In holding that the song plugging the biblical city was a "fair use," the court found that the take-off version did not interfere with the marketability of "I Love New York"; that it did not affect the value of the copyrighted work; and that it did not have the effect of fulfilling the demand for the original.

In this case, however, the court found the facts to be "a far cry" from those in Elsmere. Here, said the court, the parties were competitors in the entertainment field; both Bugle Boy and Cunnilingus Champion were performed on stage; both were sold as recordings; both were sold in printed copies; and testimony, accepted as credible by the trial court, indicated that Cunnilingus Champion was made to sound like Bugle Boy to create publicity.

"We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism," said the court.

In a dissenting opinion, Circuit Judge Mansfield said he would have reversed the judgment, believing that Cunnilingus Champion -made a fair use of the copyrighted work. It "amounts to a sexual satire or burlesque of contemporary mores by putting a comic or humorous twist on the more conventional Bugle Boy and by parodying the Andrews Sisters' style." It was the dissent's view that Cunnilingus Champion used only enough of Bugle Boy to conjure up a recollection of that image;

that the two songs fill completely different demands; and that there is no evidence that the parody caused any damage to Bugle Boy.

"We cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances," stated the dissent.

"Permissible parody, whether or not in good taste, is the price an artist pays for success, just as a public figure must tolerate more personal attack than the average citizen."

The opinion of the majority also addressed several damages issues. The court reversed the award of $3,250 assessed against the president of the Village Gate Cabaret, because there was no proof that his salary was contingent upon the profits of the musical. The lower court's award of $32,000 in statutory damages were reduced to $250, because the court found that the show's continuous run at the Village Gate should have been treated as one continuing infringement. The court also reversed an award of $22,626 for the printing of programs which contained only the lyrics of Cunnilingus Champion, and it reduced the award of $20,000 in attorneys' fees to $ 10,000.

MCA, Inc. v. Wilson, 211 USPQ 577 (2d Cir. 1981) [ELR 3:23:2]

Lessor of lounge where unauthorized print of "Coalminer's Daughter" was screened may be liable for contributory vicarious copyright infringement

Four days after the film "Coalminer's Daughter" was released in Chicago, an underground screening of the film was held at the Pavilion Lounge, a social club for residents of an apartment complex. Universal City

Studios brought an action for copyright infringement against Pavilion Limited Partnership, the owner of the apartments and lessor of the lounge, and against American Invsco, which manages the apartments, and obtained an ex parte order enjoining a second showing of the film. The partnership and Invsco denied direct, contributory or vicarious liability for any infringement.

Liability for copyright infringement may be based on the direct copying of protected material, on inducing or materially contributing to the activities of someone who directly copies such material, or on a relationship with the direct infringer which warrants a finding of vicarious liability. The partnership and Invsco did not supervise the daily operation of the lounge and were not consulted regarding the screening. Hence, they did not directly infringe Universal's copyright. However, issues of material fact were found to exist as to whether the partnership and Invsco knew that the screening was unlawful. The screening occurred soon after the official release date of the film, and the partnership and Invsco therefore knew or should have known that the proprietors of the lounge were screening a print which was obtained unlawfully, stated the court. One of the managers of the lounge testified that he knew the videotape copy of the film, which he purchased for $100, was an "illegal copy." Further, the partnership had the authority to stop any screening. Invsco, as managing agent for the partnership, shared in this authority. If Universal establishes that the partnership and Invsco knew of the imminent infringement, both parties would be liable for contributory infringement.

Holding a party vicariously liable for infringement requires a showing that the party was in a position to control the unlawful activity of the direct infringer and stood to benefit from the infringement. Again, the partnership and Invsco were "well situated to police against violations of the copyright laws" by the lounge's management. And the partnership received rental income from the lounge at the higher of a flat per month rate or 10% of the lounge's gross receipts.

Summary judgment also was found inappropriate with respect to Universal's claim of conspiracy to infringe a copyright. There was evidence that the partnership and Invsco knew that feature films were being shown in the lounge, that several showings infringed valid copyrights, and that the films could not have been advertised without the acquiescence of the partnership and Invsco.

Universal City Studios v. American Invsco, CCH Copyright Law Reports, Para. 25,271 (N.D.Ill. 1981) [ELR 3:23:3]

Federal court lacks jurisdiction to bear record company's challenge to California's unitary method of taxation, but may hear challenge filed by foreign parent corporation

A challenge to the state of California's unitary method of taxation, brought by record manufacturer and distributor Capitol Industries-EMI, Ltd., must be heard by the state's administrative agencies and courts, rather than in the federal courts, a Federal Court of Appeal has ruled.

California Revenue and Taxation Code section 25101 provides that "When the income of a taxpayer ... is derived from or attributable to sources both within and without the state, the tax shall be measured by the net income derived from sources within this state...."

A large majority of Capitol's stock is owned by EMI, Limited, a United Kingdom corporation. EMI is engaged in the music business and other diversified businesses outside the United States. The Franchise Tax Board determined that Capitol, EMI and other EMI subsidiaries are commonly owned or controlled corporations engaged in a single business. Capitol therefore would be required to report the combined net income related to the music portion of the businesses of these companies. The tax then would be based on a formula which compares California property, payroll and sales to the world-wide figures for the same factors. For the seven year period in dispute, Capitol's additional tax obligation totaled about $800,000, according to the Franchise Tax Board.

Capitol, arguing that the unitary tax assessment was inappropriate under California law and violated the Foreign Commerce Clause of the United States Constitution, sought injunctive and declaratory relief to prevent the assessment of additional income taxes. The

District Court granted the Board's motion for summary judgment on the ground that the AntiInjunction Act, 28 U.S.C. section 1341, barred the suit because a "plain, speedy and efficient" state remedy was available.

The Court of Appeals agreed that California afforded Capitol various administrative and judicial routes to protest the tax assessment. Capitol had argued that requiring a company to exhaust its administrative remedies before bringing a refund action is significantly less "speedy and efficient" than an injunctive action in federal court. But a state remedy need not be the best available remedy in order to be "adequate," noted the court. Further, while an administrative agency may not rule on constitutional questions (pursuant to the California constitution), Capitol was not barred from raising its constitutional claims in a judicial proceeding. The Court of Appeals therefore remanded the matter for the entry of judgment dismissing the action for lack of jurisdiction.

EMI brought a separate action asserting the same claims as Capitol and also alleging that the proposed assessment would decrease the value of its holding in Capitol stock. The District Court found that EMI's interests were substantially identical to those of Capitol, that Capitol had access to the remedies available to California taxpayers and that EMI's interests would be adequately represented in Capitol's action. But EMI's interests were distinguishable from those of Capitol, ruled the Court of Appeals. Capitol sought to avoid the payment of an assessment while EMI faced more indirect harm. EMI - the nontaxpayer - was "entitled to a judicial remedy in which it (could) participate as a party." Since California does not provide EMI with such a remedy, the company was entitled to proceed in federal court. The Eleventh Amendment did not bar the action because EMI had charged that state officials had acted unconstitutionally by applying the unitary tax method to a domestic subsidiary and its foreign parent. And EMI requested injunctive and declaratory relief, not a money judgment against the state. The order granting summary judgment to the FTB in EMI's action therefore was reversed.

The Court of Appeals suggested that on remand the District Court consider whether EMI had standing to sue and whether a cognizable claim was pleaded. Once these requirements have been met, the District Court may also consider ordering a stay of the EMI matter pending state review of Capitol's claim, in order to avoid simultaneous federal and state action involving substantially similar issues.

Capitol Industries-EMI, Inc. v. Bennett, Cases No. 80-4113 and 80-4114 (9th Cir., Feb. 16, 1982) [ELR 3:23:3]

Concert promoters agree to consent decree restraining alleged violations of Massachusetts antitrust law in connection with popular music concerts

Acting in concert, even in the music business, may not always lead to applause. A consent decree has been entered between the State of Massachusetts and three music promoting agencies concerning charges that the music promoters had conspired to monopolize popular music concerts in violation of the state's anttrust laws.

A consent decree is an agreed to judgment entered by a court which is in the nature of a contract between the parties and is, in effect, an admission by them that the decree is a just determination of their rights, but does not necessarily constitute an admission of any of the disputed facts.

Under the decree in this case, which is to be in effect for five years, the Don Law Agency, Orpheum

Management Corporation and Mount Auburn Club have agreed to refrain from engaging in various business practices which, in the state's view, would violate the Massachusetts Antitrust Act.

The promoters have agreed, for example, not to enter into any contracts with certain named concert halls containing provisions granting the promoters the exclusive right to promote music concerts at those halls. They have also agreed to limit, in their contracts with certain facilities, the period of time during which another promoter may not produce or present a concert at a particular facility without the consent of the promoter. This "protection period" must now be limited to 3 days before or after any popular music concert unless a greater protection period is generally made available by the concert hall to all music promoters.

The decree also specifies that the promoters shall not coerce other concert promoters to co-promote with them any music event in any facility where they act as management or booking agents. The defendant promoters have also been required to provide other promoters with written notification indicating that they need not co-promote events in order to rent the facility for a popular music event.

The promoters have also agreed to cease requiring other promoters or popular music artists to refrain from promoting or performing popular music concerts at any facility not controlled by them, as a condition to presenting a concert at a facility which is controlled by them.

The decree bans any effort by the promoters to interfere with other promoters' efforts to advertise their popular music events in the Massachusetts media.

The defendant promoters have agreed to pay $20,000 to the Commonwealth of Massachusetts as reimbursement for expenses incurred by the state in filing suit.

The decree applies only to concerts in which "popular music" is performed; the decree defines popular music as "rock, jazz, rhythm and blues, country and all other types of non-classical music."

Commonwealth of Massachusetts v. Don Law Co., Inc., 1981-2 CCH Trade Cases, Para. 64,368 (Mass.Super.Ct. 1981) [ELR 3:23:4]

United States Tennis Association rule restricting use of double-strung rackets does not violate antitrust laws

Among all sports, tennis seems to epitomize sportsmanship. Indeed, one of the purposes of the United States Tennis Association, in addition to conducting tennis tournaments, is to establish "rules of play and high standards of amateurism and good sportsmanship." In 1978, the USTA adopted a new rule defining a tennis racket. The rule, which was promulgated by the International Tennis Federation, established specifications for the stringing of rackets and essentially bans "double-strung" rackets and any other rackets which impart an excessive amount of topspin to a tennis ball. Gunter Harz Sports, Inc., a manufacturer and distributor of tennis equipment, including the "Play Spaghetti" racket which utilizes double-stringing, claimed that the USTA had conspired to restrain competition in the sale of tennis rackets and tennis stringing systems in violation of section 1 of the Sherman Act.

Thousands of miles from Wimbledon, a very central court in Nebraska has ruled that the USTA's rule did not unreasonably restrain trade and was not adopted with the intent to injure any manufacturer or seller of tennis equipment. Rather, said the court,the rule was intended to preserve the essential character and integrity of the game of tennis as it has always been played.

The USTA was found to be subject to the Sherman Act even though the organization bears no competitive or business relationship to Harz Sports. Non-profit voluntary associations, such as the Ladies Professional Golf Association and the NCAA, which sanction and regulate professional and amateur sporting events have been held subject to the antitrust laws, particularly with respect to their rulemaking functions. However, the lack of competition between the USTA and Harz did preclude a finding that the alleged group boycott entered into by the USTA, the ITF and other national associations of the ITF was per se unreasonable, because there did not exist an agreement among business competitors in the traditional sense to hinder Harz's distribution of tennis equipment. When the purpose of a "group boycott" has been to protect fair competition in sports and games, challenges to certain regulations and restrictions have been analyzed under the rule of reason.

Moving to the net, the court declared that the collective action of the participants in the alleged boycott "was intended to accomplish the legitimate goals of preserving the game of tennis ... and preserving competition by attempting to conduct the game in an orderly fashion." The actions of the USTA and ITF were reasonably related to their goals, stated the court. Several studies and tests had been conducted on double-strung rackets. The tests indicated that increased spin on the ball makes it more difficult for an opponent to return a serve. Cliff Drysdale and Vic Braden testified that the use of a double-strung racket would change the character of the game by decreasing service returns and by forcing players to back away from the net to adjust for the higher bounce taken by the ball. Accommodating the double-strung racket might even call for a change in court dimensions and structure, stated Braden. And players had indicated their displeasure with the racket by staging walk-outs and threatening strikes.

The rule was narrowly drawn and provided an appeal procedure by which a manufacturer could demonstrate that its racket did not impart exaggerated topspin to the ball or change the character of the game. And Harz had been given an opportunity to comment on the rule and submit test results on its racket. In dismissing the action, the court noted that the USTA appeal procedure provides a means for Harz to demonstrate his contention that the "Play Spaghetti" racket does not violate the USTA's rule.

This decision has been affirmed on appeal. The Court of Appeals upheld the application of the antitrust laws to the USTA - an association that "wields enormous economic clout by virtue of its exclusive control over the conduct of a major sport." Also upheld was the finding that the challenged rule rationally relates to legitimate USTA goals and provides adequate procedural safe-guards to protect arbitrary enforcement.

Gunter Harz Sports, Inc. v. U.S. Tennis Assn., 1981-2 CCH Trade Cases, Para. 64,243 (D.Neb. 1981), affirmed, 665 F.2d 222 (8th Cir. 1981) [ELR 3:23:5]

Dolphin expert's suit against Penthouse is dismissed, because expert found to be public figure and actual malice not shown

The libel suit of dolphin expert James W. Fitzgerald against Penthouse Magazine has taken another flip, as a Federal District Court in Maryland, after its original dismissal of the case was reversed by the Court of Appeals

(ELR 3:4:6), has again dismissed the case on other grounds.

The activities of James Fitzgerald, a research scientist, in the study of dolphins were described in an article entitled "The Pentagon's Deadly Pets," published in the June 1977 issue of Penthouse Magazine. The article stated that Fitzgerald "made overtures, possibly with CIA and Navy knowledge, to sell dolphin torpedoes or 'open-ocean weapons systems' to Mexico, Peru, Columbia, Chile, Argentina, and Brazil.... Fitzgerald wanted to make some fast bucks on the side by turning small countries into 'instant naval powers.' The Pentagon couldn't possibly object for fear of exposing its whole operation."

A Federal District Court had granted a Penthouse motion for summary judgment, because it determined that, "fairly read," the article did not charge Fitzgerald with espionage. But the Court of Appeals disagreed, finding one possible interpretation of the article to be that Fitzgerald was attempting to sell defense secrets to foreign countries, or in, other words, was engaging in espionage.

On remand, the District Court has granted a second Penthouse motion for summary judgment, on the issue of "actual malice," and thus has dismissed Fitzgerald's libel claim as well as his other claims for invasion of privacy and interference with business relationships.

A public figure suing for defamation must prove that the defamatory statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard for whether it was false or not. The court held that Fitzgerald had become a public figure with respect to the issue of the application of dolphin technology to military and intelligence uses, and that he retained that status at the time the Penthouse article was published.

In 1973, Fitzgerald appeared on a "60 Minutes" segment about military uses of dolphins. He was introduced to the viewing public by Morley Safer as "James Fitzgerald, President of Fitzgerald Laboratories ... one of the pioneers in dolphin research for the U.S. intelligence community and the Navy." Fitzgerald said the reason for his appearance on the program was to promote his new product lines of nonmilitary dolphin technologies and that it was the network that decided to edit out his remarks on the peaceful aspects of dolphin technology and use only his comments on the dolphin's military capabilities. Nevertheless, the court said that "Most private citizens are not solicited by a major television network to give their views on issues of public concern," and concluded that through Fitzgerald Laboratories and his personal business efforts, Fitzgerald has had significantly greater access to channels of effective communication than private individuals normally enjoy.

The court determined that the article was not published with "actual malice." The source of the quotations attributed to Fitzgerald in the article had been the transcript of the "60 Minutes" segment in which Fitzgerald had appeared. In researching the dolphin article, the author consulted, among others, Michael Greenwood, who had previously submitted an unsolicited report on the military dolphin program to the Senate Select Intelligence Committee. The author never conferred with Fitzgerald because Greenwood had told him that Fitzgerald was dead. The author's characterization of Fitzgerald's conduct as attempting to make isome "fast bucks" was his own, but the court called this a "somewhat liberal use of language" and found that it did not create a jury question on the issue of actual malice.

The court dismissed Fitzgerald's claims for invasion of privacy and interference with business relationships, holding that these theories require a public figure to prove actual malice also. To require otherwise, said the court, "would allow a public figure defamation plaintiff, who cannot show actual malice, to recover damages from the same defendants for identical acts simply by altering the form of his action without changing its substance."

Fitzgerald v. Penthouse International, Ltd., 525 F.Supp. 585 (D.Md. 1981) [ELR 3:23:5]

New Jersey Monthly Magazine is ordered to answer interrogatories concerning sources for article about Resorts International

An article which appeared in the May 1979 issue of Now Jersey Monthly Magazine, entitled "Surrender in Atlantic City," referred to Resorts International as a "mismanaged, unscrupulous, mob-tainted" company which obtained a license to operate a casino in Atlantic City as a result of improper influence. In the ensuing libel action, the magazine refused to answer certain interrogatories dealing with material obtained through "confidential sources," and concerning its editorial process. But a New Jersey court has ruled that by asserting the absence-of-malice defense, the magazine had "waived" any protection it might otherwise have had under the First Amendment and under the New Jersey Shield Law.

The court pointed out that permitting a media entity "to insulate itself from an inquiry into the sources of its publication could effectively deprive the plaintiff of the ability to prove malice." Questions of malice are subjective and require "an examination into the thought process of the person accused." The nature of the thought process, including the material upon which an article is based, are critical to establishing a cause of action, particularly when a public figure such as Resorts International is involved, stated the court.

Further, such recent cases as United States v. Cuthbertson, 630 F.2d 139 (ELR 2:22:1; 3:5:5), and United States v. Criden, 633 F.2d 346 (ELR 2:22:1), indicate that while a reporter may have a First Amendment privilege which protects the identity of confidential sources, the privilege will yield when outweighed by competing demands such as securing access to essential testimony. In a civil case where a reporter's own actions are in issue (as opposed to a criminal proceeding where the reporter claiming the privilege usually is not a party), it is questionable that any privilege exists, the court said.

However, assuming the existence of the asserted First Amendment privilege, the court declared that the magazine still would be required to respond to discovery. The libel allegations were not without substance and the interrogatories were relevant to ascertaining the basis of the magazine's charges. A "compelling need" for the information was shown, because it would be highly impractical to seek out "mob" figures to respond to the article.

Thus, neither the New Jersey Shield Law, which was found applicable but waived, nor the First Amendment, which "yielded" to the circumstances of the case, protected the magazine from an inquiry into the sources of its article.

Also waived was any protection for the editorial process. Again, facts were sought which were necessary to establish malice and a lack of good faith on the part of the magazine, said the court.

Resorts International, Inc. v. NJM Associates, 435 A.2d 572 (N.J.Sup. 1981) [ELR 3:23:6]

Federal Court of Appeals affirms one FCC decision allocating radio station frequencies but reverses another such decision

The allocation of radio frequencies was the subject of two cases which were decided by the Federal Court of Appeals in Washington, D.C. in December of 1980 but published only recently.

In Hubbard Broadcasting, Inc. v. FCC, the court upheld an FCC order granting WABC in New York clear channel status to operate on the 77OkHz frequency. Station KOB in Albuquerque, New Mexico may operate on the same frequency as a Class II station - meaning that it must directionalize its nighttime operation to protect WABC's non-directional broadcasting. This decision brought to an end almost 40 years of proceedings in this matter.

In Miner v. FCC, the court reversed and remanded an FCC order granting the application of Albert L. Crain to construct a new radio station in St. George, Utah. In so doing, the FCC had rejected an application for a construction permit submitted by Julie Miner who had operated radio station KDXU in St. George since 1968. The proposed station will operate on increased power and reach a much larger audience than KDXU.

The FCC recognized that Miner was more likely to achieve greater integration of ownership with management, given her long residence in the community, than Crain, who is a resident of Colliersville, Tennessee and a licensee of a station in Colliersville and a station in Texas. But the FCC granted Crain's application on the basis of "diversification." The FCC assumed that if Crain's application were granted, Miner would continue to operate KDXU, thus providing a choice of programs and services from separately owned stations. It was also assumed that if Miner's application were granted, it would be less likely that a newcomer would institute a new service on the frequency vacated by Miner "in the face of competition from a higher power radio station."

The court held that the FCC had erred in ruling on mutually exclusive applications on the basis of assumptions, rather than conducting a factual inquiry as to how the granting of either application would affect competition. The court also pointed out that while diversification of control of the media is of primary importance, "it must be achieved in a way that is fair and does not automatically disadvantage existing licensees who have a record of service in favor of untried newcomers."

Hubbard Broadcasting, Inc. v. F.C.C., 663 F.2d 220 (D.C. Cir. 1980); Miner v. F.C.C., 663 F.2d 152 (D.C. Cir. 1980) [ELR 3:23:7]

Briefly Noted:

Antitrust.

A motion picture exhibitor will be entitled to present to a jury its claim that nine motion picture distributors and three other exhibitors participated in a split arrangement in violation of the antitrust laws. Evidence had been presented that one distributor in particular, may have illegally participated in the split along with its wholly-owned exhibiting subsidiary. Summary judgment therefore was denied.

Quad Cinema Corp. v. 20th Century Fox Film Corp., 1981-2 CCH Trade Cases, Para. 64,224 (S.D.N.Y. 1981) [ELR 3:23:7]

First Amendment.

An Atlantic City ordinance prohibiting nudity in business establishments open to the public has been ruled unconstitutionally overbroad and facially invalid in violation of the First and Fourteenth Amendments by a New Jersey state court. The court found that the ordinance impermissibly burdened the content of an expressive activity - in this case, live nude dancing in an adult bookstorepeepshow emporium. The city also had claimed that two other zoning ordinances justified its denial of a license to the bookstore. One ordinance confined live entertainment of any sort in the central business district of Atlantic City to restaurants. The court found that the city had failed to establish that this substantial restriction on protected activity was rationally related to legitimate municipal concerns and therefore held that this ordinance violated the Equal Protection clause. A third ordinance provided that a mercantile license could be denied if a business "will not comport with the peace, health, safety, convenience, good morals or general welfare of the public." In view of a lack of evidence showing that these factors were being violated by the bookstore, the license denial was found .arbitrary and capricious." The protection of minors, traffic regulation and the possible discouraging effect on surrounding retail businesses also were rejected by the court as grounds for justifying the overbroad ordinances. And the procedures followed by city officials in ruling on mercantile license applications did not contain sufficiently definite standards and guidelines for the exercise of discretion by these officials, thereby violating due process. The court therefore enjoined the enforcement of the various ordinances and ordered the issuance of the requested mercantile licenses.

Trombetta v. Atlantic City, 436 A.2d 1349 (N.J.Sup.Ct. 1981) [ELR 3:23:7]

First Amendment.

The Cook County Outdoor Movie Theater ordinance has been upheld as constitutional by an Illinois appellate court. Under the ordinance, applicants for licenses to operate outdoor movie theaters are required to agree not to exhibit films containing scenes depicting sexually explicit nudity if such films are "viewable from any private residence or a public street or walkway." The court found that the ordinance was a "conscientious and constitutional effort" to protect the right of individuals in their homes to be free from "the visual onslaught of offensive sexual material." The ordinance was not unconstitutional solely because it was based on the content of communication protected from total suppression by the First Amendment. However, the court did find that the provision of the ordinance banning scenes involving the "touching, caressing or fondling of a bare female breast or bare male or female genitals" was overbroad with respect to the exhibition of films viewable from a public street, since such non-erotic scenes as a mother nursing or bathing a baby might be restricted.

People v. Starview DriveIn Theater, 427 N.E.2d 201 (Ill.App. 1981) [ELR 3:23:8]

DEPARTMENTS

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[ELR 3:23:8]