RECENT CASES

"Superman" copyrights not infringed by ABC's "Greatest American Hero"

Though Superman is one of the greatest heroes in American fiction, he has been beaten - three times now - by the fictional character "Ralph Hinkley," also known as the "Greatest American Hero" on an ABC television series of the same name. Actually the battle has been between the owners of the copyrights to "Superman" and the network and producer responsible for "Hero." For in the opinion of the Superman copyright owners, "Hero" infringes their copyrights. It is an opinion they have not been able to get the courts to share thusfar.

Last year, just before the scheduled premiere of "Hero," Superman's owners filed suit in Federal District

Court in New York City seeking to enjoin the broadcast. The court denied their request for a preliminary injunction. And the Court of Appeals affirmed that denial. (ELR 3:7:1) Superman's owners pursued the case nevertheless, but have had their case "thrown out," as it were, just before trial was scheduled to begin. Taking matters into its own hands, as Superman often does, the court determined that Superman and "Hero" are not substantially similar as a matter of law, and thus the court granted a motion by ABC and "Hero's" producer for summary judgment.

The court acknowledged that Superman and "'Hero" have many characteristics in common. Among them are super-strength, super-hearing, supervision, super-speed, super-breath (a characteristic made popular by the Big Bad Wolf in the "Three Little Pigs," the court noted), invulnerability, the ability to fly, close encounters with aliens, an after-ego, and a costume. However, the court ruled that these common characteristics were mere "ideas." And it is a fundamental principle of copyright law that "a copyright never extends to the 'idea' of the 'work,' but only to its 'expression,' and no one infringes, unless he descends so far into what is concrete as to invade that expression."

Thus the court noted that the question before it was whether the expression of the common ideas in "hero" was substantially similar to their expression in Superman. The answer to this question is "no," the court found, saying that it is "readily apparent" that the common ideas are expressed differently in "Hero" than they are in Superman. As to the works taken as a whole, the District Court quoted from the Court of Appeals' earlier decision in this case which said, "plaintiffs cannot seriously contend that the pattern of scenes, sequence of incident, principal characters, or the general theme between [the 'Hero' pilot] and 'Superman, The Movie,' . .

. the 'total concept and feel' of the two works greatly differ."

The District Court also considered Superman and Hero individually, because "characters may be protected out of the context of the story line or lines in which they appear." Here the court acknowledged that "After forty years of development in various media, Superman is a well-defined character sufficiently developed to deserve copyright protection." However, said the court, Superman and "Hero" are not substantially similar. Superman is a "non-stylish, broadshouldered, big-muscled, calm and confident "square!" "Hero" on the other hand is a "bumbler," a "trim, hungry-looking, non-macho" guy who is "concerned with family and the every day problems of life." In short, "Hero" is the "mirror image" of Superman.

The court also dismissed unfair competition and New York trademark dilution law claims that had been asserted by Superman's owners. It did so for many of the same factual reasons that led to the dismissal of their copyright claims, namely, insubstantial similarity between particular characteristics. In so doing, the court noted that "Hero's" creators may have been encouraged by Superman's success. By itself, however, that is not actionable, the court ruled. "A defendant is permitted to 'capitalize on a market or fad created by another provided that it is not accomplished by confusing the public [into believing] that the product is the product of the competitor."

Warner Bros. v. American Broadcasting Companies, 530 F.Supp. 1187 (S.D.N.Y. 1982) [ELR 4:2:1]

Owners of copyrights to "Gone With The Wind" obtain permanent injunction against production of musical comedy stage play "Scarlett Fever"

The difference between permissible parody and impermissible copyright infringement has been the subject of many a lawsuit, including well-known cases involving the movies "Gas Light" and "From Here to Eternity." Recently, another case has tackled the issue, this one concerning the book and movie "Gone With The Wind."

In the fall of 1979, the Showcase Cabaret in Atlanta presented a musical comedy stage play entitled "Scarlett Fever," which, according to its producers, was a spoof of "Gone With The Wind." The owners of the copyrights to the now-classic movie and novel failed to see the humor in "Scarlett Fever," however. They felt it violated their copyrights and immediately filed suit. A Federal District Court in Atlanta issued a preliminary injunction prohibiting further stagings of "Scarlett Fever" pending trial. (ELR 1:19:1)

The case has now been tried, and the court has reaffirmed its earlier conclusion that "Scarlett Fever" infringed the copyrights to "Gone With The Wind." The court reconsidered, but did not reverse, its original decision that the play was not a "parody" - at least not the sort of parody that is exempt from the copyright law. According to the court, in order for a parody to be exempt, it must consist of "original expression which has social value by commenting upon the work being parodied." In this case, the court found that "Although the play does contain a good bit of parody in the form of mockery of the original film, there is enough tragedy, straight drama, and original creation (in the original songs) in the production that, in the Court's opinion, the overall effect is not predominantly one of parody or satire but rather that of a light musical comedy version of

Gone With The Wind, which draws its vitality primarily from the themes, characters, and perspectives of the original film, not from Defendants' comment on those themes, characters and perspectives."

Although the copyright law does permit a parody to copy enough of the original work to "recall or conjure up" the original, the court concluded that Showcase Atlanta failed the "conjure up" test because it copied so much of the original but parodied such a small amount of it. For these reasons, the court rejected Showcase Cabaret's contention that its production was a "fair use" of "Gone With The Wind."

The court also rejected the contention that the owners of the copyrights to "Gone With The Wind" had abandoned those copyrights. In an effort to prove that this was so, the defendants introduced into evidence a videotape of a spoof that appeared on Carol Burnett's television show which had been called "Went With The

Wind." No objection had been made to this broadcast, though it was also shown that the program's producer had not sought permission to do the spoof Similarly, there was testimony that the Wit's End Players had done a takeoff on "Gone With The Wind" without suffering reprisals.

The court was not persuaded that these examples were proof of copyright abandonment, however, not even a "limited abandonment" in the area of satire. "The fact that an occasional infringement slips through a copyright holder's surveillance net is insufficient to establish the intent required to find abandonment," the court ruled. This is especially so, said the court, in cases where copyright owners have been persistent in enforcing their rights. In this case, the court noted that the copyright owners of "Gone With The Wind" had once denied permission to a third-grade teacher who had wanted to use material from the novel as the basis for a school play.

For these reasons, the court issued an injunction permanently barring Showcase Cabaret from producing "Scarlett Fever." The court also awarded the copyright owners statutory damages of $500. The relatively modest amount of the damage award was explained on the grounds that the infringement had not been intentional and because only one staging of the play had taken place before the preliminary injunction was issued.

MGM v. Showcase Atlanta Cooperative Productions, CCH Copyright Law Reports, para. 25,313 & 25,314 (N.D.Ga. 1981) [ELR 4:2:2]

Comedy Store "regulars" are independent contractors despite tacit control by club's owner over certain details of their performances, NLRB judge rules

The question of whether comedians who regularly perform at the Comedy Store in Los Angeles are "employees" or "independent contractors" is no laughing matter. In a 60-page opinion, NLRB Administrative Law Judge Maurice M. Miller has ruled that although Comedy Store owner Mitzi Shore may have possessed a "consensually recognized right to control the manner and means by which performers designated and scheduled by her provide services," the performers essentially are self-employed professionals. Therefore, an unfair labor practice charge filed by the American Federation of Comedians and the American Guild of Variety Artists was dismissed.

The Comedy Store, which was founded in 1972 by Sammy and Mitzi Shore, currently operates clubs on the Sunset Strip, in Westwood and in La Jolla. The clubs have acquired a reputation as prestigious forums which provide more performance opportunities "for comedians desirous of fulfilling their psychic needs and concurrently promoting their careers, than other comedy clubs." In 1973, Mitzi Shore became the sole operator of the Comedy Store.

The clubs present nightly shows featuring 12 to 15 stand-up comedians. Shore auditions performers, selects a group of "regulars," and arranges a weekly performance schedule. The clubs provide a piano player, and a light and sound system for the performers. The comedians are directly responsible for "creating, developing and refining" the content and manner of presentation of their comedy routines, and for providing their own costumes, props and music. Shore may request performers to modify the length of a routine, but they are not told how any cuts, additions or changes are to be made. Each comedian considers him or herself to be the proprietor of the routines, and Shore has never claimed a right of ownership in this material.

Until recently, comedians received no monetary compensation for performances in the Los Angeles clubs. In March of 1979, a group of approximately 100 "regulars" designated themselves "Comedians for Compensation" and began a work stoppage at the Sunset Strip Club. On May 3rd, the work stoppage terminated pursuant to a collectively bargained "agreement of settlement." The agreement provided that the Comedy Store would recognize Comedians for Compensation as the bargaining representative of the performers. It also established a minimum compensation rate of $25 per complete act at the Sunset Strip club, $10 per act during the week and $25 per act on weekend nights at the Westwood club, and stated that 50% of the cover charges collected from patrons would be divided among the comedians scheduled to perform in the Sunset Boulevard club's Main Room (Performers at the La Jolla location generally received compensation, and signed an agreement stating that they were to be considered independent contractors.) The parties agreed to refrain from retaliatory action arising from the work stoppage, and established grievance procedures.

In June of 1979, the CFC changed its name to the American Federation of Comedians. In July of 1979, Shore notified the AFC that she considered the May agreement breached, unilaterally rescinded and void. AFC's collective bargaining powers and representation subsequently were assigned by its membership to AGVA, primarily for the purpose of enforcing the May 3rd agreement.

Shore initially challenged the jurisdiction of the NLRB on the ground that the Los Angeles clubs served as "workshops" and "showcases" for performers and, as such, the Comedy Store was not a business enterprise engaged in interstate commerce. However, Shore's Los Angeles business operations included not only presenting public entertainment before paying customers, but also providing a booking and referral service for comedians, arranging college tours, and acting as a talent scout for ABC. These operations, which generated gross revenues in excess of $500,000 yearly and for which supplies were purchased from out-of-state sources, Were not essentially local in character, and the assertion of the NLRB's jurisdiction was warranted. Judge Miller ruled.

Shore also argued that the AFC is not a statutorily defined labor organization since it does not represent "employee" participants. In addition to the employment conditions described above, each comedian has always been responsible for paying his or her own taxes, and workers compensation insurance was carried for the performers. Most significantly, many "regulars" seek performing opportunities apart from their appearances at the Comedy Store. Shore has never claimed the right to restrain Comedy Store performers from working elsewhere. Indeed, the club occasionally presents showcases for prospective talent purchasers, such as nightclub proprietors, and motion picture, television, and stage producers. Comedians often hire managers or agents to advance their careers.

Despite these indicia of "independent contractor" status, the performers argued that the customs and practices of the Comedy Store amounted to a "pervasive system of controls" which created an employment relationship between Shore and the performers. Judge Miller noted that workers who are hired for sporadic, short-term or part-time tasks may still be characterized as "employees" - particularly if the work is recurring and the employer has sufficient control over the worker's performance. The fact that prior to the May 3rd agreement, the comedians were not paid for their services also was not dispositive of their status, since "putative employers" who have received benefits from an individual's services may be found to have consented to an employment relationship. In any event, Comedy Store performers did receive "cognizable" if not monetary rewards, Judge Miller found. These rewards of personal recognition, status, and more favorable performance opportunities were .,coin, which though it might not be tangible, [was] clearly valued." Shore had the power to grant or withhold such rewards, including access to the prestigious Comedy Store facilities. The result was that her suggestions or critical comments to performers regarding their material or other aspects of their careers often were considered to be directives requiring compliance.

For example, Actor Mark Lonow testified that "[A] direction and a suggestion from Mitzi Shore is one and the same thing, in my opinion.. . ." With insight into a performer's world, Lonow explained, "When you are beginning a career in which every fiber of your ego, your self esteem, your entire fantasy life of who you are and who you are going to become is involved and there seems to be one path - one way - to make it in your mind, and that is through The Comedy Store, the person who owns The Comedy Store becomes an all-encompassing dictator. Whether in fact that is true or not is almost irrelevant to a person trying to become a regular at The Comedy Store to fulfill their fantasy of being a great star. What Mitzi Shore says is the law. It isn't that she requests or indicates. The mere fact that the thought passes through her mind, in ninety-nine percent of the cases, becomes the law in your life.... I am not saying this is right or wrong. I am just saying it is a fact ..."

Judge Miller found that Mitzi Shore does realistically possess a right of control which she may exercise as to "details" affecting the performances of the regulars at the club. However, Judge Miller concluded that this somewhat attenuated right of control was not of itself conclusive. The preponderantly entrepreneurial characteristics of the stand-up comedian's vocation, including his or her non-Comedy Store appearance opportunities outweigh the control which Shore may sometimes exercise, in Judge Miller's view.

Therefore a determination that the comedians who provide services to the Comedy Store are "employees" who are consciously and deliberately "hired" for that purpose was not warranted. Any remedies for the club's alleged repudiation of the negotiated settlement agreement will have to be pursued in some other forum, concluded Judge Miller.

The Comedy Store and American Federation Of Comedians and American Guild of Variety Artists, Case Nos. 31-CA-9219 and 31-CA-10067, National Labor

Relations Board, Division of Judges (April 21, 1982) [ELR 4:2:3]

Damages are awarded to performer under New York Civil Rights Law for the airing of a commercial after performer's employment agreement expired

In 1973, Charles C. Welch entered into a one year agreement with the advertising firm for Mr. Christmas Incorporated by which he agreed to perform in a Mr. Christmas commercial. The agreement contained an option for the use of the commercial in 1974 with minimum compensation of $1,000 to Welch for the option year. The commercial was used during the 1974 Christmas season without notice or payment to Welch. Eventually Welch was paid for the 1974 use. Mr. Christmas was put on notice by the Screen Actors Guild that the term of the employment contract had expired. The commercial, however, was aired approximately 11 times during the 1975 Christmas season. Local distributors of the Mr. Christmas product line in Rochester and in Colorado apparently arranged the air time for the commercials.

Welch brought an action against Mr. Christmas for violation of section 51 of the New York Civil Rights Law, for breach of contract and for fraud. The contract and fraud claims were discontinued during trial. The jury granted Welch $1,000 compensatory damages and $25,000 punitive damages (reduced to $15,000 by the court). This award has been upheld by an appellate court in New York in an opinion which focuses solely on section 51 without considering Welch's possible right of privacy or right of publicity claims.

Mr. Christmas first argued that it had not "used" the commercial. But the company did supply prints of the commercial to its local distributors, and the jury reasonably could have found that Mr. Christmas made little or no effort to inform its distributors of the expiration date of its agreement with Welch, or to limit the showing of the commercial after the expiration date by repossessing its prints. The company therefore "contributed to and participated in the unauthorized publication," stated the court, citing Brinkley v. Casablancas, 438 N.Y.S.2d 1004 (1981) (ELR 3:15:1)

A closer question was raised by Mr. Christmas' contention that the use of the commercial without Welch's consent may have been a breach of contract though not a violation of section 51. According to Mr. Christmas, when Welch permitted the exhibition of his performance for trade purposes, he relinquished his right of privacy. This argument derives from a frequently cited concurring opinion in the case of Gautier v. ProFootball, Inc., 106 N.Y.S.2d 253, aff'd. 107 N.E.2d 485. In Gautier, an animal trainer contracted to perform his act during the half-time intermission of a professional football game. The performance was telecast live and the exhibition was seen by the home audience between two commercials. The majority in Gautier denied the performer's claim on the basis that the telecast was not "for the purposes of trade," and that any impingement on the performer's privacy was minimal. The concurring opinion, however, stated that the performer could not claim an invasion of his right of privacy when he had agreed originally to perform before a vast audience. The appellate court chose to distinguish Welch's claim on the basis that Gautier and its progeny involved valid, "albeit limited" consent by a performer, while the Mr. Christmas commercial was aired after the expiration of the agreed-upon term of use.

Somewhat inexplicably, although perhaps mindful of the fact that the parties indeed had a valid agreement at one point, the court chose not to address the possible violation of Welch's right of publicity. Brinkley again was cited for its statement that "A public figure has a privacy interest which finds recognition in the statute and for the violation of which a remedy of monetary redress is provided." But the court held only that the use of the commercial by Mr. Christmas without Welch's consent violated section 51.

Judge Kupferman, dissenting in part, viewed the action as "essentially a breach of contract claim." He did acknowledge that the more "interesting" question was whether a performer in commercials can claim a right of privacy (rather than a right of publicity) when his or her picture is used as he or she originally consented in writing that it could be used. But he found it unnecessary to reach this question.

Judge Kupferman would have modified the punitive damage award. He stated that the only "logical award" was $1,000 - the equivalent of payment to Welch for another option year. The majority had concluded that "morally culpable conduct" or conduct actuated by "evil or reprehensible" motives was not required for the recovery of punitive damages since the statute permits such recovery if a party "knowingly" uses a person's name, portrait or picture in a manner prohibited by section 50. The evidence was found sufficient to support the conclusion that Mr. Christmas had acted knowingly. But according to Judge Kupferman, Mr. Christmas' failure to inform its distributors of the expiration date of the commercial was not "egregious" and there had been no intentional wrongdoing which would support the punitive damage award.

Welch v. Mr. Christmas, Inc. 447 N.Y.S.2d 252 (App.Div. 1982) [ELR 4:2:4]

Jabberwock Band's nightclub contract was enforceable despite alleged oral agreement that contract could be terminated if band did not draw well, Alaska Supreme Court rules

Jeanette Johnson, owner of Le Pussycat Lounge in Alaska, executed an American Federation of Musicians' form contract engaging the Jabberwock Band to perform at her nightclub for eight weeks. After the band's fourth week, it was given two-weeks' termination notice and was subsequently fired. The band then sued Johnson for the amount due for the remaining two weeks of the written contract.

In her response, Johnson asserted as an affirmative defense that one of the band's members, who said he was the band's leader, orally represented that the contract could be terminated on two-weeks' notice if the band did not draw well. The two-week cancellation provision was not, however, included in the written contract. Additionally, Johnson counterclaimed for damages based on fraud and filed a third-party claim against the American Federation of Musicians Local No. 560. The trial court held that the parol evidence rule barred testimony concerning the alleged oral twoweek cancellation agreement. And therefore, the trial court granted the band's motion for summary judgment.

When the case reached the Alaska Supreme Court, Johnson unsuccessfully argued that the parol evidence rule was inapplicable, and that therefore evidence concerning the alleged oral agreement was admissible. The court reviewed the purpose of the parol evidence rule, under which evidence of oral understandings or agreements generally is not to be admitted for the purpose of varying or contradicting the terms of a written agreement. The court noted that written evidence is more accurate than human memory and that the parol evidence rule reduces the opportunities for innocent contracting parties to be victimized by the fraud or perjury of those who invent inconsistent oral agreements.

The court flatly rejected Johnson's contention that the alleged oral agreement should be admissible as bearing on the issue of promissory estoppel. Promissory estoppel is a principle applicable only to situations where a gratuitous promise, unsupported by consideration, is sought to be enforced on the ground that the party seeking enforcement has detrimentally relied on the promise. That principle had no relevance here, however, because the alleged oral two-week cancellation agreement was indeed supported by consideration: Johnson's promise to compensate the band.

Johnson next argued that the oral agreement was nothing more than an additional, consistent contract term not contained in the written document. The court rejected this argument as well. The alleged oral agreement, the court concluded, "is inconsistent with the unambiguous terms of the written contract in that it contradicts the written contract's provision for the anticipated duration of the Jabberwock's stay in Le Pussycat." The court observed that the written contract specified a definite time without mentioning any right of early termination.

Johnson persevered. She additionally argued that the band fraudulently induced her to enter into the written contract and that the alleged oral agreement constituted the inducement and therefore was admissible to establish fraud. This argument had some merit but not enough. The court noted that parol evidence of the two-week cancellation agreement is admissible to show fraud. However, a party seeking to avoid enforcement of a contract on the ground of fraud must show, among numerous other things, that the party's reliance on the fraudulent misrepresentation was justified. In this regard, the court concluded that Johnson presented no evidence from which it could have been inferred that she was induced to enter into the contract on the basis of the alleged oral agreement. She did not assert any assumption on her part that the written agreement embodied the alleged oral agreement. Furthermore, no evidence was presented from which it could have been inferred that she failed to read the contract or, having read it, failed to understand its terms. In other words, and as suggested by the court, Johnson should have seen to it that the alleged oral argument was made part of the written contract. Failing to have done this, she was not justified in relying on the alleged oral agreement. The bargain she struck was as reflected in writing and nothing more.

The lower court's entry of summary judgment in favor of the band therefore was affirmed.

Johnson v. Curran 633 P.2d 994 (Alaska 1981) [ELR 4:2:5]

News reports containing incorrect information concerning the filing of criminal charges against a Seattle pharmacist were privileged; dismissal of defamation claims is upheld by Washington Supreme Court

In covering the filing of criminal charges against Albert Mark, a Seattle pharmacist, the Seattle Times, the West Seattle Herald and three local television stations quoted a deputy prosecutor who said that the action was "the largest Medicaid fraud case ever filed in the state." Copies of the prosecutor's affidavit of probable cause were made available to the media. The affidavit stated that a preliminary audit revealed that Mark had submitted approximately $200,000 worth of forged and fraudulent billings over a 32-month period. Mark was officially charged with larceny, and at trial the state ultimately established invalid claims totaling about $2,500.

Mark brought five separate actions against the news media for defamation. Summary judgment was granted to the media defendant in each action and the Washington appellate courts upheld the trial court decisions in four of the cases (Mark v. Seattle Times, 27 Wash.App. 1014 (1980); Mark v. Fisher's Blend Station, 27 Wash.App. 916,. 621 P.2d 159 (1980, ELR 2:24:5); Mark v. KING Broadcasting Co., 27 Wash.App. 344, 618 P.2d 512 (1980, ELR 2:22:3); Mark v. Robinson, 28 Wash.App. 1028 (1981). The Supreme Court of Washington took the fifth case, Mark. v. KIRO, Inc., on direct review from the trial court.

The Washington Supreme Court first noted that Mark was required to establish the elements of his defamation claim by "evidence of convincing clarity" in order to withstand motions for summary judgment by the media. The lower court opinions had held that the reports appearing in the media were privileged as accounts of judicial proceedings open to the public. While an affidavit is not technically a pleading, the allegations contained in the affidavit and the information were "instrumental in the commencement of a criminal proceeding, were matters of public record and were verified by the prosecutor," stated the court. The appellate courts had not decided whether the scope of the fair report privilege extended to the statements of the deputy prosecutor, since the statements "merely reiterated the material already of record in the proceedings." The Supreme Court pointed out that this conclusion was incorrect in that at least two prosecutorial statements did not appear in court documents. But the court also declined to decide whether the publication of the deputy prosecutor's statement was privileged because Mark had not shown with convincing clarity that the statements were false. The news media also had not abused the conditional privilege of fair report by failing to make a reasonable effort to verify their facts by conducting an independent investigation of the truth of the statements. There had been no reason for the news sources to doubt the truth of the contents of their reports or to question whether the statements in the official court documents were false. The court then observed that an inaccurate report of facts drawn from judicial proceedings is not always actionable as defamation. In addition to fault, Washington state law requires a party to show that "the substance of the statement" will cause substantial danger to his or her reputation. In one instance, KIROTV reported that Mark had been charged with "defrauding" the state of $200,000 when in fact he was officially charged with "larceny." But the published stories were substantially accurate. The inaccuracy would not have had a materially different effect on a viewer, listener or reader than that which the literal truth would produce. In view of Mark's failure to establish a prima facie case of defamation, the trial court orders granting summary judgment were affirmed.

The court also dismissed Mark's action against KING-TV for invasion of privacy resulting from the unauthorized telecast of film showing the interior and exterior of one of his pharmacies. Among the factors considered by the court were that the place from which the film was shot was open to the public, the film of the interior lasted only 13 seconds, Mark was not shown in any embarrassing position, and his facial features were not recognizable.

Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981) [ELR 4:2:6]

Taxes properly assessed against cable television system on income from activities conducted wholly within state

An assessment of business and occupation taxes against Capitol Cablevision Corporation has been upheld by the Supreme Court of Appeals of West Virginia. The court rejected Capitol's argument that the assessment was levied against income which was a product of interstate commerce and therefore violated the Commerce Clause of the United States Constitution. It was found that the tax was based on revenue which was derived from the installation and subscription fees paid by Capitol's subscribers. All of the company's subscribers, equipment and employees are located within the state. And although Capitol does purchase and retransmit broadcast signals which originate in other states, it does not transmit its own signal across state lines. Thus, while Capitol, as a cable television system, is a part of interstate commerce, the company's gross income derived from business activities wholly within West Virginia was subject to state taxes measured by its West Virginia receipts.

Capitol also argued that denying cable systems the exemption from taxation which the state gives to conventional broadcasters was a denial of equal protection. But the court concluded that cable systems and conventional television broadcasters do not offer the same product or service. Television broadcasters generate and transmit broadcast signals to the general public, while cable operators "enhance and facilitate,, reception of those signals by people who have paid for this service. The fact that Capitol provides programming on its local origination channel did not make Capitol a "broadcaster," because the programs were not intended to be received by the public at large. While cable systems possess some of the characteristics of a television broadcaster, they may also be characterized as common carriers, according to the court. The state therefore was entitled to impose a different taxing policy than that applied to conventional broadcasters without violating guarantees of equal protection or of equal and fair taxation.

Capitol Cablevision Corp. v. Hardesty, 285 S.E.2d 412 (W.Va. 1981) [ELR 4:2:6]

Briefly Noted:

High School Sports.

A Federal Court of Appeals has held that an action brought by a high school junior challenging a state athletic association eligibility rule barring his participation in sports presented a substantial federal question, because the rule allegedly interfered with freedom of family choice. The rule in question required children of divorced or separated parents to live with the parent having legal custody in order to be eligible for sports. John Lorenzo's mother had legal custody of him, but in 1979, he and his parents decided that hi should live with his father. As a result, John was declared ineligible for sports for a year. Although the court ruled that a federal issue was presented, it also held that the case had become moot when John graduated from high school.

Laurenzo V. Mississippi High School Activities Assn., 662 F.2d 1117 (5th Cir. 1981) [ELR 4:2:7]

Copyright.

A plaintiff in a copyright infringement action need not prove that the allegedly infringing work was identical to the copyrighted work, according to a Federal District Court in Wisconsin. "All that plaintiffs need prove is that their works were performed. The degree of similarity to the original is irrelevant if the work is held out to be a performance music publishers had sued a nightclub owner for of the copyrighted composition." ASCAP-member repeatedly refusing to secure a license to have ASCAP musical compositions played on his premises. The court rejected the nightclub owner's defense that the songs played in his club were not exactly identical to the copyrighted compositions, and granted the music publishers' motion for summary judgment.

George Simon, Inc. v. Spatz, 212 U.S.P.Q. 398 (W.D.Wisc. 1980) [ELR 4:2:7]

Trademark.

The determination whether two marks are confusingly similar is an issue of fact to be decided based on the trier of fact's common knowledge and experience. Therefore, an expert opinion will not create an issue of fact and preclude a summary judgment in a trademark infringement action, particularly when the trial court had the discretion to exclude the expert opinion under Federal Rule of Evidence 702, a Federal Court of Appeals has ruled. Faberge, owner of the "Macho" mark used on a line of men's toiletries and cosmetics, had filed an opposition to the registration of the mark "Match" for use on similar products by Chesebrough-Pond's, alleging that the marks were confusingly similar. Chesebrough subsequently filed an action in Federal District Court seeking a declaratory judgment that the use of its mark "Match" would not infringe Faberge's rights in its mark "Macho" or constitute unfair competition. The District Court held for Chesebrough-Pond's, and Faberge appealed. The Court of Appeals affirmed, noting that "in view of the dissimilarity of the words, the lack of intent to infringe, and the total absence of evidence of actual or potential confusion of the undressed marks, the District Court correctly concluded that no likelihood of confusion existed."

Chesebrough-Pond's v. Faberge, 666 F.2d 393 (9th Cir. 1982) [ELR 4:2:7]

Libel.

The New York Court of Appeals has agreed with a New York appellate court that the late sportswriter Tex Maule was a public figure but has reversed the appellate court's order dismissing a libel action brought by Maule's executrix against NYM Corporation. (429 N.Y.S.2d 891, ELR 2:15:2). Maule had admitted that he was one of the best known writers at Sports Illustrated

wrote numerous articles and 28 books, and appeared regularly as a public speaker and as a television commentator. All of these activities "were obviously designed to project his name and personality before millions of readers of nationally distributed magazines and millions of television viewers..." By seeking publicity for his views and his writing, Maule thrust himself into the public eye and became a public personality. The jury should have been charged accordingly on the standard of liability to be applied, stated the court, in ordering a new trial. Whether Maule's estate will be able to meet that standard is fox a jury to decide.

Maule v. NYM Corporation, 444 N.Y.S.2d 909 (N.Y. 1981) [ELR 4:2:7]

DEPARTMENTS

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Should Amateur Athletes Resist the Draft? by Steven H. Burkow & Fred Slaughter, 7 Black Law Journal 314 (1981)

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Artworks and American Law: The California Art Preservation Act, 61 Boston University Law Review 1201 (1981)

"Works Made For Hire" Under the Copyright Act of 1976: Two Interpretations by William O'Meara, 15 Creighton Law Review 523 (1981-1982)

Family Law Issues in High School Athletic Eligibility: Equal Protection v. The Transfer Rule, 20 Journal of Family Law 293 (1981-82)

Women in Athletics: Winning the Game but Losing the Support by Ann Victoria Thomas & Jan Sheldon Wildgen, 8 Journal of College and University Law 295 (1981-82)

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