RECENT CASES

New York statute requiring rental property owners to permit installation of cable television equipment for nominal compensation is declared unconstitutional by United States Supreme Court

When escaping summertime heat "up on the roof," certain New York apartment residents may notice the presence of about 36 feet of cable, a couple of metal boxes, and some wire bolts and screws along their building's exterior wall. They are up there because New York statute provides that landlords must permit cable television companies to install transmission equipment on rental property. However, the United States Supreme Court has ruled that this stateauthorized, minor but permanent installation of cable facilities is a "taking of property" for which "just compensation" must be paid to the owner under the Fifth and Fourteenth Amendments of the Constitution.

Jean Loretto purchased a five-story apartment building on West 105th Street in 1971. Loretto claimed that she did not know at the time of purchase that the previous owner had granted Teleprompter permission to install a cable on the building and to furnish cable TV services to the tenants. Prior to 1973, Teleprompter compensated the property owners along its cable "highway" at the rate of 5% of the gross revenues that Teleprompter realized from the particular property. Then, in January of 1973, section 828 of the New York Executive Law went into effect. This statute provides that a landlord may not "interfere with the installation of cable television facilities upon his property..." and may not demand payment from any tenant for permitting cable TV, or demand payment from any cable TV company in excess of an amount determined by the State Commission on Cable Television. The Commission ruled that a one-time $1.00 payment is the fee to which a landlord is entitled (though landlords still may require cable TV companies or tenants to bear the cost of installation and to pay for any damage caused by the installation). In 1976, Loretto filed a class action alleging that Teleprompter's installation was a trespass and that section 828 amounted to a taking without just compensation.

The New York Court of Appeals upheld the statute, finding that it served the legitimate police power purpose of eliminating "landlord fees and conditions that inhibit the development of CATV." That decision has been reversed by the U.S. Supreme Court, however. Justice Marshall, citing constitutional history, announced that any permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve, even if it has only minimal economic impact on the owner. It was noted that there was no constitutional difference between a "crossover" and a "noncrossover" installation. (The former are cable lines extending from one building to another in order to reach a new group of tenants; the latter provide cable TV service to the tenants of a particular building.) In either case, the government-sanctioned occupation of physical property destroys the owner's right to possess the occupied space himself, and the power to exclude the occupier from possession and use of the space. The owner also is denied power to control the use of the property; and the presence of an occupied space will make valueless an owner's "bare legal right" to dispose of the occupied space because the purchaser also will be unable to make any use of the space. The extent of an occupation is significant only as a factor in determining the compensation that is due, rather than as an element of determining whether there was a taking in the first instance, stated Justice Marshall.

Justice Marshall, characterizing the court's holding as "very narrow," concluded by noting that its " physical occupation" rule will not impair a state's power to adjust landlord-tenant relations, such as by requiring a landlord to comply with building codes and provide mailboxes and smoke detectors, "so long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party." The amount of compensation which may be due from the cable companies was left for consideration by the state courts on remand.

Justice Blackmun, with whom Justice Brennan and Justice White joined in dissent, objected to the majority decision as "curiously anachronistic" and as relying on "bygone precedents." Justice Blackmun pointed out that the New York Court of Appeals had applied the multifactor balancing test prescribed by the Supreme Court's recent "Takings Clause" decisions and had found that section 828 represented a "reasoned legislative effort to arbitrate between the interests of tenants and landlords and to encourage development of an important educational and communications medium." The Court of Appeals also concluded that the statute's economic impact on Loretto was minimal because section 828 did not affect the fair return on her property and did not interfere with her reasonable investment-backed expectations. Since Loretto was unaware of the existence of the cable when she purchased the building, "she could not have expected that the one-eighth cubic foot of space occupied by the cable television installation would be income-productive."

In Justice Blackmun's view a per se rule based on permanent physical occupation is inapplicable in the modern urban age where government injury to private interests often depends very little on whether or not a "physical contact" has been authorized. According to one commentator, a "takings rule" based on the distinction between physical and nonphysical intrusions is "inherently suspect" because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Justice Blackmun expressed concern that New York statutes that require landlords to make physical attachments to their rental property may also be found to constitute takings even if tenant protection and safety interests are served. Other statutes require far greater takings of common space and compel a landlord to pay for and maintain equipment such as tenant mailboxes. Further, it appeared to the dissenting justices that section 828 would not impair a landlord's power to dispose of, use and exclude others from, a property. A purchaser who wished to make nonrental use of a building could have the cable removed and use the space in any manner. And by insuring that tenants of the building have access to cable television for as long as the building is used for rental purposes, the resale value of the building and its attractiveness to renters is increased. The dissent also objected to the majority's failure to consider that Loretto's tenants may have had a property interest in permitting Teleprompter to install its equipment.

Loretto v. Teleprompter Manhattan CATV Corp., Case No. 81-244, (U.S.Sup.Ct., June 30, 1982) [ELR 4:6:1]

"Mork & Mindy" entitled to registration as a trademark for T-shirts, because names served a source-identifying function

The requirements for obtaining trademark registration for T-shirt decals, as set forth in a recent Trademark Trial and Appeal Board decision involving the names "Mork & Mindy," approach the cosmic. The decal in question depicted the letters of the names and the ampersand in a "gaudy, fluorescent rainbow shading." These multi-colored letters were superimposed on a photograph of Robin Williams and Pam Dawber, the actors who portrayed Mork and Mindy in the television series of that name. The Trademark Attorney had refused to register the decal on the ground that the names were an "aesthetically functional" feature of the T-shirts, as opposed to performing the trademark function of identifying or distinguishing Paramount Pictures as the source of the goods.

In reversing the Trademark Attorney's decision, the Appeal Board noted that indeed the primary significance of the words "Mork & Mindy" to any prospective purchaser was to indicate the television series and its principal characters. However, of itself, this did not preclude trademark protection for the names unless their ornamental and characteridentifying characteristics dominated their sourceindicating characteristics. The Appeal Board pointed out that it is a common merchandising technique to license the use of character names and images as trademarks for a variety of collateral products. Thus, purchasers have become "accustomed to seeing characters' names and images used as trademarks to indicate source of origin."

The case of International Order of Job's Daughters v. Lindenburg and Co. (ELR 2:18:3), relied on by the Trademark Attorney, was distinguished by the Board. It ruled that in the Job's Daughters case, the requirement that there be a single "official" source of Job's Daughter jewelry had been diluted by the fact that many unlicensed jewelers had been permitted to produce items bearing the Order's emblem. Further, it was not necessary, as the Trademark Attorney suggested, for the "Mork & Mindy" mark to be used on a label affixed to the product instead of as a component of the product itself in order for the mark to be registrable.

In re application of Paramount Pictures Corporation, Trademark Trial and Appeal Board, Serial No. 210,108 (April 9, 1982) [ELR 4:6:2]

WNBCs use of the slogan "We're for You" did not violate promotion company's claimed service mark in the slogans "We're 4" and "We're 4 You"

An action for service mark infringement brought by Invisible, Inc. against the National Broadcasting Company failed to make an impression on a Federal District Court in Los Angeles. In 1974, Invisible created a "total identity promotional campaign" to promote television stations which are licensed to operate on the channel four frequency. The campaign centered on the slogans "We're 4" and "We're 4 You," and was sold to the channel four stations in Boston, Denver and Detroit. WNBC-TV, a channel four station in New York City, viewed a demonstration tape of the promotion but proceeded to develop its own campaign, using the slogan "We're for You."

Invisible claimed that its promotional slogans functioned as service marks to identify its broadcasting services and that NBC's use of the "We're for You" slogan caused confusion in the promotion industry as to the source of WNBC's promotional campaign The District Court (in a decision issued in November 1980 but published only recently) concluded that Invisible's slogans were not service marks because they were "merely descriptive" of the channel four stations they were intended to identify. The fact that an outside agency created the slogans and licensed them to channel four stations did not entitle the agency to a monopoly over the descriptive phrases inasmuch as no reference was made in the promotional materials to Invisible as the source of the promotion.

Invisible took its case to a Federal Court of Appeals in California. But the Court of Appeals has affirmed the District Court's opinion granting NBC's motion for summary judgment. The appellate court noted that the slogans "We're 4" and "We're 4 You" were designed for the functional use of identifying broadcast stations. The functional feature may have been copied by NBC, but "there (was) no suggestion that NBC copied the slogans in order to trade on the reputations of Invisible, Inc. and its client stations ... Any property interest that Invisible, Inc. may have in the slogans is not so broad that it permits control of use of the slogans in this manner," the Court of Appeals ruled.

Invisible, Inc. v. National Broadcasting Company, Inc., 212 U.S.P.Q. 576 (C.D.Cal. 1980); Case No. 806074 (9th Cir., Feb. 25, 1982) [ELR 4:6:3]

Hollywood film processing lab and its parent company, a supplier of inflight films, were not engaged in a "unitary" business for California franchise tax purposes, California Board of Equalization rules

Under section 25101 of California's Revenue and Taxation Code, a taxpayer who has income from sources both within and outside of the state is required to measure its California franchise tax liability by its net income from California sources. In some instances, a taxpayer may do business solely in California but may earn income from sources both inside and outside the state if the taxpayer is engaged in a multistate unitary business with affiliated corporations. In that case, an apportionment formula is applied to the total income derived from the combined operations of the affiliated corporations in order to determine the amount of income attributable to California sources.

Hollywood Film Enterprises, Inc., a wholly owned subsidiary of Inflight Services, Inc., contended that it was engaged in a unitary business with its parent and sought a refund of franchise taxes amounting to approximately $190,000 paid by HFE from 1971 to 1973. HFE, whose facilities are located in Hollywood, and all of whose activities are conducted within California, is a film laboratory involved primarily in developing and printing educational, informational and training films. Inflight, a Delaware corporation with headquarters in New

York City, is in the business of providing feature films to airlines for passenger viewing. Inflight's business is conducted both inside and outside California. For 1971, 1972 and 1973, HFE and Inflight filed separate California returns. HFE reported its entire net income from its operations. Innight used the formula apportionment. HFE subsequently filed for a refund, claiming that it was engaged in a unitary business with Inflight and therefore was entitled to compute its California income on the basis of a combined report. The refund claim was denied by the Franchise Tax Board and this action has been upheld by the State Board of Equalization.

The Board of Equalization noted that the existence of a unitary business may be established by the presence of: (1) unity of ownership; (2) unity of operation as evidenced by central purchasing, advertising, accounting, and management divisions; and (3) unity of use of a centralized executive force and general system of operation.

A business also may be characterized as unitary when the portion of the business done within California. is dependent upon or contributes to the operation of the business outside California.

HFE asserted that it met both tests for unity on the basis of the following facts: Inflight owned 100% of HFE's stock; Inflight selected HFE's legal, accounting and public relations firms and controlled HFE's accounting and budget procedures; the companies had interlocking officers and boards; and Inflight provided HFE with financial and technical assistance.

However, the Franchise Tax Board found that Inflight and HFE were engaged in diverse lines of business with no horizontal or vertical integration, and the State Board of Equalization has agreed. It was observed that Inflight and HFE "did not deal with each other as steps in a vertical process, nor did they deal with the same level of technology or provision of the same end product or service." Also absent were such significant factors as intercompany product flow or central purchasing and distribution. The fact that Inflight may have attempted to channel film processing business to HFE in years subsequent to 1973 was found not "germane" to the relationship between the companies during the years on appeal.

The Board of Equalization concluded that "Although there clearly was unity of ownership, the factors alleged ... as indicating unity of operation and use or contribution or dependency were more form than substance."

In the Matter of the Appeal of Hollywood Film Enterprises, Inc., Before the State Board of Equalization of the State of California (March 31, 1982) [ELR 4:6:3]

New Jersey Supreme Court affirms newsperson's absolute right not to disclose confidential sources in libel action brought by a state legislator against New Jersey Monthly magazine

The New Jersey Supreme Court has ruled that its state's Shield Law (N.J.S.A. 2A:84A-21) was intended to provide comprehensive protection for all aspects of newsgathering. The statute creates an absolute newsperson's privilege not to disclose confidential information, absent any conflicting constitutional right, stated the court. The absolute privilege was found particularly appropriate in libel cases which usually lack an "overriding constitutional interest" such as those that might be present in a criminal prosecution. The privilege therefore was found to support New Jersey Monthly magazine's refusal to respond to a trial court order to answer interrogatories propounded by New Jersey state legislator Joseph Maressa in his libel action against the magazine,

Maressa had alleged that he was defamed by statements in an October 1979 article in the magazine entitled "Rating the Legislators." The article described Maressa as "callous, stupid, and just plain devious," and "sneaky, self-interested and basically unprincipled." Maressa responded by filing an action in which he claimed that the article falsely conveyed the impression that he was unfit to serve as a legislator and that he participated in illegal and unethical practices.

In seeking an order to compel the disclosure of information about the sources consulted by the writers of the article, Maressa argued that the Shield Law did not apply to the "editorial process," that is, to communications between newspersons, decisions about what information to publish, and the basis for a reporter's belief in the truth of the statements published. But the court found that permitting a libel claimant to obtain this type of access to the "city room" would "inhibit the exchange of ideas that is crucial to the functioning of a free and vigorous press."

The protection of the Shield Law was not waived by the fact that the magazine responded to certain interrogatories or by its assertion of affirmative defenses such as truth, fair comment, or lack of malice. In criminal proceedings, the statute does provide that the publication of information may constitute a waiver of confidentiality, but this applies only to the specific material provided. The court did not hesitate to extend this provision to civil matters where "the public interest in disclosure is less compelling."

Noting that the cost of defending a libel action may impair freedom of the press, the court also announced its support for the expeditious resolution of free speech litigation, including the use of summary judgment. This case was especially suited for summary judgment, the court said, because the statements complained of were "obviously opinions" which are absolutely privileged.

Public figure libel actions will not be entirely fore closed by the Shield Law's restrictions on discovery, according to the court. Inferential evidence may establish the recklessness necessary to sustain a libel judgment. Such an inference may arise "when a false report is published solely in reliance on confidential sources if (1) the content of the report is such as to be defamatory as a matter of law, (2) the defendant knew or should have known of some reasonable means of verifying its accuracy, and (3) the failure to verify rises to the level of a gross violation of the standards of responsible journalism." The media inevitably will publish inaccurate statements due to deadline pressures; and individuals who claim to be defamed by these statements may find it difficult to prove reckless falsehood in view of the Shield Law. But the court viewed itself as obligated to uphold the legislature's determination that "the competing interest in a free press outweighs the possibility of damaged reputations." The order of the trial court therefore was reversed and the matter was remanded for further proceedings.

Judge Schreiber, in dissent, traced the history of the state's constitutional protection of individuals who claim that they have been harmed by the abuse of freedom of speech and the press. He noted that the majority's interpretation of the Shield Law will in most cases eliminate relevant state-of-mind evidence and thereby obliterate a public official's constitutionally protected cause of action. Article 1, paragraph 6 of the New Jersey Constitution reads, in part: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. The majority stated that the underlined clause did not create a constitutional right to sue for damages in libel but rather only affirmed that libel actions were not precluded despite the Article's broad protection of free speech.

Judge Schreiber also pointed out that in Herbert v. Lando, 441 U.S. 153 (1979) (ELR 1:1:2), the United States Supreme Court stated that a plaintiff in a libel action was entitled to pursue discovery concerning a reporter's thoughts and the editorial process without violating the First Amendment. According to Judge Schreiber, New Jersey's Shield Law focuses on the identity of third party sources of information, not on what a newsperson may do with the information; and thus it does not refer to or shield the newsperson's impressions of the facts or conclusions about their truth. He also expressed concern that the "Maressa doctrine" will be applied not only to legislators, who, according to the majority, should not be "meek and thin-skinned" in any event, but to "ordinary citizens attempting to voice their views in town meetings."

In accordance with its interpretation of the Shield Law in Maressa, the court also reversed a trial court order compelling New Jersey Monthly to disclose privileged information in an action brought against the magazine by Resorts International, Inc. An article entitled "Surrender in Atlantic City," which appeared in the May 1979 issued of the magazine, described a hearing held to review Resort's application to obtain a permanent license for a gaming casino in Atlantic City. The company was described as a "mismanaged, unscrupulous, mob-tainted company with the morals of an alley cat," and the hearings were called a "charade" designed to make Resorts "look clean." The trial court had concluded that the magazine had waived its Shield Law privilege by asserting the defense of lack-of-malice (ELR 3:23:6). The New Jersey Supreme Court, however, ruled that the assertion of a lack-of-malice defense was not a waiver of the privilege, and that there was no other evidence of waiver except as to the specific material provided by the magazine, such as the names of nonconfidential sources.

Maressa v. New Jersey Monthly, Case No. A-74 (N.J., May 6, 1982); Resorts International, Inc. v. NJM Associates, Case No. A-102 (N.J., May 6, 1982) [ELR 4:6:4]

Federal Court of Appeals upholds finding that sports concessionaire's share of the market, contract terms and "predatory" financial practices constituted restraint of trade and attempted monopolization in violation of the Sherman Act

Operating a concession franchise at a sports stadium involves more than peanuts and crackerjacks. The franchising practices of one national concessionaire, Twin City Sportservice, Inc., have been in litigation since 1967 when the company filed suit against Charles 0. Finley & Company, Inc., alleging that Finley breached his 1950 concession contract with Sportservice. The contract issues were decided in favor of Sportservice in 1970. But Finley, in a counterclaim, had contended that the contract violated sections I and 2 of the Sherman Act. A Federal Court of Appeals, in what may be the "denouement in this long and tangled story," recently has agreed with Finley.

One of the factors contributing to the marathon length of the proceeding was an initially erroneous definition by a Federal District Court of the relevant competitive market. The District Court had ruled that Sportservice competed with other operators of major league baseball concessions. However, in an earlier ruling, the Court of Appeals instructed the District Court to consider franchises, rather than concession services, as the appropriate article of commerce with the concessionaire viewed as a buyer in the franchise market. The Court of Appeals also stated that limiting the relevant franchise market to those offered for sale by major league baseball teams was too narrow.

On remand, the District Court analyzed the interchangability of the concession facilities at various sports arenas with the type of facilities serving major league baseball teams. The court concluded that there were 118 possible concession franchises within the redefined relevant market. These are concession franchise opportunities at major arenas for which national concessionaires might meaningfully compete based upon a test of profitability. Sportservice controls 24% of the 118 franchises.

In determining whether Sportservice's operations violated the antitrust laws, the Court of Appeals pointed out that it previously had found that there was no per se illegal tying relationship between Sportservice and its franchisors, and that the District Court had determined that Sportservice's share of the relevant market was not sufficient to support an actual monopolization claim. But the Court of Appeals upheld District Court Judge Peckham's finding that Sportservice's competitive position in the relevant market constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act and an attempted monopoly in violation of section 2 of the Sherman Act.

Judge Peckham based his conclusion not only on Sportservice's 24% market share, but on the fact that Sportservice had consistently obtained unreasonably long concession franchise contracts - often for more than 10 years - and on occasion also secured "follow the franchise" clauses. Sportservice acquired such favorable terms, in part, by the "predatory" use of its financial strength to make cash loans and advances to franchisors.

Judge Peckham found that Sportservice's contracts were anticompetitive and were not justifiable under the "rule of reason" because the contracts created entry barriers into the relevant market which foreclosed competition. Sportservice's contracts "have locked up a large portion of the concession franchise market for many years, placing a significant amount of potential concession business beyond the grasp of any competitors," stated Judge Peckham. The length of the concession contracts was not proved necessary to recapture Sportservice's investments, and no justification was shown for the manner in which Sportservice used follow-the-franchise clauses. Sportservice did not demonstrate any pro-competitive effects of its concession franchise practices or that its practices were common in the industry.

The court rejected Sportservice's attempt to compare its long-term agreements with those which have been upheld in the fast-food franchising industry. Not only are the operations of the two businesses distinguishable, but Sportservice possesses far superior bargaining power than most small fast-food operators. Further, contractual length was not the only factor considered by the District Court in finding a section 1 violation.

A section 2 attempt to monopolize claim requires proof of (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anti-competitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. The District Court had found that these factors were present, particularly since Sportservice, via its contract practices, had achieved an "impregnable" competitive position as the leading power in the concession market. The company's conduct supported an inference of a specific intent to destroy competition. The "most blatant" indication of this intention was Sportservice's frequent use of "lavish loans, advances, and cash payments specifically to secure long-term contracts and contract extensions," the court ruled.

Twin City Sportservice, Inc. v. Charles O. Finley & Company, Inc., (9th Cir., May 10, 1982) [ELR 4:6:5]

Misleading presentation of consumer shampoo survey results in a television commercial violates Lanham Act, rules Federal Court of Appeals

Presenting the results of a consumer product survey in a manner that may mislead consumers as to the product's inherent quality has been ruled a violation of the Lanham Act.

A consumer test on various shampoos was conducted for Bristol-Myers Company, the manufacturer of "Body on Tap." The purported results of the testing were announced in a television commercial by "turbaned (high fashion model Cristina Ferrare) apparently fresh from shampooing her hair, holding a bottle of Body on Tap." Ferrare claimed that "In shampoo tests with over nine hundred women like me, Body on Tap got higher ratings than Prell for body. Higher than Flex for conditioning. Higher than Sassoon for strong, healthy looking hair."

However, 900 women did not make product-to-product shampoo comparisons. Rather, about 200 women each tested one shampoo and rated it on a qualitative scale from "outstanding" to "poor" (a procedure known as "blind monadic testing"). Furthermore, approximately one-third of the women participating in the testing were 13 to 18 years old, and whether they could be called "women like Cristina Ferrare" was questionable. On the basis of the top two ratings, it appeared that Body on Tap tested considerably higher than Sassoon for "strong, healthy looking hair." But when the top four ratings were combined, there was only a statistically insignificant difference of one percent between the ratings of the shampoos. Evidence was presented that blind monadic testing usually is not used to support comparative advertising claims; that the women testers were instructed to use Sassoon contrary to Sassoon's own instructions; and that they were allowed to use other brands of shampoo at the time when they were testing Sassoon.

A Federal District Court granted Sassoon's motion for a preliminary injunction to halt the broadcast or publication of the commercial on the ground that it was ambiguous and misleading and thus violated section 43(a) of the Lanham Act. This decision has been upheld on appeal.

Bristol-Myers had contended that the alleged misrepresentations were only misstatements about the test results and did not falsely describe the quality of Body on Tap.

But Judge Kaufman of the Court of Appeals noted that the results of a consumer perception study conducted by Sassoon indicated that most potential purchasers would incorrectly believe that 900 women made product-to-product comparisons of the named shampoos. The statements in the commercials were "in connection with" Body on Tap stated Judge Kaufman. Therefore, the District Court was correct in ruling that Sassoon would likely sueceed in showing that "the intent and total effect of the advertisement were to lead consumers into believing Body on Tap was comprehensively superior-"surely a representation regarding its 'inherent quality.'" The repeated communication to consumers of suggestions of competitive superiority would eventually result in irreparable injury to Sassoon in the form of lost sales, concluded the court, and for this reason it affirmed the injunction.

Vidal Sassoon, Inc. v. Bristol-Myers Company, 213 U.S.P.Q. 24 (2d Cir. 1981) [ELR 4:6:6]

Briefly Noted:

Libel.

During the jury trial of a libel action brought by attorney Jerome Rosenthal against the New Yorker Magazine and author John Updike, Judge Stanley R. Malone of the Los Angeles Superior Court issued a ruling on the standard of proof required of a private figure. The ruling may well influence future libel actions in the state.

In a review of A.E. Hotchner's book "Doris Day - Her Own Story," Updike characterized Rosenthal as a "swindler." Apparently Updike was referring to Day's account of Rosenthal's involvement with the disposition of the estate of Day's late husband. Rosenthal had been ordered to pay a $22.8 million judgment in a legal malpractice action arising over the disposition of the estate.

Judge Malone ruled that Rosenthal was a private figure, but that because the matter in which he was involved was of public concern, "the standard should be that the defendants knew that the statements were false or acted with reckless disregard for their truth or falsity." Judge Malone stated that the application of common law negligence in this case would be a "chilling damper on First Amendment rights," but that the "reckless disregard" standard would provide "proper" First Amendment protection to the magazine and to Rosenthal.

The jury ultimately concluded that neither Updike nor the magazine had libeled Rosenthal.

Rosenthal v. The New Yorker Magazine, Inc., Case No. C188674 (L.A. Sup. Ct., Feb. 1, 1982) [ELR 4:6:7]

First Amendment.

After a rehearing en banc, the Federal Court of Appeals in Arkansas has declared unconstitutional an emergency zoning ordinance passed by the City of North Little Rock, Arkansas. The ordinance prohibited the exhibition, or sale, within 100 yards of specified structures and areas, of sexually explicit films. A panel of the Court of Appeals had upheld a District Court judgment affirming the constitutionality of the ordinance Avalon Cinema Corp. v. Thompson, 658 F.2d 555 (ELR 3:20:6). But after a rehearing, the Court determined that the ordinance is a content-based regulation which restricts public access to a form of protected speech, and is not necessary to achieve any compelling governmental interest. It was noted that the ordinance was enacted only after the North Little Rock City Council had learned of the imminent opening of the Avalon Cinema - the city's first "adult" movie theatre. There were no empirical findings, as in Young v. American Mini Theatres, Inc. 427 U.S. 50 (1976), that the presence of one theatre within 100 yards of a city area would have a "deleterious effect upon the surrounding neighborhood." Also the ordinance in Young did not affect existing adult establishments only the location of new establishments. Work on the Avalon essentially had been completed when the Little Rock ordinance was passed. The ordinance therefore had the effect of "virtually suppressing public access to sexually oriented (but nonobscene) adult entertainment." The court remanded the matter for a determination of appropriate equitable relief.

Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981) [ELR 4:6:7]

Trademark.

A Federal District Court in Illinois has held that there is a substantial likelihood of confusion between the marks "WALT DISNEY WORLD" and "DISNEY-WORLD SEEKERS' TOURS" and therefore, the mark "DISNEYWORLD SEEKERS' TOURS" infringed the Walt Disney Production's well-known mark "WALT DISNEY WORLD." The court noted that a finding of actual confusion by the public is not necessary to prove trademark infringement; the mere likelihood of confusion by the appropriate segment of the consuming public is sufficient The court also found that "DISNEY-WORLD SEEKERS' TOURS" had violated the trademark antidilution statute, held applicable "...where the activity of the defendant poses a threat of dilution of the distinctiveness of the (plantiff's) mark" or "...when the reputation of the trademark owner might be damaged by the use of the mark by another person." The court enjoined further use of the mark "DISNEYWORLD SEEKERS' TOURS" and also ordered the defendant to pay attorney's fees to "WALT DISNEY WORLD" for having raised a spurious defense, noting that "(t)he point at which the fees should start to run for these purposes is a point at which it can be said without doubt that the defendant knew her use of the mark was likely to cause confusion...Her persisting in this use beyond that point does, in my view, subject her to liability for the attorneys' fees incurred by the plaintiff after that point."

Walt Disney Productions v. Jeffries, 212 U.S.P.Q. 670 (N.D. Ill. 1981) [ELR 4:6:7]

Employment Relations.

An order of the Florida Department of Labor and Employment Security stated that the musicians and conductor who performed for the Fort Lauderdale Symphony Orchestra Association were "employees," and thus the Department held the Association liable for unemployment compensation taxes. A Florida appellate court has ruled that while the conductor was an "employee," the musicians were "independent contractors." Accordingly, the Department's order was affirmed only as the conductor.

Fort Lauderdale Symphony Orchestra Association, Inc. v. State Department Of Labor and Employment Security, 405 So.2d 1365 (Fla.App. 1981) [ELR 4:6:8]

DEPARTMENTS

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