RECENT CASES

Federal Court of Appeals upholds much of Cher's judgment against Forum Magazine based on its false advertising, but not mere publication, of an interview without her consent

It appears that Cher may now reprise "I Got You, Babe" once again, because a Federal Court of Appeals has affirmed much (though not all) of the $650,000 judgment the performer obtained in her suit over Forum magazine's misuse of an interview obtained from a freelance writer.

In 1980, Cher agreed to participate in an interview with radio talk show host Fred Robbins for an exclusive cover story in US magazine. Robbins and Cher understood that the taped interview was to be published in

US. However, the editors of US, at Cher's request, never ran the interview, and returned it to Robbins, paying him a "kill" fee. Robbins subsequently sold the interview to publishers of two other magazines, Star and Forum, and used portions of the interview on his radio show.

Cher filed suit against Robbins, Star and Forum, as well as Penthouse magazine, whose staff helped Forum prepare advertisements of the interview which ran in Forum and Penthouse. Cher's complaint charged breach of contract, unfair competition, misappropriation of name and likeness, misappropriation of right to publicity and violation of the Lanham Act. Defamation was not alleged, but reference was made to the publishers' misuse of headlines, cover promotions and advertising in connection with the interview.

The trial court awarded general and punitive damages against all defendants, amounting to more than $650,000. (ELR 3:20:1) The Court of Appeals has reversed the awards against Robbins and the Star, but has upheld those against Forum and Penthouse, leaving Cher with about $170,000 in compensatory damages against Forum and Penthouse, and $100,000 in punitive damages against Forum.

The court found there could be no liability based on the mere publishing of the interview by Star. "Star bought an interview with a public figure from a freelance writer and published it. This activity is protected by the First and Fourteenth Amendments in the absence of a showing that the publishers knew that their statements were false or published them in reckless disregard for the truth," said the court.

Star published the article in its March 17 and 24, 1981 issues, and printed Cher's picture and these words on its March 17 cover: "Exclusive Series," followed by "Cher: My Life, My Husbands and Many, Many Men." By these words, charged Cher, the magazine falsely represented to the public that she had given Star an exclusive interview. The court concluded, however, that Star was entitled to inform its readers that the issue contained an article about Cher, that the article was based on an interview with Cher herself, and that the article had not previously appeared elsewhere, which it sought to do by the use of the words "Exclusive Series."

The use of these words could not support a finding of knowing or reckless falsity, said the court, nor could they constitute a false claim that Cher endorsed Star magazine. The court noted that Cher had previously appeared in Star a number of times, and "Even if some of the material in Star had already appeared in Forum, Cher did not suffer any damage from Star's exaggerated claims of exclusivity."

Forum published part of the interview in its March 1981 issue, picturing Cher on the cover with the words "Exclusive: Cher Talks Straight."

Inside the same issue, Forum carried a subscription "tearout" opposite the legend: "There are certain things that Cher won't tell People and would never tell US. She tells Forum," which was printed above a picture of Cher. The text of the ad also included: "So join Cher and FORUM'S hundreds of thousands of other adventurous readers today." The same legend and picture were used in an ad appearing in the February 1981 issue of Penthouse, and a similar ad was placed in the New York Daily News.

The court found that mere publication of the article by Forum, as by Star, was protected by the First Amendment. Unlike Star, however, Forum's explicit advertising using Cher's name and picture provided an alternative basis for liability. "Forum would have been entitled to use Cher's picture and to refer to her truthfully in subscription advertising for the purpose of indicating the content of the publication . . . . But Forum was not content with honest exploitation . . . . Forum falsely proclaimed to the readers of its advertising copy that Cher 'tells Forum' things that she .would never tell US.' In view of the fact that Cher had intended to 'tell' the rival magazine, US, the very words in the interview, and had not 'told' Forum anything, the advertising copy was patently false. This kind of mendacity is not protected by the First Amendment, and those defendants responsible for the placement and circulation of the challenged advertising copy must look elsewhere for their protection."

Further, in requesting its readers to "join Cher and Forum's hundreds of thousands of other adventurous readers," the magazine may well have, as the trial court found, falsely implied that Cher endorsed Forum. Cher's theory against Penthouse relied on (1) Penthouse's ownership of 80% of Forum's stock, and (2) Penthouse's participation in the preparation of the advertisements which appeared in Forum and Penthouse. The court upheld the judgment against Penthouse, saying that there was enough participation by its staff in the false advertising to permit Penthouse to share Forum's liability.

Cher's judgment against the interviewer Robbins was reversed, however. Accepting the lower court findings that Cher bad no contract with Robbins and Robbins had never promised her any approval rights concerning the interview, the court found that any liability of Robbins to Cher would have to be predicated on a finding that Robbins participated in one or more of the tortious actions of the publisher defendants. Since Robbins had no part in the publishing, advertising or marketing of the articles in question, the judgment against Robbins was erroneous.

The court expressed no opinion on the applicability to this case of the Lanham Act, which provides remedies for misrepresentation in advertising.

Cher v. Forum International, Ltd., Case No. 82-5106 (9th Cir., November 18, 1982) [ELR 4:13:1]

Satellite retransmission of New York Mets games broadcast by WOR-TV does not infringe Mets' copyrights, Federal Court of Appeals rules

In a recent Federal Court of Appeals ruling, Eastern Microwave, Inc. (EMI), a satellite retransmitter of television signals, has been found not liable for copyright infringement to Doubleday Sports, Inc., the owner of the New York Mets.

EMI is licensed by the FCC as a communications common carrier. EMI converts the television signals of broadcast stations into microwave signals and relays the microwave signals via satellite or terrestrial repeater stations. The retransmitted signals eventually are delivered by EMI to the headends of approximately 600 cable television systems which reconvert the microwave signals to television signals for distribution to, and viewing by, the cable systems' subscribers.

Among the signals transmitted by EMI are those of WOR-TV in New York. Since 1965, EMI has retransmitted the entirety of WOR-TV's signal, with no editing, including its broadcasts of about 100 New York Mets games per season. In 1981, in response to Doubleday Sports' claim that EMI's retransmission of Mets broadcasts infringed Doubleday's copyright, EMI sought a declaratory judgment that it was a "Passive carrier" and thus exempt from copyright liability under section 111(a)(3) of the Copyright Act of 1976. A Federal District Court declared that EMI was not entitled to the passive carrier exemption because it had "chosen" to retransmit WOR-TV's signal, thereby extending its activities beyond providing wires, cables or other communications channels for the use of others (ELR 3:23:1).

Chief Judge Howard T Markey (U.S. Court of Customs and Patent Appeals, sitting by designation) has reversed this ruling, holding that EMI's retransmission activity is exempt from copyright liability under section 111(a)(3). Judge Markey called EMI's technical operation a "mixed breed," distinguishable from both the activities of broadcasters and of older common carriers such as the telephone company. EMI does not convert the television signals it receives into an audiovisual display. Instead, the company functions solely as an "intermediate link" in an overall chain of television signal distribution. Most significantly and contrary to the District Court opinion, it was found that EMI did not exercise control over the selection of the primary transmission when it chose to retransmit the WOR-TV signal via satellite. EMI transmits many broadcast signals via terrestrial microwave repeaters, but the company has access to only one satellite transponder. Consequently, the satellite was used to retransmit the most marketable signal available - that of WOR-TV. This "one-time" station selection was the result of a technical restriction and did not evidence the "control over the content and selection of the primary transmission" which would preclude the application of section 111(a)(3), said Judge Markey. To hold otherwise would "emasculate" the exemption provision of the Act with respect to intermediate carriers, he commented.

Further, EMI does not control the recipients of its retransmission. As a licensed common carrier, EMI must furnish its services upon reasonable request and has done so.

The third requirement for the passive carrier exemption - that the retransmitter merely provide wires, cables or other communications channels for the use of others -

also was met. EMI's cable customers cannot afford the capital costs of repeater stations, and satellite transponders are not widely available. EMI was engaged in selling only transmission services for a maximum compensation of $3,000 per cable system; it was not "selling" the Mets games, as contended by Doubleday.

Judge Markey also observed that denying common carrier status to EMI might disrupt the compulsory license system pursuant to which cable systems pay license fees for program materials, measured by the number of cable viewers, under a formula provided in section 111(d)(2)(B) of the Copyright Act. These fees, which are distributed to copyright owners by the Copyright Royalty Tribunal, are paid in addition to the license or royalty fees paid directly to copyright owners such as Doubleday by television broadcast stations, including WOR-TV. The compulsory licensing system was enacted in order to avoid requiring each cable system to obtain the consent of numerous individual copyright owners. The court refused to impose additional copyright liability on EMI when the same activities, if carried out by a cable system with its own retransmission facilities, would not be subject to a second royalty fee.

The court distinguished, in a footnote, the case of WGN Continental Broadcasting Company v. United Video, Inc. (reported below) by noting the satellite retransmitter's practice in that case of removing certain WGN program material.

Eastern Microwave, Inc. v. Doubleday Sports, Inc., Docket No. 82-7243 (2d Cir., October 13, 1982) [ELR 4:13:2]

Satellite Retransmitter's substitution of teletext material in news broadcast of WGN-TV is copyright infringement, Federal Court of Appeals rules

An undreamt-of confrontation between technology and the Copyright Act has been adroitly resolved in a recent Federal Court of Appeals ruling in a case between Chicago TV station WGN and United Video, a satellite retransmitter that delivers WGN signals (without WGN's consent) to cable systems throughout the country.

In an experimental project, WGN decided to use the "vertical blanking interval" (VBI) during its nine o'clock news program to broadcast additional news messages and a program schedule. This material would be received on a different channel in the home of cable subscribers than would the regular news program. But the VBI material never reached its intended test audience - the subscribers of a WGN-affiliated cable system in

Albuquerque - because United Video substituted in the VBI teletext supplied by Dow Jones.

WGN brought an action for copyright infringement of its news program (the VBI material was not copyrighted separately), but its claim was denied by a Federal District Court (ELR 3:20:4) which ruled that United's retransmission of the Dow Jones material was not a "public performance."

This decision has been reversed on appeal on the ground that WGN's copyright in its news program encompassed the "related images" in the VBI. The court first pointed out that the definition in the Copyright Act of "perform or display ... publicly" was broad enough to encompass "indirect transmission to the ultimate public." Thus, the "private performance" exemption was not available to United. The court ruled that the "passive carrier" exemption also would not apply, because United was not retransmitting WGN's signal intact.

United would be relieved from its obligation to carry the teletext only if it were copyrighted separately. In that case, cable systems might request that United carry only the nine o'clock news and not the teletext. But if the teletext were indeed covered by the news copyright, any cable system picking up the news via United would be obligated to take the accompanying teletext.

United conceded that if the teletext were overlaid on the television images of the news (as are captions for the deaf or English subtitles for foreign movies), it would be covered by the copyright for the news. But in this case, United argued, the teletext was intended to be viewed on another channel of the same set. Nevertheless, this separate-channel teletext display remained part of the news, stated Judge Richard Posner, since it was intended by WGN to be seen by the same viewers who were watching the news, during the same time in which the news was broadcast and as an integral component of the news program. The teletext would not be viewed simultaneously with the news program, but neither are the frames of a motion picture, each of which is covered by the copyright in the motion picture. Analogous situations described by the court included a dictionary, the pages and entries of which are not intended to be read in sequence, and a history book in which a fold-out map may be included for a reader to consult from time to time. WGN similarly intended its teletext to be available to the viewer as a source of program information and also as a means of presenting local news of Chicago supplementing the information which was presented during the main program. The court characterized this approach as "two-channel" programming, and stated that it could not see that "the difference between a one and a two-channel program is much more profound than that between a silent movie and a talkie." If television technology required two channels to simultaneously carry a sound program, and the VBI were used to transmit the sound, one program copyright would suffice, just as it does for a televised musical performance and its "stereo simulcast."

The court noted that technological advances were among the factors motivating the reform of the Copyright Act, and that flexibility in interpreting the Act was encouraged in order to avoid the necessity of constant updating of the Act by Congress.

In conclusion, the court emphasized that it did not hold that WGN "owns" the VBI in its copyrighted programs - the copyright is in the programming. A teletext that was not intended to be viewed in conjunction with a program would not give the teletext copyright protection despite the fact that it was transmitted via the VBI in a copyrighted program. These images would not be "related images" of a protected audiovisual work. The court declined to distinguish protected material on the basis of whether it was overlay or nonoverlay (i.e., shown on a different channel). Instead, it said that interpreting "related images" to mean those shown on a single channel was too limiting. The court therefore granted WGN's request for an injunction to bar further interference with the VBI of its nine o'clock news by United Video.

WGN Continental Broadcasting Company v. United Video, Inc., Case No. 81-2687 (7th Cir., August 11, 1982) [ELR 4:13:3]

Turner Broadcasting enjoined from broadcasting the 1982 National League Baseball Championships via "superstation" WTBS in violation of ABC's exclusive rights

In 1979, the 26 major league baseball clubs granted ABC the "exclusive television broadcasting rights" to end-of-season playoff events including the 1982 National League Championship Series. ABC agreed to pay $9 million to Major League Baseball for the rights to the championship series. But before the Atlanta Braves and the St. Louis Cardinals could shout "let's play ball," a legal championship series was played between ABC Sports and Ted Turner, the owner of the Braves, in a Federal District Court in New York.

Turner Broadcasting owns both the Atlanta Braves and television station WTBS in Atlanta. In 1972, WTBS (then known as WTCG) acquired the right to telecast, as a flagship station, certain baseball games of the Braves, both over-the-air and by cable. There is a "flagship exception" to ABC's exclusive rights. The exception grants each club participating in the championship series the right to permit its local flagship station to broadcast the series in the club's home market.

WTBS is a "superstation" whose signals are retransmitted by satellite to cable systems serving more than 20 million homes throughout the country. On several occasions since 1975, flagship telecasts of baseball games have been retransmitted beyond the normal over-the-air broadcast range of the originating station to cable systems with more than two million subscribers, in technical violation of ABC's exclusive rights. Nevertheless, Judge Mary Lohnson Lowe found that WTBS' proposed transmission was likely to be much more damaging to ABC's rights than any prior non-home market cablecast of regular season games. Other stations generally had not encouraged the cable retransmission of their broadcasts, as had WTBS.

Judge Lowe agreed with ABC that WTBS was not entitled to benefit from the "flagship exception." WTBS is not a local over-the-air station, but rather is involved in a cable network reaching millions of viewers. The fact that Turner Broadcasting does not have the power to prevent the retransmission of WTBS' signals did not help the station, because Turner has facilitated the nationwide expansion of its signal.

Judge Lowe also noted that the WTBS broadcast would impair ABC's relationships with its affiliates and sponsors, because these parties have paid large fees for advertising time on the network with the expectation of reaching a significant viewing audience. For example, one of the major sponsors of the ABC telecasts of the championship series was Miller Brewing Co. WTBS, however, intended to sell national advertising for the series to Anheuser-Busch. Turner expected to net approximately $250,000 for each game aired by WTBS. WTBS' broadcasts also would adversely affect Major League Baseball's ability to market television rights to special events - an injury which the American public ultimately is likely to bear, in Judge Lowe's view.

Turner took another turn at bat with the argument that ABC never had been granted any rights with respect to cable or closed circuit broadcasts. In support of this position, Turner noted ABC's failure to respond to prior infringements of its purportedly exclusive broadcast rights. The court reiterated its view that those infringements in no way compared to Turner's proposed activities, and that no waiver of ABC's exclusive rights had occurred.

Turner also struck out with its argument that the Commissioner of Baseball did not possess the power to grant cable rights to a broadcaster because this power was reserved to the individual clubs. ABC pointed out that the use of the term "exclusive" in the sports television industry would preclude competing live coverage of the same event by the use of any electronic technique. The court awarded the inning to ABC. It noted that no ball club other than the Braves has exercised any allegedly reserved power to sell lucrative cable rights on its own. Judge Lowe therefore found that it was likely to be proven at trial that the Commissioner of Baseball did have the authority to sell ABC exclusive television rights for the championship series, and that ABC had reasonably relied on the Commissioner's authority.

ABC also was likely to demonstrate that the proposed broadcast would constitute unfair competition against ABC by Turner Broadcasting and the Braves.

Thus, ABC's motion for a preliminary injunction barring the broadcast of the 1982 National League Championship series over WTBS was granted. The order did not result in the blackout of the event in Atlanta, because ABC telecast the games nationwide. The court also enjoined Turner from interfering with ABC's access to the Brave's stadium to prepare for, and to actually telecast, coverage of the series.

ABC Sports, Inc. v. Atlanta National League Baseball Club, Inc., Case No. 82 Civ. 6104 (S.D.N.Y., Oct. 4, 1982) [ELR 4:13:4]

Miami Dolphins may black out telecasts of home games by TV station located outside Miami's home territory

The NFL, as well as professional baseball and hockey, enjoy a limited statutory exemption from the antitrust laws (15 U.S.C.A. sections 1291 and 1292). Professional sports teams in each league are permitted to sell the television rights to their games as a single package. As a result, prospective buyers, such as the networks, are forced to buy the rights to all football games played by the NFL and cannot bargain with each team on an individual basis to televise just a few select games. Interestingly enough, the rule for college sports is different (ELR 4:11:2).

This exemption, however, does not apply if the agreement restricts the "televising of any games within any area, except within the home territory of the member club."

In other words, a television agreement made on behalf of the entire NFL is legal even though it restricts the televising of professional sporting events, so long as any television blackouts resulting from the restrictive agreement affect only the home territory of the member club.

The Congressional intent underlying this exemption is the belief that a team's home games should not be televised unless that team consents. Congress was concerned that televising games within the home territory of a club could deprive the team of its gate attendance and ultimately threaten the overall economic vitality of the league.

NFL Bylaws prohibit telecasts of home games within a club's home territory unless both teams agree to such telecasts. The NFL Constitution and Bylaws define "home territory" as the area within a 75-mile radius surrounding the city limits.

WTVX is a television station located 96 miles north of Miami. It is thus outside the home territory of the Miami Dolphins. However, WTVX recently installed a new, more powerful transmitter, which enabled its signal to penetrate into the Miami Dolphins' home territory. As a result, the Miami Dolphins were concerned about WTVX telecasts reducing their ticket sales. Therefore, the Dolphins refused to give WTVX permission to telecast its home games which were not sold out.

WTVX brought suit against the NFL and against the Miami Dolphins for damages and injunctive relief, alleging that the Dolphins' refusal to allow WTVX telecasts violated Section 1 of the Sherman Act.

The issue presented by the case was whether the NFL may black out home games only when a TV station's transmitter is located within the 75-mile home territory, or whether blackouts are permissible when the transmitter is located outside the home territory, but the signal nevertheless penetrates into the 75-mile home territory. It was a question of first impression.

A Federal Court of Appeals has held that signal penetration, rather than station location, is the crucial factor in determining whether or not TV stations are televising within a club's home territory. The court reasoned that the "signal penetration" definition better achieves the purpose underlying the statute which is protection of the club from a dilution of its home game attendance.

The court pointed out that since technological advances have now made it possible for stations such as WTVX to transmit its signal (by satellite or otherwise) to far and distant locations, the signal penetration rule, rather than a transmitter location rule, must control for the purpose of defining the word "televising" under Section 1292.

In short, the signal penetration rule provides greater protection to teams like the Miami Dolphins and is more in line with the intent of Congress to shield member clubs from a decline in football home game attendance.

WTWV, Inc. v. National Football League and Miami Dolphins, Ltd.,678 F.2d 142 (11th Cir. 1982) [ELR 4:13:5]

Copyright Royalty Tribunal's increase of jukebox compulsory license fee is upheld by Federal Court of Appeals

Section 116 of the Copyright Act permits operators of coin-operated phonorecord players ("jukeboxes") to secure as a matter of right, and even over the objection of copyright owners, a compulsory license enti tling the jukebox operators to stock their jukeboxes with records of copyrighted musical compositions, so long as the copyright owners are paid the applicable compulsory license royalty. Until the new Copyright Act became effective in January 1978, jukebox operators were statutorily exempt from any requirement that they obtain a license from or pay royalties to owners of copyrighted musical compositions embodied in records played in jukeboxes. Under Section 116 of the current Act, however, jukebox operators are requited to distribute to copyright owners through the owners' performing rights societies (ASCAP, BMI, or SESAC) an $8.00 compulsory license fee per year per jukebox operator.

On January 5, 1981, the Copyright Royalty Tribunal, after hearing arguments by the performing rights societies and by the Amusement Music Operators Association ("AMOA"), increased the compulsory license fee to a $50.00 per year fee. The fee increase will be phased-in in two stages. The Tribunal ordered jukebox operators to pay $25.00 per jukebox in 1982 and 1983; thereafter, the operators will be required to pay a $50.00 fee. Additionally, the Tribunal determined that in 1987 the $50.00 fee will be subject to a cost-of-living adjustment. The Tribunal's final rule was reached pursuant to Section 801(b) (1) of the Act directing the Tribunal "to make determinations concerning the adjustment of reasonable copyright royalty rates . . ."

In the detailed analysis in its final rule, the Tribunal concluded that its rate adjustment met the four statutory criteria set out in Section 801 of the Act. The Tribunal found that the increased payment for jukebox performances will encourage the creation of music by songwriters and its exploitation by music publishers and therefore will maximize "the availability of creative works to the public." The Tribunal also found that the phasing-in of the fee schedule and the possibility of adjusting the fee in the future based on inflation will ensure a fair return to the copyright owner and a fair income to copyright users (jukebox operators). The Tribunal also found that jukebox operators and owners of establishments using jukeboxes do not "make any unique or distinctive contribution concerning creativity, technology, capital investment, cost, risk and the opening of new markets for creative expression and media for their communication." Accordingly, the Tribunal concluded that by increasing the remuneration to copyright owners, and thereby likely decreasing jukebox operators' profits, unique or distinctive contributions generally would not be impeded. Finally, the Tribunal found that the fee increases would minimize any disruptive impact on the music industry and on generally prevailing industry practices. In this regard, the Tribunal emphasized that " a failure to establish a reasonable fee for jukebox performances could interfere with the receipt by performing rights societies of reasonable fees from other users of copyrighted music by artificially depressing fees similar to those under examination." The Tribunal did recognize, however, "that its decision would also affect the jukebox industry because of the low profit margin earned by most jukebox operators." But the "Tribunal concluded that the phasing-in approach to fee increases which it adopted 'adequately reflected' concern for the impact of the change on all parties involved."

The Federal Court of Appeals, in reviewing and approving the Tribunal's rate increases, aptly remarked that "Ratemaking is an art, not a science." The court concluded that the Tribunal's final rule was not, as it must not be, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. The court also found that the final rule was supported by "substantial evidence" and that the Tribunal "has given reasoned consideration to each of the pertinent factors (involved in the decision)."

AMOA argued that the rate increases were too high in light of the depressed economic condition of the jukebox operators' business. The survey offered by AMOA purported to show that 18% of all jukeboxes in operation earned less than $300 per year and that 57% earned less than $600 per year. The survey also suggested that the operators' average annual revenue per jukebox was $754 while their average annual operating costs per jukebox were $673, thus producing a statistically calculated average gross profit per jukebox of $88 annually. However, the Tribunal noted that the questionnaire distributed in connection with the survey generated a low response rate from the jukebox operators, estimated at approximately 14%. The Tribunal therefore could not justifiably rely on the survey's results. Recognizing this, the court noted that "Marginal constituents populate every industry in a market economy, and some of these constituents may go out of business when costs increase. But to accept the proposition that AMOA may deprive copyright owners of increased remuneration for the exploitation of their works by showing that some jukebox operations will become unprofitable is, we believe, unsound and unjust."

ASCAP and SESAC argued that the royalty fee should be set between $70 and $140, with an annual inflation adjustment. In support of their position, they provided marketplace analogies in connection with monies paid to copyright owners for the use of commercial background music services and the playing of phonorecords in night-clubs. The court was satisfied that the Tribunal properly tempered the fee increases urged by ASCAP and SESAC in an effort to minimize any disruptive impact on the music industries.

BMI proposed that the Tribunal determine the fee by applying the Consumer Price Index to a proposed juke-box royalty rate which would have resulted in a recom-mended fee of $30 which, if adopted, would then be adjusted annually for inflation. The Tribunal rejected this proposal, and the court found that this proposal "does not accord with the mandate of the Act that the

Tribunal perform an independent analysis based upon evidence to arrive at a fair and reasonable fee."

Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982) [ELR 4:13:6]

Briefly Noted:

Copyright.

Keeping advertisers "down on the farm" was Fenton McHugh's chore as part of a joint venture agreement with WGN Continental Productions. In 1975, McHugh secured sponsorship for an initial 13 week run on WGN of a national farm news show entitled "National Farm Digest." However, due to a lack of sponsorship for a subsequent run, WGN terminated the joint venture and pulled the "National Farm Digest" off the air. Within three months of the termination, WGN presented its own show - the "U.S. Farm Report" - sponsored by a company which McHugh had approached to sponsor the "National Farm Digest." McHugh brought an action against WGN for tortious interference with a literary prop erty. WGN's motion for a directed verdict was granted and this ruling has been upheld on appeal. The court found that the joint venture agreement gave WGN the right to terminate the program if a national sponsor could not be found and to create television programs similar or identical to the "National Farm Digest" provided this title was not used. There was no proof that WGN tortiously misappropriated McHugh's alleged common law copyright in the idea of a national farm news show.

Fenton McHugh Productions, Inc. v. WGN Continental Productions Co., 434 N.E.2d 537 (Ill.App. 1982) [ELR 4:13:7]

Idea Protection.

"The unconditional public disclosure of an idea by the originator makes it the property of all and operates to deprive the originator of any further proprietary rights in it," a Federal District Court in Massachusetts has held. Morris Leibovitz, a private citizen, sent an unsolicited letter to CBS in 1972 requesting employment. He included a "series of suggestions" for television programs "in an attempt to demonstrate his creative abilities." When CBS allegedly used these ideas without offering Leibovitz employment or other compensation, Leibovitz filed suit, contending that CBS had breached its implied contract with him to compensate him if it used his submitted ideas. Leibovitz also alleged that CBS infringed his copyrights in his submitted ideas. The court disagreed with Leibovitz, noting that "although plaintiff could have protected his idea by contract, he failed to do so. An unsolicited disclosure cannot impose upon defendant an implied contractual or fiduciary relationship." Leibovitz's allegation of copyright infringement failed because "the copyright law does not extend to the protection of mere ideas or concepts but rather covers only a particular mode of expressing those ideas or concepts."

Leibovitz v. Columbia Broadcasting System, Inc., 213 U.S.P.Q. 289 (D.Mass. 1981) [ELR 4:13:7]

Employment Agreement.

A dispute between the Indiana Pacers and William Leonard, the team's former head coach and general manager, over the terms of Leonard's employment agreement was not a proper matter for injunctive relief, an Indiana appellate court has ruled. A trial court had ordered the Pacers to stop demanding that Leonard return to work for the team and ordered the Pacers to pay him pending resolution of his breach of contract claims. But the appellate court found that if Leonard were entitled to the salary guaranteed him under the employment agreement, he could be adequately compensated by an action at law for damages, and thus the order requiring the Pacers to continue to pay Leonard was improper. Furthermore, the Pacer's mere assertions that Leonard should return to work would not cause irreparable harm either, the appellate court ruled.

Indiana Pacers v. Leonard, 436 N.E.2d 315 (Ind.App. 1982) [ELR 4:13:7]

Racial Discrimination.

The Hudson Valley Freedom Theatre, Inc., (HVFT) a nonprofit, tax-exempt theatrical production corporation, has standing to bring an action claiming that New York county officials denied the corporation CETA funds for racially discriminatory reasons. HVFT "is in a better position than anyone else to challenge allegedly discriminatory practices leading to cutting its grants funds," stated a Federal Court of Appeals, and has a solid claim of its own of economic injury. Thus the lower court judgment (ELR 3:10:7) dismissing HVFT's complaint has been reversed and the matter has been remanded for further proceedings. A concurring judge noted that HVFT will be required to establish that the denial of funds injured HVFT's ability to present theatrical productions which would reach the local black and Hispanic communities and that the denial was motivated by "racial animus."

Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702 (2d Cir. 1982) [ELR 4:13:7]

Attorney Fee Contract.

When Gary Rossington and Allen Collins, performers in a popular musical group, hired a law firm to negotiate certain agreements on their behalf, the firm proposed that it be paid a fee for its services equal to five percent of the performers' gross earnings. Fee contracts were sent out by the firm. But Rossington and Collins did not sign any of the contracts. Instead, they eventually suggested that payment be made on a straight fee basis. A Federal District Court in New York has dismissed the law firm's action to recover fees from the performers. The court found that the contract between the performers and the law firm was required by the Statute of Frauds to be in writing since it was not to be fully performed within one year. But the necessary writing was not signed, because the law firm's proposal ultimately was rejected by the performers. However, the court did grant the law firm an opportunity to plead a claim for the fair value of the services it did render.

Arrow Edelstein & Gross, PC. v. Rosco Productions, Inc., 538 F.Supp. 608 (S.D.N.Y. 1982) [ELR 4:13:8]

First Amendment.

The Supreme Court of Rhode Island has affirmed a trial court ruling granting summary judgment to the National Broadcasting Co. in an action brought by the parents of a 13-year-old boy. The boy died tragically while attempting to imitate a hanging stunt performed on the May 23, 1979 broadcast of the "Tonight Show." The court noted that it was not shown that the broadcast incited immediate harmful conduct so as to preclude First Amendment protection. In fact, the danger of the stunt was stressed and the stuntman-demonstrator stated "it's not something you want to go and try." It was pointed out that the consequence of permitting any recovery might be increased self-censorship by broadcasters, and this would violate both the broadcaster's right to select programming and the "paramount" right of viewers to access to an uncensored range of program materials.

DeFilippo v. National Broadcasting Co., Inc., 446 A.2d 1036 (R.I. 1982) [ELR 4:13:8]

DEPARTMENTS

In the Law Reviews:

Graham v. Scissor-Tail, Inc.: Unconscionability of Presumptively Biased Arbitration Clauses Within Adhesion Contracts by Gregory R. Kim, 70 California Law Review 1014 (1982)

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