RECENT CASES

Producers of "Bonanza" and "The High Chaparral" have standing to bring block booking claims against NBC, Federal Court of Appeals rules

A Federal Court of Appeals has reversed a District Court ruling that Aurora Enterprises and Xanadu Productions, the developers of the television series "Bonanza" and "The High Chaparral," lacked standing to bring an antitrust action against NBC. The programs were sold to, and exhibited by, NBC prior to the FCC's 1972 order requiring the three major networks to divest themselves of their syndication businesses. NBC subsequently sold all syndication rights it then owned, including the rights to Bonanza and The High Chaparral, to National Telefilm Associates, retaining as a part of the

sales price a share of the programs' profits. Aurora and Xanadu alleged that NBC and NTA had engaged in block booking and that NBC's purchase of network broadcast rights to the series was illegally tied to its acquisition of syndication rights to the series. Aurora and Xanadu's claims of block booking and tying were dismissed by the District Court (ELR 3:21:3).

On appeal, Circuit Judge Warren Ferguson cited Section 4 of the Clayton Act which provides, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ." The "by reason of" clause was interpreted in Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970), cert. denied 402 U.S. 923 (1971), in which the owner of a motion picture theater charged that his receipts were diminished by a block booking scheme. The theater owner was found to have standing to sue since he was within the "target area" of potential

injury. However, in the Aurora and Xanadu case the District Court concluded that the Mulvey doctrine was overruled by the United States Supreme Court in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), which denied standing to several bowling alley operators because they failed to prove "an injury of the type the antitrust laws were intended to prevent that flows from that which makes defendant's acts unlawful," that is, an injury occurring by reason of a violation of the antitrust laws.

Judge Ferguson agreed with the District Court's characterization of Aurora and Xanandu as producers of the tying product rather than competitors of the tied product or purchasers in the market for the tied and tying product. But Judge Ferguson distinguished the facts of Brunswick, rejected the District Court's narrow view of standing, found that NBC's alleged block booking activity was a per se violation of the antitrust laws and

upheld Aurora and Xanadu's standing under Mulvey to bring a tying claim.

An attempt to monopolize claim also was adequately stated, ruled the court since it was possible to infer the requisite "predatory conduct" from the elements of a tying claim.

Aurora and Xanadu also alleged that a Sherman Act violation occurred when NBC conditioned its purchase of network exhibition rights to Chaparral on the purchase of syndication rights to the program. This claim was dismissed as barred by the applicable four year statute of limitations. The statute was not tolled by a since-settled civil antitrust action brought by the Justice Department. And the fact that NBC continued to receive benefits from its 1966 contract was not sufficient to restart the statute of limitations, stated the court. It also was not made clear how an alleged conspiracy between

NBC and NTA to restrain competition with NTA's syndication rights injured Xanadu and Aurora.

Aurora Enterprises, Inc. v. National Broadcasting Company, Inc., Case Nos. 80-5948, 80-5001 (9th Cir., Sep. 23, 1982) [ELR 4:14:1]

New Jersey Supreme Court rules that Glenn Miller's attorney was not entitled to receive one-third share of recording royalties after 1967, because Miller's widow did not intend royalty payments to continue in perpetuity

If you are in the mood for a saga, this one begins some years after Glenn Miller's disappearance in 1944 while on a military flight. In 1951, David Mackay, now deceased, the attorney for the bandleader's estate,

suggested to Miller's widow that RCA might be interested in making commercial quality recordings from the recordings Mackay had preserved of radio performances of the Glenn Miller Orchestra. Although the sound quality of these "air checks" was poor, Mackay proceeded to catalog them and to monitor their recording by RCA - a "monumental job." Helen Miller, as executrix of Miller's estate, entered into a contract with RCA by which RCA agreed to release one album a year for three years, each album to contain eight selections recorded from among 250 of the air checks. Miller's estate was to receive a six percent royalty on 91.5 percent of all sales.

On the same day that Helen Miller signed the RCA contract, Miller signed a document prepared by Mackay in which she agreed to "sell, assign, transfer and set over" to Mackay one-third of the RCA royalties.

The recordings met great commercial success, and in 1954 a new contract was signed by RCA. The estate

agreed to turn over to RCA all previously unreleased recordings of the Glenn Miller Orchestra. RCA agreed that it would re-record and release a minimum of 80 performances from these recordings and would pay the estate six percent of 90 percent of all sales. RCA also agreed, for tax reasons, to pay the estate $50,000 a year from 1955 to 1959; any income exceeding that amount would be retained by RCA as a reserve fund against future payments. But when the reserve fund exceeded $250,000, RCA was to pay the estate the excess semi-annually as earned. This was quite a change in fortune for an estate which had seen royalty income from recordings decline in the years 1948-1951 from $54,000 to $14,500.

As well as signing the 1954 RCA agreement, Helen Miller again executed a transfer of one-third of the royalties accruing under the agreement to Mackay. However, the first $15,000 earned each year was excepted

from the "one-third" provision, apparently because Miller believed that the estate should earn this amount whether or not the recordings derived from the air checks earned any income.

The commercial success of the RCA releases continued, generating a new contract in 1955 which was amended in 1958, 1960, 1962 and 1963. The amend ments increased both the reserve ceilings and the annual minimum payment, and extended the term of the annual payment schedule through 1967. Mackay's royalty interest was reaffirmed by Miller in documents executed in 1958 and in 1960. The 1960 document stated that Mackay would receive one-third of the monies accruing under the 1955 RCA contract "and any amendments thereof."

Helen Miller died in 1966. Mackay was appointed by Miller to serve as the executor of her estate; he also assumed the role of successor executor of Glenn Miller's

estate. In 1968, Mackay proposed to Miller's heirs that the $15,000 exclusion in the royalty interest agreement be eliminated and that in return he would no longer receive a $5,000 legal service fee from the Glenn Miller estate. This arrangement was accepted by Helen Miller's children, Steven Miller and Jonnie Soper. But in 1975, Miller and Soper undertook an investigation into Mackay's conduct of the estate; and they subsequently brought an action for an accounting.

The trial court's most significant conclusion was that Mackay's right to receive one-third of the RCA royalty income ceased on March 15, 1967. Over a vociferous minority opinion, the New Jersey Supreme Court in a 4-3 decision has held that there was sufficient support for the trial court's ruling.

The Supreme Court observed that the Mackay royalty documents did not give any indication of how long the attorney was to continue to receive his one-third

interest. The majority perceived this omission as an ambiguity to be resolved by an examination of the intent of the parties. According to the trial court, Helen Miller never manifested an intent to give Mackay an interest that would last in perpetuity. Indeed, the repeated execution of new royalty interest documents appeared to the court to refute any original understanding that Mackay's interest in the royalties was to last as long as royalties accrued. Further, Miller at one point had sought to give Mackay an interest in the royalties on a year-to-year basis; she signed the 1955 "transfer" in 1958 only after the negative tax consequences of not doing so were clarified by Mackay. The trial court pointed out that terminating Mackay's interest in 1967 was reasonable. He had already received more than $400,000 between 1952 and 1967 - a "considerable return" for his efforts in connection with the recordings, the court observed. It also was noted that there was a close link between the signing of

the RCA contracts and of the Mackay royalty documents. This connection, along with other evidence presented, amply supported a "compelling inference" that Miller understood Mackay's interest to be limited in time by the payment schedule set forth in the underlying RCA contracts.

Additional support for the 1967 cutoff date was found in the fact that none of the parties realized how profitable the sale of RCA's recordings would be. It was expected that the amounts paid under the contracts would have ceased by 1967. Based on this projection, as incorrect as it was, the court reasoned that "If this is so, it is unlikely that Mrs. Miller contemplated that Mackay would go on receiving payments indefinitely. It seems more likely that she believed that by ... March 15, 1967, the Glenn Miller estate, and as a result David Mackay, would no longer be receiving income from RCA."

The traditional principle that ambiguity in a contract is construed against the draftsman also was applied against Mackay. As a sophisticated party, Mackay could have worded the royalty document to provide for the payment of his interest as long as royalties accrued, declared the court.

In dissent, Judge Pashman chastised the majority for having "misconstrued the various contracts, misdescribed important events, misinterpreted the intent of the parties and misapplied the law of contracts." Judge Pashman believed that he was obligated to recount in detail an "accurate" description of the lengthy factual history of the matter. After so doing, he singled out the statement in Miller's contract with Mackay that the estate "hereby sells, assigns, transfers and sets over" to David Mackay the agreed-upon royalty payment. Judge Pashman discounted the majority's finding that the royalty-interest grant was ambiguous, pointing out that

the use of the word "sale" does not normally refer to a temporary arrangement. Although Mackay could have stated that the transfer was permanent, there was no reason for him to believe that such a statement was necessary. And Helen Miller was an "astute business person" who could have altered the document if she intended to limit Mackay's interest in any way. The royalty payments went on for 15 years, hardly a temporary arrangement in Judge Pashman's view. Further, after 1960, despite the fact that no new documents were executed between Miller and Mackay, Miller continued to deliver to Mackay his royalty interest.

Judge Pashman also pointed out that the original royalty document incorporated the provisions of the 1951 contract with RCA, which stated that the record company had the right to produce records "perpetually" and the duty to pay royalties on all records sold. While the 1954 contract with RCA did not explicitly contain the

language of the 1951 contract, the parties apparently never intended to limit RCA's rights right to sell records to the term of guaranteed annual payments. The guaranteed payment provision was a tax arrangement. RCA continued to sell records and pay royalties to the estate after the specified annual payments ended in 1967. The only difference was that the royalties were paid as earned rather than spread out in specified smaller amounts.

Judge Pashman then observed that "If it is reasonable to require RCA to continue paying royalties to the estate as long as it releases records, it is also reasonable to require the estate to pay Mackay his fair share when the estate receives those royalties." According to Judge Pashman, the estate's obligation to pay royalties to Mackay should cease only when RCA stops selling records and stops paying royalties to the estate. The fact that more money was earned than anticipated did not

excuse RCA from its obligation to pay royalties to the Miller estate; similarly, it should have had no bearing on Mackay's rights. The estate was not being required to buy Mackay's services for an unreasonable period of time. It was continuing to benefit from past services, namely, the hundreds of hours of work performed by Mackay without which no recordings would have been made at all.

Judge Pashman would have concluded that the trial court's finding was not based on sufficient credible evidence, and would have reversed the judgment of the Appellate Division upholding the trial court finding.

In re Miller, 447 A.2d 549 (N.J. 1982) [ELR 4:14:2]

Radio producer's use of title "The Music Makers" for a syndicated musical program did not preclude

distribution of a similarly titled television series featuring musical performers

Narwood Productions, the producer of "The Music Makers," a series of weekly one-hour radio programs featuring the music of popular entertainers, has been denied injunctive relief in an action for trademark infringement brought against Lexington Broadcast Services Company, the distributor of a series of monthly television programs featuring musical performers in concert. Lexington's television series bears the title "LBS's Music Makers in Concert."

Judge Goettel of the Federal District Court in New York City observed that the trademark "The Music Makers" "falls within the middle range of distinctiveness." Although arguably descriptive of Narwood's services, the mark might also be considered suggestive in that the interview-music format of the program is not

immediately apparent. For the purpose of ruling on Narwood's motion, Judge Goettel found that the mark is not particularly distinctive, and that there was no substantial evidence that the title had acquired a secondary meaning.

The likelihood of confusion between the marks was diminished by the fact that Lexington describes its series to television stations as "LBS's Music Makers in Concert." However, in advertising LBS's first program, WNEW-TV in New York referred to the series as "Music Makers in Concert." The title also was abbreviated as "Music Makers" in the TV-Guide listing. Judge Goettel found that it was not shown that the use of the shortened title was intended or should have been reasonably foreseen by LBS or that LBS knowingly continued to supply its program to parties using the shortened form of the title in advertisements. The fact that LBS used its company name and the words "in Concert" in the title of

its series weighed against a finding that consumer confusion was likely.

In considering another standard for assessing a trademark infringement claim - the proximity of the products - Judge Goettel pointed out that the format of the programs is different; Narwood's programs have a music-interview format while LBS's programs feature an entertainer in concert. The programs also are directed to different audiences. Narwood has focused on performers such as Rosemary Clooney, Vic Damone and Benny Goodman. The LBS series has presented ABBA, Peter Allen, Rita Coolidge, Ian Hunter and The Pointer Sisters. And, of course, the programs are broadcast over different media, thereby enlarging the "competitive distance" between them.

The sophistication of the product's purchasers also was distinguishable. The television and radio programmers who deal with Narwood and LBS are highly

sophisticated and "Regardless of any trademark, they would surely be well informed about the nature of a program and its producer . . ." stated Judge Goettel. A second group of purchasers - the listening and viewing audience - is less sophisticated. The possibility of confusion among this group might support Narwood's position. However, this group is more likely to be influenced by the featured performer on a program, not by the title, observed Judge Goettel.

The court also noted that no evidence of actual confusion was shown; that Narwood has no present intention to enter the television market; and that the quality of LBS's television series was not inferior to that of Narwood's programs. Additional support for Narwood's likelihood of confusion argument was found in the company's contention than an audience might perceive one program as a "spin-off" of the other and therefore conclude that the producers of the two programs were the

same. But as shows generally do not spin off from one medium to another, this was not a particularly strong argument, stated the court.

It was found that LBS's original decision to use the title "Music Makers" was made in good faith. A trademark search was conducted, as a result of which the company concluded that the widespread use of the term would preclude any claim of exclusive trademark rights. Narwood had not yet registered its title; LBS had no knowledge of Narwood's use of the term until shortly before the scheduled commencement of the LBS broadcasts. At that point, in response to Narwood's objections, LBS agreed to add the company's name and the words "in Concert" to its title.

In view of these factors, the court found that Narwood was not likely to prevail on the merits of its claim and, accordingly, was not entitled to a preliminary injunction.

Narwood Productions, Inc. v. Lexington Broadcast Services Company, Inc., 541 F.Supp. 1243 (S.D.N.Y. 1982) [ELR 4:14:3]

Blackjack player Ken Uston must be permitted to play in Atlantic City casinos, in the absence of state regulation barring card counters, New Jersey Supreme Court rules

Ken Uston, a well-known advocate and practitioner of the blackjack strategy known as card counting, may be counting courts as well in his marathon encounter with the Resorts International Hotel. In January 1979, the New Jersey Casino Control Commission adopted a rule which benefits card counters. Soon after, Resorts excluded Uston from its casino based on Resorts' view that he was a professional card counter. Resorts then

formulated standards for the identification of card counters and adopted a general policy to exclude such players.

The Commission upheld Resorts' decision to exclude Uston, citing the casino's common law right to exclude any individual as long as the exclusion did not violate state or federal civil right laws. An appellate court reversed the Commission's decision (ELR 3:15:5) and the appellate court ruling has been upheld by the New Jersey Supreme Court. The Supreme Court found that Resorts had no right to exclude Uston on the ground that he successfully plays blackjack under the existing rules. While not deciding the extent of Resorts' common law right to exclude patrons for reasons not covered by Commission regulations, the Supreme Court did hold that "the common law right to exclude is substantially limited by a competing common law right of reasonable access to public places." New Jersey courts have

acknowledged that when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. The casinos may still exclude the disorderly, the intoxicated and repetitive petty offenders. But Uston could not be dealt into one of these categories and he therefore has a right of reasonable access to Resorts' blackjack tables.

The New Jersey Supreme Court refused to decide whether the Casino Control Act empowered the Commission to adopt a regulation excluding card counters from casinos. The Commission is authorized to regulate gambling so as to assure the vitality of casino operations and fair odds to, and maximum participation by, casino patrons. The court suggested that in considering the possible regulation of card counters the Commission must balance these goals and must also carry out the legislative policy of maintaining public confidence in casino

gambling. Casinos' exclusion of card counters and persons mistaken for card counters might well diminish such public confidence, said the court.

Uston v. Resorts International Hotel, Inc. 445 A.2d 370 (N.M. 1982) [ELR 4:14:4]

U.S. Supreme Court declares that New York statute barring the distribution of child pornography does not violate the First Amendment; on remand, New York Court Appeals reverses its prior invalidation of the statute

A New York criminal statute which prohibits the distribution of materials visually depicting children under the age of 16 engaged in sexual conduct, without requiring the material to be legally obscene, has been upheld by

the United States Supreme Court, in the Court's first examination of the issue.

The New York Court of Appeals had held that the statute violated the First Amendment since it barred the portrayal of children engaged in nonobscene sexual activity, but did not also prohibit the distribution of material showing children involved in other types of dangerous activities, and since the statute might be read as prohibiting the distribution of such works as medical texts or National Geographic pictorial reports.

But the U.S. Supreme Court has concluded that states are entitled to "greater leeway" in the regulation of pornographic depictions of children, due to the state's compelling interest in safeguarding the well being of minors. Restricting the distribution of such materials was found intrinsically related to the goal of preventing the sexual exploitation of children, stated the Court.

And the obscenity standards set forth in Miller V. California, 413 U.S. 15 (1973), are not responsive to the abuses to which the statutes of New York and many other states are directed.

Legislation in this area must still adequately define the prohibited conduct and describe the category of "sexual conduct" proscribed. However, the Miller standard was adjusted by the Court as follows: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." The distribution of nonobscene descriptions of sexual conduct which do not involve a live performance or a visual reproduction of such a performance retain First Amendment protection. And some showing of scienter on the part of the defendant still is required in order to impose criminal responsibility.

New York's statute was found to have complied with these requirements. The fact that the statute singled out for regulation a category of unprotected speech did not render it unconstitutionally "under-inclusive." And the statute was not overbroad, concluded Justice White, since any impermissible application would likely involve only a "tiny fraction" of the materials within the state's reach.

Three concurring opinions expressed varying views regarding the impact of the majority's decision on works of serious artistic value.

On remand from the Supreme Court, New York's Court of Appeals agreed that Section 263.15 of the state's Penal Law does not violate guarantees of free expression. Judge Meyer, however, in a concurring opinion, suggested that given the concerns expressed by the concurring justices of the Supreme Court regarding possible unconstitutional applications of the statute, New

York should recognize as a matter of state constitutional law an affirmative defense for literary, scientific or educational uses of the proscribed materials. Such a defense might avoid the chilling effect that the statute could otherwise have upon serious depictions of sexuality among youth which do not threaten the harms to which the statute was addressed, concluded Judge Meyer.

New York v. Ferber, Case No. 81-55 (U.S., July 2, 1982); People v. Ferber, New York Law Journal, October 2l, 1982 [ELR 4:14:5]

New York Ranger hockey player was entitled to allocate United States and Canadian source income on the basis of an entire season, including training camp and playoff time; but New York area living expenses

and certain promotional expense deductions were disallowed

Pete Stemkowski has skated to a partial victory in his action challenging an alleged tax deficiency of $3,927 for the taxable year 1971. In 1971, Stemkowski was playing hockey for the New York Rangers. He received compensation of $31,500 in the 1970-71 season and $35,000 in the 1971-72 season, plus various bonuses. As a nonresident alien (Stemkowski is a Canadian citizen), Stemkowski was subject to United States tax on that portion of his income connected with his performance of services in the United States, and was entitled to deduct expenses relating to such income. I.R.C. sections 871(b), 864(b). On his tax return, Stemkowski reported $44,271 in income, of which he initially excluded $10,625 as earned in Canada, and he claimed approximately $3,000 in miscellaneous deductions.

The Internal Revenue Service determined that Stemkowski had underestimated the proportion of his income derived from services in the United States. In contesting the IRS determination, Stemkowski increased his claimed exclusion for Canadian source income to $22,439 and claimed additional deductions on his United States source income.

This disparity in calculating United States source income was the result of a dispute concerning whether Stemkowski's compensation under his NHL Standard Player's contract, which does not distinguish between payments for services performed within and outside the United States, covered 365 days, 234 days (all but the off-season), or 179 days (the number of days in the regular season). Stemkowski argued that his contractual salary covered the time he spent in Canada during training camp, the playoffs and the off-season.

The Tax Court held that the contractual salary covered only the regular season and that out of the 179 days in the regular season, 164 days involved services performed in the United States. A tax deficiency was assessed accordingly.

A Federal Court of Appeals, however, has ruled that while Stemkowski's contract did not cover offseason services, the Tax Court's conclusion that the player contract did not compensate for training camp and the playoffs as well as the regular season was clearly erroneous. The off-season was not included in the calculation of United States source income because no specific obligations are imposed on a player during the off-season. For example, a player's obligation to appear at training camp "in good condition" did not require Stemkowski to follow any mandatory training program.

The Court of Appeals acknowledged that players are paid separate bonuses for participating in the playoffs

and that flat fees plus certain expenses are paid players for participating in training and preseason exhibition games. Further, players who are suspended are docked salary based on a ratio which utilizes the number of regular season games. Owners and league officials obviously would have an interest in having the contract cover a shorter time period to maximize the loss to suspended or striking players, noted the court. But the Standard Player contract requires a player's participation in training camp, exhibition games and in play-off games in exchange for the basic contract salary. Bonuses are incentives to motivate and reward superior performance, stated the court, and do not establish the length of the season under the contract.

Stemkowski's expense deductions also were challenged by the Commissioner of Internal Revenue. Among the business expenses which Stemkowski contended were necessary to meet his contractual obligation

to keep in good physical condition were the amounts he spent on golf, bowling, tennis, running, swimming and using health club facilities. The Tax Court held that these expenses were nondeductible because they were allocable to income earned in Canada. This holding also was clearly erroneous, the Court of Appeals ruled. Off-season conditioning contributes to the fitness required of players on the first day of training camp and throughout the regular season. The suggestion was made that golf, tennis or bowling "at least for a hockey player, may well be at the fun-and-relaxation end of the spectrum . . ." Also remanded to the Tax Court was the matter of allocating off-season conditioning expenses between Canadian and United States source income.

Miscellaneous business deductions also were claimed by Stemkowski and were disallowed on the ground that they were not required by the employer. The Court of Appeals found this an erroneous ground for disallowing

the deductions because I.R.C. section 162(a) requires only that the expense be a necessary and ordinary expense paid or incurred during the taxable year in carrying on a trade or business. Nevertheless, the Tax Court's decision was sustained, in part, on different grounds because Stemkowski had failed to establish deductibility of most of his expenses or did not meet substantiation requirements. Stemkowski's "promotional" expenses for entertaining fans, team members and the media, purchasing hockey tickets for friends, and having his hair styled, therefore were disallowed. The Tax Court was asked to make a factual determination based on the record as to whether Stemkowski's fan mail service was an ordinary and necessary business expense.

Stemkowski failed to show that his United States sales tax expenses were work-related - a condition of deductibility for a nonresident alien. And disability insurance premiums, "even for hockey players," noted the court,

are personal and not business expenses, and were properly disallowed.

The disallowance of a deduction for Stemkowski's New York area living expenses was upheld. Stemkowski chose to live in Canada. A deduction would not have been available to a Ranger player living in New York City all year and was also unavailable to Stemkowski who lived in New York only part-time. He was not engaged in business travel away from home, concluded the court.

Stemkowski v. Commissioner of Internal Revenue, Case No. 1206 (2d Cir., Sept. 17, 1982) [ELR 4:14:5]

Humorous restaurant review and critical book review are held to be non-libelous statements of privileged opinion

"Who ordered the libel action?" A student restaurant reviewer named Mary Mazza may well have asked this very question when her less-than-laudatory comments about the Havalunch restaurant, which were published in the West Virginia University Daily Athenaeum, resulted in a jury verdict of $15,000 in favor of the restaurant.

However, Justice Neely of the West Virginia Supreme Court of Appeals has reversed the judgment, finding that the jury failed to understand the instructions of the trial court and that the court erred in failing to direct a judgment for Mazza notwithstanding the verdict.

The court took the opportunity to "adumbrate" its views on the state's defamation law. Justice Neely pointed out that Havalunch was entitled to "private person" status since the restaurant had not held itself out as a place of "particular culinary interest." Havalunch's objection to Mazza's review was that she went beyond her

truthful observation of a roach on the premises and her distaste for a BLT sandwich and presented a false impression, going beyond an inference which a reasonable person would draw from the facts observed, that the restaurant was pervaded by vermin, that all of the food was of poor quality and that the customers were "rednecks."

But the court found that no element of negligence, let alone malice, was involved in the publication and that the award of $15,000 in punitive damages without a showing of malice was improper under Gertz v. Welch, 418 U.S. 323 (1974). Further, the review was an opinion based upon reasonable evidence, stated the court. The fact that the opinion was expressed in a humorous manner did not negate its protection as fair comment, particularly since the entire tone of the newspaper's review of area restaurants was humorous. Havalunch was not singled out for special treatment.

In a similar though unrelated case, a Federal District Court in New Jersey has held that a critical review of the book "Casino Gambling for the Winner," which described the book as "the #1 fraud ever perpetrated upon the gambling reader," was not libelous. Gambling Times magazine published an extremely negative review of Lyle Stuart's "how-to" casino gambling book. Stuart sued the magazine for defamation, alleging that the magazine had injured his character by falsely accusing him of criminally defrauding the public. On mutual motions for summary judgment, the court held all statements in the book review to be the privileged opinion of the reviewer. "In such a review, the critic's privilege is intact, if the facts are truly stated, the comment is fair, and the comment is an honest expression of the writer's opinion." In arriving at this conclusion, the court noted that the author's statements were prefaced by the words "I consider" and were "supported in the review by the

facts upon which the defendant based his opinion." The court then waxed philosophical, stating that "a book which purports to guide the reader to certain gambling winnings deserves an askance review. If the plaintiffs have the right to purvey pleasant dreams, the defendants have an equal right to proclaim that they are nightmares."

Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W.Va. 1981); Stuart v. Gambling Times, 534 F.Supp. 170 (D.N.J. 1982) [ELR 4:14:6]

Briefly Noted:

Discrimination.

The New York Court of Appeals has held that the New York Roadrunners Club, a private organization that promotes the New York Marathon, did not unlawfully discriminate against the disabled by requiring participants to "use only their feet, and not wheelchairs, skateboards, bicycles or other extraneous aids." The court found that the race the Roadrunners "had decided to conduct was not just any kind of marathon race, but a marathon footrace, a traditionally... and historically rooted athletic event." The court noted that the Roadrunners were free to make such race eligibility limitations, and their decision to do so "cannot be catalogued as blameworthy in a Human Rights Law discriminatory sense."

New York Roadrunners v. Slate Division of Human Rights, 447 N.Y.S.2d 908 (N.Y. 1982) [ELR 4:14:7]

Alcoholic Beverage Regulation.

The owners of certain establishments licensed to dispense alcoholic beverages had their licenses revoked by California's Department of Alcoholic Beverage Control Board because the establishments were presenting nude dancing by female entertainers in violation of a Department rule. The owners contended that the state's procedure for revoking liquor licenses denied them procedural due process. They argued that the procedure provided "no meaningful opportunity to present constitutional defenses to license revocations." A Federal District Court ruling denying declaratory and injunctive relief to the owners has been affirmed on appeal. The Court of Appeals noted that California law prohibits administrative bodies from declaring statutes unconstitutional or refusing enforcement of statutes on the basis of claims that such statutes are unconstitutional. However, the

Department was competent to examine the evidence presented in light of constitutional standards and did, indeed, consider and dispose of the owner's constitutional claims. Therefore, the minimum requirements under the Fourteenth Amendment's due process clause were met.

Dash, Inc. v. The Alcoholic Beverage Control Appeals Board, Case No. 80-5740 (9th Cir., Aug. 10, 1982) [ELR 4:14:7]

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