RECENT CASES

Universal's movie "Bustin' Loose" did not infringe screenplay entitled "Easy Money"

In several recent copyright infringement actions, California courts - despite cautionary asides about the use of summary judgments - nevertheless have ruled that summary judgment indeed was available to the alleged infringer since no genuine issues of material fact existed as to the substantial similarity of the works in question.

This was the case in a recent action in which Federal District Court Judge Pamela Ann Rymer found that the 1981 movie "Bustin' Loose" starring Richard Pryor did not infringe Anthony Overman's screenplay entitled "Easy Money." The court conducted its analysis in accordance with the test for determining copyright infringement set forth in Sid & Many Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). In this bifurcated test, substantial similarity of ideas is analyzed by "extrinsic criteria" and substantial similarity in expression by an "intrinsic appraisal." Judge Rymer first noted that although some courts have read Krofft as precluding the summary resolution of copyright claims when the central inquiry concerns the expression of ideas, recent decisions make clear this is not the case. (See, e. g., See v. Durang, (ELR 5:12:18), and Jason v. Fonda (ELR 4:22:2).)

The court therefore applied the extrinsic test - an examination of the nature of the plot, character, themes and dialogue of the two works. Both works do involve a black man involuntarily thrown together with a black woman and children on a journey. But, observed the court, "Easy Money" is "an earthy and heavily ethnic story. It has scenes of anger, violence and death. Bustin'

Loose, on the other hand, is generally light-hearted and bland. No one is killed. The humor relating to the children is more vulgar in Easy Money, more prankish in Bustin' Loose. . . . To the extent that both [male characters] are rogues with redeeming virtue, the character is not protectable. The females in each are totally different in character and development. . . . The basic tone and feel of Bustin' Loose is a light-hearted and sentimental comedy in which an educated urban black woman falls in love with a streetwise but loveable petty criminal after a cross-country adventure. The basic impression of Easy Money is an earthy and sometimes violent comedy in which an uneducated but strong-willed rural black woman falls in love with a streetwise black man following a cross-country adventure." The court concluded that as a matter of law, these aspects of the works were not substantially similar.

The works also were found to lack substantial similarity of expression since the "total concept and feel of the two works" was entirely different. The court stated that it was "impossible" to conclude that the producers of "Bustin' Loose" wrongfully appropriated something which belongs to [Overman]." Several of the alleged points of similarity involved unprotectable abstract ideas; or were "scenes a faire" (forms of expression which are either stock scenes or which flow necessarily from the elements common to the two works); or did not exist.

Furthermore, there were substantial differences between the works, the most significant of which was the "lesson" conveyed.

In all, Judge Rymer declared, summary judgment was appropriate because reasonable minds could not differ as to the absence of substantial similarity of expression.

Overman v. Universal City Studios, Inc., Case No. 82-3604 (C.D.Cal., April 30, 1984) [ELR 6:4:3]

Supreme Court rules that NCAA football plan and television contracts violate antitrust laws

The Universities of Oklahoma and Georgia have made legal, sports and television history with their resounding courtroom victory over the National Collegiate Athletic Association. At issue in the hotly contested legal scrimmage was the legality of the NCAA's football television plan and the contracts by which the NCAA gave ABC, CBS and Turner Broadcasting the exclusive right to carry NCAA football games live. In a 7-to-2 ruling, the United States Supreme Court affirmed earlier decisions by a Federal Court of Appeals and a District Court which held that the NCAA plan and its TV contracts violated the Sherman Antitrust Act.

The NCAA football television plan at issue in the case traces its origins back to 1951 when commercial TV was in its infancy. Even then, colleges were concerned that unrestrained televising of their football games could hurt live, in-person attendance. Thus the NCAA adopted rules limiting the number of games that could be broadcast each season and the number of times a single school's team could appear in authorized broadcasts. From the start, support for the plan was not unanimous. The University of Pennsylvania - which had been televising its games ever since 1938 when there were only six TV sets in all of Philadelphia announced that it would defy the then-new NCAA rule. But when the NCAA responded by declaring Penn a member in "bad standing," and when four colleges scheduled to play at

Penn in 1951 announced that they would not do so, Penn backed down and agreed to abide by the plan.

All was relatively peaceful for more than 30 years. The NCAA plan evolved as television and college football matured. But the plan adopted in 1981, covering the 1982 to 1985 football seasons, had the same essential features as the first: total broadcasts were limited, as were the number of times a single college could appear on TV. By 1981, however, the NCAA had grown and had grown more diverse. Of its 850 or so members, only 276 had "major" athletic programs, and only 187 of those played football. Two years earlier, most of the colleges that had "major" football programs had formed an organization known as the College Football Association (CFA). Originally, the CFA's purpose was to work within the NCAA for greater control over its members' television rights. But in 1981, the CFA took matters into its own hands. Although the NCAA had negotiated contracts with ABC, CBS and Turner Broadcasting granting them the exclusive right to show live broadcasts of NCAA football games, the CFA made a deal with NBC giving that network the right to carry live broadcasts of the games of CFA members. With that, the CFA and the NCAA were at loggerheads. The NCAA reacted as it had three decades before when it was defied by the University of Pennsylvania: the NCAA announced that it would take disciplinary action against any member that complied with the CFA-NBC contract.

At that point, CFA members could have withdrawn from the NCAA entirely and could have gone about their own business with impunity. CFA members were not willing to do so, however, because there are many sports administered by the NCAA other than football; and apparently the CFA was not ready to expand its activities into those other sports. Furthermore, at least 20 of the country's major college football teams were not members of the CFA: none of the Pac-10 or Big Ten schools ever joined. As a result, the CFA-NBC contract was never consummated. And instead, the dispute was taken to courts of law, where the Universities of Oklahoma and Georgia - acting as point men for the rest of the CFA - alleged that the NCAA's football plan and contracts were illegal. Oklahoma and Georgia were successful in the District Court (ELR 4:11:2) and in the Court of Appeals (ELR 5:3:9). Indeed, the only reason the NCAA plan remained in effect through the 1983 football season was that stays pending appeal were granted, by the Court of Appeals following the District Court decision, and by Justice White of the Supreme Court following the Court of Appeals decision.

In an opinion by Justice Stevens, the Supreme Court's majority had no trouble in finding that the NCAA television plan constituted a "restraint of trade" and that it shared characteristics of restraints the Court had previously held unreasonable. This was so, the Court explained, because the plan limited the output of televised college football and fixed its price.

The NCAA plan limited output because no single team could appear on television live more than six times in two years. The plan fixed prices, because the NCAA contracts with ABC, CBS and Turner specified the "minimum aggregate" amount that each would pay. Although these three networks were then free to negotiate directly with schools whose games they wished to broadcast (subject to the six-appearances-per-two-years limitation), the networks had no incentive to offer more money than the NCAA recommended per game, because the sum total of the NCAA's recommended amounts came to the "minimum aggregate" the networks had agreed to pay. Likewise, individual schools had no bargaining power with the networks, because NCAA rules prohibited members from selling TV rights to anyone other than ABC, CBS and Turner. Furthermore, ABC, CBS and Turner never bid against one another for particular games, because under complicated "ground rules" established with the NCAA for individual negotiations, each network had an exclusive or first negotiating right to games played on each day during the football season. As a result, the NCAA "recommended" price became in practice the fixed price. The recommended price depended only on whether a game was to be broadcast nationally or regionally, and whether it was between Division 1, 11 or 111 schools. In 1981, for example, USC played Oklahoma in a game carried by more than 200 ABC affiliates, while on that same day The Citadel played Appalachian State in a game carried by only four ABC affiliates; yet, all four schools received exactly the same amount of money from ABC for those games.

Agreements that limit output and fix prices usually are held to be illegal per se. In this case, both the District Court and the Court of Appeals declared the NCAA plan illegal per se for this reason. However, in a ruling which will make this case significant even outside the sports and entertainment industry, the Supreme Court declared that the per se rule should not be applied, and that the more lenient rule of reason should be used instead. The Court so ruled not because the NCAA is a nonprofit organization and not because of the Court's stated "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics." "Rather," the Court explained, "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."

The argument that restraints are necessary in order to produce league sports is one that has been made many times before, most notably by the National Football League. While lower courts have accepted it in the past, this is the first time such an argument has received the imprimatur of the Supreme Court. The Supreme Court's sanction of the argument was not so broad, however, as to exempt league rules from the antitrust laws. The Court merely ruled that the particular practice in question is to be tested under the rule of reason - meaning, its anticompetitive effects must be weighed against any procompetitive effects it may have. Only if its anticompetitive effects are outweighed by procompetitive benefits will the practice pass muster under the antitrust laws. In this case, the alleged procompetitive effects of the NCAA plan did not even exist let alone outweigh its anticompetitive effects.

The Supreme Court found that the NCAA did not function as a "joint selling agent" on behalf of its members, the way ASCAP and BMI do on behalf of theirs.

Negotiations for the sale of individual game rights had to and did occur after the NCAA made its agreements with the networks. And thus no new products or efficiencies were created by the NCAA plan.

The Supreme Court also found that the NCAA plan did not protect live, in-person attendance at football games (a justification still asserted for the plan). But even if it did, such a justification is anticompetitive, not procompetitive, the Supreme Court ruled.

Finally, the Supreme Court ruled that the NCAA plan was not even arguably tailored" to equalize competition among its members. "The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue producing activity," the Court explained.

Justice White dissented, in an opinion joined by Justice Rehnquist. According to Justice White's analysis, the output of the NCAA plan should have been measured in viewers rather than in games. White concluded that an exclusive package of fewer games may have attracted more total viewers than an uncontrolled number of non-exclusive game broadcasts. Indeed, White would have ruled that TV rights to a package of exclusive games is a new product, different from non-exclusive TV rights. However, in a seemingly contradictory position, White also concluded that college football games are not a separate market from other forms of television programming. Finally, in what would have been the most controversial portion of his opinion had it been the decision of the majority, Justice White indicated that he would have recognized "noneconomic values like the value of amateurism and fundamental educational objectives" in weighing the procompetitive effects of the NCAA plan against its anticompetitive effects. "When these values are factored into the balance;' he wrote, "the NCAA's television plan seems eminently reasonable."

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, U.S.Sup.Ct., No. 83-271 (June 27, 1984) [ELR 6:4:3]

University of Arizona football players fail to block enforcement of NCAA sanctions barring team from post-season bowl games and TV appearances

Four University of Arizona football players have thus far failed to score any points in a lawsuit which seeks to enjoin enforcement of sanctions imposed by the NCAA barring their team from post-season bowl games and television appearances for two seasons. The sanctions were imposed because the NCAA Infractions Committee determined that Arizona violated NCAA rules by providing certain football players with free airline transportation and lodging, and cash and bank loans for auto payments, rent and personal expenses. Neither the University nor the players who have sued the NCAA deny that the violations occurred. Rather, the players' case rests on the equally undisputed fact that the violations took place from 1975 through 1979 - long before the four players enrolled at Arizona, and long before the sanctions took effect - and did not involve any of the four plaintiffs or any current members of the Arizona football team or coaching staff. As a result, the players' complaint alleges that the sanctions deprive them of their constitutional rights not to be punished in the absence of guilt, and to play football in bowl games and on television. They also allege that the sanctions violate federal antitrust law.

Judge Robert J. Kelleher (of California, sitting in Arizona by designation) has denied the players' motion for a preliminary injunction, in a lengthy and comprehensive opinion. To establish a likelihood of success on their constitutional claims, the players had to prove that the NCAA sanctions deprive them of a constitutionally protected property interest; and this they failed to do. Judge Kelleher was not without sympathy for the players who filed the suit. "The fact that the plaintiffs are innocent of the wrongdoing that led to the imposition of the sanctions is truly unfortunate," he said, "but it does not in itself elevate the interest at stake to the level of a substantive constitutional right protected by the Due Process Clause of the Fourteenth Amendment." The opportunity to play in post-season bowl games and on television was held to be a "mere expectation" and not a property right, even though "participation in post-season bowl competition or in televised games in some instances could have an impact on a player's initial salary in the professional ranks."

Judge Kelleher also ruled that the sanctions imposed in this case were not arbitrary or irrational. "The protection and fostering of amateurism in intercollegiate athletics is a legitimate objective of the NCAA," he wrote. And the sanctions imposed on Arizona "are rationally related to the NCAA's stated objective of promoting amateurism." While Judge Kelleher acknowledged that "it is unfortunate and less than fair that the current football players are adversely affected by sanctions imposed for the misconduct of persons long departed," he added that "such a result is to some extent unavoidable under the present system" because it "takes a good deal of time for a full investigation to be conducted once potential violations are brought to the attention of the NCAA Infractions Committee."

The players fared no better with their antitrust claim. Judge Kelleher expressed the opinion that the players did not have standing to assert an antitrust claim because "there is little more than a remote possibility that the plaintiffs' ,value' in the professional football trade would be substantially different but for the sanctions." Even assuming the players did have standing, however, Judge Kelleher ruled that the sanctions do not violate the antitrust laws. He distinguished the NCAA's rules concerning amateurism, which have no anticompetitive purpose, from those involving television broadcasts which do have an economic purpose. And he ruled that sanctions for violating the NCAA's amateurism rules do not constitute a group boycott.

Justice v. National Collegiate Athletic Association, 577 F.Supp. 356 (D.Ariz. 1983) [ELR 6:4:5]

Federal District Court awards $48,000 in damages in action involving unauthorized merchandising use of musical performers' names and likenesses

In a thriller of an opinion, nine musical groups and performers have been awarded a total of almost $48,000 in damages for the infringement of their right of publicity by three companies distributing buttons, patches and key tags bearing the groups' trademarks, names, logos or likenesses. In a prior ruling (ELR 5:3:12), a Federal District Court in New York established the liability of Button-Up, Kraftwerk and Button Master to Judas Priest, Iron Maiden, Pat Benatar, Neil Young, Styx, the Who, Pink Floyd, Devo and Molly Hatchett. Judge Sofaer then requested that the parties submit evidence to establish damages. Certain difficulties arose in that the buttoneers recorded their sales on a total inventory basis; they did not itemize the sales volume for each individual button title they distributed and therefore could not accurately state the profits they realized. And none of the parties submitted information that might establish the volume of their lawful sales of buttons with authorized marks, which sales may have been made possible by the sale of buttons bearing the unauthorized marks.

The groups suggested that an alternate formula to estimate damages in lieu of sales data would be the value of the misappropriated merchandising licenses. Judge Sofaer stated that in this case, relying upon the value of such licenses would be "inappropriate" since the buttoneers, in effect, appropriated a hard to value nonexclusive merchandising license which did not include the right to sell the goods involved at concerts. The court also rejected the groups' suggestion of a range of values for each license misappropriated, finding that "factual controversy" surrounded the proposed estimates, and noting the differences in factors such as exclusivity, range of merchandise and license term.

Judge Sofaer pointed out that two of the buttoneers did provide helpful sales accounts and that the Copyright Act of 1976 would serve as an appropriate legislative guideline of minimum liability, i.e., $250 as the very least each buttoneer's violations of each party's rights should be worth. The court stated that the right of publicity resembles federal copyright law in the monopoly it grants in the commercial use of one's name or likeness.

Thus, not totally dancing in the dark, the court determined that a reasonable profit measure in this case would be 20%, particularly since the buttoneers profited not only from the actual sale of buttons bearing the groups' marks, but also from the increased sales, including the sale of unprotected buttons, that the sale of the buttons bearing the groups' marks made possible. After determining that certain sales figures provided by one of the buttoneers should be increased by an overall factor of five (in one case, a factor of three) to account for self-interested imprecision and an unrealistic estimated profit level, the court declared that the damage award would provide reasonable compensation to the groups and would serve to deter future violations.

The groups' request for punitive damages was denied, since they did not make the requisite showing of the buttoneers' conscious and intentional disregard of the groups' rights.

Bi-Rite v. Button Master, 578 F.Supp. 59 (S.D.N.Y. 1983) [ELR 6:4:6]

Appearance restrictions for non-celebrity game show contestants did not violate antitrust laws, rules Federal Court of Appeals

The "Litigation Sweepstakes" game has taken its toll on contestant Martin Allen Fine. Fine's antitrust claim against various game show producers and the three television networks was dismissed by a Federal District Court for lack of standing (ELR 5:2:9). A Federal Court of Appeals has held that Fine did have standing to pursue his claim, but has affirmed the dismissal of his action based on a rule of reason analysis on the merits.

It was in 1978 that Fine, then a law student, declared "Let the games begin." He proceeded to appear on three different game shows in the next four years, winning a total of about $8,500. This amount represented approximately onehalf of Fine's taxable income during the period from 1978-1982; Fine earned the balance of his income from several part-time jobs. In January 1982, Fine applied to become a contestant on the show "Joker's Wild," but when the show's producers, Barry and Enright Productions, learned of his previous game show appearances, Fine was disqualified.

Contestant appearance restrictions vary from network to network. NBC limits contestants to three game shows in a lifetime; ABC will not accept contestants who have appeared on a game show once in the past 12 months or twice within the past five years; CBS "eliminates" applicants who have been on one game show in the past 12 months or on two game shows in a lifetime. Barry and Enright Productions limits contestants to one show within the past 12 months or not more than two shows within the past 10 years; Merrill Heatter Productions requires contestants to agree not to appear on any other game show in the 90 days following an appearance on one of the company's shows.

When Fine was disqualified from "Joker's Wild," he proceeded to the door which led to the Federal District Court. That court granted summary judgment to the game show producers and to the networks on the basis of its finding that Fine had not alleged injury to his business or property as required by section 4 of the Clayton Act, or a significant threat of future injury so as to qualify for injunctive relief.

On appeal, Judge Boochever first stated "the rules of the game," as it were, by noting that section 4 of the Clayton Act allows the recovery of treble damages by "[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The court acknowledged that a person could make a business out of being a game show contestant in the absence of producer/network restrictions on non-celebrity appearances, since the word business "includes that which occupies the time, attention and labor of men for the purpose of... pecuniary reward."

Judge Boochever concluded that while the issue of Fine's standing was "close," Fine had raised a triable issue of fact as to whether he was injured in his business. It was noted that section 4 of the Clayton Act does grant standing to a prospective entrant to a business if he or she has "taken substantial demonstrable steps to enter an industry" and has been "thwarted in that purpose by antitrust violations." Accordingly, Fine's standing was analyzed under the four factor "intention and preparedness" test of Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). The court found that the fact that Fine made six attempts to compete on game shows in four years and was a successful contestant on three occasions met the " significant background and experience" test, and also constituted "affirmative action" to make a business out of contest appearances. Fine's actual participation on the three game shows was equivalent to the "consummation of contracts." The "ability to finance the business" was not a relevant factor since contest participation is "labor intensive." Judge Boochever disagreed with the District Court's conclusion that Fine was not engaged in or attempting to engage in business for purposes of section 4 because of his "status as a law student, engagement in part-time employment and failure to make special efforts to improve contest skills," pointing out that a business can be conducted on a part-time basis, and that Fine's contest winnings were a significant portion of his taxable income.

In turning to the question of whether the restrictions on game show participation violate section 1 of the Sherman Act, the appeals court restated Fine's contention that the network/producer agreements limiting non-celebrity appearances constitute a group boycott which is a per se violation of section 1. But an illegal group boycott requires "some concerted effort at a single market level," noted Judge Boochever. The restrictions in question were developed partially in response to the

1950s scandals in which alleged collusion between non-celebrity contestants and producers enabled certain contestants to continue to win prizes on successive weeks. Thus, the restrictions aim to prevent contestants from gaining an advantage on the basis of familiarity with contestant selection and television taping procedures. In addition, game show viewers on occasion have complained about repeat appearances by certain individuals. The network restrictions are not identical, and were adopted independently, at different times. And only two of the many game show producers have appearance restrictions.

Fine argued that the restrictions on repeat appearances were "consciously parallel," and thus amounted to a horizontal agreement. But the court found that the agreements between the networks and the producers were vertical and thus, even if one assumed that the restrictions constituted consciously parallel action, such action alone would be insufficient to establish a conspiracy. A per se rule generally is not applied when a concerted refusal to deal is vertical rather than horizontal, declared Judge Boochever. Fine did not show that the challenged rules had any general anticompetitive effect so as to justify creating a new per se classification.

Judge Boochever proceeded to conduct a rule of reason analysis of the challenged restrictions. This analysis requires a party to show an agreement "which is intended to harm or unreasonably restrain competition and actually does so," and to show injury to a market or to competition in general. Since there were valid reasons for the network restrictions on repeat appearances, and again, no showing of a general anti-competitive effect on the contestant "market," the court ruled that no material issues of fact remained to preclude the affirmance of summary judgment.

In a concurring opinion, Judge Sneed differed from Judge Boochever's "almost delphic" classification of Fine's standing. Judge Sneed declared that the court's comments beclouded the principles of standing and that the court could have rendered its opinion on the basis of the rule of reason versus per se question with less potential fall-out by assuming, without deciding, the standing issue. Judge Sneed would have held that the District Court was right as to standing, since in his view, six attempts to compete on game shows did not amount to sufficient background and experience, or the required affirmative action to enter a business, under the Solinger v. A&M analysis; and that Fine's activities "were no more the business of contest participation than would the playing of slot machines in Nevada every third or fourth weekend be the business of gambling."

Judge Kennedy also wrote a concurring opinion which stressed the point that each network acting independently was free to design its products, i.e., game shows, to its own specifications, and to include those specifications in its contracts with the producers of the shows. Fine, who was not in competition with the networks or the producers, was not entitled to rely on vertical restraint cases involving parties on different market levels who agree to exclude a third party who is in horizontal competition with one of them.

Fine v. Barry and Enright Productions, Case No. 83-5899 (9th Cir., April 25, 1984) [ELR 6:4:6]

Television news monitoring service infringed Atlanta television station's copyrighted news feature on local fitness trail, rules Federal District Court; de minimis damages of $35 are awarded to the station

Significant issues conceding the scope of copyright protection for television news reports have been worked out in the context of a dispute concerning the allegedly unauthorized use of a videotape copy of an Atlanta television station's feature on a local "fitness trail."

The dispute warmed up when WXIA-TV broadcast, on March 11, 1981, a one-minute, 45-second segment concerning a junior college's newly-installed fitness trail. A company known as TV News Clips, a television news monitoring and clipping service, sold a tape of the feature to the junior college. WXIA brought a copyright infringement action against News Clips; the company's motion for summary judgment was denied (ELR 5:6:16) and a bench trial then was conducted.

Chief Judge Orinda D. Evans first discussed the preliminary issues of fixation and registration - issues which in most copyright infringement cases warrant only cursory attention. In this case, the court, noting that a fundamental requirement for copyright protection is that a work be "fixed in any tangible medium of expression," pointed out the fitness trail feature was fixed when it was pretaped. The March 11th broadcast as a whole, including the anchor person's introduction of the feature, was fixed when it was aired and a studio videotape was made. It was further found that the station's deposit with the Register of Copyrights of the pretaped version of the fitness trail feature constituted a proper deposit with the Register and established copyright registration for the feature. And the deposit of an audiotape and description of the entire March 11th broadcast satisfied the alternate requirement for the deposit of a transmission program. Thus, the copyright in the newscast as a whole was properly registered.

In turning to the substantive question of the extent of copyright protection available to WXIA, Judge Evans first pointed out that such protection would not extend to news "events" or to the facts or ideas which are the subject of news reports. But copyright protection does extend to the manner of expression of news reports. News Clips' tape was a total reproduction of WXIA's feature, and as such, was an infringement unless such use qualified for a First Amendment or fair use defense.

Judge Evans observed that no circuit court has recognized a First Amendment defense to copyright protection apart from the doctrine of fair use. Professor Nimmer has stated that for some works, the "idea" and the expression of that idea "may be so inseparable and the work may be so infused with public interest, that both should be in the public domain and exempt from copyright." However, the fitness trail feature did not quite reach the level of an informational work, such as Nimmer's cited example of photographs of the My Lai massacre.

News Clips' fair use argument also was unsuccessful. The company cited Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980), a case which held that commercial use of a copyrighted work did not preclude a finding of fair use. In Triangle Publications, a magazine was pictured in a newspaper advertisement prepared by a competitor which published a similar magazine. The advertisement made a direct comparison of the two magazines. The Court of Appeals rejected the magazine's claim that the commercial character of the use precluded a finding of fair use. But the competitor's activity in Triangle Publications, stated Judge Evans, was a form of "comment" on the copyrighted work, "conceptually similar to satire or parody" which are recognized forms of fair use. News Clips' copying and distribution of video clips "was not an inherently productive or creative use" of the type referred to in section 107. The court therefore found it unnecessary to consider the four factors set forth in the section as relevant to a fair use analysis.

Somewhat surprisingly, in view of the above discussion, the court refused to issue the injunctive relief and damages requested by the station. It was noted that News Clips no longer possesses a copy of the fitness trail feature. More significantly, the court determined that broad injunctive relief prohibiting News Clips from future copying of any of WXIA's newscasts might not meet the Copyright Act's objective of fostering creativity and might infringe upon First Amendment rights. News Clips' systematic copying and sales could represent a "modest social benefit" given the station's policy of destroying its tapes a week after broadcast. Broad injunctive relief also might improperly prohibit the distribution of parts of newscasts in which WXIA no longer has copyright protection.

WXIA's request for statutory damages of $50,000 and for attorneys' fees was denied for the following reasons: the fixation of the unpublished pretaped feature did not first occur at the time of the transmission, and the requisite statutory notice was not given; WXIA admitted that it suffered virtually no actual damage from News Clips' sale of the fitness trail segment; and the station does not actively attempt to market tapes of its broadcasts. Thus, the court estimated News Clips' profit at $35 and entered judgment for WXIA in this amount.

Pacific and Southern Company, Inc. v Duncan, 572 F.Supp. 1186 (N.D.Ga. 1983) [ELR 6:4:8]

Federal Copyright Act preempts Florida criminal statute prohibiting sale of stolen property, when

statute used to prosecute alleged sale of bootleg tapes of copyrighted sound recordings

A Federal Court of Appeals has reversed the conviction of Robert Larry Crow for selling bootleg eight-track tapes in violation of a Florida statute prohibiting dealing in stolen property.

Crow had argued that the only "stolen property" in the case was Columbia's Broadcasting Systems' copyright in the allegedly pirated Tammy Wynette album "Golden Ring," and that section 301 of the Copyright Act of 1976 preempted Florida's regulation of his activities. The state contended that the stolen property rights at issue were private contract rights belonging to various performers.

Federal Court of Appeals Judge James C. Hill has rejected the state's argument, pointing out that CBS would not be entitled to bring an action against Crow under state contract law for the rights purportedly infringed, and that the rights sold by Crow were CBS's rights "to distribute copies or phono records of the copyrighted work" and "to reproduce the copyrighted work." CBS's sole remedy in an action against Crow would be under the Copyright Act.

Judge Hill further observed that the elements essential to establishing a violation of the Florida statute in this case corresponded almost exactly to those of the tort of copyright infringement; the state criminal statute differed only in that it required proof of "scienter." Crow's conviction therefore was declared null and void and the matter was remanded to the District Court with instructions to grant the writ of habeas corpus.

Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983) [ELR 6:4:9]

Federal Court of Appeals upholds conviction for criminal copyright infringement in connection with the sale of pirated cassettes of copyrighted films

Barbara Gottesman's conviction on, among other charges, criminal copyright infringement in connection with the sale of pirated videotape cassettes of copyrighted motion pictures, has been upheld by a Federal Court of Appeals.

In challenging her conviction, Gottesman argued that the transportation of the unauthorized videotape cassettes did not constitute an offense under section 2314 of the National Stolen Property Act, since the property at issue was the "intangible magnetic signals" impressed on the tapes. According to Gottesman, the intangible signals were not "goods, wares and merchandise" subject to being acquired by theft, conversion or fraud. The court had rejected this argument once before, in the appeal of Gottesman's husband's conviction on the same charges, and it reiterated its support of the position that "an intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes and therefore constitutes 'goods, wares or merchandise' within the meaning of section 2314."

Gottesman further argued that the Copyright Act of 1976 and the Piracy and Counterfeiting Amendments of 1982 precluded the application of section 2314 to a charge of willful copyright infringement. The court found no evidence in the legislative history of the Act to support this position.

Gottesman next attacked the interstate transportation of stolen property conviction on the ground that the government failed to prove that the value of each of the two shipments of cassettes totaled $5,000. But the court found that the government had presented sufficient proof as to the value of the tapes, using the "thieves market" approach, i.e., the value was arrived at by taking the sale price paid by the government agents for each shipment, less a deduction for the value of the non-stolen tangible tapes in each shipment.

Also upheld was Gottesman's conviction on a count of racketeering under the Racketeer Influenced and Corrupt Organizations Act (RICO), notwithstanding Gottesman's claim that RICO was intended to apply only to large enterprises engaged in organized crime.

Gottesman was shown to have had personal knowledge that the videocassettes were pirated copies and to have been an active participant in the pirating activity; her conviction was not based on knowledge imputed to Gottesman because of her marital status.

The court, however, did note that Gottesman was correct in pointing out that the 18-month sentence imposed exceeded the statutory limit established for a criminal copyright infringement conviction. Under the version of section 506(a) of the Copyright Act effective at the time of Gottesman's offense, the maximum sentence for a first conviction of copyright infringement was 12 months. The 18-month sentence therefore was vacated and the matter was remanded to the District Court for the imposition of a sentence on this count not to exceed one year.

United States v. Gottesman, 724 F.2d 1517 (11th Cir. 1984) [ELR 6:4:9]

Partner in book publishing venture was not liable for infringement of co-owned copyright, but may be required to account for book's earnings; claim for unauthorized use of articles that were not jointly owned is upheld by Federal Court of Appeals

When two individuals engage in a partnership to publish a book, without being joint authors of the resulting work, the rules of copyright ownership apply, a Federal Court of Appeals has ruled.

The copyrighted work at issue evolved from a 1978 partnership agreement whereby Jack Ries was to provide capital and supervise the business aspect of the project, and Frank Oddo was to write and edit a book describing how to restore F-100 pickup trucks. In January 1980, Oddo delivered to Ries a manuscript consisting partially of a "reworking" of previously published magazine articles that Oddo had written and partially of new material. Although the manuscript was incomplete, Ries added some material by a new writer and proceeded to publish the book.

A Federal District Court held that Oddo's copyright was infringed by Ries. But Federal Court of Appeals Judge Goodwin pointed out that three copyrighted works were at issue: Oddo's magazine articles, Oddo's manuscript, and the book published by Ries. Judge Goodwin stated that the District Court erred if its finding of copyright infringement was meant to apply to the copyright in the manuscript for the book. The Ries/Oddo partnership owned the copyright in the manuscript and book, and Ries, as a co-owner of the partnership's assets, could not be liable to another co-owner for infringement of the copyright. Each co-owner has an independent right to use or license the use of a copyright with the obligation, under general principles of law governing the rights of co-owners, to account to the other coowners for any profits earned from such licensing.

Accordingly, Ries can be required to account to Oddo for the profits earned by the book and manuscript. And Ries might be liable to Oddo under California partnership law for misuse of the partnership copyrights. But an alleged violation of state partnership law would not transform Ries' use of the copyrights into infringement under federal law.

Judge Goodwin then considered the possibility that the District Court had found that Ries infringed Oddo's copyright in his magazine articles. Ries first argued that the publisher of the magazine in which the articles appeared, rather than Oddo, was the owner of the copyrights. But there was no evidence that Oddo had made the requisite "express transfer" of the copyrights to the magazine publisher or that by written agreement, the publisher had acquired ownership of the copyrights in the articles as "works made for hire' " Furthermore, Oddo, by preparing a manuscript based on the preexisting articles as part of his partnership duties, impliedly gave the partnership a license to use the articles in the manuscript. However, this "implied license" did not give Ries or the partnership the right to use the articles in any work other than the manuscript itself, stated Judge

Goodwin. And the published book, as a work distinct from the manuscript, exceeded the scope of the partnership's license. Therefore, the publication of the book infringed Oddo's copyrights in the articles, concluded the court.

The judgment of the District Court was vacated as to the award of statutory damages and attorneys fees, and the matter was remanded for an award of actual damages to Oddo for the infringement of his copyrights in the articles; it was suggested that the District Court might also consider whether, pendent to the infringement claim, it would compel Ries to account to Oddo for any profits from the use of the co-owned copyrights.

A general damage award of $1,000 for Oddo's state law claims was upheld because several of the claims were found not preempted by federal law.

Oddo v. Ries, Case No. 83-6190 (9th Cir., June 19, 1984) [ELR 6:4:10]

Warner Bros. obtains injunction barring the distribution of a toy car similar to the "General Lee" car featured on "The Dukes of Hazzard" television series

It seems that the General Lee at last will be taking its victory lap after clearing a series of hurdles in a trademark infringement event against a competing toy car.

The General Lee is an imitation 1969 orange Dodge Charger with a Confederate flag emblem on the car roof and the numeral "01" on the door. The car is a featured element of Warner Bros.' "The Dukes of Hazzard" television series. When Gay Toys, Inc., began marketing a toy car patterned after the General Lee (but bearing the numeral "10"), Warner sued Gay Toys for violating section 43(a) of the Lanham Act. A Federal District Court initially denied Warner's motion for a preliminary injunction, but a Federal Court of Appeals then held that Warner was entitled to a permanent injunction restraining Gay Toys from marketing its toy car, and remanded the matter to the District Court (ELR 3:16:5). The District Court complied with the Court of Appeals' direction (ELR 5:5:10) and granted summary judgment to Warner. The Court of Appeals now has affirmed this ruling.

Federal Court of Appeals Judge Oakes took the wheel to drive home the point that the"functionality" defense raised by Gay Toys did not preclude a ruling in favor of Warner. Gay Toys had argued that the design of the General Lee was functional and therefore not protected under section 43(a) because the symbols on the car were essential in order for children to play "The Dukes of Hazzard" with the toy car. Judge Oakes first pointed out that "Carried to a logical conclusion, Gay Toys' argument would enlarge the functionality defense so as to eliminate any protection for any object, since presumably each feature of any object is designed to serve a particular 'function' in Gay Toys' sense of the term." After reviewing relevant case law, the court concluded that the functionality defense was developed to protect advances in functional design from being monopolized, and that it "is designed to encourage competition and the broadest dissemination of useful design features." But the General Lee symbols, i.e., the flag emblem and the numerals and the color orange, were not the kind of "useful objects" that the functionality defense was designed to protect. Rather, the symbols functioned to enable consumers to identify the toy car with a particular television series.

Gay Toys then argued, once again, that Warner failed to establish that its trademark had acquired a secondary meaning to consumers as a mark identifying the product with a particular source, and that Warner therefore could not prove a violation of the false designation of origin prohibited by section 43(a). According to Gay Toys, a trademark holder must show that consumers are motivated to buy the allegedly infringing goods because they believe the goods are sponsored or manufactured by the source which is identified by the trademark. In this case, it was not shown that consumers of the General Lee toy car were concerned with the source of manufacture or sponsorship of the car. But there was proof that the public did associate the General Lee with "The Dukes of Hazzard" television series, and that consumers wanted the toy, in part, because of the identification of the toy with the series. This was sufficient to establish secondary meaning even though Warner is not a manufacturer of toy cars and even in the absence of a showing that consumers believed that the toy cars marketed by Gay

Toys were sponsored or authorized by Warner, stated Judge Oakes, citing the position taken by the Seventh Circuit in a case "for all practical purposes identical to ours, involving the very General Lee and another imitator, Processed Plastic Co. v. Warner Communications, Inc., (ELR 4:18:4). In all, the "true inquiry" is "whether the primary function of a particular design is other than referential, leading to association in the public mind with no one or nothing, or, by virtue of its distinctiveness, it is designed to create an association with a single source. In making that inquiry, the actual motivation of purchasing consumers ... is essentially irrelevant." Warner established that the public did associate the General Lee with "The Dukes of Hazzard" and that it was because of the association that the toy car was purchased by the public. "That is enough."

Judge Oakes concluded his opinion by rejecting Gay Toys' remaining defenses of unclean hands and abandonment through failure to police trademark use.

Warner Bros. Inc. v. Gay Toys, Inc., 724 F.2d 327 (2d Cir. 1983) [ELR 6:4:10]

Court refuses to enjoin distribution of "Flower Kid" dolls in copyright infringement and unfair competition action brought by originator of "Cabbage Patch Kids" dolls

A recent entry for toy of the year is the line of dolls known as the "Cabbage Patch Kids." Xavier Roberts, a Georgia artist, along with a friend, began producing the ancestors of the Cabbage Patch Kids in May 1977. Roberts subsequently formed Original Appalachian

Artworks, Inc. In 1979, Appalachian obtained a copyright certificate for the dolls and in August 1982, the company granted Coleco Industries an exclusive license to manufacture and sell the dolls. It was predicted that an amazing 2.5 million dolls would be sold in 1983.

Blue Box Factory Ltd. also has produced a line of "soft bodied" dolls, which Blue Box markets as the "Flower Kids. " Appalachian brought an action in a Federal District Court in New York seeking to prohibit Blue Box from selling its Flower Kids dolls, alleging copyright infringement and unfair competition. The court has denied Appalachian's motion for a preliminary injunction, finding that the company had not demonstrated the likelihood of success on the merits.

The Flower Kids are "at first glance" superficially similar to the Cabbage Patch Kids, observed Judge Sofaer "they are approximately the same size, both have yam hair, both are made of a soft material and their facial and bodily features resemble those of human babies." But significant dissimilarities also were found, particularly in the physical qualities most closely identified with Appalachian's dolls - "a distinctly recessed chin, realistic skin, dimpled knees and life-like bodily features such as a belly button, a 'cute tush,' 'ten real fingers and ten real toes' and feet capable of creating footprints." The dolls' diaper and shoe styles also differed.

The court therefore found that the similarities between the dolls were insufficient to support an inference of copying. Indeed the testimony of Appalachian's expert, Dr. Joyce Brothers, confirmed for the court the impression of substantial dissimilarities. Dr. Brothers described for the court certain features of the Cabbage Patch Kids which accounted for their extraordinary appeal. But these features, such as "softness and cuddliness" and outstretched arms, either are common to all dolls and teddy bears or were absent in the Flower Kids dolls.

An Appalachian consumer survey which purported to establish consumer confusion was accorded little weight in determining the presence of the substantial similarity necessary to support an inference of copying.

The court declared that Blue Box had "succeeded in making sufficient changes in a work that would otherwise be regarded as substantially similar to that of [Appalachian]." An ordinary observer would not overlook the differences in the dolls.

With respect to Appalachian's unfair competition claim, the court pointed out that the manner in which the dolls were sold eliminated the possibility of consumer confusion as to source. Dolls generally are fully visible in each package through a transparent plastic window. Any similarities in trade dress apparently resulted from features not unique to Appalachian, such as the plastic front window. Furthermore, the boxes differed as to size, shape, color and verbiage. And Blue Box did not market its dolls via the clever diabolical techniques (depending upon whether you have a six-year-old daughter) utilized by Appalachian, techniques stressing the uniqueness of each doll and its adoptability. Appalachian also was not entitled to control the use of all "garden-variety" names (cabbage, flower, rose petal) absent a stronger showing of similarity in the underlying product. Any consumer confusion would be further reduced by differences in price and quality: a minimum price of $20-$25 was set for the Cabbage Patch Kids; the Flower Kid dolls sold for about $10-$12.

In all, the differences in the "total concept and feel" between the dolls at issue made it unlikely that Appalachian would succeed in its claims and the company's motion for a preliminary injunction was denied accordingly.

Original Appalachian Artworks, Inc. v. Blue Box Factory (USA) Ltd., 577 F.Supp. 625 (S.D.N.Y. 1983) [ELR 6:4:11]

Federal Court of Appeals refuses to enjoin distribution of action figure toy dolls resembling Mattel's copyrighted "Masters of the Universe" figures

Amidst the clutter of children's rooms, the General Lee toy car (which has raced its way into the hearts of ELR readers), has been replaced in its Confederate glory by 51/2 inch action figure toy dolls from a more enchanted, albeit copyrighted and trademarked realm, known as "Masters of the Universe." But even He-Man was powerless to compel a Federal District Court to issue a preliminary injunction against Azrak-Hamway International (Remco) barring Remco's production and sale of 5 1/2 inch figure toy dolls called the "Warlords." So Mattel undertook the perilous journey to a Federal Court of Appeals. The appellate court, however, proved as impenetrable as Castle Grayskull and also refused to grant the requested injunctive relief.

The Masters of the Universe collection consists of a series of action figures with different heads, clothing and names, but all of which share the "common torso" of an exaggerated bodybuilder's body. Remco's series of figures also possess a highly muscled body and proportionately short legs. And each company's figures are posed in a similar crouching position - "the fighting stance of a Neanderthal man." But Remco had obtained a license from DC Comics, Inc., to model its figures after DC's comic book figures "Warlord," "Arak" and "Hercules Unbound." And the Remco figures also differed from the Mattel figures as far as certain aspects of their musculature.

Mattel claimed that Remco infringed its copyright in the Masters of the Universe figures by copying the torso - the "essential" part - of the figures. But the Court of Appeals agreed with the District Court that Mattel did not demonstrate substantial likelihood of success in proving infringement of the torso. It was noted that Remco apparently had given its sculptor a Mattel figure to show him the kind of figure the company wished to produce. But Remco also presented to the District Court the testimony of an expert on human anatomy who stated that the Remco figure was not a direct copy of the Mattel figures. Thus, any similarity in the figures' bodies may have derived from the unprotectable idea of a "superhuman muscleman crouched in ... a traditional fighting pose," stated the court. While the figures conveyed an image of strength - the unprotected superhuman muscleman idea - the District Court found that this image was not expressed in a substantially similar manner as a result of the differing sculptural emphasis on certain muscle groups. This finding was upheld on appeal.

In response to Mattel's trademark infringement and unfair competition claims, the Court of Appeals noted that Mattel had to show that Remco copied nonfunctional design features of the Mattel figures, which features had acquired a secondary meaning. The court concluded that Mattel presented insufficient evidence to support its claim that the arrangement of musculature in the Masters of the Universe figures had developed a secondary meaning such that consumers would incorrectly associate Remco's figures with those produced by Mattel.

Mattel also cited Remco's alleged violation of section 32(a) of the Trademark Act, a section that prohibits the use of registered trademarks without permission in connection with the sale of goods. But another section of the Act allows a competitor to use another's registered trademark to describe aspects of the competitor's own goods. Remco included, but did not highlight, on its Warlord figure packages, the phrase "Play with ... Masters of the Universe ... and other 5 1/2 Action Figures." The District Court determined that Remco was using the Masters of the Universe trademark to describe to purchasers a use of its own product and was not engaging in a "bad faith effort" to deceive consumers into thinking they were buying a Mattel item.

Perhaps most significantly, as many ELR families are aware, Mattel, at the time of the District Court hearing, was already selling as many Masters of the Universe figures as it could produce, and for "inadequately explained reasons" delayed bringing its action until just before the beginning of the Christmas selling season. The District Court therefore had concluded that an injunction would hurt Remco more than it would aid Mattel, as the balance of hardships go.

In all, since Mattel did not demonstrate that Remco was trading on Matter's success in any illegal way, the company was correctly denied injunctive relief, stated the Court of Appeals.

Mattel, Inc. v. Azrak-Hamway International, Inc., 724 F.2d 357 (2d Cir. 1983) [ELR 6:4:12]

Injunction prohibiting distribution of puzzle that was confusingly similar in trade dress to Rubik's Cube is upheld on appeal

The continuing story of "As the Cube Turns When we left CBS Inc. (the successor in interest to Ideal Toy Corporation), the company had brought a variety of trademark and trade dress infringement and unfair competition claims against Logical Games, Inc., the distributor of a puzzle game known as MAGIC CUBE. MAGIC CUBE resembles in appearance CBS' RUBIK'S CUBE.

In 1978-1979, Logical had ordered about 3,000 puzzles from a Hungarian exporter, and those puzzles all were sold. Then in the fall of 1979, the exporter entered into an exclusive distribution agreement for the United States with Ideal. Ideal subsequently sold about 16 million of the puzzles under the name RUBIK'S CUBE. In May 1979, Logical decided to manufacture a puzzle game for distribution in the United States; the game so manufactured bore a "trade dress," in this case, a unique color scheme, which was conceded to be "confusingly similar" to the puzzle distributed by Ideal.

In response to CBS' lawsuit, Logical argued that its initial importing and sale of the puzzles conferred upon it the exclusive right to use the trade dress. But a Federal District Court found that Logical's use of the trade dress "was not inherently distinctive nor possessed of a secondary meaning." A Federal Court of Appeals has agreed, ruling that Logical's use of the trade dress was "minimal" and did not preclude CBS' right to create an exclusive claim in the United States to the trade dress at issue. The grant of injunctive relief was upheld accordingly.

CBS Inc. v. Logical Games, 719 F.2d 1237 (4th Cir. 1983) [ELR 6:4:13]

Cable television trade show organizer has standing to proceed with antitrust claims against Home Box Office and Showtime Entertainment, rules Federal Court of Appeals

The "Crimpers Caper" is not a mini-series that Home Box Office or Showtime Entertainment will likely present. Crimpers Promotions was organized in 1980 for the purpose of producing a cable television trade show known as CATEL EXPO PROGRAMMING SOURCES '81 in Las Vegas during September 1981. Catel was to be a conference for suppliers of cable programming and for local cable system operators. The show contained space for 350 booths, and 5,000 individuals were expected to attend. Eventually however only 97 booths were occupied and less than 200 people participated in the event. Crimpers attributed the failure of its program to Home Box Office and Showtime, the two major pay television networks in the United States. According to Crimpers, HBO and Showtime contacted independent producers and system operators to discourage their attendance at CATEL, allegedly stating that the trade show was a "rip-off' and threatening not to purchase programming from those suppliers who attended the show. Instead of spearheading an international cable marketplace, Crimpers found itself the catalyst of a lawsuit alleging that HBO and Showtime violated sections 1 and 2 of the Sherman Act.

A Federal District Court ruled that Crimpers had standing to prosecute its action under section 4 of the Clayton Act (ELR 5:2:10) and this ruling has been "unhesitatingly" affirmed on appeal.

Federal Court of Appeals Judge Friendly analyzed Crimpers' standing under section 4 pursuant to the standards set forth by the United States Supreme Court in Blue Shield of Virginia v. McCready, 457 U.S.465 (1982) and in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 103 S.Ct. 897 (1983), rather than relying upon the Second Circuit's "target area" test, as derived from Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 1983 (1970), cert. denied, 401 U.S. 923 (1970), and Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972). McCready imposed two types of limitations on the broad scope of section 4. The first limitation was designed to prevent double recovery. But Crimpers' injury - the expenses incurred in preparing the trade show and the loss of reasonably anticipated profits - was distinct from any losses that might be incurred by independent program producers or cable systems in their dealings with HBO and Showtime.

The second limitation raised by McCready was the "remoteness" of the injuries allegedly incurred by the antitrust violation. Justice Brennan had suggested that courts consider "(1) the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) ... the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under (section) 4."

In Judge Friendly's view, Crimpers met these "hurdles" in that the company "got in the way" of the barriers created by HBO and Showtime in their alleged monopolization of the business of purchasing and assembling programming from producers and selling it to cable systems. Furthermore, Crimpers was attempting to create a business that would have mitigated "the precise injury, the limiting of dealings between producers and television stations to those conducted through HBO and Showtime, against which Congress meant to protect." The injury to Crimpers was "the precisely intended consequence" of HBO and Showtime's boycott and even more direct an injury than would have been borne by the producers or cable systems who concededly would have had standing. Crimpers, while not a buyer or seller of programming, was the most logical party to sue for the injury alleged in the boycott of its trade show (as distinguished from the more general conspiracy to prevent direct dealing between producers and cable systems) and, as a "paradigm of standing," was allowed to proceed with its action.

Crimpers Promotions, Inc. v. Home Box Office, Inc. 724 F.2d 290 (2d Cir. 1983) [ELR 6:4:13]

Federal District Court refuses to dismiss libel action brought by Ariel Sharon, former Defense Minister of Israel, against Time Magazine in connection with article concerning massacre of Palestinian refugees

The tragic murder of Palestinian refugees by Phalangist forces at the Sabra and Shatilla camps in West Beirut, Lebanon, was investigated by the Kahan Commission, appointed by the State of Israel. The Commission found, in part, that General Ariel Sharon, Israel's Minister of Defense at the time of the massacre, bore "indirect" responsibility for the massacre because the decision to permit the Phalangists to enter the camp soon after the assassination of Bashir Gemayel (the Phalangist military leader and Prime Minister-elect of Lebanon) was "taken without consideration of the danger ... that the Phalangists would commit massacres and pogroms against the inhabitants."

Time Magazine reported on the Commission's findings in its February 21, 1983 issue in an article entitled "The Verdict is Guilty." The article described the Commission's report as a "stinging indictment of Defense Minister Ariel Sharon and several military officials," and further stated that one section of the report, which was not published at all, purportedly contained information about a visit Sharon paid to the Gemayel family on the day after Bashir Gemayel was assassinated. According to the magazine Sharon reportedly told the Gemayel family that the Israeli army would be moving into West Beirut and that he expected the Christian forces to go into the Palestinian refugee camps. Sharon also reportedly discussed with the Gemayels the need for the Phalangists to take revenge for the assassination of Bashir, but the details of the conversation are not known.

Sharon filed an action against the magazine for libel, claiming that the quoted statement accused him of knowingly permitting or encouraging the murder of the refugees. Federal District Court Judge Sofaer, in a compassionate opinion confronting controversial and complex events and legal issues, has refused to grant Time's motion for dismissal of the action.

Time argued that the allegedly libelous statement could not fairly and reasonably be construed to defame Sharon since the purported discussion of the need for revenge, without more, could not expose Sharon to hatred, contempt or aversion, or harm him in his profession. But Sharon claimed that in light of the entire article, the statement might reasonably be read to suggest that he encouraged the Phalangists to engage in violence and/or that the statement suggested that the Kahan Commission had made a finding that Sharon in fact made the alleged statements or participated in such discussions, a very different conclusion about Sharon's involvement in the massacre than the Commission had publicly announced.

The court declared that both in view of both the specific words used in Time's account of the complained-of statement and the course of the Lebanese civil war, a reasonable reader of the statement might likely infer that Sharon had "at least condoned the massacre." The article's claim that the reported findings were contained in a secret appendix to the Commission report "enhanced the reasonableness of a defamatory interpretation," stated Judge Sofaer, because a reader might conclude that the Commission had withheld additional material adverse to Sharon.

Sharon further claimed that Time's statement concerning his discussion of the "need for revenge" was libelous since Sharon had stated to the Commission that he never considered a slaughter at the camps a real possibility and therefore "was unconcerned about preventing one." If Sharon had discussed the need for revenge, the article could be read, stated the court, as suggesting that Sharon lied under oath in the investigation of his conduct and possibly, that the Commission, again contrary to its published report, had found that he had so lied.

Even if the statement at issue were capable of a defamatory meaning, Time argued, Sharon was libel proof as a matter of law, i.e., the alleged libel could do so little incremental harm in the context of the other unchallenged statements in the article that the lawsuit should be dismissed. The "libel proof" principle protects the media against litigation commenced by individuals with no likelihood of recovery, such as habitual criminals; the principle has been applied in the noncriminal context. Time stated that the findings of the Kahan Commission, as reported for the most part without challenge, injured Sharon's reputation "beyond the capacity of [the challenged statement] to augment."

Judge Sofaer however, concluded that while Sharon's reputation as a military and political leader was severely affected by the refugee massacre and its aftermath, his reputation could not be said "as a matter of law to have been so damaged by the reported events that he could recover only nominal damages for the article's potentially libelous statements." The Commission was operating under an "extraordinary concept" of indirect responsibility, observed Judge Sofaer, and based its findings on a high and uniquely stringent moral standard, inspired in part by Biblical teachings and Jewish history.

Pursuant to these standards, Sharon was found to have had "absolutely no direct responsibility" for the massacre; he was not condemned by the Commission for acting illegally or even immorally; but he was found to have committed a "grave mistake" on a most serious occasion. Thus, the Commission's conclusion could not be equated with a verdict rendered in a criminal case, a verdict of the type that might lead a court to find a convicted defendant libel proof in connection with subsequent claims.

Judge Sofaer emphasized that "no finding or statement in the report or in the article was comparative in its seriousness and potential reputational impact to the statement upon which this suit is based," a statement suggesting, as summarized by the court, that Sharon anticipated but did not act to prevent the massacre, or that he actively instigated such acts, or that he lied to the Commission, or that the Commission found that he lied but attempted to cover up his complicity.

It was pointed out that Time will have an opportunity to present evidence to support its claim that the damage inflicted on Sharon's reputation by the Commission would significantly diminish any monetary damages occasioned by the publication of the article.

The court concluded by rejecting Time's defense that Sharon was required to allege special damages. Special damages were not required because the challenged statement was defamatory on its face when read as part of the article in which it appeared, and "reasonably subject to a construction that would hold Sharon up to contempt and disparage him in his profession."

Sharon v. Time Inc., 575 F.Supp. 1162 (S.D.N.Y. 1983) [ELR 6:4:14]

Sports agent who sued Ted Turner for alleged defamatory statement is a public figure in connection with dispute between baseball player Bob Horner and the Atlanta Braves

A Federal District Court in Georgia, in the course of a defamation action brought by sports agent William "Bucky" Woy against Ted Turner, has ruled that Woy is a public figure and must establish that Turner's allegedly defamatory statements were made with actual malice.

Woy's action arose from his representation of baseball player Bob Horner in contract negotiations conducted in early 1979 with the Atlanta Braves. Bill Lucas was the general manager and representative of the Braves, but prior to the resolution of Horner's contract dispute, Lucas died. Subsequently, as the court described the ensuing events, Turner, the owner of the team, made statements to the media to the effect that Woy's "tactics and accusations regarding the character of Mr. Lucas during the course of the negotiations had contributed to or caused Mr. Lucas' death."

In response to Woy's action for libel and slander and for tortious interference with existing and prospective business and contractual relations, Turner moved for partial summary judgment seeking a ruling that Woy is a public figure. In October 1981, the District Court held: that a nonmedia individual defendant, such as Turner, is entitled to the rights provided in New York Times v. Sullivan when the complaining party is a public figure; and that there existed genuine issues of material fact regarding the nature and extent of Woy's participation in the public controversy at issue so as to preclude summary judgment on the public figure issue.

After the presentation of evidence at the trial of the matter, Turner moved for a declaration that Woy was a public figure at the time that Turner made the alleged defamatory statements. Woy argued that he was a private person who was "thrown into public controversy" as a result of his professional service to a client.

In issuing its ruling, the court first declared that Woy was not so well known, based on his general fame or notoriety as a sports agent, to qualify as a public figure based on his special prominence in the community. But Woy was designated a public figure because he "voluntarily thrust himself into the forefront of a public controversy" - the contractual dispute between Bob Horner and the Atlanta Braves. The court relied upon the following factors in reaching its conclusion: during the period of the contractual dispute, Woy was in contact with the press, television stations and sports magazines regarding the dispute, several times upon his own initiation; and Woy made himself readily available, and even actively solicited, interviews and media attention on a regular basis in early 1979 and thereafter. In all, stated the court, Woy had used the media many times to promote himself and knew how to and did use the media on a regular basis in an attempt to influence the outcome of the contract dispute. The court stated that the evidence established that Woy "was as much a major participant in the public controversy as Ted Turner and Bob Homer (possibly more), and much of this was due to Woy's own efforts," thus endowing him with public figure status at the time of Turner's allegedly defamatory statements, and requiring him to show actual malice for recovery.

Woy v. Turner, 573 F.Supp. 35 (N.D.Ga. 1983) [ELR 6:4:15]

Chic Magazine's unauthorized publication of photograph of amusement park performer results in jury award of damages for defamation and for invasion of privacy; but Federal Court of Appeals orders retrial due to duplication of damages unless performer elects to recover only on invasion of privacy claim

Devotees of the Aquarena Springs amusement park in San Marcos, Texas probably are familiar with the novelty act "Ralph, the Diving Pig." For the rest of us, the act features Ralph, a pig who was trained to dive into a pool and feed from a bottle of milk held by park employee Jeannie Braun. One evening in 1977 when Mrs. Braun went to market, to market, she discovered that Chic Magazine, a hard-core men's magazine, had included a picture of the act, without Braun's consent, in a section of the magazine entitled "Chic Thrills." Although the caption accompanying the picture was inoffensive, the picture appeared on a page which included vulgar cartoons and articles.

Braun sued the magazine and Larry Flynt, its publisher, alleging invasion of privacy, slander and libel. A jury returned a verdict for Braun, awarding her $5,000 actual and $25,000 punitive damages for defamation, plus $15,000 actual and $50,000 punitive damages for invasion of privacy. A Federal District Court entered judgment accordingly. However, a Federal Court of Appeals, finding the damages award somewhat muddied, proceeded in its opinion to cure certain weighty concerns.

The appellate court first determined that Mrs. Braun was not a public figure and that Chic was not entitled to the protection of the First Amendment applicable to public figures under New York Times v. Sullivan and its progeny. Braun was not involved in a public controversy or in influencing the outcome of important public issues. She did not relinquish her interest in protecting her name and reputation "by force of her limited role as an entertainer."

Nevertheless, while New York Times v. Sullivan was ruled inapplicable, the court noted that states may not impose liability without fault for defamation and may not award compensation greater than the actual injury suffered by a complaining party. Thus Braun was entitled to recover for the impairment of her reputation in the defamation action and, under Texas law, also was entitled to recover actual damages for mental anguish under both her defamation and invasion of privacy claims. Furthermore, impairment of reputation damages also were available to Braun under the invasion of privacy claim since the claim was "false light" invasion of privacy, arising from the same circumstances which gave rise to the defamation cause of action.

In all, the two causes of action were not sufficiently distinguished by jury instructions or in the special verdict to assure that there had been no double compensation, stated the court. The evidence supporting the award of damages dealt almost exclusively with Braun's pain and suffering over the appearance of her photograph in Chic. It therefore appeared that the jury in its defamation award primarily was compensating Braun for the embarrassment and humiliation which were the basis of the invasion of privacy cause of action. But the form of the jury instructions made it impossible for the Court of Appeals to determine the exact extent of the overlap in the awards.

The punitive damages also were duplicative since each award was based on the same conduct: Chic's reckless disregard for the false impression its publication created of Mrs. Braun and Chic's misrepresentations in connection with obtaining the photograph of Braun. Public policy considerations were not found sufficient to support punitive damages under both causes of action.

The Court of Appeals therefore found itself compelled to remand the case for a new trial on damages. However, it pointed out that on retrial Braun would likely be able to prove only nominal damages for loss of reputation. The court therefore was willing to uphold the entry of judgment on one of the compensatory awards and the correlative punitive damages award. And since the facts of the case fit more precisely the false light invasion of privacy theory than the defamation theory, the court proceeded to review and conditionally uphold this award.

The court held that the evidence did support the conclusion that Chic's publication of Mrs. Braun's picture was fully capable of conveying a false impression of Braun. Chic argued that the picture and caption should have been considered by the jury separately, apart from the other portions of the magazine, in determining whether they created a false impression of Mrs. Braun. A general principle in defamation cases, which was found applicable in this case, is that an allegedly defamatory publication must be construed as a whole. Braun contended and the jury apparently found that an ordinary reader would form an unfavorable opinion about the character of a woman whose picture appears in Chic magazine. Thus, "it was appropriate to introduce the entire magazine so that the jury could, in effect, be placed in the position of the ordinary reader."

Chic contended that no ordinary reader would assume Mrs. Braun to be unchaste or promiscuous on the basis of its publication of her picture. But a jury might have found that the publication implied that Mrs. Braun approved of the opinions expressed in Chic, or that it implied that Braun had consented to having her picture in Chic. Either of these findings, noted the court, would support the jury verdict that the publication placed Mrs. Braun in a false light highly offensive to a reasonable person.

Chic then adverted to the consent the magazine had obtained prior to publishing the picture. Braun had signed a release authorizing Aquarena Springs' use of the picture. When the park's public relations director spoke with an editor of Chic who had requested transparencies or negatives of Ralph, the editor stated that Chic was a men's magazine containing men's fashion, travel and humor. The park's representative stated that she was not told that Chic was a men's magazine of any sort but that it was a "fashion" magazine with the same clientele that would read Redbook or McCall's, a comparison which prompted the court to comment: "The same clientele indeed; in the sense that both sets of readers were featherless bipeds."

The jury found that the editor misrepresented the true nature of the magazine and that the consent was fraudulently induced - "the legal equivalent of no consent."

The $15,000 jury award was not unjustifiable, as Chic argued, because there was evidence that the publication impaired Mrs. Braun's performance of a "respectable, if unusual" job, and evidence that she suffered humiliation, embarrassment and shock. And the punitive damages award of $50,000 also was upheld - the evidence again supported the jury finding that Chic acted in reckless disregard for Braun's reputation. The jury was entitled to infer from the testimony that the magazine was aware that its use of Mrs. Braun's picture might convey a false impression of her, and that the magazine's misrepresentations in connection with obtaining consent from the park were not inadvertent or immaterial. The park would not likely have cooperated in providing transparencies had it known the true nature of the magazine.

The punitive damages were not excessive, particularly in view of the public interest in discouraging the repetition of the conduct engaged in by Chic.

Thus, if Mrs. Braun were to waive her right to a retrial on the damages award, the appellate court declared that it would instruct the District Court to enter judgment on the jury's verdict granting actual and punitive damages for the invasion of privacy claim.

A concurring judge would have reversed on the defamation issue on the ground that the truth of the matter published would have been a defense to the action. The picture and caption of the diving pig were factually accurate and were neither distorted nor offensive.

Braun v. Flynt, 726 F.2d 245 (5th Cir. 1984) [ELR 6:4:15]

Federal Court of Appeals rejects property owner's defamation and trespass claims against WCAU-TV

in Philadelphia, because television news report was within Pennsylvania fair report privilege

A Federal Court of Appeals has affirmed a District Court ruling (ELR 5:1:10) granting a directed verdict to CBS in an action for defamation and trespass brought by Amrit Lal, a college professor and rental property owner against WCAU-TV, a station operated by CBS in Philadelphia.

The action arose from CBS's broadcast, on March 21, 1980, of a report concerning a court proceeding involving one of the properties owned by Lal. The report included a statement by Lal's tenants as to alleged deficiencies in the properties.

The report was ruled within the scope of Pennsylvania's common law "fair report" privilege as a report on a judicial proceeding. Lal argued that the use of videotape accompanying the report rendered the news story unfair or inaccurate and therefore beyond the scope of the privilege. But the "mere fact" that an illustrative videotape accompanied the report on the proceeding did not constitute an abuse of the privilege, stated the Court of Appeals. Lal had been given an opportunity to demonstrate that the videotape contained deliberate distortion and sensationalism, but the District Court concluded that there was no evidence on which a jury could reasonably conclude that the videotape rendered the news report unfair or inaccurate.

The District Court ruling granting summary judgment to CBS on Lal's trespass claim also was upheld. A tenant in the house had given permission to the CBS reporter to enter the premises, and this consent was a complete defense to the trespass action.

Lal v. CBS, Inc., 726 F.2d 97 (3d Cir. 1984) [ELR 6:4:16]

Federal Court of Appeals upholds Copyright Royalty Tribunal's increase in fees for cable carriage of deregulated distant signals

The Copyright Act of l976 established royalty rates to be paid by cable operators in exchange for the right to carry non-network programming from distant television stations. In 1980, the Federal Communications Commission repealed its distant signal and syndicated program exclusivity rules. The distant signal rules had restricted the number of distant signals a cable system was permitted to carry; the limit varied according to the size and signal density of the market within which the cable system operated. For example, in the top 50 television markets, cable systems were permitted to carry three network stations and three independents. The syndicated program exclusivity rules limited cable carriage of particular programs which were otherwise permitted under the distant signal quotas.

As a result of the FCC's deregulation action, the Copyright Royalty Tribunal determined an appropriate rate for the newly deregulated distant signals. A market fee was the standard, i.e., a fee for the deregulated signals that program producers and cable operators would have agreed upon "in the absence of compulsory licensing and the presence of copyright liability." The Tribunal concluded that a reasonable rate for each newly added distant signal would be 3.75 percent.

The National Cable Television Association contended that the Tribunal-established rate served to restore the "barrier" which the FCC originally had imposed on the cable carriage of distant signals, and that the Tribunal should have followed the statutory fee schedule with its lower rates.

Federal Court of Appeals Judge Ginsburg, however, found that the Copyright Act of 1976 did not require the Tribunal to base its rate adjustment on the statutory declining rate schedule, and that, upon the evidence, before it, the Tribunal had arrived at "reasonable" rates. The Tribunal had analogized to the television broadcast and sports network markets and apparently then made a downward adjustment in the copyright owners' proposed flat rate of five percent to take into account the differences between those marketplaces and the marketplace for distant signals. This "best guess" was acceptable to the Court of Appeals in view of the character of the evidence presented in the ratemaking proceeding.

The Tribunal's decision to increase royalty fees to compensate copyright owners for the loss of syndicated exclusivity protection also was upheld. There was evidence that the importing of distant signals by cable systems diverts audiences from local broadcast stations that may have purchased exclusive rights to syndicated programming, thereby decreasing the local stations' advertising revenues and, consequently, reducing bids for programming. It was determined that copyright owners were economically harmed by programming duplication, warranting an increase in royalties for "old" distant signals, and that this increase was within a "zone of reasonableness."

National Cable Television Association, Inc. v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C.Cir. 1983) [ELR 6:4:17]

Federal Communications Commission is not required to issue regulations to increase broadcast participation by the handicapped, rules Federal Court of Appeals

The California Association of the Physically Handicapped has been denied relief in its action seeking to require the Federal Communications Commission to issue regulations, under section 504 of the Rehabilitation Act of 1973, encouraging the employment and media ownership opportunities of handicapped individuals. The Association had filed a petition with the FCC in 1977 requesting rulemaking proceedings with respect to: including the handicapped in the Commission's equal employment opportunity rules; giving preference to handicapped individuals in the ownership and management of broadcast facilities; and requiring licensees to modify their facilities to accommodate the handicapped. In 1980, the FCC declined to adopt the regulations sought by the Association. However, the Commission promised to appoint a "coordinator for broadcasting and the handicapped" and stated that "it would consider findings of illegal discrimination against the handicapped in reviewing applications for new licenses and license renewals."

The Association also had presented its case to a Federal District Court. But the court found that it lacked subject matter jurisdiction since the FCC had issued a final ruling on the matter, "a ruling that was within the exclusive jurisdiction of the Court of Appeals." The Court of Appeals agreed, pointing out that statutory and constitutional claims against the FCC may not be made in Federal District Court.

The appellate court also considered the substantive issues raised. Section 504 of the Rehabilitation Act provides that "no otherwise qualified handicapped individual, solely by reason of the handicap, shall be subjected to discrimination under any program or activity receiving federal financial assistance." The Association argued that broadcast licenses are a form of federal financial assistance, and that the FCC therefore was required to issue regulations implementing section 504. However, the court held that broadcast licenses are not a form of federal financial assistance under section 504 because the FCC is not a funding agency and has no responsibility to enforce section 504 (citing Community Television of Southern California v. Gottfried (ELR 5:2: 11).

The Association then argued that even if section 504 were not applicable, the "public interest" standard of the Communications Act would impose on the Commission the obligation to establish the requested regulations. The court again cited Gottfried in rejecting this argument, pointing out that in that case, the public interest standard of the Communications Act was found "insufficient" to create any obligation to enforce section 504 or to incorporate that section's standards into the Communications Act.

The Association's equal protection argument also was unsuccessful. No appellate court has held that the handicapped are a suspect class so as to require strict scrutiny of the FCC's action, and the Commission had presented a reasonable justification (under the rational basis test) for refusing to include the handicapped in its equal employment opportunities program.

The court concluded by stating that the District Court was correct in dismissing the Association's motion for attorneys' fees but that it had erred in basing this holding on a lack of jurisdiction. Nevertheless, the Association did not qualify for attorneys' fees requested under section 505(b) of the Rehabilitation Act since it was not a prevailing party. The FCC's decision to appoint a coordinator for broadcasting and the handicapped was not required under section 504, and as a "gratuitous" action, did not endow the Association with the status of a prevailing party entitled to attorneys' fees.

California Association of the Physically Handicapped, Inc. v. Federal Communications Commission, 721 F.2d 667 (9th Cir. 1983) [ELR 6:4:17]

Court of Appeals upholds FCC decision to shorten license renewal application form

Thanks to a Federal Court of Appeals in Washington, D.C., broadcasters can continue using the FCC's simplified radio and TV license renewal applications. The court upheld the use of these forms despite allegations that their adoption violated both the Communications and Administrative Procedure Acts.

Although broadcasters have welcomed the court's decision, not all of them will reap the benefits of the streamlined renewal form. At least five percent of all noncommercial radio renewal applicants in a given year will have to file a long audit form similar to the old renewal application. But, most licensees will be relieved of paperwork, because the new form consists of only five yes/no questions, none of which address past or future programming. In addition to the application, all licensees will have to provide public files containing program logs and information on how the licensee ascertained and lived-up to the community's needs. To insure that the licensees make these records available, and comply with technical standards, the FCC's Field Operations Bureau will make random station inspections. Charges of licensee misconduct also will result in on-site inspections.

The charges in the renewal application form grew out of an FCC inquiry. The inquiry concluded that most broadcasters complied with regulations and that public complaints and petitions-to-deny provided the most effective means of regulation enforcement. Based on these findings, the FCC felt a post-card renewal form would comply with the mandate of the Communications Act. Petitioners, Black Citizens for a Fair Media and Henry Geller, disagreed. They charged that the FCC's adoption of the new renewal application form violates the Communications and Administrative Procedure Act.

The petitioners asserted that the new renewal forms would not serve the public interest, convenience and necessity as required by the Communications Act. They premised their claim on the lack of programming questions provided in the new renewal application. According to the petitioners, the FCC cannot grant license renewals which serve the "public interest, convenience and necessity" without having information on a licensee's non-entertainment programming.

In addressing this argument, the court reviewed the Communications Act, its legislative history, and past actions of the FCC. The court found that Congress did not intend to make a programming inquiry a prerequisite to a renewal. It cited a 1952 amendment to the Communications Act as a basis for this finding. Prior to 1952, the Act dictated extensive procedures for granting and renewing licenses. However, in 1952, Congress streamlined the renewal process by substituting the lengthy review with the "public interest, convenience and necessity" standard. This legislative action and Congress's failure to include programming inquiries in the Communications Act's list of suggested renewal application questions helped convince the majority that Congress did not mandate a programming inquiry for renewals. The court also felt that the broad discretion given the FCC in the area of licensing should be paralleled in the area of renewals.

The majority also cited past FCC actions to help buttress its finding. It noted that over the years the FCC has added and subtracted questions, and it pointed out that the renewal form did not contain ascertainment and children's programming questions until the 1960s and 1970s. The court reasoned that the FCC had the power to eliminate these and other questions since it had the power to add them.

Once making this determination, the majority considered whether the new renewal system would allow the FCC to fulfill its statutory obligations. The petitioners claimed that the FCC has twice ignored its obligations by first relying on public enforcement and then by not providing the public with a means for enforcement. The majority felt that the FCC's reliance on the public was not unreasonable in light of the limited resources of the FCC and the public's awareness of a station's programming. The majority also found that the public file requirements of TV and radio licensees would provide the public with a means for enforcing the public interest, convenience and necessity requirement. In addition, the majority held that the Communications Act did not preclude the FCC from inferring service in the public interest. It reached this conclusion after finding "strong incentives for operating in the public interest" and after noting that the presumption was rebuttable.

The court next addressed the petitioners' argument that the FCC violated the Administrative Procedure Act. This Act requires that an agency specify its reasons for departing with previous policies. The court concluded that the FCC satisfied this requirement when it stated that it adopted the new renewal system because of its superior cost effectiveness and comparable enforcement capabilities. Although the majority felt that the FCC's conclusions lacked rigorous deduction, it deferred to the Commission's discretion.

The dissent, however, argued that the court should not defer to the FCC's discretion. According to the dissent, the Communications Act implicitly requires a programming review of each applicant before granting a renewal. According to the dissent, a licensee can only fulfill the Act's public interest requirement by providing nonentertainment programming which addresses community issues and responds to community needs. Since the Act requires the FCC to determine whether the public interest will be served by a license renewal, the dissent argued that the FCC must review the programming of all renewal applicants.

Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C.Cir. 1983) [ELR 6:4:18]

Briefly Noted:

Invasion of Privacy.

A Federal District Court in Ohio has dismissed an action brought by three minor boys against Playboy Enterprises, Inc., finding no actionable invasion of their privacy in its publishing, along with nude photographs of a policewoman, a photograph of her and the boys on a public sidewalk attempting to fix a flat bicycle tire. Following the publication of these photographs in the May 1982 issue of Playboy magazine, the boys filed a lawsuit in Ohio, asserting that publication of the photograph destroyed their right of privacy and "humiliated, annoyed, disgraced, [and] exposed [them] to public contempt and ridicule." In a diversity action such as this, a federal court must apply the law of the state in which it is situated. To state a cause of action for invasion of privacy under current Ohio law, plaintiffs must establish any of four possible theories: unreasonable intrusion upon their seclusion; an appropriation of plaintiffs' names or likenesses; unreasonable publication of plaintiffs' lives; or an unreasonable public placement of plaintiffs in a false light. The court found that none of these were established by the plaintiffs in this case. With regard to the first theory, a defendant is liable "only when it has intruded into a private place, or has otherwise invaded a private seclusion." That was not the case here as the photograph showed a public sidewalk. The theory of appropriation likewise was not proved, since the plaintiffs did not allege that their names or likenesses had intrinsic value which had been taken by Playboy for its own benefit. There was no unreasonable publicity given to their private lives since the incident was not a matter of private concern, but rather was open to the public eye. Finally, there was no allegation that the photograph was not a true representation of the plaintiffs.

Jackson v. Playboy Enterprises, Inc. 574 F.Supp. 10 (S.D. Ohio 1983) [ELR 6:4:19]

Antitrust.

An Illinois Federal District Court has granted summary judgment to a game manufacturer, Parker Brothers, in an action brought by two game board developers who failed to show that Parker Brothers attempted to monopolize the game board market and exclude competition by selling a similar game. In early 1976, the plaintiffs, two truck drivers, developed a board game designed to capitalize on the C.B. radio fad popular at that time. By mid-August, the plaintiffs were out of business, allegedly because of Parker Brothers' conduct. Parker Brothers had issued sales kits and solicited orders for a similar game beginning in June of that year.

Other such games were also on the market at that time, using the C.B. radio, truck drivers theme. To prove a Sherman Act violation, plaintiffs must show defendant's specific intent to monopolize the relevant market and a dangerous probability that the defendant would succeed. The court found that the plaintiffs in this case failed to show that Parker Brothers' actions were not taken for sound business purposes, given that the appeal of a faddish product like this game was short-lived and therefore normal product introduction procedures were abandoned under the pressure of marketing for the Christmas season. In addition, the plaintiffs failed to show there was a genuine issue of material fact as to whether there was a dangerous probability that Parker Brothers would succeed in this monopoly attempt, noting that Parker Brothers, together with the leading manufacturer, Milton Bradley, did not control 50% of the market.

Lappe v. Parker Brothers Division of General Mills Fun Groups, Inc., 575 F.Supp. 44 (N.D.Ill. 1983) [ELR 6:4:19]

Constitutional Law.

Young video game players will be disappointed by a Colorado Federal District Court decision which has upheld a city ordinance prohibiting game owners from letting children under the age of 16 play coin-operated games during school hours on school days unless accompanied by a parent or guardian. The plaintiffs, owners of Sam's Super Foods in Dacona, Colorado, have several video game machines in their store. After having been cited for violations of the ordinance, they brought an action alleging that the ordinance was unconstitutional on its face and in its application on the grounds that it violated due process and equal protection and invaded protected rights of association, property, privacy and fundamental family rights. The court applied a rational relationship test which requires that the legislation have a legitimate public purpose based on the promotion of public welfare, health or safety, and that it bear a rational relation to the end it seeks to accomplish. The goal - to abate truancy - was clearly a proper public purpose, according to the court, and was rationally related to that purpose although there were no such restrictions on other child-distracting amusements and even though some children were not required to be in school during the restricted hours. The court reasoned that the ordinance need not "maintain a perfect fit between the end sought ... and the means used. So long as the objective and means are rationally met, the fact that the ordinance could be improved does not imperil the law."

Shorez v. City of Dacono, Colorado, 574 F.Supp. 130 (D.Colo. 1983) [ELR 6:4:19]

Sports.

A Federal Court of Appeals has decided a dispute over ownership of season football tickets between a corporation and the corporation's former vice-president by affirming the lower court's dismissal of the suit. In his capacity as a vice president for production and sales, Eugene Poche, Jr., entertained business customers for the corporation, State Block, Inc. He purchased season tickets to Louisiana State University football games for the major purpose of entertaining these customers. The tickets were paid for by the corporation. In 1981, after many years of working for the corporation, Poche sold his stock to the corporation president's son and left the corporation. When LSU mailed out the 1981 season tickets, Poche asked the president to send the tickets to him, but the president refused. Poche then requested LSU to issue the tickets for subsequent seasons to him in care of his new corporation. When the 1982 season tickets were mailed to Poche, State Block brought suit. The court held that neither of the parties "owned" the tickets, but that the purchase of the tickets was more in the nature of a lease of the right to attend a season of games with an option to renew at the end of the season. The court concluded that the corporation was the "owner" of the tickets and the rights accruing therefrom. However, in order for the court to order the lease renewal in favor of the corporation and the return of the tickets, LSU would have to be named as a party. Return of the tickets also failed since the current season had ended, making the return moot.

State Block, Inc. v. Poche, 444 So.2d 680 (5th Cir. 1984) [ELR 6:4:20]

First Amendment.

Based on a First Amendment right to free expression and unwarranted prior restraint, a Federal District Court in Oklahoma has ordered the city manager of Oklahoma City to rent a hall in the city's convention center as the site for a national pageant for female impersonators. An Arkansas corporation responsible for producing an annual national contest for female impersonators entitled the "Miss Gay America Pageant" contracted with the Oklahoma City Public Property Authority, manager of the Myriad Convention Center in Oklahoma City, to hold the pageant in the Center three months hence. A few weeks after the arrangements were made, the corporation's president and sole stockholder, N.R. Jones, was notified that the event would not be accommodated and a permit would not issue. No reason was given for the turnabout. Defendant Scott Johnson, city manager, denied the issuance of the permit, believing that the event would be "an open expression of homosexuality which ... violated prevailing community standards," and therefore he concluded it would be obscene. The court reasoned that as a public forum, the Myriad Convention Center was "designed for and dedicated to expressive activities." The pageant was such an "expressive activity" protected under the First Amendment. Additionally, while the pageant might meet some of the Miller criteria defining obscenity, no evidence was produced that indicated the pageant would include depictions of sexual conduct in violation of state law - one of the Miller criteria. Thus, the defendants did not meet the burden of showing the production to be obscene and consequently outside First Amendment protection. The court found it particularly disturbing that the city manager unilaterally rejected the application without investigation, based solely on his own subjective opinion.

Norma Kristie, Inc. v. Oklahoma City, 572 F.Supp. 88 (W.D.Okl. 1983) [ELR 6:4:20]

Defamation.

The dismissal of a suit against Columbia Broadcasting System for defamation and invasion of privacy has been upheld by a Federal Court of Appeals. In August 1975, CBS aired a television news broadcast reporting that

Carl Wehling, owner of a chain of vocational schools in Texas, had defrauded the federal government and many students through the misuse of federally funded loans for students attending his schools. In defense, CBS asserted that the news broadcast was true as established by prior judgments against Wehling won by the federal and state governments. The District Court concluded that the guilty verdicts confirmed the truth of the indictment and thus, of the broadcast and granted summary judgment for CBS. On appeal, the court's analysis was two-pronged. The effect of the prior federal judgment against Wehling was determined by federal standards. Thus, three prerequisites to collateral estoppel under federal law had to be met: that the issue at stake be identical to the one involved in the prior litigation; that the issue has been actually litigated in the prior litigation; and that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment in that earlier action. Here the judgment in the federal criminal case conclusively established the truth of the broadcast and all three prerequisites were fulfilled. The collateral estoppel effect of the state civil judgment was determined by Texas law which allows collateral estoppel "against one who has litigated and lost an issue by one who was not a party to the prior litigation." Thus, CBS's defense of substantial truth was aided by any facts actually litigated and necessarily decided in the state civil case which held him liable for failing to refund unearned student tuition. Since the substance of the CBS report was true, summary judgment was properly granted on the defamation claim.

Wehling v. Columbia Broadcasting System, 721 F.2d 506 (5th Cir. 1983) [ELR 6:4:20]

NEW LEGISLATION AND REGULATIONS

Tax Reform Act changes tax treatment of sound recordings, movies and video tapes

The Tax Reform Act of 1984 has amended the tax treatment of sound recordings, movies and video tapes. The changes involve the depreciation and investment tax credit provisions of the Internal Revenue Code.

A sound recording is a work resulting from affixing a series of musical, spoken or other sounds regardless of the material on which such recordings are affixed. Hence, the new rules apply to traditional records, as well as cassette tapes.

Basically, under the new Act, persons owning sound recordings have two options with respect to the tax treatment of each sound recording. A taxpayer may elect to depreciate the sound recording as if it were three-year property under the Accelerated Cost Recovery System (ACRS) and take a 6% investment tax credit. Alternatively, a taxpayer may depreciate the sound recording under the "income forecast" method and deduct contingent amounts when paid or accrued to the extent that they are deductible under present law.

In order to elect to depreciate the recording under the ACRS option, all taxpayers with an ownership interest in the recording must elect to utilize that option. Hence, if any of the taxpayers having an ownership interest do not so elect, the income forecast method must be utilized.

For taxpayers electing the ACRS option (i.e., three-year recovery period and 6% investment credit), all capital costs (including non-United States production costs, but not including contingent payments) are to be recovered. However, for the purposes of determining investment credit, only qualified United States production costs may be utilized. The Act also provides that foreign use rules with respect to the investment credit (IRC section 48(a)(2)) and with respect to depreciation (IRC section 168(f)(2)) are not applicable to the distribution of sound recordings outside of the United States.

These provisions are generally effective for sound recordings placed in service after March 15, 1984.

The amendments concerning films are different. As a result of those amendments, movies and video tapes are no longer "recovery property" for accelerated cost recovery (ACRS) purposes. Hence, non-ACRS methods of depreciation must be used. Basically, this means the "income forecast" method should be used. Furthermore, Congress has indicated that only the 6 2/3% investment credit may be utilized for films.

The new rule with respect to ACRS deductions for films does not apply to any qualified film placed in service before March 15, 1984 where depreciation was claimed with respect to that movie on a tax return filed before March 16, 1984. Also, the new rule does not apply to any qualified movie placed in service before 1985, if ACRS is claimed with respect to that movie, and 20% or more of the production costs were incurred prior to March 16, 1984.

Tax Reform Act of 1984 section 113, amending sections 46, 48 and 168, and adding new sections 48(r) and 168(e)(5) [ELR 6:4:7]

IN THE NEWS

Videocassette distributors agree to use Motion Picture Association of America ratings on cassette versions of feature films

The Motion Picture Association of America and the Video Software Dealers Association have announced that 14 major videocassette distribution companies will use the MPAA "G" through "X" rating system in connection with the home video release of all new films and reissues of past films. The ratings given to films by the MPAA's Classification and Ratings Board upon their theatrical release will automatically appear on both the cassette packaging and label for videocassette releases that are identical to the theatrical version of a film. The companies which will be using the ratings include all the distributors, at present, of theatrical motion pictures produced by MPAA member companies. The Video Software Dealers group has pledged to exercise the same "good faith effort" of its 1000 members to voluntarily enforce the ratings system at the sales and rental level as that exercised by theatrical exhibitors.

It appears that the parties acted, in part, in response to the portent of state legislative action with respect to the rating of videocassettes. Maryland and Tennessee have passed laws requiring MPAA ratings on film cassettes; and similar bills have been considered, but not enacted, by New Jersey and New York. [Sept. 1984] [ELR 6:4:21]

Harlem Globetrotters settle action against former player Meadowlark Lemon

Meadowlark Lemon, the former Harlem Globetrotters star, has settled an action brought against him by the Globetrotters in which it was alleged that Lemon engaged in unfair competition, trademark infringement and breach of his termination contract. The agreement bars Lemon and the Bucketeers, an exhibition basketball team Lemon formed after leaving the Globetrotters (or any other team he organizes) from playing "Sweet Georgia Brown" during their performances. And the agreement Prevents Lemon from using the "Magic Circle" warmup routine, from using the name of the Harlem Globetrotters in advertisements promoting his team, and from referring to the Globetrotters in a "disparaging way." The Globetrotters did not recover any of the $25 million in damages they sought, and Lemon will not have to relinquish his title as the "Clown Prince of Basketball." In 1980, shortly after the case was first filed, the Globetrotters obtained a preliminary injunction quite similar to the ultimate settlement. The preliminary injunction also prohibited Lemon from using the "Globetrotter" name, the "Sweet Georgia Brown" song, and the "Magic Circle" routine, but not from using other routines or the "Clown Prince of Basketball" phrase. (ELR 2:1:1) [Sept. 1984] [ELR 6:4:21]

DEPARTMENTS

Book Notes:

"Counseling Clients in the Entertainment Industry 1984" by Martin E. Silfen (Editor)

This two-volume set was published by the Practicing Law Institute in connection with its annual entertainment law program earlier this year. Though designed to supplement the talks given by the program's faculty, the books are a valuable collection of documents, forms and outlines even for those who were unable to attend. They contain an enormous amount of material - together, the two volumes come to 1380 pages - and cover a wide range of topics of interest to entertainment lawyers.

Included are chapters on Personal Management and Legal Representation, Sound Recordings, Music Publishing, Motion Pictures, Home Video, Theatrical Production, and Taxation.

Counseling Clients in the Entertainment Industry 1984 is available for $35 from the Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019. (Course Handbook Numbers 174 & 175; Order Numbers G4-3748/G4-3749.) [ELR 6:4:21]

"Representing Professional Athletes and Teams 1984" by Martin E. Blackman and Philip R. Hochberg (Editors)

This volume was prepared for distribution at this year's Practicing Law Institute sports law program. It supplements and was designed to be used in conjunction with the 1983 handbook. Among the topics covered are Agent Regulation, Eligibility Issues, Workmen's Compensation, Financial Planning, Player/Management Agreements, Antitrust Issues, Leases, Insurance, Broadcasting, and Trademarks. Also included is a 25 -page section listing the 1983 through 1985 salaries of some 1500 NFL players identified by name, position and team.

Representing Professional Athletes and Teams 1984 is available for $35 from the Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019. (Course Handbook Number 185; Order Number G4-3750.) [ELR 6:4:21]

"Communications Law 1983" by James C. Goodale (Editor)

This two-volume set was prepared in connection with last year's communications law program, sponsored by the Practicing Law Institute. The books are an enormous almost 1900 pages in total - and eclectic compilation of material. Much of the book consists of detailed, cite-filled outlines written especially for the PLI program. Also included are articles drawn from newspapers and legal journals, unpublished opinions, proposed legislation, and agency guidelines. Among the specific topics addressed in these books are Libel, Privacy, Right of Publicity, Courtroom Access, Advertising and Commercial Speech, Antitrust (issues of concern to the press and to cable-TV operators), Copyright, the Freedom of Information Act, and Reporter's Privilege.

Communications Law 1983 is available for $35 from the Practicing Law Institute, 810 Seventh Avenue, New York, N.Y. 10019. (Course Handbook Numbers 168 & 169; Order Number G4-3739/G4-3740.) [ELR 6:4:22]

In the Law Reviews:

New York University Law Center has published Volume 31, Number 4 of the Journal of the Copyright Society of the USA which contains the following articles:

The Mechanical Right: A Pragmatic Perspective - the 21st Annual Jean Geiringer Memorial Lecture of International Copyright Law by Ralph Peer, 11, 31 Journal of the Copyright Society of the USA 409 (1984)

From New Technology to Moral Rights: Passive Carriers, Teletext, and Deletion as Copyright Infringement - the WGN Case by Stephen R. Barnett, 31 Journal of the Copyright Society of the USA 427 (1984)

Legislative and Administrative Developments - United States of America and Territories, 31 Journal of the Copyright Society of the USA 486 (1984)

Communications and the Law, Volume 6, Number 4, has been published by Meckler Publishing, 520 Riverside Avenue, Westport, CT 06880 and examines the following issues:

Obtaining the Photojournalist's Work Product Via Warranted Searches and Subpoenas by Michael D. Sherer, 6/4 Communications and the Law 3 (1984)

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