RECENT CASES

FCC reactivates inquiry into children s television

The Federal Communications Commission has reactivated its 7-year-old inquiry into programming and advertising practices in children's television. Though the FCC has not proposed specific rules, one major purpose of the reactivated inquiry is to determine whether formal regulations are necessary.

At the present time, broadcasters are expected to comply voluntarily with policy guidelines set forth in the Children's Television Report and Policy Statement, 50 FCC 2d 1, issued by the FCC in November 1974. In that Report, the FCC found that broadcasters have an obligation to provide "diversified programming" for children; to present programs specifically designed for both preschool and school aged children; and to remedy the imbalanced scheduling of almost all of children's programs on weekends.

The 1974 Report also adopted advertising guidelines for children's television. Broadcasters were told to reduce advertising on children's programs to time limitations recommended by the National Association of Broadcasters and the Association of Independent Television Stations. Broadcasters also were told to maintain a "clear separation" between programs and commercials, and to eliminate "hostselling" and other forms of "tie-ins" between program content and product promotion.

The 1974 Report stated that full compliance was expected by January 1, 1976 and that non-compliance would raise questions at license renewal time concerning the adequacy of a broadcaster's performance. Nevertheless, the Report's guidelines were characterized by the FCC itself as an invitation to “self-regulation” by the industry.

The FCC’s decision to issue guidelines, rather than regulations, was challenged by Action for Children’s Television, a consumer group which charged that the FCC abused its discretion by failing to adopt formal regulations in 1974. However, the Court of Appeals affirmed the FCC’s decision to issue guidelines first, saying that it could “see no compelling reason why the Commission should not be allowed to give the industry’s self-regulatory efforts a reasonable period of time to demonstrate that they will be successful in rectifying the inadequacies of children’s television . . .” Action for Children’s Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977). The court also said that the FCC may well have adequate authority to regulate in the area, perhaps even to the extent of adopting formal regulations.

Approximately a year ago, the FCC began to receive filings from consumer and industry groups focusing on the extent to which broadcasters have complied with the 1974 guidelines. For that reason, and because the FCC has always intended to reconsider the children's television issue, the FCC has formally reactivated its original inquiry in order to evaluate the effectiveness of its 1974 guidelines and to assess possible alternatives to them.

The FCC's reactivation of its inquiry into children's television appears to be the first step in a comprehensive study which eventually could result in its adoption of formal regulations. For now, interested parties merely have been asked to respond to questions, although there are more than 70 of them. Among the questions are these: Are more children's programs being broadcast now than prior to 1976? Are a greater proportion of children's programs being broadcast on weekdays now than prior to 1976? Are broadcasters limiting advertising time to that recommended by the National Association of Broadcasters and the National Association of Independent Television Stations? To what extent are broadcasters separating program from advertising material? Are broadcasters adhering to the prohibition against host-selling and tie-ins?

The FCC is also seeking information on the economics of children's television, including information on its profitability; its profitability compared to other types of programming; and the effects on profitability that might result from the adoption of rules on a variety of subjects, including rules which would reduce allowable commercial time, require separation of program and commercial material, and require more television programs for children.

Initial comments must be filed by November 1, 1978. Reply comments are due by December 15, 1978.

Children's Programming and Advertising Practices, 43 Federal Register 37136 (1978) [ELR Preview:1]

Muhammad Ali obtains injunction prohibiting continued invasion of his rights of privacy and publicity

Muhammad Ali has obtained a preliminary injunction requiring Playgirl Magazine to cease distribution of its February 1978 issue, because it contains a drawing that violates Ali's "right of privacy" under Section 51 of the New York Civil Rights Law and his common law "right of publicity."

The complained of drawing depicts a nude black man seated in the corner of a boxing ring with both hands taped and outstretched, resting on the ropes on either side. According to U.S. District Judge Gagliardi, Playgirl did not and could not deny that the drawing was in fact of Ali. The figure's cheekbones, broad nose, wide-set brown eyes, distinctive smile and close-cropped black hair were said to be recognizable as the features of Ali, even on cursory inspection.

Although the drawing was captioned "Mystery Man," an accompanying verse referred to the figure as "the Greatest." Judge Gagliardi took judicial notice that Ali has referred to himself as "the Greatest" and that his efforts to identify himself in the public mind as "the Greatest" have been so successful that he is regularly identified as such in the media.

Section 51 of the New York Civil Rights Law provides that any person whose name, portrait or picture is used within New York for the "purposes of trade" without his or her written consent may sue to restrain such use and to recover damages.

Although the use of a picture "in connection with an item of news or one that is newsworthy" is not for trade purposes, there was no informational or newsworthy dimension to the Playgirl drawing. Playgirl's drawing was said to be a dramatization, an illustration falling somewhere between representational art and a cartoon, whose purpose was merely to attract attention. As such, the drawing was not for the purpose of presenting the unembroidered dissemination of facts or the unvarnished, unfictionalized truth, but rather was solely for the purposes of trade.

Playgirl contended that the New York statute does not protect athletes who seek publicity. Judge Gagliardi found that contention to be "plainly in error," however, because it confused the right of privacy with "the quite different and independent right to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another."

The Playgirl drawing also was held to violate Ali's common law "right of publicity." That right recognizes the commercial value of the picture or representation of a prominent person, and protects his proprietary interest in the profitability of his public reputation or "persona." It is analogous to a commercial entity's right to profit from the goodwill it has built up in its name. The interest which underlies protecting publicity rights is the straightforward one of preventing unjust enrichment by the theft of good will.

Judge Gagliardi took judicial notice that there is a fairly active market for exploitation of faces, names and reputations of celebrities. And he held that there was little doubt that Playgirl's unauthorized publication of Ali's portrait amounted to a wrongful appropriation of the market value of his likeness.

Ali v. Playgirl, Inc., 447 E Supp. 723 (S.D.N.Y. 1978) [ELR Preview:2]

Elvis Presley s right of publicity survived his death; distribution of unauthorized memorial poster is enjoined

The right to exploit Elvis Presley's name and likeness for commercial purposes survived Presley's death, the Second Circuit Court of Appeals has held. The court affirmed an injunction obtained by the exclusive licensee of that right preventing the distribution of an unauthorized "memorial poster." In doing so, the court rejected — without extensive analysis — a defense contention that the poster commemorated a newsworthy event and was therefore entitled to First Amentment protection.

While he was alive, Presley exploited his name and likeness for commercial purposes through a Tennessee corporation named Boxcar Enterprises controlled by Presley and Colonel Tom Parker, his personal manager. Two days after Presley's sudden and unexpected death, Boxcar Enterprises granted an exclusive license to exploit Presley's name and likeness to Factors Etc., Inc. in exchange for a $150,000 guarantee, $100,000 of which was paid immediately.

Three days after Presley's death, Pro Arts, Inc. published a poster entitled "In Memory" using a copyrighted photograph of Presley it had purchased from a newspaper photographer.

Factors filed suit against Pro Arts and sought a preliminary injunction. The district court found that Presley exercised his right of publicity during his lifetime by giving Boxcar the exclusive right to exploit his image. The district court further found that this exclusive authority survived Presley's death, after which the right was validly assigned to Factors. Therefore, the district court enjoined Pro Arts from distributing merchandise bearing Presley's name or likeness.

The Court of Appeals affirmed, saying, "To hold that the right did not survive Presley's death, would be to grant competitors of Factors, such as Pro Arts, a windfall in the form of profits from the use of Presley's name and likeness. At the same time, the exclusive right purchased by Factors and the financial benefits accruing to the celebrity's heirs would be rendered virtually worthless."

In a footnote, the Court of Appeals added, "Because the right was exploited during Presley's life, we need not, and therefore do not, decide whether the right would survive the death of the celebrity if not exploited during the celebrity's life."

The Court of Appeals did not explain what significance, if any, it attached to exploitation of the right of publicity during life. Exploitation during life is a factor missing from the Bella Lugosi and Rudolph Valentino cases now pending before the California Supreme Court, however, and thus this case may have less influence with the California Supreme Court than it would have, had the footnote been omitted from the Court of Appeals' decision.

Factors, Etc. v. Pro Arts, Inc., 4 Med.L.Rptr. 1144 (2d Cir. 1978) [ELR Preview:3]

U.S. Court of Appeals affirms jury verdict that Joe Kapp was not damaged by illegal N.F.L. rules

Joe Kapp, who quarterbacked the Minnesota Vikings to the Super Bowl in 1969 while playing out his option, failed to convince a jury that he was damaged by NFL rules that were held illegal in pretrial proceedings in his own case. And the 9th Circuit Court of Appeals has affirmed the jury's verdict in favor of the National Football League.

After playing out his option with the Vikings in 1969, Kapp signed a 3-year "memo agreement" with the New England Patriots in 1970. That "memo agreement" was not an NFL Standard Player Contract. Thus, in 1971, Commissioner Rozelle insisted that Kapp sign a Standard Player Contract, as required by the NFL Constitution and By-Laws. When Kapp refused to do so — because the Standard Player Contract incorporated option rules to which Kapp objected — Kapp was, in effect, told by the Patriots to leave camp. He never played professional football again, and was not paid any salary for the second and third years of his "memo agreement."

As a result, Kapp filed an antitrust lawsuit against the NFL. In 1974, in response to a motion by Kapp for partial summary judgment, U.S. District Judge Sweigert ruled that the NFL's Option, Tampering, Standard

Player Contract and Rozelle Rules were unreasonable restraints of trade, and therefore were illegal. Kapp v. National Football League, 390 F.Supp. 73 (N.D. Cal. 1974).

That decision was greeted with jubilation by NFL players. Ed Garvey, Executive Director of the NFL Players Association, called it "the most significant development in the history of professional sports from the point of view of the athlete." And Kapp's lawyer said that if the opinion were upheld, "the structure of organized football is going to be changed pretty radically."

The structure of organized football has changed since 1974. The Kapp case was followed in 1975 by Mackey v. National Football League, 407 F.Supp. 1000 (D. Minn. 1975), affd., 543 F.2d 606 (8th Cir. 1976), which also held the Rozelle Rule to be an unreasonable and thus illegal restraint of trade. And it was followed in 1976 by Smith v. Pro-Football, 420 F. Supp. 728

(D.D.C. 1976), which held that the NFL draft also violated federal antitrust law.

In 1977 a new Collective Bargaining Agreement was entered into between the NFL Players Association and the NFL Management Council which significantly modified option and draft practices in the league.

Because Kapp v. National Football League was the first published ruling on the legality of intraleague enforcement of option rules, Joe Kapp deserves a significant measure of credit for the changes that were ultimately negotiated into the 1977 NFL Collective Bargaining Agreement. He did not benefit personally from Judge Sweigert's opinion in his case, however.

At the trial which followed Judge Sweigert's opinion, Kapp asked the judge to direct the jury to find that Kapp had been damaged solely because the NFL had violated federal antitrust laws. Judge Sweigert refused to do so, however. Instead, he instructed the jury that it was to decide whether Kapp had sustained injury which was proximately caused by the NFL's illegal rules. The jury decided that Kapp had not.

The Court of Appeals affirmed Judge Sweigert's refusal to give the requested instruction. "The mere fact that some of the NFL's rules were found violative of the antitrust laws does not automatically produce damages for Kapp. He must prove that he was injured by reason of one of the unlawful practices," that court said.

According to the Court of Appeals, the National Football League had argued to the jury that the real reason Kapp quit playing football was that for personal reasons of his own he had decided to seek less strenuous employment in the entertainment field. Apparently the jury agreed. Apparently, the Court of Appeals agreed as well, for in conclusion, it remarked, "That Kapp's principal concern was not with the ability to play professional football free from the restraints imposed by the rules is strongly suggested by the fact that he was urged by both the Patriots and the League to sign a Standard Player Contract with the right reserved to challenge the rules should they be applied against him in the future."

Kapp v. National Football League, F.2d (9th Cir. 1978) [ELR Preview:3]

George Benson obtains injunction prohibiting sale of album recorded years ago, because it was found likely to cause consumer deception and injury to Benson s reputation

Jazz guitarist George Benson has obtained a preliminary injunction prohibiting the sale of an album found likely to cause consumer deception and injury to Benson's professional and personal reputation.

Though recently released, the album actually was recorded years ago, when Benson was an unknown member of a jazz combo which had been hired to record music composed and directed by others. Paul Winley, the composer, remixed the old recordings to accent Benson's guitar track, and began marketing them as an album entitled "George Benson, Erotic Moods." The album jacket featured a large, recent photo of Benson and prominently displayed his name in bold letters. Publicity for the album also used Benson's name and picture.

The jacket design and album advertisements were found to be false descriptions and representations which violated section 43(a) of the Lanham Act, 15 U.S.C. section 1125(a). All that is required under that section is a likelihood of consumer deception. U.S. District Judge Owen found that the prominent use of Benson's name and picture, promotional claims that the album contained new material, and the complete absence of any indication that the performances were from 5 to 12 years old, were more than likely to mislead the public into believing the album contained recent recordings by Benson as the principal performer.

The court also found that the album was likely to cause irreparable injury to Benson's professional and personal reputation, because the music, though of quality, was much less sophisticated in style than that for which Benson has become famous. In addition, one selection was "overdubbed" with sexually suggestive moaning - something that could cause the public to mistakenly believe that Benson endorses "X Rated" material. For both of these reasons, the court found that the public may be deterred from purchasing future Benson releases.

CBS, Inc. v. Gusto Records, Inc., 403 F.Supp. 447 (M.D.Tenn. 1974) was distinguished. In that case the court declined to enjoin the sale of an album of 10 to 15 year old songs recorded by Charlie Rich before he became successful, but bearing a current likeness of him. Instead, the court merely ordered that a decal be affixed to each album clarifying its contents. There, however, Rich had in fact been the principal performer in the old recordings, and had exercised technical and stylistic control over the production of his work.

George Benson, on the other hand, had been made to appear as the central and controlling artist, when in fact he was not. As a result, Judge Owen found that an explanatory label on the "Erotic Moods" album would be inadequate to give Benson the relief to which he was entitled.

Benson v. Paul Winley Record Sales Corp., 452 F.Supp. 516 (S.D.N.Y. 1978) [ELR Preview:4]

Producer of television series Nova obtains injunction prohibiting publication of a magazine by the same name

The producer of the educational television series "Nova" has obtained a preliminary injunction prohibiting Robert Guccione, publisher of Penthouse, Viva and Forum magazines, from using the name "Nova" for a new magazine devoted to science fact, science fiction, science fantasy, the occult and UFO's. Such use would violate the federal trademark rights of the producer of the television series, even though the producer did not register the "Nova" name as a mark, U.S. District Judge Carter has held.

"Nova" is produced by WGBH Educational Foundation, Inc., a non-profit educational corporation which operates several public television an radio stations in Massachusetts. The series deals with scientific issues in a serious and informative though entertaining fashion. Because of the program's quality, WGBH has been able to obtain the support and assistance of some of the most prestigious figures in the scientific community. WGBH also publishes a collection of press reports on "Nova" in magazine form, as part of its promotional effort to popularize the program.

In granting the injunction, the court held that "The mark Nova is arbitrary, fanciful and nondescriptive as applied to a TV science program or publication and, therefore, a strong mark entitled to protection." "There is no question in my mind"' said Judge Carter, "that a magazine such as the one proposed by defendants is so closely connected to [the television series] that even absent any publication activity by WGBH, its right to be protected against the use of its mark on a periodical by a latecomer would be difficult to deny." In addition, because it was clear that titillation was part of the magazine's aim, it posed a threat to WGBH's image of integrity and seriousness, and gave WGBH a basis to be concerned that "Nova" might lose its funding and its audience.

Although it would have been preferable for WGBH to have registered "Nova" as its mark, its failure to do so was not critical. It was conceded that WGBH used the name first and that Guccione had actual knowledge of WGBH's prior use. Furthermore, "Usage, not registration, confers the right to a trademark . . . All registration does is to afford the registrant prima facie evidence of ownership of the mark; it confers no greater rights than those possessed at common law."

WGBH v. Penthouse International, 4 Med.L.Rep. 1164 (S.D.N.Y. 1978) [ELR Preview:5]

Miller Brewing Company obtains injunction prohibiting the broadcasting of television commercials for Carling s Highlite beer in the U.S.; injunction based solely on Miller s right to its High Life trademark, however, and not upon the copyrights to Miller s commercials, despite similarities between the content of the Miller and Carling commercials

The Miller Brewing Company has obtained a preliminary injunction prohibiting Carling O'Keefe Breweries of Canada from broadcasting television commercials for Carling's "Highlite" beer in the United States. However, the injunction was based solely on Miller's right to the exclusive use of its registered "High Life" trademark. The court expressly rejected Miller's contention that the Carling commercials also infringed the copyrights to Miller's own television commercials.

On the trademark issue, U.S. District Judge Elfvin found there to be "a striking similarity . . . in appearance and pronunciation" between Miller's "High Life" trademark and the name of Carling's beer, "Highlite." Thus, he found that the test for trademark infringement — likelihood of confusion had been satisfied.

On the copyright issue, however, the court held that the two companies' commercials were not substantially similar. Such similarities which did exist — and there were several — were said to be similarities in idea or theme only, and not similarities in expression protected by copyright.

The copyrighted Miller commercials in question feature John Mackey and Matt Snell (former football players) arm wrestling; Mendy Rudolph and Tom Heinsohn (former basketball referee and coach) arguing; Deacon Jones (former football player) reciting poetry; and the VanArsdale twins (former basketball players) reciting the commercial's message in unison. All of the commercials are set in a tavern.

The allegedly infringing Carling commercials feature two unidentified men arm wrestling; a gregarious fellow reciting poetry; and the McCluskey brothers reciting portions of the commercial's message in sequence. All of the Carling commercials are also set in a tavern.

In support of its copyright infringement claim, Miller asserted that arm wrestling, argument, the recitation of a sales message in verse, and brothers speaking in unison are the expressions used to communicate the commercials' idea and were therefore protected by their copyrights. Miller also contended that there was substantial similarity between its commercials and Carling's in settings, characterization, format, language, pace and pattern of scenes.

The court found, however, "that arm wrestling, argument in a tavern, recitation of poetry, and siblings speaking in unison . . . are only ideas or themes . . . and do not constitute expressions subject to copyright protection." According to the court, arm wrestling did not express the commercial's theme; it was merely a vehicle for placing the characters in context. Similarly, argument and poetry, in and of themselves, do not express ideas; it is the words voiced which convey the ideas expressed. The court also found that the use of brothers speaking in unison was not protectible expression, but was merely an advertising theme; it was the words spoken by the brothers that expressed the idea.

Interestingly, although Carling's commercials were found not to he similar enough to Miller's to infringe the copyrights to Miller's commercials, they were sufficiently similar to the Miller commercials so that "an inference of conscious imitation" of Miller's trademark was readily drawn by the court another factor which led the court to find trademark, though not copyright, infringement.

Miller Brewing Company v. Carling O'Keffe Breweries of Canada, 452 F.Supp. 429 (W.D.N.Y. 1978) [ELR Preview:5]

Expiration of statutory copyright in the 1937 version of A Star Is Born dedicated it to the public domain; common law copyright in underlying script and musical score afford no basis for enjoining distribution

The expiration of Warner Brothers' statutory copyright in the 1937 version of "A Star Is Born" dedicated that version of the movie to the public domain. Though Warner Brothers still owns the common law copyright to the underlying script and musical score — and thus would be able to enjoin unauthorized remakes of the movie — the common law copyright to the underlying script and score of the 1937 version do not afford Warner Brothers with a basis to enjoin distribution and exhibition of the 1937 version itself.

U.S. District Judge Gignoux has so held in a case between Warner Brothers and Classic Film Museum, Inc., a Maine corporation engaged in the business of renting movies for theatrical, nontheatrical and television exhibition. Classic obtained prints of the 1937 version of "A Star Is Born," which were made by persons having no authority to do so, after the expiration of the movie's statutory copyright.

Judge Gignoux distinguished G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir.), cert. den., 342 U.S. 849 (1957), which held that when a derivative work passes into the public domain while a copyright still exists in the underlying material, only the new matter in the derivative version is dedicated to the public use. In the Ricordi case, the copyright in the underlying material was statutory, not common law. Said Judge Gignoux, "Extension of the Ricordi doctrine to a case in which the underlying copyright is common-law, not statutory, would permit the proprietor of the copyright in the underlying work to extend for an indefinite time his monopoly of those portions of the derivative work which are based on the underlying material . . . To permit this result would frustrate the whole concept of limited monopoly in copyright law . . . It would allow a person to exercise an unlimited monopoly of a derivative work otherwise in the public domain simply through the artifice of having maintained a common-law copyright in the underlying work, instead of having copyrighted the basic work for a fixed period of years pursuant to statute . . . It is a result which clearly conflicts with the limited monopoly policy of the Copyrights Act and the Copyrights Clause of the Constitution."

Classic Film Museum, Inc. v. Warner Bros., Inc., Copyright Law Reports Para. 25,022 (N.D.Me. 1978) [ELR Preview:6]

Theatrical agents fail in bid to enjoin enforcement of Actor s Equity rule prohibiting members from dealing with certain agents

Several theatrical agents have sued Actor's Equity Association under the federal antitrust laws. At issue in the case is an Actor's Equity rule prohibiting members from dealing with agents who do not comply with Actor's Equity regulations limiting the fees that agents may charge actors and requiring agents to be franchised by

Equity. Actors who use unfranchised agents may be disciplined.

U.S. District Judge Motley has refused to issue a preliminary injunction against enforcement of the challenged rule, because of the likelihood that the actions of Actor's Equity will be found to be exempt from the federal antitrust laws under the "labor exemption."

The labor exemption provides that unions are exempt from the antitrust laws, except in circumstances the agents did not show were likely to exist, because similar rules used by the musicians' union and the writers' union have already been upheld by the courts.

H.A. Artists & Associates, Inc. v. Actor's Equity Association, 1978-2 Trade Cases Para. 62,165 (S.D.N.Y. 1978) [ELR Preview:6]

Alleged spy and U.S. Navy Captain both held to be public figures; reckless disregard for the truth not found in either libel lawsuit

llya Wolston, named as a Soviet agent in the book "KGB: The Secret Work of Soviet Secret Agents" by John Barron, and Navy Captain Marcus Arnheiter, the subject of a book entitled "The Arnheiter Affair" by Neil Sheehan, both were held to be public figures in separate libel lawsuits filed against the authors and publishers of those books.

In the Wolston case, the D.C. Circuit Court of Appeals held that whether Wolston was a public figure was a question of law to be decided by the court, not a question of fact for the jury. The court then went on to hold that Wolston was a public figure, because he had failed to appear before a grand jury several years ago and had thus invited public attention and comment. Said the court, "Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage. The reference to him in KGB related strictly to those issues, without intruding into his personal fife or affairs."

In the Arnheiter case, the 9th Circuit Court of Appeals held that "The commanding officer of a United States Navy vessel during war is in control of governmental activity of the most sensitive nature. Such a person holds a position that invites 'public scrutiny and discussion' and fits the description of a public official under New York Times." Furthermore, the 9th Circuit noted that Arnheiter did much more than seek reversal of a Navy decision to remove him from command of a ship during the

Vietnam war. “He used every conceivable effort to gain publicity and eventually pressured one congressman to hold a series of ad hoc hearings on the subject of his removal.” Under these circumstances, said the court, Arnheiter qualified both as a public official and as a public figure, and thus was required to satisfy the actual malice standard of New York Times v. Sullivan.

Neither Wolston nor Arnheiter were able to prove actual malice. Actual malice means knowledge of the falsity or reckless disregard for the truth or falsity of what one has written and published.

John Barron, the author of KGB which named Wolston as a Soviet agent, spent four years writing his book, assisted by the large Reader’s Digest research staff. The statements about Wolston were based primarily on a published FBI report entitled “Expose of Soviet Espionage” which stated that an FBI investigation had identified Wolston, and others, as being Soviet intelligence agents.

In his libel lawsuit, Wolston contended that it "could be inferred that Barron had serious doubts as to the truth of his statement that Wolston was a Soviet agent, because Barron failed to check with the FBI or make any other inquiries to verify the statements in the FBI report." To this the court responded, "Failure to investigate does not itself establish bad faith or recklessness . . . in any event Barron was entitled to rely upon the report of the F.B.I., one of the great investigative agencies of the world, and to believe that the Bureau's investigative skill and resources far exceeded any that were available to him . . . Furthermore, the extensive research conducted by Barron and his staff, over a period of four years, revealed no evidence that Wolston had ever objected to the statements about him in the Bureau's report..."

The Arnheiter court's analysis of the "reckless disregard" issue was even shorter. It said, "`Reckless disregard' has been held to mean `those false statements made with the high degree of awareness of their probable falsity.'. . . Sheehan did not proceed irresponsibly with his writing effort. He spent more than three years researching the data, reviewing sworn testimony taken at the various hearings, and talking with individuals who both supported and criticized Arnheiter's conduct. Appellant's argument that Sheehan recklessly attributed insanity to him simply misstates the facts."

Wolston v. Reader's Digest Association, Inc., 578 F.2d 427 (D.C. Cir. 1978); Arnheither v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978) [ELR Preview:7]

Purchaser of television station unable to take tax deductions for cost of FCC license, terminated network affiliation agreement, or advertising contracts

When Forward Communications Corporation purchased television station KVTV for almost $4 million, the purchase price was allocated among the assets acquired. In addition to tangible broadcasting equipment, Forward purchased an FCC license, network affiliation contracts with both CBS and ABC, and several year-long advertising contracts.

Forward sought to amortize that portion of the purchase price allocated to the FCC license. In doing so, it relied upon a 1963 decision of a U.S. District Court in Tennessee permitting amortization of the cost of an FCC television license. Since 1963, however, the U.S. Court of Claims, the 4th and 5th Circuits, the Tax Court and a district court in Virginia all have refused to permit amortization of television licenses, on the grounds that such licenses do not have determinable useful lives because the FCC almost always has renewed them automatically.

Forward argued that there has been a change in the attitude and policies of the FCC concerning license renewals, so that now it is no longer certain licenses will be renewed. If not, licenses would have a reasonably determinable useful life, and thus would be amortizable.

According to Forward, a change in FCC attitudes and policies is evidenced by Greater Boston Television Corp. v. FCC, 444 F. 2d 841 (D.C. Cir. 1970), cert. den., 403 U.S. 923 (1971), and Citizens Communication Center v. FCC, 447 F. 2d 1201 (D.C. Cir. 1971). In Greater Boston Television, the FCC treated a license renewal application as a fresh comparative proceeding, because of misconduct on the part of the licensee, and then awarded the license to one of the competing applicants.

In Citizens Communications Center, the Court of Appeals invalidated an FCC policy statement which said that if a licensee could demonstrate a record of "substantial" service without serious deficiencies, it would be entitled to renewal, and all other applications would be dismissed without a hearing on their merits. The court held that even in a license renewal proceeding, all other applicants are entitled to be heard on the merits.

Court of Claims Trial Judge Miller decided that neither of these cases cast any substantial doubt on Forward's prospects for renewal of its license, especially because both were decided after the taxable years in question.

Forward also sought to deduct as a loss that portion of the purchase price allocated to a network affiliation contract with CBS. At the time Forward purchased the station, it had affiliation contracts with both CBS and

ABC. Thereafter, however, it terminated its contract with CBS and became an ABC station exclusively.

Judge Miller held that had Forward lost one of its network affiliation contracts involuntarily, it would have had a deductible loss. Forward did not lose its CBS contract involuntarily, however. Instead, it gave up its CBS affiliation in order to enter into an exclusive ABC contract providing for substantially greater compensation.

Any "loss" realized from the termination of the CBS affiliation was more than compensated for by additional payments received from the exclusive ABC contract. Therefore, Forward's "loss" was not deductible, because IRC section 165(a) permits deductions only for uncompensated losses.

Judge Miller also held the loss to be nondeductible, because the CBS affiliation was "exchanged" for an exclusive ABC affiliation. Because such affiliations are properties of a "like kind," any loss suffered in connection with their exchange was not recognizable under IRC section 1031 (a).

The portion of the purchase price allocated to year-long advertising contracts, pursuant to which Forward was paid by those whose commercials were broadcast on KVTV, was not deductible either as a loss or as a return of basis. Forward's expectation of continued business with those advertisers meant that their contracts had no determinable useful life and made them simply parts of an "indivisible" or "mass asset" includible in good will.

Forward Communications Corporation v. United States, 78-2 USTC Para. 9542 (Ct. Cl. 1978) [ELR Preview:7]

DEPARTMENTS

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An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus, by James R. Kirby II, 9 Pacific Law Journal 855-888 (July 1978)

The Federal Trade Commission's Involvement in Children's Television or Trucks A rent for Kids, by Bruce P. Keller, 16 Publishing, Entertainment, Advertising and Allied Fields Law Quarterly 387-422 (Spring 1978)

Income Tax Planning for Athletes and Entertainers, by Douglas G. Sykes, 5 Black Law Journal 384-414 (1978)

Symposium, Sports and the Law, 10 Connecticut Law Review 251-377 (Winter 1978)[ELR Preview:8]