RECENT CASES

Supreme Court holds that ASCAP/BMI blanket licenses to television networks do not constitute price fixing which is illegal *per se* under antitrust laws

The U.S. Supreme Court has held that the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at mutually prenegotiated fees is not price fixing "per se" unlawful under the antitrust laws. In so holding, the Court ruled against CBS, which had initiated the case with a complaint alleging both antitrust and copyright violations.

The CBS action named ASCAP, BMI and their respective members and affiliates as class action co-defendants charging, among other things, that ASCAP and BMI are unlawful monopolies and that the blanket license practices employed by them constitute illegal price fixing. CBS urged that the issuance of blanket licenses be enjoined and replaced with a per-use license.

The issuance of blanket licenses to copyrighted musical compositions is a practice which has been used by both ASCAP and BMI ever since their creations in 1914 and 1939. The practice evolved from the practical need to facilitate the administration of license negotiations and detection of unauthorized use. With this end in mind, blanket licenses, which give the licensee an unlimited right to perform any of the compositions owned by BMI/ASCAP members or affiliates during a stated term, were established in the music industry.

The Supreme Court noted that at the time ASCAP was organized, "... those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and detect unauthorized uses."

In response to these problems, ASCAP and BMI were created to act as ". . . clearing house(s) for copyright owners and users to solve . . . the . . . problems associated with the licensing of music." As a result, throughout the years the two organizations have operated primarily, though not exclusively, under the blanket licensing structure.

Although the BMI/ASCAP licensing operations rely primarily on the blanket licensing structure, there are now alternative licensing procedures available to prospective licensees. These alternatives, however, were not always available. As a result, it was the exclusive use of blanket licenses by both ASCAP and BMI which promoted the first of several antitrust charges against them beginning in 1941. At that time, the Justice Department charged that such practices constituted an illegal restraint of trade. In response, ASCAP and BMI, by consent decree, agreed to provide alternative licensing mechanisms. This did not prevent subsequent antitrust charges, however; and as a result in 1950, the 1941 consent decree was modified.

The amended decree, which governs present-day activities, provides that ASCAP and BMI may not insist on blanket licenses; per program licenses also must be made available. Furthermore, the decree allows direct license negotiations between BMI/ ASCAP members and prospective licensees, thus providing a means of avoiding the organizational structure altogether. Finally, if a licensee chooses to deal with ASCAP or BMI directly, but the parties are unable to agree on a fee, the licensee may apply to the District Court for a determination of a reasonable fee and ASCAP/ BMI has the burden of proving reasonableness. Despite these provisions, the Court of Appeals found the BMI/ASCAP blanket licenses to violate the Sherman Act. However, it was precisely the availability of these alternatives that caused the Supreme Court to reverse the Court of Appeals.

In reversing the Court of Appeals decision, the Supreme Court held that "although . . . the blanket license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license,. . .it cannot be wholly equated with a simple horizontal arrangement among competitors."

Furthermore, the Court added, ". . . this is not a question simply of determining whether or not two or more potential competitors have literally fixed a price. As generally used in the antitrust field, `price fixing' is a shorthand way of describing certain categories of business behavior to which the `per se' rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice . . . is plainly anticompetitive and very likely without redeeming virtue."

The Supreme Court went on to comment on the Court of Appeals' conclusion that since literally speaking, the blanket licenses are a form of price fixing, it necessarily follows that such licenses are automatically and conclusively presumed to be "per se" illegal under the antitrust laws. The Supreme Court disagreed with this conclusion on several grounds. It found that despite the earlier antitrust violation charges against BMI and ASCAP, courts themselves are unfamiliar with the business relationships involved. Thus, because ". . . it is only after considerable experience with certain business relations that courts classify them as `per se' violations . . .," the blanket licenses cannot be conclusively presumed illegal, the Supreme Court held.

The Court also noted that although alternatives to blanket licensing have been in existence since 1950, CBS has held blanket licenses from both ASCAP and BMI ever sin 1946 without ever attempting to secure any other form of licensing from either of the organizations or any of their members. In addition, the Court cited the 1976 Copyright, Act blanket licensing provisions for cable television and juke boxes, emphasizing that Congress adopted them notwithstanding any provisions of the antitrust laws.“ The Court found that, ”The blanket license is not a `naked restraint of trade with no purpose except stifling of competition’. . . but rather accompanies the integration of’ sales, monitoring, and enforcement against unauthorized copyright use, which would be difficult and expensive problems if left to individual users and copyright owners. ASCAP and the blanket license developed together out of the practical situation in the market place . . . Most users want unplanned, rapid and indemnified access to any and all repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights.

Despite the favorable tone of the Supreme Court's opinion regarding the legality of the blanket license, the future of such licenses is not yet free from doubt. The Supreme Court returned the case to the Court of Appeals so that it may consider any unresolved issues that CBS may have properly brought to it. The legality of blanket licenses under the "rule of reason" was not addressed by the Court of Appeals and it is not clear whether CBS preserved the question in that court. If it did, CBS may still argue that blanket licenses are illegal even under the rule of reason. Because of that possibility, the Supreme Court concluded its opinion by noting that, "It [the blanket license] may not ultimately survive that attack, but that is not the issue before us today."

Justice Stevens dissented.

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., Docket No. 77-1578, April 17, 1979 [ELR 1:1:1]

Supreme Court holds there is no First Amendment privilege preventing inquiry into the state of mind of those who edit, produce or publish, or into the editorial process, in libel lawsuits brought by public figures

Conceding his status as a "public figure," and the applicability of the New York Times rule requiring him to show that defendants published allegedly defamatory matter with "actual malice," retired Army officer Anthony Herbert sought to meet his burden of proof by directly inquiring into the state of mind of those who participated in producing an allegedly defamatory segment of "60 Minutes" and into the editorial process.

During a lengthy deposition of producer Barry Lando (a co-defendant along with Mike Wallace CBS and Atlantic Monthly Magazine), Lando refused to answer certain questions on the ground that the First Amendment protected against "inquiry into the state of mind of those who edit, produce or publish and into the editorial process." A federal District Court disagreed with this contention, however, and ordered Lando to answer the disputed questions stating that ". . . the defendant's state of mind was of 'central importance' to the issue of malice . . ." and that there was ". . . nothing in the First Amendment or relevant cases . . ." barring Herbert's lawyer from making such inquiries.

The Second Circuit Court of Appeals reversed, and held that there is a First Amendment privilege not to answer such questions. However, in a decision announced

April 18, 1979, the U.S. Supreme Court reversed the Court of Appeals, and thus Lando will have to answer the questions he had earlier refused to answer.

Anthony Herbert first attracted national attention in 1969 when he accused his superior officers of covering up Vietnamese War atrocities and other war crimes. Several years later, the CBS program "60 Minutes" broadcast a segment about Herbert and his charges. In addition, producer Lando published a related article in Atlantic Monthly Magazine. Alleging that the program and the article falsely and maliciously portrayed him as a liar and a person who had made war crime charges to explain his relief from command. Herbert sued.

In upholding the District Court's opinion rejecting the defendants' First Amendment privilege claims, the Supreme Court cited several earlier cases, including New York Times v. Sullivan, which had permitted such inquiries. Specifically, the Court noted that in the New

York Times case itself, the “evidence relied . . . [on] . . . included substantial amounts of testimony that would fall within the editorial process privilege as defined by the respondents. The record before the Court included depositions by the author of the defamatory article. . . . a Sports Editor of the Saturday Evening Post, and both its Managing Editor and Editor-in-Chief.”

The Court also said that, it is evident that courts across the country have long been accepting evidence going to the editorial process of the media without encountering constitutional objections.“

The Court of Appeals had held that two Supreme Court cases, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and CBS v. Democratic National Committee, 412 U.S. 94 (1973), had ”. . . announced unequivocal protection for the editorial process. . . .“ However, the Supreme Court distinguished those cases, saying that they involved efforts to control in advance the content of media publications and not post-publication inquiries of the kind at issue in this case.

It appears that the Supreme Court's principal concern was the preservation of a balance struck in the New York Times case between First Amendment protections for the press and the need to protect individuals from defamatory publications. To provide further protection for the press when sued for defamation, the Court said, would modify this balance ". . . by placing beyond plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood. . . ." This the Court declined to do.

Despite the Court's rejection of the privilege sought by the defendants in this case, the Court did not say that editorial discussions have no constitutional protection "from casual inquiry." In fact, the Court did say that subjecting . . . the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as public interest . . . would not survive Constitutional scrutiny . . . This case was deemed different because of the com- peting interests involved. Referring to the Nixon White House Tapes case, the Court concluded: ”. . . Whatever their origins, . . . exceptions to demands for evidence are not lightly created or expansively construed for they are in derogation of the search for truth . . .“ Justices Brennan, Stewart and Marshall dissented.

Herbert v. Lando, Docket No. 77-1105, April 18, 1979
[ELR 1:1:2]

FCC s cable television access rules held invalid by Supreme Court

The United States Supreme Court has held the FCC's cable television access rules to be invalid, on the grounds that the FCC did not have statutory authority to adopt them.

Cable television access rules were adopted by the FCC in May of 1976. They required cable television systems with 3,500 or more subscribers to make as many as four channels available on a first-come, non-discriminatory basis for use by members of the public, educational organizations, local governments, and leased access users. The rules prohibited cable operators from determining or influencing the content of access programming, and they strictly limited what cable systems could charge for access and for use of equipment. (59 FCC 2d 294)

Although the Communications Act of 1934 does not specifically authorize the FCC to regulate cable television, the Supreme Court has held that the FCC does have authority to regulate cable television where FCC regulations are ”reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.“ United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

In the southwestern Cable case, the Supreme Court upheld FCC rules requiring cable television systems to carry the signals of television stations into whose areas they bring competing signals, prohibiting cable television systems from duplicating local television station programming on the same day such programming is broadcast, and prohibiting cable television systems from importing distant television signals into the 100 largest television markets unless first demonstrating that doing so would be consistent with the public interest.

More recently, in United States vs. Midwest Video Corp., 406 U.S. 649 (1972), the Supreme Court upheld an FCC rule requiring cable television systems having

3,500 or more subscribers to originate their own programs and to maintain facilities for local production and presentation of programs.

Because the purpose of the cable television access rules was the same as the purpose of the program origination rule upheld by the Supreme Court in the Midwest Video case, the FCC argued that it plainly had authority to adopt cable access rules. The Supreme Court disagreed, however. It distinguished the program origination rule from the access rules by pointing out that the origination rule did not take away cable operators' control over the composition of their programming, while the access rules did. Access rules, the Supreme Court said, transferred control of the content of access cable channels from cable operators to members of the public.

It was in transferring such control from cable operators to the public that the FCC made its fatal mistake, according to the Supreme Court. This was so, because

Section 3(h) of the Communications Act of 1934 prohibits the FCC from treating persons engaged in broadcasting as common carriers. In the communications industry, a common carrier is one who provides communications facilities to all persons who may wish to use them to communicate messages or programs of their own design and choosing. According to the Supreme Court, the access rules required cable television systems to become common carriers, and thus, such rules were prohibited by Section 3(h).

The Court of Appeals, whose earlier decision the Supreme Court affirmed, also suggested that the cable television access rules might violate the First Amendment rights of cable operators, might constitute an unconstitutional ”taking“ of property, or might violate the due process clause of the Fifth Amendment by exposing cable operators to possible criminal prosecution for offensive cablecasting by access users over which operators had no control. The Supreme Court said that because its decision was based upon the FCC's lack of statutory authority to adopt the access rules, it expressed no view on the First Amendment question, except ”to acknowledge that it is not frivolous,“ and it also declined to comment on the due process issues.

Justices Stevens, Brennan and Marshall dissented.

FCC v. Midwest Video Corp., Docket No.77-1575, April 2,1979 [ELR 1:1:3]

California Court of Appeal upholds preliminary injunction restraining OIivia Newton-John from recording for anyone other than MCA, but limits injunction to term of recording contract

A preliminary injunction obtained by MCA Records against singer Olivia Newton-John has been affirmed by the California Court of Appeal. The injunction, issued in connection with breach of contract actions filed by both parties against one another, restrains Newton-John from recording for anyone other than MCA until her contract expires (or until the case comes to trial, whichever is earlier).

The contract in dispute was entered into in April of 1975. It provided that Newton-John would record two albums per year for MCA for an initial period of two years and, at MCA's option, two albums per year for three additional one-year periods. The contract also provided that if Newton-John failed to deliver a recording when due, MCA would be entitled to extend the term of the contract. MCA agreed to pay Newton-John royalties and a non-returnable advance of $250,000 for each recording received during the initial two years, and an advance of $100,000 for each recording received during the option years. The cost of producing the recordings was to be borne by Newton-John.

Newton-John delivered four recordings under the contract, and MCA paid her approximately $2.5 million in royalties and non-returnable advances. MCA exercised its option to renew for the first additional year, but received no further recordings.

In May of 1978, MCA and Newton-John sued one another in Superior Court in Los Angeles. MCA then sought, and was granted, a preliminary injunction restraining Newton-John from recording for anyone else while the case was pending or until two years after the expiration of her five-year contract, whichever occurred first. (In California, by statute, personal service contracts may not be enforced against employees for more than seven years. Calif. Labor Code Section 2855.)

Though the breach of contract issues were not yet decided, Newton-John immediately appealed the injunction. In California' by statute, such an injunction may be issued only if the employee is guaranteed at least $6,000 per year. (California Civil Code Section 3423 and Code of Civil Procedure Section 526.) Thus, Newton-John first asserted that the preliminary injunction had been improperly granted because the contract failed to guarantee her payment of $6,000 per year. This was so, she said, because production costs for two recordings a year could exceed $194,000. If they did, when such costs were deducted from the guaranteed annual advance of $200,000, her net compensation would be less than $6,000 annually. However, the Court of Appeal agreed with the trial court that the $6,000 minimum compensation requirement of the California statutes did not mean ”net profits.“ Even if it did, the Court of Appeal agreed with the trial court that suitable recordings could be made for less than $194,000. ”It is decisive here that under the terms of the agreement exclusive control of production costs remained in [Newton- John’s] hands at all times. [Newton-John] was free to record in as tight-fisted or as open-handed a manner, cost- wise, as she chose. [Newton-John’s] interpretation of the mininium compensation statutes would allow her to nullify her contract at any time merely by increasing her production expenses, which at all times remained under her exclusive control. We do not believe the legislature intended to sanction such a one-sided bargain . . .“ The Court of Appeal distinguished the case of Foxx v. Williams, 244 Cal.App.2d 223, 52 Cal.Rptr. 896 (1966), in which a similar injunction against comedian Redd Foxx had been reversed. Foxx’s contract, unlike Newton-John’s, did not guarantee him anything. His royalties were contingent upon prospective sales which could have amounted to nothing.

Newton-John also asserted that she could not be suspended by MCA and enjoined from rendering personal services to others. But the Court of Appeal found that Newton-John had not, in fact, been suspended, and that she could record for MCA and receive the agreed upon compensation.

In addition, the Court of Appeal found that MCA had made the necessary showing of irreparable injury by alleging that it would lose profits and goodwill if Newton-John were permitted to record for a competitor, and by supporting that allegation with substantial evidence that Newton-John's services were unique. Newton-John also contended that if a preliminary injunction were granted, it could not extend beyond the five-year term of her contract. MCA had successfully argued to the trial court that the contract provided for extensions of the term if Newton-John failed to perform her obligations, and that, therefore, the contract and preliminary injunction should continue in effect for as long as the seven years permitted by statute.

The Court of Appeal agreed with Newton-John for two reasons. First, it said that MCA could not have prevented Newton-John from recording for competitors at the end of the five-year term of the contract if she had performed under the contract; and, despite the contractual provision for an extension of the term upon failure to perform, the Court of Appeal stated, ”We have grave doubts that [Newton-John’s] failure to perform her obligations under the contract can extend the term of the contract beyond its specified five-year maximum.“

Second, the court also expressed apparent concern that MCA might fail to exercise ”due diligence in the prosecution of its action,“ unless the preliminary injunction were modified to limit its duration to the term of the contract.

In support of its decision to shorten the injunction, the Court of Appeals cited only Lemat Corp. vs. Barry, 275 Cal.App.2d 671, 80 Cal.Rptr.240 (1969), in which basketball player Rick Barry was enjoined from ”jumping“ from the NBA San Francisco Warriors to the ABA Oakland Oaks. The Warriors had sought an injunction that would remain in effect until Barry actually ”played out“ his option. Barry argued that the injunction could last no longer than one year, because the Warriors only had a one-year option to his services, even if he ”sat out“ the option year (as he did). The court agreed with Barry, and refused to extend the Warriors’ injunction beyond one year. However, the Warrior-Barry contract did not provide for extensions if Barry refused to play. The MCA-Newton-John contract differs in that respect, because it did provide for extensions if she failed to deliver recordings.

The MCA-Newton-John decision does not discuss Dallas Cowboys vs. Harris, 348 S.W.2d 37 (1961). In that case, the Dallas Cowboys were granted an injunction preventing Jimmy Harris from ”jumping“ from the NFL to the AFL, even though Harris had, in effect, sat out his NFL option year, because the NFL contract does provide for extensions in the event of ”retirement.“ The Cowboys case was decided by the Texas Court of Civil Appeals, and is thus not binding on California courts. Out-of-state decisions are sometimes influential, however.

MCA and Newton-John both petitioned the California Supreme Court for a hearing. MCA appealed the Court of Appeal’s decision to shorten the injunction, and Newton-John appealed the Court of Appeal’s decision not to set it aside completely. The California Supreme Court denied the petitions of both parties, however.

MCA Records, Inc. v. Olivia Newton-John, 90 Cal.App.3d 18 (1979) [ELR 1:1:4]

Book and movie based on true incident in life of Agatha Christie are protected by First Amendment

The heir and assignees of well-known mystery writer Agatha Christie were unsuccessful in their attempt to enjoin distribution of the movie and book "Agatha," both of which presented a fictitious account of a true incident in the life of the late writer. Although the federal District Court for the Southern District of New York found that Agatha Christie's right of publicity in her name had survived her death and had been transferred to the plaintiffs, the court held that the right of publicity was outweighed by the First Amendment protection given to novels and movies, because it was evident to the public that the events depicted in the novel and movie were fictitious.

The true incident on which the movie and book were based was the 11-day disappearance of Mrs. Christie from her home in 1926 during her marriage to Colonel Archibald Christie. The disappearance has never been explained. The fictitious account of the incident in the movie and book presented Mrs. Christie as emotionally unstable and involved in a plot to murder her husband's mistress while attempting to regain her husband's alienated affections.

Mrs. Christie's heir and assignees sought orders enjoining distribution of the movie and book alleging infringement of right of publicity and unfair competition.

The court held that the right of publicity — that is, the right in the publicity value of a person's name or likeness — is a property right which may be transferred and which survives the death of its owner, if the owner has exploited that right during life. The court also held that to exploit a name or likeness, the decedent owner must have acted in a way that evidenced his or her own recognition of the extrinsic commercial value of his or her name or likeness, and must have manifested that recognition in an overt manner.

In this case, Mrs. Christie's exploitation of her name during her lifetime was established by evidence that she had contracted for the use of her name in connection with movies and plays based on her books, and that she had assigned rights to her books during her lifetime and in her will.

The unusual question in this case, the court found, was whether her right of publicity was infringed when Mrs. Christie's name was used in connection with a book and movie, which are "vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections, not generally accorded `merchandise.'"

In determining whether any constitutional protection limited Mrs. Christie's right of publicity, the court found no authority among the right of publicity cases, and looked to the right of privacy cases under Section 51 of the New York Civil Rights Act for the limitations, if any, that would be applied in a right of publicity case.

The court held that the same limitations that have been "engrafted" on the New York right of privacy statute are also engrafted on the right of publicity. These limitations, which are privileged uses or exemptions for "matters of news, history, biography and other factual subjects of public interest," did not apply in the "Agatha" case. The book and movie were fictional and were not, therefore, biography, newsworthy, or historical, and could not be treated as privileged "fair comment." The "few scant facts" about Mrs. Christie's disappearance were treated as ”mere appendages to the main body of their fictional accounts.“

However, the court did apply the balancing test used in First Amendment cases to the fictional book and movie, and weighed society’s interest in the speech for which protection was sought (here the book and movie) with the societal, commercial or governmental interest seeking to restrain such speech (here the right of publicity). Unless there appears to be some countervailing legal or policy reason, the right of speech will be protected. The court in this case found no such countervailing legal or policy grounds against protection. To support this conclusion, the court relied upon Spahn v. Julian Messner, 260 N.Y.S.2d 451 (1965), and University of Notre Dame du lac v. Twentieth Century-Fox Film Corp)., 256 N.Y.S.2d 301 (1965), affd, 259 N.Y.S.2d 832 (1965). The court found from its review of the Spahn and Notre Dame cases that the ”absence or presence of deliberate falsifications or an attempt by a defendant to present the disputed events as true, determines whether the scales in this balancing process, shall tip in favor of or against protection of the speech at issue.“

In the ”Agatha“ case there were no deliberate falsifications, and the public knew that the events depicted in the motion picture and in the book were fictitious. Therefore, the court found that the movie and book were protected speech, and did not infringe plaintiff’s right of publicity.

The court also ruled that the plaintiffs would be unlikely to prove a case of unfair competition, because the use of the name ”Agatha“ and ”Agatha Christie“ would not cause confusion in the minds of the public in general, nor in the minds of Agatha Christie readers, that Mrs. Christie had authorized or written the movie or novel.

Hicks v. Casablanca Records, 464 F.Supp. 426 (S.D.N.Y. 1978) [ELR 1:1:5]

Court of Appeals affirms FCC decision to renew license of television station KCOP, without a bearing, despite FCC s occasionally garbled rationale for doing so

The Court of Appeals has affirmed an FCC decision to renew the license of Los Angeles television station KCOP, without a hearing, despite what the court described as the FCC's "occasionally garbled rationale."

Though recently decided, the case stems from KCOP's 1974 license renewal application. A petition to deny that application was filed by the National Association for Better Broadcasting (NABB) which alleged that KCOP had been deficient in its programming, had failed to ascertain and satisfy community needs, and had breached a 1971 agreement with a citizen's group known as the Council on Radio and Television.

The FCC denied the NABB petition and granted KCOP's license renewal application without holding an evidentiary hearing. This was done pursuant to Section 309(d) of the Communications Act of 1934 (47 U.S.C. Section 309(d)), which provides that the FCC shall renew a license if it finds, after considering the application and all pleadings submitted, that there are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest]."

Although any interested party may object to renewal of the license by filing a petition to deny the renewal application, the objecting petitioner's allegations must be both "substantial and specific," and sufficient "to show that . . . a grant of the application would be prima facie inconsistent with [the public interest]." General allegations and allegations of ultimate, conclusionary facts are not sufficient.

The FCC granted KCOP's renewal application without a hearing, because it found that the NABB petition had failed to raise any substantial and material questions of fact or to present prima facie evidence that the renewal of KCOP's license would not be in the public interest.

The Court of Appeals agreed with the FCC. Criticisms of the quality of KCOP's programming were found to be imprecise and unspecific. The Court of Appeals sustained the FCC's finding that KCOP's programming had met the ascertained needs of the community and had satisfied percentage guidelines for various program types. NABB objections to particular programs fell into three categories. Some programs were said to be unlawful lotteries or fraudulent; but the FCC found, and the Court of Appeals agreed, that those allegations were insufficient to show prima facie illegality. NABB also alleged that

KCOP had violated the fairness doctrine and the personal attack rule; but the FCC found, and the Court of Appeals agreed, that no such violations were shown to have occurred.

NABB also alleged that some programs broadcast by KCOP contained excessive violence. On this issue, the Court of Appeals said, "The FCC arguably could have conducted an inquiry here as to the violent content of programming, but it chose not to do so. We hold only that the Commission did not abuse its discretion in declining to pursue (NABB) allegations of ex- cessive violence in programming on the facts of this case."

It was the FCC's treatment of the allegation that KCOP had breached its agreement with the Council on Radio and Television that the Court of Appeals found to be "occasionally garbled." The agreement between KCOP and the Council on Radio and Television became an issue, because the agreement had been incorporated into KCOP's prior license renewal application. Programming proposals contained in private agreements that are incorporated into license renewal applications become representations to the FCC and are treated the same as other promises of future performance. Thus, broadcasters are obligated to comply substantially with such agreements, or to justify any substantial variations from them. The FCC declined to conduct a hearing concerning the meaning of certain provisions of the KCOP agreement on the grounds it would not "arbitrate the meaning of vague terms," but also found that KCOP had satisfied its obligations under the agreement. The court found this to be a "muddled" approach, but affirmed the FCC for the following reasons.

Alleged racial and ethnic slurs, which KCOP had agreed to remove from its programming, were found to be infrequent and insubstantial. KCOP's alleged failure to comply with its agreement to produce documentary programs was found to be irrelevant, because of KCOP's overall record of public affairs and minority programming. And KCOP's alleged failure to broadcast locally produced religious programs was insufficient to raise a substantial question concerning its integrity or capacity to broadcast in the public interest.

National Association for Better Broadcasting v. FCC, 591 F.2d 812 (D.C.Cir. 1978) [ELR 1:1:6]

Publisher s share of earnings of musical composition must be based on most current accounting available

Where an appeal delays the entry of a final judgment, the fair market value of a music publisher's share of the copyright earnings of a musical composition must be based on the most current accounting of earnings available to the court, rather than on earnings at the date of the original trial years earlier, according to the Appellate Division of the New York Supreme Court.

In a trial conducted in September of 1973, Chris Towns, a partner in a company that published "You've Got to Change Your Evil Ways," claimed his portion of the publisher's share of the royalties earned by that song. Judgment was entered in favor of Towns against Clarence Henry, the song's author, in July of 1975, but was subsequently modified by an appellate court. Richcar Music Co. v. Towns, 385 N.Y.S. 2d 778 (1976).

The case was returned to the trial court, which, in accordance with its interpretation of the modified judgment, then calculated the fair market value of the musical composition based on its earnings through September of 1973 and on expert testimony concerning its probable future earnings from that date.

Thereafter, the appellate court again rejected the trial court's decision; and, in order to clarify its earlier modification of the original judgment, it calculated the fair market value of the publisher's share.

The appellate court's calculations were based on earnings through October of 1976, the most recent date for which figures were available, and on expert testimony concerning the song's probable future earnings from that date. According to the appellate court, calculating past earnings in and estimating future earnings from 1973, rather than from 1976, "was to ignore the reality of the actual income over the intervening three-year period and to substitute, instead, an expert's conjecture based on a time reference that was purely arbitrary."

Richcar Music Co. v. Towns, 413 N.Y.S. 2d 705 (1979) [ELR 1:1:7]