RECENT CASES

Income received by movie theaters from the sale of student discount cards need not be included in gross receipts when calculating license fees payable to distributors

In an action filed by Paramount Pictures and nine other distributors against Marcus Theatres of Wisconsin, a Wisconsin Circuit Court has held that Marcus Theatres was not required to include income from the sale of student discount cards in its "gross receipts" when calculating the license fees it pays distributors. The reason for the court's decision was that the contracts involved in the lawsuit had not stated that such proceeds were to be included in "gross receipts," even though the distributors' exhibition contracts contain very comprehensive provisions in fine print, even though the distributors had known for years that Marcus Theatres had not accounted for student discount card proceeds, and even though the contract forms had been revised several times. The consequences of this ambiguity, the court decided, had "to be lodged at the doorstep of the person who drew it" — the distributors.

According to the court, one of the distributors (not mentioned by name) inserted specific language concerning student discount cards in its exhibition contract forms, but not until after the lawsuit had been filed.

The Wisconsin Circuit Court is a trial court, and its ruling is set forth in an oral decision and unpublished written findings of fact and conclusions of law. The distributors have appealed.

Paramount Pictures Corporation v. Marcus Theatres Corporation, Case No. 458-761, State of Wisconsin, Circuit Court, County of Milwaukee, Branch 1, Judge Louis J. Ceci [ELR 1:2:2]

Eight separate antitrust suits brought by motion picture exhibitors against producers, distributors and other exhibitors in six states are transferred to Texas for consolidated pretrial proceedings

Eight separate antitrust lawsuits filed by motion picture exhibitors against producers, distributors and other exhibitors in Arizona, Texas, California, Tennessee, Florida and Utah all have been transferred to a federal District Court in Texas for consolidated pretrial proceedings. The cases were transferred at the request of the plaintiff-exhibitors, and over the objection of the defendants, by the federal Judicial Panel on Multidistrict Litigation.

In all of the actions, the plaintiff-exhibitors allege that the defendants have conspired to restrain trade and monopolize the motion picture business by engaging in the following practices, all of which the plaintiffs allege to be illegal: "blind-bidding" (requiring exhibitors to bid for film licenses without having an opportunity to see the films in advance); "move overs" (switching a movie from the theater to which a bid was awarded to a different theater which was not involved in the bidding process); giving preferential treatment in the awarding of licenses to large theater circuits; bid rigging or sham bidding; fixing prices and terms of film licenses; fixing movie admission prices; "block booking" of movies (licensing a movie on condition that the exhibitor also license another movie); "splitting" (an agreement among exhibitors that only one or some of them will attempt to license any particular movie in a particular area); unreasonable "clearances" (the periods between "runs" of a film); and boycotts.

The defendants opposed transfer on the grounds that each of the cases involve several individual factual issues, that most allege a separate conspiracy involving different distributors and exhibitors, and that transfer would not be convenient for the parties or witnesses.

The Panel on Multidistrict Litigation disagreed, however. It said, While we recognize that each action before us may involve some unique, localized factual issues, a careful review of the entire record before the Panel has persuaded us that all these actions, regardless of market area involved, share numerous common questions of fact on the economic and conspiratorial issues, particularly regarding the manner in which film distribution decisions are made in the motion picture industry.

A similar case in Georgia was not transferred, because the judge before whom it is pending advised the Panel that remaining pretrial discovery was to be concluded shortly and was local in nature. A Virginia case originally included in the transfer motion was not transferred, because the defendants won the case before the Panel ordered transfer of the other cases. And one Texas case was not consolidated with the others, because the judge before whom it is pending expected it to be settled.

In re Motion Picture Licensing Antitrust Litigation, 1979-1 Trade Cases, Para. 62,535 (Jud. Pan. Multidist. Lit. 1979) [ELR 1:2:2]

Theater circuit not required to arbitrate dispute with union over automated projection booths

Arbitration of a labor dispute between United Artists Theaters and Local 640 of the International Alliance of Theatrical Stage Employees has been stayed, at the theater's request, by a federal District Court in New York.

United Artists Theaters and Local 640 had been negotiating certain differences concerning work to be performed by the union's members in automated projection booths used in certain UA theaters when a nationwide strike was called by the local's parent. The strike was ended by a "stipulation" amending local collective bargaining agreements. The stipulation provided that the terms and conditions of employment in automated theaters were to be subject to further collective bargaining.

Thereafter, UA allegedly "locked out" a union projectionist and used a nonbargaining unit person in his place. The union then demanded arbitration of the lockout, and UA applied for a stay of arbitration.

The court found that although the collective bargaining agreement between UA and Local 640 contained a provision requiring arbitration of disputes concerning the agreement, UA had not agreed to arbitrate disputes concerning automated projection systems. This was so, the court found, because the collective bargaining agreement did not contain provisions concerning such systems. Moreover, the strike-ending "stipulation" merely suggested an obligation on the parties to negotiate in good faith concerning automated projection systems. The remedy for the breach of that obligation would be an unfair labor practice charge, not arbitration.

United Artist Eastern Theatres, Inc. v. Local 640, International Alliance of Theatrical Stage Employees, 465 F.Supp. 709 (E.D.N.Y. 1979) [ELR 1:2:3]

Motion Picture Studio Mechanics union ordered to cease causing discrimination against nonmembers by producer of Slow Dancing in the Big City or any other employer

The Second Circuit Court of Appeals has enforced an order of the National labor Relations Board requiring Local 52 of the Motion Picture Studio Mechanics to cease causing Michael Levee Productions, producer of "Slow Dancing in the Big City," or any other employer, to refuse employment to nonmembers of the union. The union also was ordered to pay "back pay" to Michael

Goldbaum, a nonunion sound-mix engineer who was denied employment on "Slow Dancing . . ." solely because he was not a member of the union.

After being denied employment, Goldbaum filed an unfair labor practice charge with the NLRB. An administrative law judge found that the union's business agent had indicated to Levee Productions that retaliatory action might be taken if Goldbaum were hired. The judge also found that the agent's threats were intended to, and in fact did, cause the company not to hire Goldbaum, even though neither Levee Productions nor the movie's distributor, United Artists, had contracts with the union.

Before the Court of Appeals, the union contended that there was not enough evidence to justify a finding that the statements of its business agent had caused Levee Productions not to hire Goldbaum. The Court of Appeals reviewed the evidence and found otherwise, however.

The union also contended that the NLRB's order was too broad, because it referred to other employers as well as Levee Productions, and to other employees and job applicants as well as Goldbaum. The Court of Appeals rejected this contention too, because the union had recently caused the American Broadcasting Company to fail to hire an employee because of her lack of union membership. Motion Picture Studio Mechanics, Local 52, 226 NLRB 212 (1976). In the view of the Court of Appeals, two similar violations of the National Labor Relations Act — the second only nine months after the NLRB's decision in the first case — "sufficiently established a proclivity to continue the unlawful conduct" and justified the breadth of the order.

The court also enforced the back pay award.

Motion Picture Studio Mechanics, Local 52, v. National Labor Relations Board, 593 F.2d 197 (2d Cir. 1979) [ELR 1:2:3]

Infringer of copyrighted Scott Joplin compositions held liable for share of profits and statutory in lieu damages

The owner of copyrights to musical compositions written by Scott Joplin that were used without authorization in a "complete works" record package has been awarded one-half of the profits of the package and statutory "in lieu" damages. The Second Circuit Court of Appeals also held that a purported assignment of the copyrights was invalid and enjoined the defendants from further manufacture and sale of the records without proper licenses.

Lottie Joplin Thomas, Scott Joplin's widow, had assigned her renewal interests in Joplin's copyrighted opera "Treemonisha" (and two compositions from it) to the trustee of the Lottie Joplin Thomas Trust. The trustee subsequently purported to assign the copyrights to his own music publishing company, which in turn attempted to assign an interest in the copyrights to the president of Olympic Records, one of the defendants in the case.

The Court of Appeals found that the defendants were not the copyright owners of the compositions in question, because the trustee had misstated the capacity in which he was acting at the time of the purported assignment; because an assignment of trust property to the trustee's own company "would be highly suspect"; and because the assignment had not specified any consideration for the transfer.

Each defendant was held liable for one-half of the profits it realized from the sale of the albums plus statutory damages in lieu of the plaintiffs actual damages. The total award amounted to $177,980.73.

The defendants contended that the award was excessive because the infringed compositions took only one side of a five-album set; thus, they argued that the plaintiff should be entitled to only 10% of their profits. The Court of Appeals, however, called the lO% figure a “meaningless percentage” because inclusion of the infringed compositions made the defendants’ album the only “complete set” of Joplin’s works. Furthermore, the court found that the defendants had not met their burden of proving what portion of their total profits resulted from the non-infringing recordings.

The Court of Appeals also upheld the discretionary award of "in lieu" damages, noting that limiting the plaintiff to an award of either statutory damages or defendants' profits would reduce the deterrent aspect of the award and would only partially compensate the plaintiff whose lost profits were impossible to calculate.

Lottie Joplin Thomas Trust v. Crown Publishers, Inc., 592 F.2d 651 (2d Cir. 1978) [ELR 1:2:4]

Sovereign immunity doctrine does not bar an award of damages and attorneys fees to copyright owner in infringement suit against a state

The Eleventh Amendment sovereign immunity doctrine does not preclude an award of damages and attorney's fees against a state, if a state infringes a copyright, according to the Ninth Circuit Court of Appeals. That court has affirmed a judgment in favor of Mills Music, Inc. against the State of Arizona and the Arizona Coliseum Board, because of their unauthorized use of Mills' musical composition "Happiness Is" as the theme and for the promotion of the 1971 Arizona State Fair.

Mills brought suit in federal District Court in 1973 against Arizona and the Coliseum Board for copyright infringement and unfair competition. The defendants contended they were not liable, because their performances of the composition were not public or for profit. (17 U.S.C. Section 1(e)). The District Court found, however, that the performances were public, because the Coliseum Board had made and distributed 64 tape recordings of "Happiness Is" which were used to broadcast 3,928 performances on both radio and television. The District Court also rejected defendants' argument that the 1971 Arizona State Fair had not been conducted for profit, saving it was a "commercial activity which directly competed with other similar forms of entertainment."

At the close of trial, the District Court held that the defendants' activities were "willful and with full notice and knowledge of plaintiff's copyrights and in total disregard for those rights," and awarded Mills $75,000 in damages and $25,000 in attorney's fees.

The Eleventh Amendment sovereign immunity defense was the only issue raised by Arizona and the Coliseum Board on appeal. As a general rule, the principle of sovereign immunity prevents private parties from "seeking to impose a liability which must be paid from public funds in the State Treasury." Thus, Mills' action would have been barred, unless Arizona and the Coliseum Board had waived their Eleventh Amendment immunity.

Mills contended that Arizona and the Coliseum Board had waived their Eleventh Amendment immunity by engaging in an activity regulated by federal law, and the Court of Appeals agreed. “Eleventh Amendment immunity is waived when Congress has authorized suit against a class of defendants that includes states, and the state enters into the activity regulated by federal law,” it said.

In this case, the Copyright Act of 1909 authorized suit against “any person” who infringed a copyright. The Court of Appeals concluded that states were within the defined class of “any person [who] shall infringe,” because of the sweeping language of the statute and its comprehensive and detailed regulations. The court pointed out that even the United States may be liable for copyright infringement (28 U.S.C. Section 1498(b)), and it would be an anomaly if states were not included within the class of potential defendants.

The court declined to follow a contrary ruling in Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962), which held a school district immune from a suit for copyright infringement by virtue of the Eleventh Amendment. However, the court did point out that its decision is consistent with Lemelson v. Ampex Corp., 372 F.Supp. 708 (N.D.Ill. 1974), which held that a patent infringement action for damages was not barred by the Eleventh Amendment.

The court also upheld the award of attorney's fees under Section 11 of the Copyright Act, providing for such fees as part of costs, and awarded an additional $3,500 in attorney's fees for work in connection with the appeal.

Although the decision was based on the Copyright Act of 1909, and not on the new Copyright Act of 1976 (which became effective January 1, 1978), it is probable that the result would have been the same. The Copyright

Act of 1976 authorizes suit against "anyone" who infringes copyright (17 U.S.C. Section 501(a)), rather than against "any person." However, there is nothing in the new act's legislative history to indicate that Congress attached any significance to this change in wording.

Mills Music, Inc. v. State of Arizona, 591 F.2d 1278 (9th Cir. 1979) [ELR 1:2:4]

Suit by Wilt Chamberlain against National Basketball Association barred by settlement of similar Oscar Robertson class action case

Federal District Court Judge Robert Carter has held that an antitrust lawsuit filed by Wilt Chamberlain against the National Basketball Association is barred by the 1976 settlement of a similar class action case brought by Oscar Robertson and other player representatives.

Chamberlain's lawsuit was based on events which commenced in the summer of 1973 when the NBA Los Angeles Lakers exercised their option to his services for the 1973-1974 season. Chamberlain, having signed a contract with the San Diego franchise of the ABA for that season, refused to honor the Lakers' option. As a result, when Chamberlain was ready to return to the NBA in 1975, Commissioner Larry O'Brien informed all NBA teams that although Chamberlain was a free agent able to sign with any team. the team that did sign him would have to compensate the Lakers for the loss of his services.

Chamberlain contended that the New York Knicks would have signed him for the 1975-1976 season, but that its interest was "chilled" by the requirement that it compensate the Lakers. In his lawsuit, Chamberlain sought to recover damages for allegedly being prevented from playing during that season.

The reason Chamberlain was not signed by the Knicks was disputed by the NBA, but Judge Carter found the dispute to be “beside the point.” lie concluded that even if Chamberlain’s contentions were true, the 1976 settlement of the Oscar Robertson case meant that Chamberlain’s suit was barred by the doctrine of res judicata.

The Robertson case commenced in 1970 as a class action, with Chamberlain as one member of the class, and alleged that the NBA option clause and compensation rule violated federal antitrust laws. The allegations of Chamberlain’s own case were the same. In fact, Judge Carter said, the allegations of Chamberlain’s complaint were “virtual verbatim reproductions of the pleadings in Robertson.”

Accordingly, Judge Carter held that the settlement of Robertson, which resulted in a consent judgment permitting the continued use of the NBA's compensation rule for a time, and which included covenant that no player would sue the NBA over that rule (or others), barred Chamberlain's lawsuit.

Oscar Robertson v. National Basketball Association, 1979-1 Trade Cases, Para. 62,524 (S.D.N.Y. 1979) [ELR 1:2:5]

North American Soccer League obtains injunction prohibiting National Football League from adopting ban on cross-ownership by its members of teams in other sports

The North American Soccer League has obtained a preliminary injunction restraining the National Football league from adopting an amendment to its Constitution and By-Laws prohibiting the owners of majority interests in NFL clubs, or any member of their families, from having an interest in another major team sport. The proposed amendment, adoption of which has now been enjoined pending final resolution of the case, also would have required NFL owners who now own interests in baseball, basketball, hockey or soccer teams to sell those interests by February of 1980 or be subject to substantial fines and possible ouster from the NFL

According to the NFL, the proposed “cross-ownership ban” was intended to prevent enhancement of competing team sports through connections with NFL personnel, to protect commercial confidentiality, to preserve good relations with the public, and to prevent a “creeping merger of the two leagues through joint ownership.”

According to the North American Soccer League, the proposed cross-ownership ban constitutes an unlawful conspiracy to deprive it of a necessary competitive resource — sports entrepreneurial know-how and capital — by eliminating a fertile source of that resource, namely NFL team owners.

Affidavits submitted by the NASL showed that at least three of its team owners would be required to divest themselves of their interests in NASL teams, if the cross-ownership ban were adopted: Lamar Hunt, owner of the Kansas City Chiefs and the Dallas Tornado, the Robbie family, owners of the Miami Dolphins and the Fort Lauderdale Strikers; and the Nordstrom family, owners of the Seattle franchises in both leagues.

The court found that “the ten year history of the NASL has been one of struggle for financial security, franchise stability and public recognition,” and that “An important element of stability for the NASL has been furnished by individuals or families who own member soccer clubs, and also own NFL football clubs."

The court also found that "the mere prospect of the NFL's proposed amendment has had a chilling effect upon presently football-oriented investors who might otherwise favorably consider ownership of an NASL franchise," and that the "loss of the stabilizing Hunt, Robbie and Nordstrom presences would be injurious in themselves."

Accordingly, because of the real potential for adverse effects to the NASL if the cross-ownership ban were adopted, and the absence of any immediate harm to the NFL if adoption of the ban were delayed until the case can be decided, the court issued the injunction requested by the NASL.

North American Soccer v. National Football League, 1979-1 Trade Cases, Para. 62,489 and 62,542 (S.D.N.Y. 1979) [ELR 1:2:5]

Harness horse driver s suspension from racetrack enjoined as probable denial of due process

A racing association's suspension of a harness horse driver-trainer which prevented him from driving or training horses at Meadows Racetrack in Washington County, Pennsylvania, has been preliminarily enjoined by a federal District Court. The driver-trainer made a successful showing that (1) he would suffer irreparable harm if the injunction were not granted, (2) that his harm outweighed any injury to the racing association or the public generally, and (3) that there was a likelihood he would prevail on the merits of his claim that the suspension deprived him of a liberty without due process and was accomplished under color of state law.

The driver-trainer stabled eleven horses at Meadows Racetrack, which he trained and raced. The driver-trainer's income was a percentage of the purses earned by horses that he drove, a percentage of the purses earned by horses that he trained, and a flat fee for training horses.

In August of 1978, the driver-trainer was notified by the racing association that, based on discussions with track judges, the association had decided to suspend him from driving and training at Meadows Racetrack, and to expel him from the racetrack for Inconsistent driving," a violation of the Pennsylvania State Harness Racing Commission Rules and Regulations under which the driver-trainer was licensed. The driver-trainer had no prior notice of the suspension and no hearing on the matter.

After his suspension, the driver-trainer could not transfer his horses to another track to continue pursuing his occupation, because other reasonably accessible racetracks had finished their meets or because the driver-trainer's horses could not qualify to race in meets still in progress.

The court found that the driver-trainer would suffer irreparable harm if the preliminary injunction were not granted, because the nature of his business was such that he had no adequate remedy at law to compensate him for the loss he would sustain from an unlawful suspension from driving and training at Meadows Racetrack. It would be a speculative endeavor, if not practically impossible, for a jury or court to attempt to calculate damages where the driver-trainer's income was related to the outcome of races in which he was a driver or trainer of the horses. Also, it would be almost impossible to determine the ultimate loss to his business and reputation caused by a suspension for a violation of a Commission Rule, because a suspension for ”inconsistent driving“ implied dishonest racing. The court further found that no proof was offered to support the racing association’s allegation that it and the public would be adversely affected if an injunction were granted.

In determining whether the driver-trainer had made a sufficient showing of the likelihood that he would prevail on the merits of his due process claim, the court found that the injury to the driver-trainer’s reputation could constitute the deprivation of a liberty interest, because the driver-trainer had made a showing that loss of reputation could lead, with some degree of probability, to the loss of another tangible interest such as employment. Under the rules of the Commission, the driver-trainer’s expulsion was required to be communicated to the Commission, which would then communicate it to every other racing association in Pennsylvania. Therefore, all of the driver-trainer's potential clients would be aware of his suspension.

The court further found that the driver-trainer was likely to prevail on his contention that the suspension was without due process of law. He was given no prior hearing on the suspension, and there was no extenuating private or public interest or overriding significance which would permit the postponement of a hearing.

Finally, the court found that it was likely that state action" was present In the suspension. under the Pennsylvania law, private racing associations are extensively regulated by the state; the defendant racing association had been granted virtual monopoly status over a substantial area of the state; and the defendants were given broad law enforcement powers. Racing associations are also given the power to regulate the conduct of patrons at race meets, and the right to employ security personnel with the "powers and duties of a peace officer" to enforce the criminal laws of Pennsylvania within the race track grounds. The racing association and its employees were acting not only as agents, but as deputies of the state. The court further found that the state had specifically authorized private persons to suspend racing privileges and had, therefore, completely delegated its authority in this area.

The racing association's assertion that the driver-trainer was suspended and expelled pursuant to an eviction clause in the stall lease did not change the result. The racing association had cited a violation of the Commission Rules as the reason for the suspension and had not simply evicted the driver-trainer.

Fitzgerald v. Mt. Laurel Racing Inc., 464 F.Supp. 263 (W.D.Penn. 1979) [ELR 1:2:6]

Radio station required to forfeit $1,000 to the United States, because of station s repeated violations of FCC s personal attack rule

A $1,000 judgment has been entered in favor of the United States against radio station WIYN in Rome, Georgia. because of the station's repeated violations of the FCC's personal attack rule.

The violation arose out of a program broadcast in 1971, during which the commentator referred to the Institute of American Democracy as a "subversive organization," stated that its newsletter was "definitely subversive," and said that both were "to the Far Left."

The FCC's personal attack rule provides that if the honesty, character, or integrity of a person (or organization) is attacked during a broadcast concerning a controversial issue of public importance, the station must notify the person, provide a script or tape of the attack, and offer the person a reasonable opportunity to reply on the air, all within seven days of the attack. (47 C.F.R. Section 73.123(a))

WIYN never notified the Institute of American Democracy of the broadcast, never provided it with a script or tape of the broadcast, and did not offer it an opportunity to respond on the air until after the FCC asked the station to respond to a complaint filed by the Institute.

Following administrative proceedings, the FCC found that WIYN had repeatedly violated the personal attack rule and ordered it to pay a $1,000 forfeiture. Suit was then commenced in federal District Court to collect the forfeiture. After a trial de novo, the court found that the broadcast in question had concerned a controversial issue of public importance, and that statements labeling the Institute a "subversive organization," its newsletter as "definitely subversive," and both "to the Far Left," constituted an attack upon their honesty, character or integrity.

In so finding, the court held that in determining what constitutes a personal attack, the contemporaneous attitude of the public is "all-important, temporary though it may be." The court then pointed out that since the end of World War II, it has been consistently held that calling a person or organization a "Communist" or "Communist sympathizer" may subject him to such public hatred and contempt that it constitutes libel. Though neither the Institute nor its newsletter were explicitly called "Communist," the court implied that "subversive" and "to the Far Left" had similar connotations.

In its defense, WIYN argued that even if it had violated the personal attack rule, its violation had not been "repeated" and thus, no forfeiture was warranted.

However, the forfeiture statute, 47 U.S.C. Section 503(b), provides that each day during which a violation occurs constitutes a separate offense. Because WIYN did not offer the Institute an opportunity to respond until 27 days after the attack occurred, the court held that WIYN had committed 19 separate offenses (one for each day after the seventh day following the broadcast).

U.S. v. WIYN Radio, Inc., 464 F. Supp. 101 (N.D.Ga. 1978) [ELR 1:2:7]

Pittsburgh business privilege tax must be paid by radio and television stations, because broadcasting is not manufacturing

A Pennsylvania statute authorizes the City of Pittsburgh to levy a business privilege tax upon all persons, transactions, occupations, privileges, subjects and personal property" except "manufacturing." Certain Pittsburgh radio and television stations sought to enjoin collection of the tax from them on the grounds that they were "manufacturers" and thus not subject to the tax.

The Pennsylvania Supreme Court held that despite the

mation into electronic signals which are transmitted on the stations' assigned wave lengths, broadcasting does not constitute "manufacturing." The court relied upon several cases holding that manufacturing consists of the application of labor or skill to material so that the original article is changed into a new, different and useful article. The court concluded that broadcasters do not produce new, different or useful articles, but merely effect "a superficial change in the original materials."

The court also was influenced by its conclusion that the translation of events into electronic impulses was not the primary purpose of the broadcasting stations; rather, the court said, their primary purpose was the transmission of commercial messages to their viewers and the sale of advertising.

Golden Triangle Broadcasting, Inc. v. City of Pittsburgh, 397 A.2d 1147 (Pa.Sup.Ct. 1979) [ELR 1:2:7]

NEW LEGISLATION AND REGULATIONS

IRS issues final regulations concerning investment tax credit for motion pictures and television programs

Ever since the enactment of the Internal Revenue Act of 1962, a credit has been allowed against federal income taxes for investments in certain kinds of property. With some exceptions, this credit — known as the ”investment tax credit“ — has been allowed for investment in ”tangible personal property“ used in the United States.

The IRS immediately took the position that movie and television films were not eligible for investment tax credit, because they were intangible property. However, in a case filed by Walt Disney Productions, it was held that movie and television films are tangible property and thus are eligible for investment tax credit treatment.

The Revenue Act of 1971 affirmed the Disney case, and made it clear that investments in movies and television are eligible for the tax credit. Nevertheless, the IRS continued to litigate the issue for prior years. In fact, Bing Crosby Productions, MCA, and Sussex Pictures have just won tax refund lawsuits arising from investment tax credits claimed by them for movies and television programs they produced in the 1960s. Bing Crosby Productions v. United States, 588 F.2d 1293 (9th Cir. 1979). In addition, the Revenue Act of 1971 left a number of issues unsettled.

The Tax Reform Act of 1976 contains provisions intended to clear up remaining uncertainties and to resolve disputes with the IRS concerning investment tax credits claimed for earlier years. It provides that investments in motion picture films or video tapes created primarily for use as public entertainment or for educational purposes are eligible for investment tax credit treatment.

Regulations just issued by the IRS provide that movies and television programs are created for entertainment if they are for the amusement, enlightenment, or gratification of an audience. Thus, dramatic or situation comedy shows qualify for investment tax credit.

On the other hand, the Tax Reform Act of 1976 provides that films or tapes which are essentially topical or transitory in nature are not eligible for investment tax credit. The legislative history of the Act cited news shows, interview shows and sporting events as examples of transitory shows (even if they may be shown in subsequent years).

In December of 1977, the IRS issued proposed regulations which included variety shows among those that are topical or transitory in nature, and thus ineligible for investment tax credit. In response, several entertainment industry representatives filed comments arguing that investments in variety shows should be eligible for the tax credit. The IRS, however, did not change its position. The recently issued final regulations again provide that variety shows do not qualify for the credit, because ”they present entertainers primarily as personalities of current interest, as opposed to dramatic or situation comedy shows which present entertainers as characters in a dramatization." Game shows and award shows also are ineligible for the tax credit.

The final regulations also distinguish between news specials relating to current affairs which do not qualify for the credit, and dramatized re-creations of recent events which do.

A film or tape is primarily for educational purposes — and thus eligible for the credit — if it is created for use by schools, public libraries or government agencies. Films and tapes created for use by industrial or commercial organizations, such as advertisements and training films, do not qualify for the credit.

In order to be eligible to claim the credit an investor must run the risk of losing his or her investment in the film or television program. Thus, if a distributor loans a producer all of the funds necessary for the production of a movie, but the loan is repayable only from the net profits from distribution of the movie (i.e., the producer has no personal liability for repayment of the loan), the distributor is the one who may claim the investment tax credit, not the producer.

As a general rule, 6.66% of the United States production costs of a film or tape may be claimed as a credit against the investor's federal income taxes. Under certain circumstances, 9% may be claimed. (However, this general rule is subject to a number of unique definitions and qualifications, each of which must be considered in computing the credit allowable for a particular production.)

Internal Revenue Service Regulations Concerning Income Tax Investment Credit for Movie and Television Films, 44 Federal Register 20416 (1979), 26 CFR Section 1.48-8 [ELR 1:2:1]

DEPARTMENTS

In the Law Reviews:

Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976, 30 Hastings Law Journal 683-703 (January 1979)

Obscenity, Community Standards, and the Burger Court: From Difference to Disarray by Kenneth Mott and Christine Kellett, 13 Suffolk University Law Review 14-26 (Winter 1979)

Disallowance of Loss Deductions in Shifts of Network Affiliations by Joseph E. Bernstein, 57 Taxes 199-208 (March 1979)

”Peculiar Characteristics“”: An Analysis of the First Amendment Implications of Broadcast Regulation by Henry Goldberg and Michael Couzens, 31 Federal Communications Law Journal 1-50 (Winter 1979)

The National Advertiser and the First Amendment by John E. Kottman, 16 American Business Law Journal 295-314 (Winter 1979)

The Betamax Case: Accommodating Public Access and Economic Incentive in Copyright Law, 31 Stanford Law Review 243-263 (January 1979)
[ELR 1:2:8]