

RECENT CASES

Arbitrators find that the directors of *Jaws 2* and *King of the Gypsies* were entitled to credit in certain advertisements

The names of the directors of the films “*Jaws 2*” and “*King of the Gypsies*” were required to appear in certain advertisements for those films, according to two arbitration decisions recently made available. (The arbitrations were held in June and November of 1978.) Universal Pictures and Paramount Pictures Corporation claimed that the ads were “teasers” and that such identification was not required. The arbitrators concluded, however, that the ads in question lacked the necessary elements of “mystery” and “uncertainty” associated with teaser ads and upheld the Directors Guild position that the

directors of the films were entitled to receive appropriate credit.

Both disputes arose under the DGA Memorandum-Basic Agreement of 1978. Article 8 of the Agreement covers directors' credits for theatrical motion pictures. Section 8-103 contains a list of exceptions to provisions requiring directors' credits in paid advertising, one of which is an exception for "so-called teaser advertising, as that term is used in the motion picture industry."

Universal Pictures had prepared two ads for "Jaws 2." The "fin-moon" ad depicted a shark's fin with the moon in the background. The copy read, "Just when you thought it was safe to go back in the water" and included the title of the film and, in small type, "Coming to theatres everywhere June 16th." The other ad showed a large shark behind a woman waterskier, the "just when . . ." copy and the title "Jaws 2" in large lettering.

The ads were not submitted to the DGA prior to public release as required under the 1978 Agreement.

Arbitrator Roger H. Davis, after reviewing several definitions of teaser advertising, noted that in general teasers are “a series of ads which show various attributes of the product advertised. . . The sketches . . . create an element of mystery in the public mind which becomes a challenge to solve, thereby heightening inquisitiveness about the product . . .” Davis pointed out that a teaser ad could include the title of the film if the title would not be widely recognized by the public. He concluded, however, that the use of the title “Jaws 2” eliminated all mystery — a moviegoer’s possible curiosity about the story differences between “Jaws” and “Jaws 2” would not supply this necessary element.

Therefore, Davis ordered Universal to replace the ads in question with ads containing “Directed by” credit to Jeannot Szwarc. However, Universal was not required

to pay any damages “because of the prior history of both parties . . . treating ads comparable to those prepared by Universal as ‘teaser’ ads . . . over the past 20 or 30 years.”

In the matter involving “King of the Gypsies,” Paramount had submitted a proposed advertisement for the film to the DGA. The ad depicted the head of a young man posed against a wall with the title of the film appearing in large capital letters above the head and “From Paramount for Christmas” and a small Paramount logo appearing below the head. The DGA rejected the ad. Paramount, contending that the ad constituted a teaser ad, sought an arbitration ruling.

Paramount’s position was that an effective teaser ad required the inclusion of the title of the film. According to Paramount, teaser ads include all prerelease advertising. Arbitrator Murray L. Schwartz disagreed, pointing

out that the parties to the 1978 Agreement could have, but did not, adopt this definition of teaser advertising.

Schwartz noted that in previous hearings regarding credits in teaser ads, arbitrators stressed “the themes of stimulating curiosity by withholding identification of the product; keeping the observer guessing, nonidentification of the product being advertised, and the creation of mystery.” He determined that a teaser ad “must create in the viewer a desire to know more about the subject . . . [and] look forward to the next advertisement for more information.” A title will usually, although not always, “end the mystery.”

Schwartz concluded that the Paramount ad was not a teaser because it did not “create a quantum of challenge to the viewer . . .” and he ruled that if the ad were used by Paramount, the director would have to be given credit.

In the Matter of the Arbitration Between Directors Guild of America, Inc. and Universal City Studios, Inc., Before the Arbitration Tribunal of the Directors Guild of America, Inc. (undated); In the Matter of the Arbitration Between Paramount Pictures Corporation and Directors Guild of America, Inc., Before the Arbitration Tribunal of the Directors Guild of America, Inc. (November 16, 1978) [ELR 1:10:2]

Elroy Crazylegs Hirsch states right of publicity and trademark infringement claims against manufacturer of Crazylegs shaving gel

Elroy “Crazylegs” Hirsch, former All American and All Pro football player, and currently the athletic director of the University of Wisconsin, filed suit against S. C. Johnson & Son, Inc., the manufacturer of a women’s

shaving gel which it distributed under the name “Crazylegs.” Hirsch alleged that the use of his well-known nickname constituted a violation of his right of publicity and tradename infringement.

S.C. Johnson & Son admitted that it had not obtained Hirsch’s consent to use his nickname; but it contended that the name “Crazylegs” was not used by Hirsch alone, that Wisconsin law did not recognize the “right of publicity” at the time the shaving gel was on the market, and that “Crazylegs” was not a tradename belonging to Hirsch because he had never used it to identify goods or services.

At the conclusion of the presentation of Hirsch’s evidence, a Wisconsin trial court dismissed his case, holding that he had failed to prove a claim under Wisconsin law. The Wisconsin Supreme Court has reversed, however, and has sent the case back to the lower court for a new trial.

In 1977, after “Crazylegs” shaving gel was taken off the market, the Wisconsin legislature enacted a statute (similar to those already on the books in California and New York) prohibiting the use of a person’s name or picture for advertising or trade purposes, without that person’s written consent. However, because “Crazylegs” shaving gel was distributed before the enactment of that statute, the question in this case was whether Wisconsin common law prohibited such uses even before the statute was enacted. This was an issue in Wisconsin at that time, because the right of publicity is one aspect of the right of privacy, and Wisconsin was one of only three states which did not recognize the right of privacy.

The trial court had concluded that because Wisconsin did not recognize the right of privacy, it did not recognize the right of publicity either. However, the Wisconsin Supreme Court has held that because the right of

publicity — that is, the right to control the commercial exploitation of aspects of a person’s identity — differs from other privacy rights, privacy cases were not controlling, and it decided to recognize a common law right of publicity.

The Wisconsin Supreme Court also held that Hirsch need not have used his nickname to identify goods and services in order for him to have a claim for tradename infringement. Rather, the court held that it would be sufficient for Hirsch to show that the name “Crazylegs” was used to identify him in his business or occupation, and that the use of that name on shaving gel caused consumer confusion or mistake concerning his approval or sponsorship of the gel.

In its concluding paragraph, the court pointed out that although it was reinstating Hirsch’s case, substantial problems of proof stand in the way of his eventual success. He must convince a jury that the name

“Crazylegs” identifies him in particular, that he suffered damages or that Johnson was unjustly enriched as a result of Johnson’s use of it, and that there is a likelihood that the public was confused and believed that he sponsored “Crazylegs” shaving gel.

Hirsch v. S. C. Johnson & Son., 280 N.W.2d 129 (Wis. 1979) [ELR 1:10:3]

Independently produced films funded by a government agency are entitled to copyright protection, Federal District Court decides

The Administrative Office of the United States Courts entered into a contract with a private party to produce five films about the Supreme Court for use by the Judicial Conference of the United States. The films were

later broadcast on public television. The Administrative Office (“agency”) determined that the producer should have a copyright in the film series. An action by the editor of Public Affairs Press, contesting the validity of the copyright, has been dismissed by a Federal District Court in the District of Columbia.

The Copyright Act of 1976 (17 U.S.C. Section 105) provides that copyright protection is not available for any work of the United States Government. The plaintiff contended that the film series was produced with the aid of government funds and therefore was not entitled to a copyright. However, the court noted that the films were not created by government employees as part of their official duties. Further, the work was not commissioned by the agency as an alternative to using one of its own employees on the project, in which case the right to obtain a copyright also would be withheld, according to the legislative history of Section 105.

The court thus held that in this case, the copyright in the films was lawful because, “Congress recognized there would be many of these ‘contract’ or ‘commission’ cases where denial of copyright protection would be unfair or hamper the publication and production of important works. It, therefore, allowed the government agency concerned to determine whether to allow an independent contractor . . . to secure a copyright in works prepared with government funds.”

The plaintiff also asserted that the copyright was unconstitutional because it conflicted with the First Amendment. The court noted, however, that copyright protects only the expression of an idea and not the idea itself, and held that “it is well established that there is no conflict between the First Amendment and the copyright laws.” The court also rejected the plaintiffs argument that the agency’s “input” on the films was unconstitutional because it amounted to federal control of films

prepared for use on public television. The films originally were not prepared for television, and the contract to broadcast the films was voluntarily entered into by the agency and the public television station involved. Congress had also considered and rejected the plaintiff's contention that such copyrights would foster government censorship.

Schnapper v. Foley 471 F.Supp. 426, CCH Copyright Law Reports, Para. 25,082 (D.D.C. 1979) [ELR 1:10:3]

NABET members were not entitled to California unemployment insurance benefits during NBC strike in 1976

A nationwide strike against NBC was called on March 31, 1976 by the National Association of Broadcast

Employees and Technicians, the union that represented NBC's technical employees. During the ensuing days, incidents of sabotage of NBC facilities occurred across the country, none of which, however, occurred in California. On April 2, 1976, a federal mediator called for a resumption of negotiations on April 8th. The date was agreed to by NABET which also notified NBC that it was directing its members to return to work on April 7th. However, NBC notified NABET that NBC would not agree to the return of striking employees until it received certain assurances from NABET concerning the prevention of further sabotage and future strike notice. While denying any connection with the sabotage, NABET refused to give such assurances. As a result, NABET members were not permitted to return to work until a new collective bargaining agreement was signed and the strike concluded on May 24th.

Between April 7th and May 24th, some striking employees applied for unemployment insurance benefits in California. The California Employment Development Department denied their applications on the basis that they had voluntarily left work to participate in a strike. However, the California Unemployment Insurance Appeals Board decided that NBC's refusal to permit the employees to return to work on April 7th made them eligible for benefits. A California Court of Appeal has reversed that decision, and has held that the striking employees were not eligible for unemployment insurance benefits, under the circumstances of this case.

California's Unemployment Insurance Code provides that an individual is not eligible for unemployment compensation benefits if he leaves work because of a "trade dispute," and that he remains ineligible so long as he remains out of work "by reason of the fact that the trade dispute is still in active progress." (Section 1262)

In this case, the question was whether NBC's striking employees remained out of work after April 7th — the date NABET told them to return to work — because of the trade dispute with NBC. The unemployment Insurance Appeals Board concluded that NBC's request for assurances was unreasonable, and thus an unforeseeable consequence of the original strike, and therefore, the willingness of NABET members to return to work made them eligible for benefits.

The Court of Appeal held that such an approach to the matter was in error, however, because it required the Board to evaluate the merits of NBC's position, and such an evaluation was “not in keeping with the neutral position of the state.”

Instead, the Court of Appeal held that the question was whether the employer-employee relationship had been permanently severed. Where an employer discharges and permanently replaces striking employees, the trade

dispute is deemed to be ended, and striking employees are eligible for unemployment insurance benefits from the time they are discharged and permanently replaced.

In this case, NBC did not replace the striking NABET members. Instead, it indicated a willingness to rehire them on certain conditions and continued to negotiate with NABET. Since the employee-employer relationship had not been severed, both it and the “trade dispute” continued until the strike was concluded; and NABET members remained ineligible for unemployment insurance benefits during that entire time as well, the court held.

National Broadcasting Co. v. Unemployment Insurance Appeals Board, 95 Cal.App.3d 550 (1979) [ELR 1:10:4]

Publisher s failure to pay authors their share of proceeds from sale of paperback rights to book constituted breach of publishing agreement; but publisher s alleged failure to promote book, and authors failure to timely deliver manuscript, were factual issues precluding summary judgment

On June 1, 1978, Sandor Frankel and Webster Mews (a pseudonym), the authors of *The Aleph Solution*, entered into a publishing agreement with Stein and Day. Stein and Day agreed, among other obligations, to pay the authors two-thirds of any signature payment for the sale of paperback rights to the book. Stein and Day also agreed that their failure to promptly pay royalties and render accountings would result in the reversion to the authors of all rights licensed to the publisher. The copyright in the book was to be held in the authors' names. The authors received a \$10,000 advance and they

agreed to deliver their manuscript to the publisher by June 20, 1978.

In September of 1978, Stein and Day sold the paperback rights to The Aleph Solution for a signature payment of \$27,500, but no payment was made to the authors. Frankel and Mews then sued Stein and Day seeking a declaratory judgment that all rights in the book had reverted to the authors, an injunction barring Stein and Day from continuing to distribute the book, and damages for copyright infringement, breach of the publishing agreement, negligent promotion of the book and breach of an alleged oral agreement to spend a minimum of \$30,000 on advertisements for the book.

Stein and Day contended that the authors had not submitted their manuscript until August of 1978 and that their “unreasonable behavior” had further delayed publication so that the book was not available in time for the Christmas market. Stein and Day therefore brought a

counterclaim against the authors for damages of \$25,000.

In considering both sides' motions for summary judgment, a Federal District Court in New York City held that it had copyright jurisdiction despite the publisher's claim that the action was essentially a contract action.

Stein and Day then argued that the failure to pay the paperback royalty to the authors was not a material breach of the agreement. The publisher cited *Nolan v. Sam Fox Publishing Co., Inc.*, 499 F.2d 1394 (2d Cir. 1974), in which a music company's failure to pay a composer 74% of the royalties due him was not found to be a material breach justifying rescission. The court, however, pointed out that in *Nolan*, the failure to pay royalties was the result of oversight and negligence, while Stein and Day had willfully failed to pay the paperback royalty due. In view of the agreement's unambiguous provision for reversion, the court held that Stein

and Day was liable for breaching the publishing agreement.

The court dismissed the authors' claim based on the alleged agreement regarding advertising expenditures, noting that the publishing agreement contained a parol evidence clause requiring any agreement between the parties to be in writing. Although two press releases issued by Stein and Day referred to a \$30,000 advertising budget, the releases were not "contractually binding." The court refused to dismiss the author's cause of action for negligent promotion, however, because the factual issues involved necessitated a hearing.

The court concluded that all rights licensed to Stein and Day under the publishing agreement had reverted to Frankel and Mews and that the authors were entitled to damages for copyright infringement and for breach of the paperback payment provision. However, in connection with the declaratory judgment, the authors had

sought a wide range of remedies, including the return of physical control over all copies of *The Aleph Solution*. Indicating concern about the publisher's loss of its investment in the book, the court refused to grant the relief sought on a motion for summary judgment and ordered a hearing on the authors' allegedly unreasonable conduct and the merits of the publisher's counterclaim.

The court also refused to grant a preliminary injunction enjoining Stein and Day from holding itself out as having any interest in *The Aleph Solution* because of the factual questions remaining to be decided and because the authors had not clearly shown a threat of irreparable harm.

Frankel v. Stein and Day, Inc., 470 F. Supp 209, CCH Copyright Law Reports, Para. 25,078 (S.D.N.Y. 1979) [ELR 1:10:4]

Consumer affairs broadcaster and TV station granted summary judgment in defamation suit

Steaks Unlimited, Inc., an Ohio firm which sold beef directly to the public in or in front of Zayre Stores in the Pittsburgh, Pennsylvania area, sued consumer affairs editor and newscaster Donna Deaner, WTAE-TV 4, and Hearst Corporation for defamation based on a consumer affairs broadcast about one of Steaks Unlimited's steak sales. A Federal District Court in Pennsylvania has granted summary judgment in favor of the newscaster and the other defendants, because of Steaks Unlimited's failure to show that the defendants had acted with actual malice.

The broadcast stated that Steaks Unlimited's advertisements mentioned neither the government quality grade for the meat nor the price per pound. In an interview on the broadcast, a Steaks Unlimited salesman said that its

meat was “commercial grade” and that that grade is “fantastic.” However, Donna Deaner reported that commercial grade was the lowest quality of meat available, that every reputable supermarket or meat market in the area sold either good or choice quality beef, and that Zayre’s officials, upon learning of Steaks Unlimited’s meat quality and deceptive sales techniques, decided to terminate their endorsement of the steak sale.

There were unresolved factual issues concerning the truth of whether the sales tactics were misleading, whether other Pittsburgh area stores carried commercial grade steaks, and whether Zayre’s terminated Steaks Unlimited. However, Steaks Unlimited was held to be a public figure, and thus required to prove actual malice by the defendants in order to recover damages in a defamation action. Although otherwise a private person, Steaks Unlimited became a public figure when it voluntarily involved itself in the large-scale steak sale, a

matter of public interest, by managing it and advertising it.

The court noted that there is a split among the courts as to the basis for granting summary judgment upon a failure to prove actual malice. Under the first view, the issue of actual malice is a constitutional issue to be decided by the trial judge on the basis of actual knowledge or reckless disregard of the truth. Under the second view, the plaintiff must raise a “genuine issue as to the existence of malice.” The court concluded that Steaks Unlimited had failed to show actual malice under either test.

Steaks Unlimited’s president and sole shareholder had stated in a deposition that he had spoken with Donna Deaner’s assistant and that she had refused to allow him to explain things to her or to speak to Donna Deaner, who was preparing for the broadcast. However, this deposition testimony did not show knowledge of

falseness in the broadcast nor did it raise any inference of a reckless disregard as to whether any statements were false, the court held.

Steaks Unlimited, Inc. v. Deaner, 468 F.Supp. 779 (W.D.Pa. 1979) [ELR 1:10:5]

United States and Michigan Supreme Courts hold that the public and the press may be barred from certain judicial proceedings; Florida and Massachusetts Supreme Courts approve electronic media coverage of courtroom proceedings

Constitutional challenges to the practice of barring the press and the public from judicial proceedings pursuant to an agreement among the accused, the prosecutor and the trial judge have been considered in two recent cases.

The U.S. Supreme Court has held that the press may be barred from a pretrial hearing of a motion to suppress evidence. The defense attorneys in a murder case in New York contended that a buildup of publicity had jeopardized the ability of the defendants to receive a fair trial. The trial judge granted the defense motion to exclude the public and the press from the hearing and the New York Court of Appeals upheld the exclusion.

In affirming that ruling, the U.S. Supreme Court held that the Sixth Amendment guarantee of a public trial was created for the benefit of defendants in criminal cases and that the public does not have a correlative constitutional right to insist upon a public trial. Even if the Sixth and Fourteenth Amendments could be viewed as affirming the public's common law right to attend criminal trials, the Court pointed out that pretrial proceedings were "never characterized by the same degree of openness as were actual trials." The Court found that

it was particularly important for a trial judge to safeguard the due process rights of an accused when prejudicial pretrial publicity is involved because of the influence that information inadmissible at the trial might have on potential jurors. Said the Court, Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun.

The Supreme Court also upheld the New York court's finding that the First Amendment right of access to the courtroom was outweighed in this case by the defendants' right to a fair trial. Moreover, once the danger of prejudice had subsided, a transcript of the suppression hearing was made available to the press and the public. The Court also pointed out, however, that the Sixth

Amendment does not guarantee a defendant the right to compel a private trial.

In a separate case, the Supreme Court of Michigan has reversed a trial court's decision to exclude the public and the press from a pretrial hearing and subsequent criminal trial pursuant to an agreement between the defendant and the prosecutor, because the defendant did not offer any reason for seeking to close the courtroom and the trial judge did not investigate the defendant's request. A Michigan statute requires that "the sittings of every court within this state shall be public." According to the Michigan Supreme Court, this statute had been disregarded by the trial judge without apparent justification. Though the court held that the public's right to attend court is not absolute, it also held that mere agreement among the parties to exclude the public is insufficient. The court ruled that when a motion for closure is made, the trial judge should, at a minimum, take

testimony at a hearing open to all interested parties, explore the constitutional and statutory validity of any proffered justifications for excluding the public and press from any portion of the trial, and determine whether any alternatives and less restrictive mechanisms exist.

In another matter, the Supreme Court of Florida has determined that electronic media (including television film and videotape cameras, still photography cameras, tape recording devices and radio broadcast equipment) may be permitted access to courtrooms in that state.

Post-Newsweek Stations had petitioned the court for a change in the code of judicial conduct which had prohibited such access. The court ordered a one-year pilot program during which the media were permitted in Florida courtrooms without participant consent but subject to certain standards of conduct and technology. The court concluded that in the absence of a demonstration

of prejudice, there is no per se proscription against electronic media coverage of judicial proceedings imposed by the Fourteenth Amendment to the U.S. Constitution or by the Florida Constitution.

The court, however, rejected the petitioner's contention that such coverage is required under the First and Sixth Amendments. The court stated that it based its decision on the supervisory authority of the court and not upon constitutional requirements.

According to recent news accounts, the Massachusetts Supreme Judicial Court has voted to allow television and photographic coverage of court proceedings within that state for a one-year experimental period. An official order suspending the present ban on such coverage is to be issued when procedural details for the experiment are adopted.

Gannett Co., Inc. v, DePasquale, U.S. Supreme Court Docket No. 77-1301 (July 2, 1979); Detroit Free Press v. Macomb Circuit Judge, 275 N.W.2d 482 (Mich. 1979); Petition of Post-Newsweek Stations, Florida, 370 S.2d 764 (Fla. 1979) [ELR 1:10:6]

FCC s renewal of television broadcast license reversed due to inadequate comparative hearing

Cowles Florida Broadcasting, Inc., a wholly owned subsidiary of Cowles Communications, Inc., began operating Channel 2 in Daytona Beach, Florida, in 1966. In 1969, Cowles sought to renew its license. Some months later, Central Florida Enterprises, Inc. applied to the FCC for a construction permit for a new commercial television station to operate on Channel 2. After a joint comparative licensing hearing, an Administrative Law

Judge concluded that renewal of Cowles' license would best serve the public interest, a decision that was thereafter affirmed by the FCC. However, the Federal Court of Appeals in Washington, D.C. has set aside the renewal and has remanded the matter for further proceedings.

The objectives of comparative licensing hearings, according to a 1965 FCC Policy Statement on Comparative Broadcast Hearings, are to ascertain which licensee will provide the best service to the public and to achieve maximum diffusion of control of the mass media. (The standards were drawn to govern hearings comparing new applicants for a license but have been applied to comparative renewal hearings as well.) The Federal Communications Act and the Policy Statement do not provide any preference to an incumbent licensee and require a full hearing prior to the issuance of a license. There is a "tacit presumption," however, according to

the court, that an incumbent may expect renewal if it has “served the public interest . . . in a substantial manner,” even if another applicant might demonstrate that it could achieve better future performance. The rationale for this preference apparently is that a “renewal expectancy” will encourage a licensee to commit sufficient resources to its operations to provide quality service, and to assure continuity and stability in the broadcast industry.

The court found that the FCC’s almost routine confirmation of Cowles’ “renewal expectancy” after a wholly noncomparative assessment of Cowles’ past performance did not comply with the FCC’s own stated objectives. Further, Central was prepared to demonstrate that its operation of Channel 2 would enhance diversity of media ownership, increase the role of ownership in management and promote minority participation.

The Administrative Law Judge had found that Central, having no connection with any other mass media outlet,

had an advantage over Cowles on the diversification criteria. CCI and another of its subsidiaries own several other broadcast properties and stock in publishing concerns, including a substantial interest in the New York Times Company. Nevertheless, the ALJ concluded that CCI's related mass media interests were of "little decisional significance." The court held that this conclusion was unreasonable and suggested that on remand the FCC consider: (1) the conceded relevance of diversification of media ownership in the comparative renewal context; (2) the materiality of related media interests anywhere in the nation; and (3) the evident hazards of relying on local management autonomy as a surrogate for diversification of media ownership.

In turning to the question of which applicant might provide the best service to the public, the ALJ noted that Central proposed to have three of its shareholders participate full time in station management, while Cowles

was absentee-owned by CCI. Nevertheless, the ALJ found that Central's proposal was "very weak" because the shareholders did not own enough stock to control corporate policy and only one shareholder would be engaged in full-time management after the station's formative stages. The ALJ then rated Cowles' past performance as "thoroughly acceptable" (this was upgraded to "superior" by the FCC), and this rating served to outweigh Central's preferential rating under the diversification criterion. It was this non comparative assessment of Cowles' past performance that was objected to by the court. There had been no direct inquiry into whether Central's proposed service would be superior and no articulation of how Cowles' past performance supported a finding that its future service would be better than Central's. The court queried whether "performance that is merely average can warrant renewal without some finding that the challenger's performance would

likely be no more satisfactory” and stated that “Such intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.”

The court also expressed concern over the FCC’s failure to consider the significance of Cowles’ violation of FCC rules and the company’s connection with a mail fraud inquiry. Cowles had moved its principal place of business outside Daytona, contrary to FCC rules requiring that the main studio of a television station be located in the principal community served. For this the ALJ had given Cowles a “slight demerit” because the move was not conducted in deliberate defiance of the FCC’s rules and had not resulted in any downgrading of service to Daytona Beach. However, the court disagreed, pointing out that the lack of injury resulting from the move did not excuse a plain violation of FCC rules. With respect to the mail fraud matter, the court noted that certain of

CCI's subsidiaries had been involved in investigations of improper magazine subscription sales but that neither the ALJ nor the FCC made findings concerning common officers of Cowles and the subsidiaries.

Central Florida Enterprises, Inc. v. F.C.C., 598 F.2d 37 (D.C.Cir. 1979), cert. dismissed, 99 S.Ct.2189 [ELR 1:10:7]

Briefly Noted:

Tax.

The Tax Court has held that a publishing company received income when it granted a corporation a credit for future advertising in partial payment for certain assets of the corporation, and that the income had to be reported

in the year the assets were acquired even though the publishing company used the accrual method of accounting. The publishing company contended that the value of the advertising credit should be included in its income only when the advertising was published. However, the Tax Court agreed with the IRS that the credit represented prepaid income to the publishing company in exchange for future advertising services to be rendered by it, and thus had to be included in income immediately, especially because there was no predetermined schedule for the publishing company's performance nor even any certainty that it would.

T.F.H. Publications, Inc. v. Commissioner, 79(10) CCH Standard Federal Tax Reports, Para. 7670 [ELR 1:10:8]

Tax.

Miss Georgia Scholarship Fund, Inc., whose purpose was to provide “scholarships” to contestants in a series of beauty pageants, has been denied tax exempt status, because the “scholarships” were remunerative in that all participants in its pageants received scholarships in exchange for their participation in the pageants and public appearances. Operating an organization for the purpose of providing compensatory payments is not a permissible tax exempt purpose, the Tax Court held in affirming the IRS’s decision to deny the Fund tax-exempt status.

Miss Georgia Scholarship Fund, Inc. v. Commissioner, 79(10) CCH Standard Federal Tax Reports, Para. 7560 [ELR 1:10:8]

Securities Law.

A Federal Court of Appeals in California has held that a financial columnist who fails to disclose his ownership of stock in a company about which he favorably, though inaccurately, reports, may be liable to investors who are damaged by a temporary increase in the market price of the stock occurring on publication of the columnist's report. The court held that although information concerning the columnist's ownership of the company's stock was not directly related to the company's value and expected performance, it was nevertheless material information, because it was information affecting his objectivity, and thus was information a reasonable investor would consider important in making an investment decision.

Zweig v. Hearst Corporation, 594 F.2d 1261 (9th Cir. 1979) [ELR 1:10:8]

Constitutional Law.

A Federal District Court in New Hampshire has ruled that the Nashua Board of Education violated the First Amendment rights of Nashua High School students and teachers when it cancelled the school's subscription to MS Magazine and removed all issues of it from the school library.

Salvail v. Nashua Board of Education, 469 F.Supp. 1269 (D.N.H. 1979) [ELR 1:10:8]

NEW LEGISLATION AND REGULATIONS

Federal Communications Commission initiates radio deregulation proceeding

The Federal Communications Commission has voted to begin what it has described as a “major proceeding” which may eventually result in an end to FCC regulation of commercial radio in four significant areas. Specifically, the FCC has proposed: to eliminate its current guidelines concerning the amount of news and public affairs programming that ought to be broadcast by AM and FM commercial stations; to eliminate its current specific requirements concerning how commercial radio stations are to ascertain the needs and problems of their communities; to eliminate its current policies concerning limitations on the amount of broadcast time that may be devoted to commercials; and to eliminate its current

requirements concerning the maintenance of program logs.

The FCC indicated that the reason it is considering these actions is that the radio market has changed significantly since 1934 when the Federal Communications Act was adopted. For example, the number of radio stations in existence has increased from 583 in 1934 to more than 8,600 today. All-news and Black and Hispanic oriented stations have become widespread. Most radio stations now broadcast more news and public affairs programming than is required by FCC guidelines. And the increased number of stations has resulted in the broadcasting of fewer commercial minutes per hour than permitted by FCC rules, in many markets. Accordingly, “the FCC found it appropriate to reexamine whether explicit and uniform government programming requirements for each radio licensee were still necessary to insure that the radio medium as a whole as well as the

choices of individual radio stations served the public interest, convenience, and necessity.”

However, the FCC made it clear that despite these deregulation proposals, it intends to continue to enforce its policies against nondiscrimination against minorities and women in employment, that it will continue with its incentives to expand minority ownership of radio stations, and that it will continue to require radio stations to comply with the Fairness Doctrine.

Although the FCC indicated that it preferred to eliminate the four areas of regulation described above, it acknowledged that there are in fact a wide range of possible actions it could take in each of the four areas. Its Notice of Proposed Rulemaking in fact specified a range of deregulatory actions that could be taken in each area. Comments on these specific proposals, or alternatives, were invited. No deadline for the filing of comments has been announced as yet.

For additional information, contact Roger Holberg of the FCC at (202) 632-6302.

Notice of Inquiry and Proposed Rulemaking, FCC 79-518 (September 6, 1979) [ELR 1:10:1]