RECENT CASES

Federal District Court holds that broadcaster s violation of FCC s Personal Attack Rule gives victim of the attack a private cause of action for damages

In 1977, radio station KDKA broadcast a talk show hosted by John Cigna during which a guest stated that motion picture writer and director Pare Lorentz had been a member of the Communist Party some years ago. As a result of that broadcast, Lorentz filed suit in Federal District Court in Pittsburgh against Cigna, KDKA, and the station's owner, Westinghouse Broadcasting Company, for libel, invasion of privacy, negligence and reckless infliction of emotional distress.

Lorentz also asserted a cause of action based on KDKA's alleged failure to comply with the FCC's

Personal Attack Rule which requires broadcasters to notify people whose honesty, character or integrity has been attacked on the air and to offer a reasonable opportunity to respond on the air. (47 CFR Sec. 73.123)

The defendants moved for summary judgment on the cause of action based on the FCC's Personal Attack Rule, arguing that the Federal Communications Act does not authorize private, civil actions to be filed for the alleged violation of its provisions. Lorentz, on the other hand, argued that there is an implied cause of action where an attack is made upon the honesty, character or integrity of a person on the air, even though the Federal Communications Act does not expressly provide private remedies.

The court agreed with Lorentz, saying, "We find it appropriate to provide interested citizens with a meaningful personal and practical approach to the matter of violations in giving the right to bring suit to redress infractions of the Rule."

The defendants asked the court to certify the issue for immediate appeal to the Court of Appeals, saying that the court's decision implying a private cause of action for alleged violations of the Personal Attack Rules was unprecedented and has significant implications not only for this case, but for the broadcasting industry generally. The court refused to do so, however, saying that an immediate appeal would not advance the ultimate termination of the case, and that this issue and all others could be appealed together when the trial was concluded.

Lorentz' motion for summary judgment on his libel, privacy, negligence and emotional distress causes of action also was denied, because there were disputed issues of fact to be resolved.

Lorentz v. Westinghouse Electric Corp., 472 F.Supp. 946 (W.D.Pa. 1979) [ELR 1:12:2]

Sole shareholder and officer of corporation held personally liable for infringement of copyrighted songs

Several music publishers sued the operator of an entertainment establishment known as R.E.O.'s in Des Moines, Iowa, alleging that he had infringed copyrighted musical compositions including, among others, "Blueberry Hill," "What Are You Doing The Rest of Your Life," and "Bad, Bad LeRoy Brown." The publishers had granted ASCAP the non-exclusive right to license the songs for public performances for profit, and ASCAP received reports that performers at R.E.O.'s had played the songs in question without a license and without permission from the copyright owners.

The defendant contended that if there was any infringement it was committed, not by himself, but by the corporate entity of which he was the sole shareholder and only officer and employee, and that the court therefore lacked jurisdiction because the summons in the action was served only on him personally. A Federal District Court in Iowa rejected this argument, however, and held that the defendant was personally liable for copyright infringement.

The court, citing Professor Nimmer, noted that an officer of an infringing corporation will be personally liable if ". . . he is the dominant influence in the corporation, determining the policies which result in the infringement." (2 Nimmer on Copyright, Section 134.1) Courts also have found a corporate officer liable as a joint tortfeasor in copyright infringement cases when: (1) the officer personally participated in the actual infringement; or (2) the officer derived financial benefit from the infringing activities either as a major shareholder in the corporation, or [received] a percentage of the revenues from the activity giving rise to the infringements; or (3) the officer used the corporation as an instrument to carry out a deliberate infringement; or (4) the officer was the dominant influence in the corporation, and determined the policies which resulted in the infringement; or (5) on the basis of some combination of the above criteria.

The defendant claimed that he had instructed groups performing at R.E.O.'s to avoid playing ASCAP songs. The court found, however, that the defendant was in a position to exercise supervision and control over the performances, that he expected a financial benefit from the entertainment, and that he had established the policies resulting in the infringement. ASCAP was not required to supply the defendant with lists of ASCAP songs so that performances of such songs could be avoided.

The plaintiffs were therefore awarded statutory damages of $2500 (infringement of 10 songs with an award of minimum statutory damages of $250 per infringement pursuant to Section 101(b) of the former Copyright Act) as well as $3000 in attorney's fees and costs.

Warner Bros., Inc. v. O'Keefe, 202 USPQ 735, CCH Copyright Law Reports, Para. 25,091 (S.D.Ia. 1977) [ELR 1:12:3]

NCAA held to be necessary party in Jerry Tarkanian s lawsuit to enjoin his termination by the University of Nevada, Las Vegas

In 1977, the National Collegiate Athletic Association imposed penalties on the University of Nevada, Las Vegas, for alleged violations of NCAA rules. In addition, the University was ordered to show cause why the NCAA should not impose additional penalties if the University did not terminate its Head Basketball Coach, Jerry Tarkanian, on the grounds that the NCAA had found that he had allegedly attempted to interfere with the NCAA's investigation.

The University granted Tarkanian a hearing at which his lawyer argued that Tarkanian should not be terminated because the University's own investigation of the alleged violations established that none had taken place, despite the NCAA's contrary findings. However, the University's hearing officer concluded that it was required to accept the findings of the NCAA, even though he also found that "in this instance the NCAA's standards of proof and due process were inferior to what we might reasonably expect."

Tarkanian then filed suit against the University — though not against the NCAA — seeking to enjoin his termination. A Nevada State Judicial District Court rendered judgment in Tarkanian's favor, and the University appealed to the Nevada Supreme Court.

The Nevada Supreme Court has reversed Tarkanian's victory and has remanded the case to the District Court for further proceedings. In doing so, however, it did not address the merits of Tarkanian's contention that he had been denied procedural and substantive due process. Rather, the Nevada Supreme Court determined that the NCAA is a necessary party to the case and should have been joined as a party before the case went to trial.

The reason for the Nevada Supreme Court's ruling was that even if the University were enjoined from terminating Tarkanian, the NCAA might impose sanctions against the University for its failure to terminate him. In that case, the University would be affected by Tarkanian's failure to join the NCAA so that it too would he bound by the court's order. Alternatively, if the NCAA were somehow prevented from imposing sanctions on the University for its failure to terminate Tarkanian, because of a court order enjoining the University from doing so, then the NCAA would be unable to protect its interests in its enforcement proceedings as a result of a lawsuit to which it was not a party, Accordingly, the Nevada Supreme Court remanded the case for joinder of the NCAA and further proceedings to which it would be a party, and by which it would be bound.

University of Nevada v. Tarkanian, 594 P.2d 1159 (Nev. 1979) [ELR 1:12:3]

Reasonableness of PGA eligibility rules to be determined in antitrust lawsuit filed by non-member who was excluded from participating in golf tournament

Emil Weser, a professional golfer, was not permitted to participate in the Western Open golf tournament in 1976, because he was not a member of the Professional Golfers' Association or its Tournament Players Division. Although he had been a PGA approved player between 1949 and 1958, his status as an approved player was terminated by the PGA in 1958, and since then his primary involvement with golf has been the operation of a driving range and golf shop and teaching golf lessons.

The 1976 Western Open was cosponsored by the PGA, the Tournament Players Division, and the Western Golf Association, and eligibility for participation in it was prescribed by the Tournament Players Regulations. Weser was not eligible for the tournament under those regulations. As a result, Weser filed suit in a Federal District Court in Chicago, alleging that the eligibility regulations restrained trade and commerce in violation of the Sherman Act.

The PGA, its Tournament Players Division, and the Western Golf Association moved for summary judgment on the grounds that the eligibility rules do not violate the antitrust laws, and on the grounds that Weser did not have standing to bring the suit; and the court has granted their motion in part, but only in part.

The court agreed with the defendants that Weser did not have standing to sue for damages, because he had not been injured "in his business or property." Under Section 4 of the Clayton Act, one may seek damages for violation of the antitrust laws only if one has been injured in his "business or property" as a result of that violation. In this case, Weser alleged that his potential pro shop and golf instruction business had been damaged; but the court held that pro shop and golf instruction were not part of the professional tournament golf market from which he allegedly had been excluded. Weser also alleged that he had been injured because he lost tournament prize money, but the court held that he was not then in the tournament golf business.

On the other hand, the court held that Weser did have standing to seek injunctive relief, because under Section 16 of the Clayton Act (governing who may seek an injunction against antitrust violations) injury to "business or property" is not required, merely a "threatened loss or damage." The court held that Weser's exclusion from tournaments would result in a continuing "loss."

On the merits of Weser's claim, the court held that the eligibility regulations in question were not per se illegal. On the other hand, the court ruled that if the regulations permitted some golfers to play who had not proven their competitive ability while denying other golfers the right to play, or if the regulations were so restrictive that those who had proven their abilities were refused entry into the tournament in order to favor less qualified PGA members, then the regulations may not be reasonable and thus not legal. Although the court did not doubt the skill of PGA members, it held that the distinction made by the eligibility rules between PGA members and golfers who were not members was questionable and a material issue of fact, and thus the court denied the defendants' motion for summary judgment on Wesees claims for injunctive relief.

Weser v. Professional Golfers' Association, 1979-2 CCH Trade Cases, Para. 62,740 (N.D.Ill. 1979) [ELR 1:12:4]

National Hockey League reserve system is exempt from antitrust laws, Federal Court of Appeals holds in Dale McCourt-Los Angeles Kings case

Since 1973, the National Hockey League reserve system has provided that when a player becomes a free agent and signs with a different team in the NHL, his former team is entitled to an "equalization payment" from his new team. This "equalization payment" may be players, draft choices, or, "as a last resort," cash. If the two teams are unable to agree, each team submits a proposal to a neutral arbitrator who then selects one of the two proposals, without changing it in any way.

In 1978, the Los Angeles Kings' star goalie, Rogie Vachon, became a free agent and signed with the Detroit Red Wings. The Kings and Red Wings were unable to agree on an "equalization payment" for Vachon, and thus each team submitted a proposal to an arbitrator. The Red Wings offered two of its players as compensation for Vachon, while the Kings proposed that the contract of Dale McCourt be assigned to it. The arbitrator selected the Kings' proposal, and the Red Wings assigned McCourt's contract to the Kings.

McCourt, however, did not want to move to Los Angeles, and thus, rather than report, he filed suit against the NHL, the NHL Players Association, the Kings and the Red Wings in Federal District Court in Detroit, alleging that the NHL reserve system and his assignment to the Kings violated Section 1 of the Sherman Act. The court agreed with McCourt, held that the reserve system did unreasonably restrain trade, held that the reserve system was not exempt from the antitrust laws under the "labor exemption," and thus the court enjoined McCourt's assignment to the Kings. McCourt v. California Sports, Inc., 460 F.Supp. 904 (E.D.Mich. 1978)

A Federal Court of Appeals has reversed that decision, however. The Court of Appeals has held that assuming the NHL reserve system could violate the antitrust laws, the reserve system was exempt from those laws because of the "labor exemption."

The parties, the District Court and the Court of Appeals all agreed that the standard for determining whether a provision contained in a professional sports collective bargaining agreement is exempt from the antitrust laws is set forth in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). In that case, the court held that a provision contained in a collective bargaining agreement is exempt from the antitrust laws if the restraint on trade primarily affects only the parties to the collective bargaining agreement, if the provision concerns a mandatory subject of collective bargaining, and if the collective bargaining agreement in question was the product of bona fide, arm's-length bargaining.

In this case, the Court of Appeals found that the NHL reserve clause primarily affected one of the parties to the agreement, namely, the players, and that the reserve system was a mandatory subject of collective bargaining, because it involves the terms and conditions of the players' employment.

The District Court had held that the reserve system was unilaterally imposed on the NHL. Players Association and thus had not been the product of arm's-length bargaining. The Court of Appeals disagreed, however. It ruled that ". . . the trial court failed to recognize the well-established principle that nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue."

Thus, although the National Hockey League had insisted on the reserve system, it agreed to other provisions demanded by the Players Association in exchange. Accordingly, the Court of Appeals held that the NHL reserve system was part of a collective bargaining agreement which was the product of arm's-length bargaining, and as such is entitled to the "labor exemption" from the antitrust law.

The injunction preventing McCourt's assignment to the Kings was therefore vacated. Before McCourt arrived in Los Angeles, however, the Kings' new owner, Jerry Buss, agreed on alternate compensation with the Red Wings, so that McCourt remains in Detroit after all. The Kings have obtained Andre St. Laurent and first-round draft picks in 1980 and 1981 from the Red Wings.

McCourt v. California Sports, Inc., 1979-1 CCH Trade Cases, Para. 62,649 (6th Cir. 1979) [ELR 1:12:4]

Reader s Digest wins libel lawsuit filed by man mentioned in article about disappearance of Jimmy Hoffa

In 1976, Reader's Digest published an article entitled "Why Jimmy Hoffa Had To Die" which concluded that Hoffa was murdered because he posed a threat to contracts then being negotiated between the Teamster's Union and businesses allegedly controlled by the underworld. The article mentioned Lenny Schultz as one of three men Hoffa thought he would be meeting the day he disappeared. Schultz, who denied meeting Hoffa that day, sued Reader's Digest for libel.

Reader's Digest moved for summary judgment on the grounds that Schultz was a public figure and on the grounds that the article was privileged under Michigan's "fair comment" doctrine. Although holding that Schultz was not a public figure, a Federal District Court in

Michigan has granted Reader's Digest's motion for summary judgment under the Michigan common law of fair comment which like the Constitutional public figure doctrine requires a plaintiff to show actual malice, something Schultz was unable to do.

In denying Reader's Digest's public figure privilege defense, the court found that Schultz was neither a public figure for all purposes nor a limited public figure for the purpose of Hoffa's disappearance, under the definition of a "limited public figure" in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Although Hoffa's disappearance was a matter of public controversy, the court found that newspaper and magazine publicity given Schultz in connection with Hoffa's disappearance was not sought by him, and his response to the publicity did not amount to his voluntary injection of himself into the controversy, as Gertz requires.

On the other hand, the court found that under Michigan law, a qualified fair comment privilege exists for publications regarding matters of public concern. Where this qualified privilege exists, the plaintiff must prove actual malice to recover.

The court further ruled that Schultz had failed to prove actual malice on the part of Reader's Digest, either under the federal standard of "knowledge of falsity or reckless disregard for the truth," or under the Michigan standard of "actuated by ill will, with a design to causelessly or wantonly injure."

The article's author and his research associates established an adequate foundation for the sections of their article on Schultz's connection with Hoffa by relying on "contemporaneous reports in local and national newspapers and magazines." The court held that "since these sources are well recognized publications in the field of journalism, they must be recognized as reliable." The court found that the reports relied on were very similar in the way they had presented the facts, the facts themselves were not "inherently improbable," and "there were no obvious reasons to doubt the reports' veracity." Accordingly, the court concluded that there was no evidence to permit an inference that Reader's Digest's "investigation was grossly inadequate" or that it possessed a "reckless disregard for the truth."

Finally, the court noted that its determination of whether Reader's Digest had acted with malice did not require Reader's Digest to disclose its confidential sources. Said the court, "Such disclosure is clearly unnecessary in this case, and while the information may not be subject to a constitutional or evidentiary privilege, public policy is best served by protecting against the unnecessary disclosure of a reporter's confidential sources."

Schultz v. Reader's Digest Association, 468 F.Supp. 551 (E.D.Mich. 1979) [ELR 1:12:5]

Unauthorized use of individuals photograph in gubernatorial election campaign did not violate New York Civil Rights Law

During Perry Duryea's 1978 New York State gubernatorial election campaign, one of his television advertisements included a reproduction of a newspaper article about the plaintiff. The article, which contained a photograph of the plaintiff, reported his arrest in connection with the killing of two New York City policemen and noted that the plaintiff had previously been released from Attica prison after receiving a pardon from the incumbent governor. The television ad presented Duryea's position on pardons and paroles. A New York state court, stressing the fundamental importance of public discussion of election issues, rejected the plaintiff's contention that the unauthorized re-use of his photograph violated his right of privacy under New York State's Civil Rights Law.

Sections 50 and 51 of the Civil Rights Law bar the unauthorized commercial exploitation of a person's name or picture. The plaintiff contended that a candidate's campaign for office amounts to a "proscribed commercialization." The court concluded, however, that the statutory prohibitions did not apply and stated "The use of the plaintiff's picture during the political campaign was not for advertising or trade purposes within the statute's intendment. Furthermore . . . the plaintiff's claims of privacy rights may not vitiate or abridge the paramount rights of society to information and necessary free expression in preparing for the exercise of the electoral franchise." Finding that the use of the name or likeness of a “public personage” during a political campaign is a constitutionally protected activity and not a commercial trade advertising use, the court dismissed the plaintiff’s complaint.

Davis v. Duryea, 417 N.Y.S.2d 624 (1979) [ELR 1:12:6]

Briefly Noted:

Antitrust Law.

A Federal Court of Appeals in New York has held that the Buffalo Courier-Express did not show a clear probability of prevailing in its attempted monopolization suit against the Buffalo Evening News. The Court of Appeals therefore vacated a preliminary injunction that had been granted against the Evening-News controlling the nature of the promotional efforts it could use to introduce its new Sunday edition which competed with the Courier-Express' Sunday edition. The injunction had been based primarily on the Evening News' plan to distribute its new Sunday edition free for five weeks to its existing subscribers, and on a circulation guaranty made to advertisers during that time. The District Court had concluded that no more than two free weeks would be proper. The Court of Appeals reversed, however, on the grounds that there had been no evidence to show that two weeks was the limit of reasonableness. The Court of Appeals also noted that there was no evidence the Evening-News intended to put the Courier-Express out of business, or that there was a dangerous probability that the methods used by the Evening-News to promote its new Sunday edition would destroy competition by the Courier-Express. A civil contempt citation based on the vacated preliminary injunction was also vacated.

Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48 (2d Cir. 1979) [ELR 1:12:6]

Antitrust Law.

A Federal District Court in California has held that although the publisher of The Daily Review violated the Sherman Act by prohibiting its independent dealers from selling papers to subscribers at any price greater than the publisher's suggested price, the dealers were entitled to only nominal damages of $3.00 each, because they had failed to prove that they would have raised their prices if they had been permitted to do so.

Knutson v. Daily Review, Inc., 468 F.Supp. 226 (N.D.Cal. 1979) [ELR 1:12:6]

Labor Relations.

The Connecticut Supreme Court has held that the state labor relations board did not abuse its discretion by ordering an election among employees of a greyhound racetrack to determine union representation of the employees. The employer had previously entered into a contract with a union, but the court noted that that union may not have represented a majority of the employees at the time the contract was executed. According to National Labor Relations Board policy, the existence of such a contract would bar any representation election. But the court concluded that the NLRB policy did not have to be mechanically applied by the state board, and ordered the employer to bargain collectively with the employee's elected union representative.

Connecticut State Labor Relations Board v. Connecticut Yankee Greyhound Racing, Inc., 402 A.2d 777 (Conn. 1978) [ELR 1:12:6]

Copyright.

A Federal Court of Appeals has held that the author of a psychology textbook could not set aside a release he had given his former publisher as part of the settlement of a copyright infringement lawsuit, despite the publisher's failure to disclose that it was then negotiating to sell all of its assets to the author's new publisher. The infringement lawsuit was filed when the author's original publisher published another psychology book which allegedly infringed the copyright to the author's book. After the author released his original publisher (and the writer of the allegedly infringing book), that publisher did sell its assets, including the allegedly infringing book, to the author's new publisher. As a result, after the settlement the author found himself in the same position he was in before: his book was being published by the same company that was publishing an allegedly infringing book. The Court of Appeals held that the release could not be set aside on the grounds of fraud, however, because the author's lawyer knew that his original publisher was negotiating the sale of its assets at the time the release was signed, and thus the author had a duty to inquire whether his new publisher might be the purchaser. The old publisher had no duty to inform the author of that possibility, in the absence of the author's inquiry.

McMahon v. Meredith Corp., CCH Copyright Law Reports, Para. 25,063 (8th Cir. 1979) [ELR 1:12:7]

Copyright.

Once a plaintiff in a copyright infringement case establishes a prima facie case of infringement, by proving that the defendant had access to the plaintiff's work and that the two works were substantially similar, the burden of proof shifts to the defendant to prove that it did not copy the plaintiff's work. The defendant may do so by proving either prior or independent creation of its work. A Federal Court of Appeals in California has held that in order for a defendant to meet its burden of prior or independent creation, it merely must present evidence that is "more persuasive" than plaintiff's evidence, not "strong, convincing and persuasive evidence."

John L. Perry Studio, Inc. v. Wernick, CCH Copyright Law Reports, Para. 25,086 (9th Cir. 1979) [ELR 1:12:7]

Copyright.

A Federal Court of Appeals in California has held that under the Copyright Act of 1909, an author who assigns his or her copyright to another does not have standing to sue for copyright infringements occurring after the assignment, even if the author purports to retain the right to sue for prior infringements, unless the assignee has refused to bring the suit and then only if the assignee is joined in the suit. The court also held that under the 1909 Act, if an assignee distributes copies of the copyrighted work without proper copyright notice, the copyright will be forfeited, even though the author registered the work before making the assignment and even though the assignee distributes the work without notice without the express consent of the author. The court also held that a blueprint or proof of a work, from which copies are to be made, may itself be a "copy" of another work and thus may infringe the copyright to another work, if copied from it.

Walker v. University Books, Inc., 602 F.2d 859, CCH Copyright Law Reports, Para. 25,087 (9th Cir. 1979) [ELR 1:12:7]

Insurance Coverage.

The Louisiana Supreme Court has held that the definition of "automobile" in an insurance policy was ambiguous, because it could not be determined whether an auto racer would be considered "equipment designed for use principally for off public roads. . .” and thus excluded from coverage under the policy. The court, construing the ambiguity against the insurer, found that the widow of a racing car driver, whose husband had been killed while driving in a race, was entitied to recover insurance benefits.

Carney v. American Fire & Indemnity Company, 371 So.2d 815 (La. 1979) [ELR 1:12:7]

Picture Arcade Ordinance.

The California Court of Appeal has upheld the constitutionality of a Los Angeles ordinance requiring that picture arcades remain closed between the hours of 2:00 a.m. and 9:00 a.m. Picture arcades present “sexually explicit pictures” and, according to the court, are “likely to be the site of patron conduct which is unlawful and dangerous to others." The court therefore held that the closing requirement did not deny equal protection of the law as compared to other businesses, did not interfere with the defendant's constitutionally protected free speech, and did not conflict with "the state's preemption of the regulation of the criminal aspects of sexual activity."

People v. Glaze, 93 Cal.App.3d 982 (1979) [ELR 1:12:7]

Constitutional Law.

The Massachusetts Supreme Court has ruled that the enactment of a proposed state statute requiring disclosure of financial information by news media employees who regularly cover activities and members of the general court would violate the First Amendment. The reason for the court's ruling was that the proposed statute would have exposed the press to civil penalties for noncompliance and may have tended to discourage some from covering State House activities or may have caused others to limit their associational ties to avoid disclosure.

Opinion of the Justices to the Senate, 392 N. E.2d 849 (Mass. 1979) [ELR 1:12:7]

Libel Law.

An item inserted in the classified advertisement section of the defendant's newspaper (presumably by one of the newspaper's employees) allegedly referred to the plaintiff in a "scurrilous and insulting manner," and he claimed injury to his reputation, as well as mental suffering, embarrassment and humiliation. The Court of Appeals of Michigan, reversing the trial court's grant of partial summary judgment to the defendant, has held that damages for the claimed injuries resulting from the allegedly libelous matter would constitute actual, rather than punitive damages. Therefore, the plaintiff would not be required to demonstrate at trial that the publisher acted with knowledge of the falsity of the item or with reckless disregard of the truth in order to recover. A dissenting opinion noted that the plaintiff had not shown that the newspaper's supervisory or editorial personnel had any knowledge of the item's existence and concluded that the defendant publisher's conduct had not been sufficiently offensive to warrant the damages sought.

Pettengill v. Booth Newspapers, Inc., 278 N.W.2d 682 (Mich.App. 1979) [ELR 1:12:8]

Obscenity Law.

The Massachusetts Court of Appeals has reversed a judgment convicting the defendant of knowingly disseminating an allegedly obscene film entitled "Autobiography of a Flea." The court found that the advertisement and exhibition of the film was not "private consensual conduct" which would be protected under Massachusetts law. The court held, however, that it was reversible error for the trial judge to refuse to instruct the jury that they could return a not guilty verdict if they determined that there "were no statewide community standards of obscenity or if they disagreed on what those standards were."

Commonwealth v. Mascolo, 386 N.E.2d 1311 (Mass.App. 1979) [ELR 1:12:8]

Obscenity Law.

The Indiana Court of Appeals has upheld a conviction for distribution of obscene matter. The court found that although the defendant did not directly sell obscene material to police officers, he had a managerial position directing the operation of the bookstore where the materials were purchased, and it was shown that he was aware of the nature and character of the material being distributed.

Riley v. State, 389 N.E.2d 367 (Ind. App. 1979) [ELR 1:12:8]

NEW LEGISLATION AND REGULATIONS

FCC proposes elimination of exceptions to its one-to-a-market and regional concentration rules

The FCC has proposed to eliminate certain exceptions to its one-to-a-market and regional concentration rules. The one-to-a-market rule restricts a party to owning one AM-FM combination or one TV station or one daily newspaper in a market. Multiple Ownership, 22 F.C.C.2d 306 (1970), recon. 28 F.C.C.2d 662 (1971); 50 F.C.C.2d 1046, recon. 53 F.C.C.2d 589 (1975), aff'd. 436 U.S. 775 (1978). The regional concentration rule, in general, prohibits the common ownership, operation or control of more than two stations within a 100-mile radius. Multiple Ownership, 63 F.C.C.2d 824, recon. 67 F.C.C.2d 54 (1977).

The exceptions in question provide that applications involving UHF TV stations which would otherwise violate these rules, will be treated on a caseby-case basis to determine whether common ownership of a UHF station and another broadcast property would be in the public interest. (The exceptions are found in Notes 8 and 11 to 47 CFR Sections 73.35 (AM), 73.240 (FM) and 73.636 (TV).) The FCC has determined that the benefits of the exceptions - which were adopted to promote UHF development - are "illusory."

The FCC has determined that by encouraging common ownership, the exceptions served to decrease the possible number of different information sources and to lessen the degree of competition for advertising among alternative media. The Commission also found that the one-to-a-market exception has had little effect on UHF development. Rather, the increased profitability of UHF ownership has served to attract the desired diversity of investors. From 1973 to 1976 only a few applications for UHF licenses were filed each year; in 1976, UHF profits improved and 186 applications for UHF stations are now pending. The FCC also discounted the assumption that a local radio station would be more likely to enter the UHF field due to advantages of cross-subsidization, lower start-up costs, and economies of joint operation, finding these advantages "generally small, nonexistent, difficult to measure, or contrary to Commission objectives."

Applications on file for UHF stations prior to September 13, 1979 will be processed under the exceptions. Applications filed after that date will not be acted on during the pendency of the proposed rulemaking.

Initial comments on elimination of the exceptions to the one-to-a-market and regional concentration rules must be received by the FCC by November 27, 1979 and reply comments by December 17, 1979. Further information may be obtained from Carol Foelak (202) 632-7792 or Alan Stillwell (202) 632-6302.

Notice of Proposed Rulemaking in BC Docket No. 79-233 (September, 1979) [ELR 1:12:1]

Internal Revenue Service adopts final regulations concerning election by publishers and distributors to exclude returns of records, paperbacks and magazines from their incomes

Federal tax law generally requires sellers of merchandise who use an accrual method of accounting to include sales proceeds in income for the year in which the sales took place.

Prior to the Tax Revenue Act of 1978, the Internal Revenue Service took the position that publishers and distributors of records, paperback books and magazines also were required to include their sales proceeds in income when the records, paperbacks and magazines were shipped to retailers, even though retailers often have the right to return them. In other words, the IRS did not permit publishers and distributors to deduct from income an "allowance" for probable returns.

However, a new section was added to the Internal Revenue Code by the Revenue Act of 1978, IRC Section 458. Section 458 does not allow publishers and distributors to deduct an allowance for probable returns. It does, however, permit publishers and distributors of records, paperbacks and magazines, who use an accrual method of accounting, to elect to exclude from income amounts attributable to records and paperbacks returned within 4 1/2 months after the close of the taxable year and magazines returned within 2 1/2 months after the close of the taxable year. (This section is effective for taxable years beginning after September 30, 1979.)

The Internal Revenue Service has just adopted final regulations advising publishers and distributors how to make the permitted election. The regulations provide that the election is effective for the taxable year in which it is made and for all subsequent taxable years. For the purpose of the election, records, paperbacks and magazines are each treated as a separate trade or business, and a separate election must be filed with respect to each. The election is made by filing a written statement of election containing certain specified information, and it must be made no later than the due date for the tax return for the first taxable year for which the election is made.

Because the election is considered a change in accounting methods, the adjustment to income which results must be made over time, rather than all at once.

Different methods of adjustment are used for records and paperbacks than for magazines. The adjustment for magazines is amortized over 5 years, while the adjustment for records and paperbacks is placed in a suspense account (the effect of which is to defer the adjustment until the taxpayer is no longer publishing or distributing records or paperbacks).

Internal Revenue Regulations, Section 1.458-10, T.D. 7628, CCH Standard Federal Tax Reports, Para. 2899Q and 6657 [ELR 1:12:2]

DEPARTMENTS

In the Law Reviews:

Antitrust Issues in the Regulation of College Sports by John C. Weistart, 5 Journal of College and University Law 77-96 (1979)

An Author's Artistic Reputation Under the Copyright Act of 1976, 92 Harvard Law Review 1490-1515 (1979)

Guidelines for the Use of Copyrighted Music Material, 9 Performing Arts Review 80-94 (1979)
[ELR 1:12:8]