Part II

Recent Legal Developments Affecting the Magazine Business

An overview of issues that concern editors.

By Lawrence Savell

Last issue the author discussed the outcome of products liability claims against publishers and defamation/libel. This final installment covers additional legal issues of interest to editors.

Source Confidentiality

The Eighth Circuit's decision last year in *Ruzicka v. The Conde Nast Publications, Inc.* raises concerns about the increasingly-popular journalistic technique of "masking" — providing readers with an incomplete description of confidential and unnamed sources. The danger is that the unnamed source may be rendered identifiable based on information disclosed in the article. Apart from damaging the reporter's relationship with the source, as the court ruled, journalists (and their publishers) who promise but fail to "mask" or conceal effectively the identity of a confidential source may be held liable for breaking their promise.

The Ruzicka ruling may encourage litigious sources to allege that similar promises had been made to them and broken. To avoid such liability, writers need to discuss in advance with their sources the *actual and final* descriptions to be used and get the sources' approval — preferably in writing. The Ruzicka court specifically said that if the source is identifiable based on facts the *source approved for publication*, he or she would have no claim for breach of promise. Such advance and specific agreement — and then living up to that agreement — does more than just avoid the risk of liability: it avoids the risk of alienating and losing that valuable source for future use.

Reporters and publishers can also minimize such risks by agreeing only to not name sources, thus largely avoiding the "identifiability" issue.

Copyright

There have been several recent major developments in the area of "fair use," an exception to federal copyright law that grants others than the copyright owner the privilege to use copyrighted material without the owner's consent. In March, the Supreme Court ruled in *Campbell v. Acuff-Rose Music, Inc.* that a rap group's parody of a classic Roy Orbison song may be a fair use. The decision, which lets courts decide on a case-by-case basis whether a particular satire qualifies, should allow parody publishers greater freedom for such efforts (to the possible detriment of publishers of the parodied underlying works).

In *Lish v. Harper's Magazine Foundation*, a federal district court in New York last year found that *Harper's* infringed on the copyright of a well-known literary editor and writing instructor when it published without permission excerpts of his letter to prospective students. The court found no fair use, because (1) the publishing of the excerpts was commercial; (2) the letter was creative and expressive, not factual; (3) the letter was unpublished; and (4) the appropriation was excessive, as 52 percent of the letter had been printed. However, on reconsideration, the court struck down its initial award of $2000 in actual damages, finding that the copied letter had no commercial value.

In October 1993, the District of Columbia District Court ruled that a trade association's photocopying a newsletter and routing copies to staff was not a fair use. The court noted that (1) the association saved money by photocopying one subscription, (2) it copied the entire document, and (3) the newsletter's market was negatively affected by the unauthorized use.

In March of this year, the Supreme Court ruled in *Fogarty v. Fantasy, Inc.* that, under federal copyright law, prevailing defendants should not be held to a higher standard for receiving attorney's fees than prevailing plaintiffs. The "even-handed" approach required by the ruling will likely make it harder for

plaintiffs and easier for defendants to recover such costs.

Trademark

In *Metro Publishing, Ltd. v. San Jose Mercury News*, the Ninth Circuit last year ruled that the name of a column in a periodical can be federally registered and protected. The Second Circuit in *Gruner + Jahr USA Pub. Co. v. Meredith Corp.* affirmed a finding that there was no "likelihood of confusion" between the names of *Parents* and *Parents Digest* magazines, given the differing typefaces

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and stylizing of the names on the covers. In *In re Homes & Land Publishing Corp.*, the Trademark Trial and Appeal Board decided last December that the magazine trademark "Rental Guide" was distinctive (i.e., not generic) and thus could be registered, despite the widespread use by others of the phrase in a descriptive context. In *In re Waverly Inc.*, the Board allowed registration of the trademark "Medicine" for a medical journal, finding that the term was not generic in that context.

Employment/Labor

In *Hausch v. Donrey of Nevada Inc.*, a Nevada federal court ruled last September that the First Amendment does not preclude application of Title VII of the Civil Rights Act of 1964 to high-ranking newspaper employees who have editorial decision-making responsibilities over the publication's content. Thus, it did not bar an employee's claim that she was subjected to sex discrimination when she was not promoted to editor.

The Third Circuit, in *Reich v. Gateway Press, Inc.*, ruled in January that none of the media company's reporters came within the scope of the federal Fair Labor Standards Act's "executive, administrative and professional employee" exemption, and thus all were entitled to the overtime protections of the FLSA. The court concluded that the Gateway reporters' job "was predominantly to fill pages by gathering facts about routine community events and reporting them in a standard format," rejecting the assertion that their primary duty required "invention, imagination, or talent" as such terms were used in Labor Department regulations. The court distinguished "the type of fact gathering that demands the skill or expertise of an investigative journalist for the *Philadelphia Inquirer* or *Washington Post*, or a bureau chief for the *New York Times*," suggesting that such individuals might be exempt from overtime protections.

Tax

The 1993 Tax Act affected how magazine companies amortize intangible assets. In the past, there had been much litigation over whether and how a company could allocate the cost of such intangible items as subscription and advertiser lists. Under the 1993 Act, all intangibles (whether or not they were amortizable under prior law) must now be amortized over a 15-year period. The good news is that goodwill, formerly not amortizable, now is. The possible bad news is that the requisite 15-year period may be longer than the period many used under the prior law.

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Editors Only.
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Editors Only is published monthly by Editors Only Publications, P.O. Box 17108, Fountain Hills, AZ 85269-7108. ISSN: 0735-8490. Subscriptions are $89 in the U.S., $95 in Canada and Mexico and $105 elsewhere. Printed in U.S.A. Copyright © 1994 by Editors Only Publications. All rights reserved. This newsletter is confidential and for subscribers only. Reproduction without prior permission is prohibited.

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