RECENT CASES

MGM's right to produce remake of "Tarzan, The Ape Man" is confirmed by Federal District Court

A Federal District Court has ruled that MGM is entitled to proceed with its planned production of "Tarzan, The Ape Man," starring Bo Derek.

The heirs of Edgar Rice Burroughs, the author of numerous Tarzan works, had asked the court to issue an injunction to stop further work on the film. Burroughs' heirs claimed that MGM's copyright interest in the Tarzan works had been properly terminated, and thus, the company was no longer entitled to produce Tarzan films.

MGM first obtained motion picture rights to the characters appearing in the Tarzan stories in 1931. These rights had been purchased from Burroughs, Inc., the company the author had set up in 1923 to act as the licensing entity for literary rights and copyright in his works.

The 1931 agreement gave MGM the right to create an original screenplay to be developed into a film. Additionally, MGM was entitled to produce as many remakes of the first film as it desired. However, each remake had to be based "substantially" on the first film, and there could be no "material changes or departures" from the story.

Burroughs had obtained the original copyright of his "Tarzan of the Apes" in 1912. That term expired fifty-six years later and the copyright was renewed. Under the Copyright Act of 1976, authors and certain of their heirs have the right to terminate the grant of "a transfer or license of the renewal copyright or any right under it."

Relying on this provision, in 1977, Burroughs' heirs sent a Notice of Termination to Burroughs, Inc. It was the heirs' intention that this Notice of Termination would end all rights MGM had under its 1931 agreement with Burroughs, Inc. MGM itself, however, was never notified that its right to make Tarzan films was purportedly being terminated. In fact, MGM did not learn of the Notice until January 1980, after the termination had supposedly become effective. Meanwhile, MGM was in preproduction stages for its new "Tarzan, The Ape Man."

While Burroughs' heirs never sent notice to MGM, they did notify Warner Bros., with whom they had been negotiating. Warners had been planning to produce a Tarzan film of its own, based on the assumption that it would have exclusive motion picture rights.

In 1979, the heirs reconveyed rights in a number of the author's works to Burroughs, Inc. Following the reconveyance, the fine points of a WarnersBurroughs, Inc. deal were renegotiated.

It does not appear that Warners will get its exclusive rights, because the court has ruled that MGM need not cease from filming its Tarzan remake.

In arriving at this conclusion, the court focused on several factors indicating that the 1931 agreement had given MGM a license to use the Tarzan characters rather than any copyright interest in the author's works. First, Burroughs had reserved the right to examine any MGM screenplay to insure that it did not conflict with his original stories. Also, the 1931 agreement stipulated that the duration of MGM's rights was to lie based on its own copyright; not the copyright of Burroughs, Inc. Significant too was the fact that the 1931 film, a 1959 remake and the prospective film are based on MGM's original story and not on the author's works. The court therefore concluded that Burroughs' heirs could not terminate MGM's rights under the 1931 agreement.

The court noted that even if MGM's rights under the agreement could be terminated, the Burroughs' Notice was invalid since it was issued before the Copyright Act of 1976 took effect on January 1, 1978.

Finally, the Copyright Act requires that any Termination requires advance notice. As the court pointed out, MGM received absolutely no advance notice of the planned termination.

Burroughs v. Metro-Goldwyn-Mayer, Inc., CCH Copyright Law Reports, Para. 25,165 (S.D.N.Y. 1980) [ELR 2:9:1]

Royalties to be paid for television broadcasts of "Gone with the Wind" were not effectively assigned,

and therefore MGM properly paid the original owner

MGM has won a recent lawsuit involving the attempted assignment of royalty payments earned by television broadcasts of the film "Gone with the Wind."

In 1963, MGM and David O. Selznick, the film's producer, settled on an agreement providing for royalty payments to The Selznick Company upon television broadcasts of the film. In 1965, Selznick died. His rights under the agreement passed to various individuals, among them his son, Lewis J. Selznick.

Ten years later, Lewis Selznick formally granted A.D. Haas a security interest in Selznick's rights under the 1963 agreement, including his right to television royalties, in exchange for business loans Haas had made to Selznick.

The two men notified MGM of their agreement, and requested that Haas be kept informed of any royalty payments MGM was to make. MGM declined to honor the request, claiming that it would be forced to assume "additional contractual obligations" not required by the 1963 agreement.

The story continued to unfold as Selznick defaulted in his debts to Haas; Haas died; and the Haas Estate obtained a judgment in excess of $200,000 against Selznick.

Meanwhile, "Gone with the Wind" appeared on television overseas. In keeping with its initial refusal to honor the Selznick-Haas assignment, MGM issued a royalty check payable to Selznick, who then turned the check over to the Haas Estate.

ln 1976, Selznick received a second royalty check from MGM. This one, however, he deposited in his personal bank account.

Unable to obtain the money from Selznick, the Haas Estate went to MGM and asked that all payments under the 1963 agreement be made directly to it. When MGM replied that all royalties had been paid, the Haas Estate filed suit.

At issue on appeal from a dismissal of the action was whether MGM acted improperly in making the royalty payments to Selznick, rather than to Haas. A Federal Court of Appeals stated that the law of assignment required that MGM be apprised of two things to effectively alter the payment provisions of the 1963 agreement. First, MGM must have received notice that the amount due had been assigned. And second, MGM must have been informed that the payments were to be made directly to the specific individual named in the assignment agreement.

The court found that the second requirement had not been met, and therefore MGM was not obligated to make payments to Haas or to his Estate. In reaching this conclusion, the court focused on the language of the Selznick-Haas notification to MGM. Their letter specifically asked MGM to "notify Mr. Haas, in advance, of any payments to be made" and to disburse the money as "Mr. Haas and Mr. Selznick shall jointly direct." The court pointed out that such language clearly did not name a specific individual as the recipient of royalty payments.

Furthermore, the court noted that when MGM made the first payment to Selznick (after having received notification of the purported assignment), the Haas Estate did not object. Only when Selznick failed to deliver the second royalty check did the Haas Estate protest. Their initial silence, the court found, was equal to an "acquiescence" to MGM's actions, and relieved the company of any obligation it might have to Haas directly.

Estate of Haas v. Metro-Goldwyn-Mayer, Inc., 617 F.2d 1136 (5th Cir. 1980) [ELR 2:9:2]

DGA arbitrators rule that talent agents are entitled to commissions from directors for television compilation and series bonus payments

In a recent arbitration brought by the Association of Talent Agents (formerly known as the Artists' Managers Guild) against the Directors Guild of America, the ATA successfully contended that its talent agent members were entitled to commissions on revenue derived from "television compilation" program payments and for "series bonuses." Television compilations are anthologies such as "25 Years of Lucy" which use excerpts from television films; series bonuses are paid when a series is sold after the production of a pilot film.

In March of 1957, the DGA and the ATA entered into an agreement setting forth the duties which talent agents are required to perform for directorclients and the commissions which the agents are entitled to charge. The Basic Agreement was amended in January of 1977 by a Memorandum of Agreement. The Memorandum stated, in Paragraph 12, Agent will not be entitled to collect any commission which reduces the Director's payment below minimum with respect to television residuals or payments on account of television use of feature motion pictures or use of such films by means of cassettes or paid television or the like.

Kenneth Ziffren, the neutral arbitrator, and Samuel Sacks, ATA's designated arbitrator, concluded that payments for the reuse of television films in compilation programs were not residuals and were not subject to Paragraph 12's restrictions on commissions. The arbitrators noted that the 1978 DGA collective bargaining agreement defined television residuals as limited to reruns on television, telecasts in foreign countries or releases for theatrical exhibition. The DGA-ATA negotiations and the language of Paragraph 12 did not indicate an intent to "chang[e] industry practice to non-commissionability," according to Ziffren and Sacks. And the use of the phrase "or the like" in Paragraph 12 was found to refer solely to new technological advances. The series bonus also was not viewed as the payment of a television residual.

Harry Evans, the DGA designated arbitrator, found the majority opinion contrary to the evidence presented by DGA spokesmen concerning the negotiations resulting in, and the intended meaning of, Paragraph 12. Evans viewed the evidence as showing that the negotiators intended a compilation program payment to be a residual payment to the director of the reused material. He also concluded that a series bonus should not be commissionable, since the parties apparently had agreed that "any minimum compensation of any sort - other than initial compensation for services performed - would not be commissionable by agencies."

In the Matter of the Arbitration between Association of Talent Agents and Directors Guild of America, Inc. before the Arbitration Tribunal of the Directors Guild of America (August 5, 1980) [ELR 2:9:3]

Unauthorized distribution of Elvis Presley memorial poster is permanently enjoined because the right to commercially exploit Presley's right of publicity survived his death

A celebrity who commercially exploits his name or likeness during his lifetime creates an intangible, transferable property right which survives his death, according to a Federal District Court in New York City, in the most recent opinion dealing with the marketing of Elvis Presley memorabilia.

Factors Etc., Inc., the holder of an exclusive license to exploit and merchandise Presley's name and likeness, had been granted a preliminary injunction by the District Court against Pro Arts, Inc., 444 F.Supp. 288 (S.D.N.Y. 1977). The injunction restrained Pro Arts from manufacturing of distributing a "memorial" poster bearing Presley's photograph. A Federal Court of Appeals affirmed the opinion granting the injunction, 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979). When the case appeared before the District Court again, the court granted Factors' motion for summary judgment and awarded the company a permanent injunction and damages against Pro Arts.

In unsuccessfully opposing Factors' motion for summary judgment, Pro Arts cited the Federal Court of Appeals decision in Memphis Development Foundation v. Factors Etc., Inc., 616 F.2d 956 (6th Cir. 1980) (ELR 1:22:1). In Memphis Development, the Foundation had solicited public contributions in order to erect a statue of Presley in Memphis. Certain donors received a small replica of the proposed statue - a practice which Factors challenged as infringing on its exclusive license to commercially exploit Presley's name and likeness.

In the absence of Tennessee law on the right of publicity, the Sixth Circuit, relying on "practical and policy considerations, the treatment of other similar rights, ... the relative weight of the conflicting interests of the parties, and certain moral presuppositions concerning death, privacy, inheritability and economic opportunity," reversed a District Court judgment and ruled against Factors. The Sixth Circuit held that the right of publicity does not survive a celebrity's death. The court gave only footnote attention to the Second Circuit decision recognizing "that the right of publicity exists independent from the statutory right of privacy and that it can be validly transferred by its owner and passed on to heirs and assigns.

The Federal District Court in New York, although noting the Memphis Development case and the decision in Lugosi v. Universal Pictures Co., 25 Cal.3d 813 (1979) (ELR 1:18:1), announced that it would continue to follow the Second Circuit ruling upholding Factors' exclusive right to print and distribute Presley memorabilia.

Pro Arts also contended that federal copyright law preempted Factors' common law right of publicity. The preemption argument was based on Section 301 of the 1976 Copyright Revision Act, which provides: "On and after January 1, 1978, all legal or equitable right[s] that are equivalent to any of the exclusive rights within the general scope of copyright ... are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law [or] statutes of any State."

Factors' action was filed prior to the effective date of the Act, but Pro Arts argued that Section 301 indicated Congress's intent to preclude claims based on the right of publicity. In disagreeing with this argument, the court pointed out that the original draft of Section 301 cited invasion of privacy as an example of a right that was not equivalent to the general scope of copyright. A report of the United States House of Representatives, several commentators, and Chief Justice Bird of the California Supreme Court, in her dissent in Lugosi, have all stated that Congress did not intend to preempt the recognition of the common law right of publicity in enacting Section 301. Further, in Goldstein v. California, 412 U.S.546 (1973), a state criminal statute prohibiting the unauthorized duplication of musical recordings was held valid under the Supremacy Clause. In Professor Nimmer's view, "it seems likely that Section 301 merely codified Goldstein" with respect to works published before January 1, 1978 (Nimmer, section 1.01[B] at 1-7, n.22).

The District Court concluded by pointing out that "[w]hile the descendible right of publicity recognized in this action may be infringed by reproduction, distribution, or display, a cause of action for infringement cannot be asserted unless the assignee of the right demonstrates that the 'celebrity' commercially exploited his name and likeness during his lifetime." Thus, the right would not be "equivalent" to a copyright, because an action for infringement of the right of publicity would require elements distinct from those necessary to demonstrate copyright violation, and thus would not be preempted by federal law. Because the right of exploitation had been established and exercised by Factors, it could not be "circumvented" by Pro Arts use of a photograph or representation allegedly copyrighted or within the public domain.

Pro Arts also claimed that its publication and sale of the Presley poster was authorized by a contractual right of first refusal granted by Factors to Pro Arts with respect to all posters for which Factors had exclusive distribution rights. The court found this claim to be "meritless," particularly since Pro Arts (as demonstrated by the evidence) did not rely on the alleged contractual right in distributing the Presley poster.

Pro Arts' argument that the First Amendment protected the publication of the poster as a newsworthy event was rejected as it had been in the prior District Court and Second Circuit opinions.

The court therefore awarded damages to Factors equal to the profits received by Pro Arts from the unauthorized sale of the Presley poster, and issued a permanent injunction barring Pro Arts from: (1) manufacturing, selling, or distributing any and all posters, reproductions, or copies identical or similar to the "IN MEMORY" poster; (2) manufacturing, selling, or distributing any other posters, reproductions, or copies containing any image, picture, or likeness of Elvis Presley; and (3) utilizing for commercial profit in any manner or form the name, image, photograph, or likeness of Elvis Presley other than pursuant to an agreement approved by the plaintiffs.

Factors Etc., Inc. v. Pro Arts, Inc., Case No. 77 Civ. 4704 (S.D.N.Y., July 29, 1980) [ELR 2:9:3]

Legal status of unauthorized pay-tv signal decoders is uncertain because of conflicting rulings and pending legislation

The pay television industry has been engaged in legal warfare this year with makers and distributors of unauthorized signal decoders across the country. At the present time, the legal status of unauthorized decoders can only be said to be in a state of uncertainty, because of conflicting rulings issued by different courts and the FCC, and because of pending legislation at both the state and federal level.

In July, Oak Industries obtained a preliminary injunction from a Federal District Court in Arizona prohibiting the manufacture, sale or distribution of any device capable of decoding Oak's subscription television service known as ON TV. The order, issued by District Judge

Valdemar A. Cordova, was shorter than two pages in length and was not accompanied by a written opinion.

In August, a Federal District Court in California issued what appears to be a conflicting ruling in another suit brought by Oak and its partner in the Los Angeles ON TV operation, National Subscription Television. District Judge Lawrence T. Lydick dismissed ON TV's complaint against several electronic parts outlets and individuals who were allegedly engaged in designing, manufacturing, distributing and selling unauthorized decoders and kits for their assembly. The federal law claim asserted by ON TV in that case was based on Section 605 of the Communications Act of 1934 (47 U.S.C. section 605) which prohibits the unauthorized interception of "radio communications."

Judge Lydick agreed with ON TV that a private right of action may be brought under Section 605, and that the retailers' actions amounted to interception of, assisting in receiving, or use of ON TV's signals. However, Section 605 does not apply to radio communications which are "broadcast or transmitted ... for the use of the general public." ON TV argued that its signals were not intended to be received by the public, and thus would not fall under the "broadcast" exception to Section 605.

Judge Lydick disagreed, however. He noted that "[t]he crucial consideration is whether the programming is of interest to a large segment of the population."

Judge Lydick also cited a 1966 ruling of the FCC in which it had equated subscription television with broadcasting and an intent to reach the general public, and in which the FCC had at least implied that subscription television would be exempt from the prohibitions of Section 605. (3 FCC2d 1)

Judge Lydick refused to find that a license to broadcast pay television signals also constituted a monopoly on the right to distribute signal receivers, saying that such a monopoly would be for Congress, and not the FCC, to grant.

Accordingly, Judge Lydick dismissed ON TV's Section 605 claim. In the absence of other federal claims, he also refused to proceed with ON TV's unfair competition and interference with prospective business advantage claims, because those were based on state law. ON TV announced that it would appeal Judge Lydick's ruling to the Ninth Circuit Court of Appeals and would pursue its state law claims in California Superior Court.

The week after Judge Lydick dismissed ON TV's case in California, a Federal District Court in Michigan refused to enjoin Detroit area sellers of decoders. (The Entertainment Law Reporter has not yet obtained a copy of that ruling, but will report the court's reasons as soon as it does.) In just a matter of days, however, a Federal Court of Appeals judge in Michigan reinstated a temporary restraining order against the Detroit decoder distributors, pending that court's hearing and ruling in the case.

On August 15th, the FCC itself entered the fray with a Public Notice in which it warned that devices installed on television receivers to decode or unscramble television signals transmitted by a licensed subscription television station must be approved as part of an entire system by the FCC prior to being manufactured, sold or used in connection with subscription television service. The FCC expressed concern with potential interference with television reception caused by devices not meeting FCC technical standards. According to the FCC's Public Notice, the use of a decoder that has not been approved by the FCC may subject the user to fines and other penalties.

On the legislative front, a bill has been introduced in Congress which would make the unauthorized interception and use of pay television signals a civil and criminal offense. In California, the state legislature has approved a bill (AB 3475) which would prohibit the manufacture or sale of decoder devices not authorized by a subscription television service.

Oak Industries, Inc. v. Sampson, Case No. CIV 80-420 PHX VAC (D.Ariz., July 10, 1980); National Subscription Television v. S & H TV, Case NO.CV 80-0829 LTL (C.D.Cal., August 4, 1980); FCC Public Notice, Manufacturers and Sellers of Non-Approved Subscription Television Decoders Are Cautioned (August 15, 1980) [ELR 2:9:4]

Texas policeman not defamed by Thomas Thompson's book "Blood and Money"

The book Blood and Money by Thomas Thompson is a nonfictional account of the deaths of a prominent Houston couple. One chapter of the book details the killing of the man who confessed to one of the murders. While free on bail, the man was killed by Texas police officer John Raymer.

Raymer found Thompson's characterizations objectionable and filed a libel suit against the author, the book's publisher, Doubleday and Company, and the holder of the book's copyright.

A Federal District Court dismissed all but one of Raymer's various contentions, ruling that the objected-to statements were clearly not defamatory. That is, Raymer presented no evidence of factually inaccurate material which would tend to damage his reputation. The remaining contention was submitted to a jury and that objected-to passage was also found not defamatory.

On appeal, Raymer challenged both the district court's conclusions and its instructions to the jury. A Federal Court of Appeals has reviewed the objectedto material and has agreed with the lower court's findings.

Chapter 35 contained statements tending to mock Raymer's physical appearance. He was referred to as resembling a "hard-boiled egg" and as somewhat overweight. Such literary descriptions, the court said, are merely the author's impressions and thus cannot be judged libelous.

Elsewhere in the chapter, Thompson seemed to imply that Raymer had made no significant achievements during his lifetime. However, such statements merely described Raymer's "background," the court reasoned, and could not be construed as libelous.

Also not defamatory was a description of Raymer's thoughts as he looked at a waitress. Raymer claimed that the passage implied that he had eyed the waitress in a "sexual manner" and thus had "impeached his virtue."

The court felt that no such inference could be derived from the passage.

Raymer also objected to Thompson's labeling him "the police executioner." The court said it was improper to examine the words standing alone. When the remark was read in context, it was clearly obvious to the reader that Raymer had killed in self-defense.

Using the same reasoning, the court disposed of the contention that Thompson had implied that Raymer had been hired to kill the confessed murderer. The court reiterated that statements must be examined in context and found nothing libelous where the passage, taken as a whole, clearly suggested that Raymer would not have killed for money.

As for Raymer's final contention - that the passage stating that he "ran ... men out of town" was libelous - the court acknowledged that this might be found defamatory. In such cases, where the language is subject to varying interpretations, it is up to a jury to determine whether the reader would be left with a derogatory impression and whether the material is thus libelous. The Court rejected Raymer's contention that the jury should have been instructed that the material was libelous per se, and ruled that the district court had properly instructed the jury.

Raymer v. Doubleday Company, Inc., 615 F.2d 241 (5th Cir. 1980) [ELR 2:9:5]

California statute requiring payment of royalty to artist upon resale of artist's work is held to be Constitutional

The constitutionality of California's Resale Royalties Act (Civil Code Section 986) has been affirmed by a

Federal Court of Appeals. As in the earlier Federal District Court opinion (ELR 1:5:6), the Court of Appeals concluded that the Act did not violate the "impairment of contracts" or "due process" clauses of the United States Constitution, and was not preempted by the Copyright Act of 1909. (The Court of Appeals did not consider the preemption question under the 1976 Copyright Revision Act which does not apply to actions arising prior to January of 1978.)

The Act, which went into effect in January of 1977, requires payment by the seller of a work of fine art to a living, original artist of five percent of the gross sales price, if that price exceeds $1,000 and is greater than the price paid when the seller acquired the work. The Act does not apply to the initial sale of the work made by the artist. Galleries must collect and pay the royalty to the artist on their sales. If a seller is unable to locate and pay the artist within 90 days of a sale, the seller must pay the royalty to the California Arts Council. The Act applies to all sales within California and to sales outside the state when the seller is a resident of California. It applies to works of art created before as well as after January of 1977.

In 1977, Howard Morseburg, an art dealer, sold two paintings. The Act applied to the sales but Morseburg contended, in a suit against one of the artists and the California Arts Council, that the Act was unconstitutional and unenforceable.

The Court of Appeals held that under Goldstein v. California (412 U.S. 546 (1973), the Copyright Clause of the Constitution did not preempt the enactment by California of the Royalties Act. In Goldstein, the United States Supreme Court found that the Copyright Clause did not preclude all state power over copyrights. Therefore, a California statute making it a criminal offense to "pirate" recordings produced by others was not preempted by the Copyright Act of 1909. Similarly, the 1909 Act did not explicitly forbid the enactment of a Royalties Act, the Court of Appeals held.

Morseburg contended that section 1 of the 1909 Act granted copyright owners an exclusive right to vend their work, and that section 27 of the Act established the unrestricted right of the lawful possessor of a copy of a copyrighted work to transfer possession of that work. The court pointed out, however, that the right to vend "merely means that the artist has 'the exclusive right to transfer the title for a consideration to others,'" and that the Royalties Act does not impair this right. Section 27 also would not apply to the Royalties Act because a work still can be transferred without restriction. The obligation owed to an artist upon resale does not create an impermissible legal restraint upon any such resale.

The argument that the Act violated the contracts clause was also rejected by the court. A buyer of a work of fine art prior to the passage of the Royalties Act might find himself "with an unbargained-for obligation to pay a royalty to the creator of that work ... upon resale." However, even if this were considered an impairment of contract, the court characterized it as being of such minor magnitude as to be far outweighed by the public purpose and benefits of the Royalties Act.

The Royalties Act, described by the court as "economic regulation to promote artistic endeavors generally," was also found not to violate due process since any retroactive effect of the Act was not sufficiently unexpected or disruptive.

Summary judgment granted to the defendants by the District Court was therefore upheld.

Morseburg v. Balyon, 621 F.2d 972, CCH Copyright Law Reports, Para. 25,161 (9th Cir. 1980) [ELR 2:9:6]

"Customary" practices in theater lighting may not be sufficient; "reasonable" care under all the circumstances is required, Massachusetts court holds

The Supreme Judicial Court of Massachusetts has rejected the traditional notion that adherence to trade standards for the lighting of theaters is conclusive proof of lack of negligence on the part of a theater owner or manager.

An elderly patron had sued a dinner theater for personal injuries she sustained when she tripped and fell, descending some steps in the establishment. The plaintiff claimed that the defendant had failed in its duty to exercise reasonable care to prevent injury to the theater's patrons. The defendant, however, moved for a directed verdict on the ground that no duty of reasonable care had been violated as a matter of law since the plaintiff's case essentially was that she fell because of semi-dark lighting conditions which are customarily found in a dinner theater. The trial court agreed with the defendant's reasoning and granted the motion. This decision has now been reversed.

The Supreme Judicial Court of Massachusetts pointed out that, in general, a land owner or occupier owes a duty to all lawful visitors "to take those steps to prevent injury that are reasonable and appropriate under all the circumstances." The court saw "no reason to make theater owners a distinct class of landowners exempt from the general obligation." According to the court, this standard of "reasonable or ordinary care under the circumstances" was preferable to the standard of custom relied on by the trial court, since it "permits the fact-finder to consider all relevant factors including the requirements of the defendant's business." The court explained:

The theatre owner's need for sufficient darkness to screen a movie or provide artistic lighting effects for a live performance, as well as the need for sufficient light to enable patrons to find or leave their seats safely during a show, are relevant factors for a jury to consider in evaluating what constitutes reasonable care.

The court thus concluded that the trial court had erred by relying on a standard based solely on customary practices.

Upham v. Chateau De Ville Dinner Theatre, Inc., 403 N.E.2d 384 (Mass. 1980) [ELR 2:9:6]

Briefly Noted:

Trademark Infringement.

General Electric has obtained a preliminary injunction barring a manufacturer of T-shirts and briefs from distributing its products. The company's items contained a monogram indistinguishable from GE's familiar trademark along with the words "Genital Electric." In granting General Electric's motion for an injunction, a Federal District Court stated that trademark infringement occurs when an emblem or monogram differs only slightly from the mark owner's and tends to "derogate" the registered trademark.

General Electric Company v. Alumpa Coal Company, Inc., 205 USPQ 1036 (D.C.Mass. 1979) [ELR 2:9:7]

Employment Discrimination.

Several preliminary rulings have been issued in an employment discrimination action brought by The California Paralyzed Veterans Association and by the California Association of the Physically Handicapped, Inc. against CBS and the FCC. The action alleged that certain physically handicapped individuals who were qualified for on and off screen television employment had been denied such employment due to their handicaps.

A Federal District Court in California has ruled that section 503 of the Rehabilitation Act of 1973, 29 U.S.C. section 793, created a private right of action in the event that a federal contractor failed to take affirmative action to employ qualified handicapped individuals. The court pointed out that statements made by members of Congress when the Rehabilitation Act was amended indicated an intent to provide a private right of action under section 503 in addition to providing for the right to file a complaint with the Department of Labor.

The court also dispensed with the usual requirement that all administrative remedies be exhausted prior to the commencement of a court action, because the private remedy would not interfere with any administrative remedy and the administrative remedy was not likely to be available within a reasonable time. The CAPH was found to have standing to sue on behalf of its members.

The California Paralyzed Veterans Association v. Federal Communications Commission, Nos. CV79-0504, 79-0644, 79-1633 (C.D. Cal., August 1, 1980) [ELR 2:9:7]

Libel.

Under the law of defamation, an expression of opinion cannot form the basis of a libel suit. Applying this principle, a Colorado Court of Appeals has upheld the dismissal of a libel suit against a Denver newspaper. The action was filed by the ex-wife of a former Denver policeman who suffered serious injuries in a bomb explosion. The objected-to article contained statements by the former policeman implying that his wife had divorced him as a result of the accident. The ex-wife claimed that following publication of the article, she received obscene phone calls and had been severely criticized. But the court reasoned that the former policeman's remarks were his personal impressions; they could not be proven true or false, and therefore could not be the basis for a defamation action.

Burns v. The Denver Post Inc., 606 P.2d 1310 (Colo.App. 1980) [ELR 2:9:7]

Libel.

Courts face a difficult problem in reconciling First Amendment freedom of the press with an individual's right to reputation. A recent Federal Court of Appeals decision hinged on the importance of a free press. The court found that an ambulance service had not met its required burden of showing that a Mississippi newspaper had acted with malice in printing allegedly defamatory falsehoods. That is, there was no showing that the paper had printed the false statements either knowingly or with reckless disregard as to their truth. The objected-to article claimed that the ambulance service had operated without a license. The allegations were untrue, and the ambulance service filed libel charges. After hearing conflicting evidence, a jury returned a verdict in favor of the ambulance company and awarded damages. But the court reversed, reasoning that the ambulance service had not proved actual malice by "clear and convincing evidence."

Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980) [ELR 2:9:7]

Libel.

Three New Orleans firemen who were labelled "freeloaders" and "slackers" by a union publication responded to the derogatory statements by filing a libel suit. When a Civil District Court dismissed their suit, two of the firemen appealed. The Louisiana Court of

Appeals' opinion was that the lower court had erred in denying a trial. The firemen's allegations that they were maliciously defamed and that as a result their reputations had been damaged were sufficient to state a cause of action. Furthermore, the court found no merit in the union's contention that the truth of its published statements defeated the firemen's cause of action. "Truth" is an affirmative defense to a defamation action and must be pleaded at trial, the court ruled.

Corcoran v. New Orleans Fire Fighters' Association Local 632, 379 So.2d 829 (La.App. 1980) [ELR 2:9:8]

Previously Reported:

The following cases, reported in prior issues of the Entertainment Law Reporter, have been published.

(References are to Volume, Issue and page numbers, in that order.) CBS v. ASCAP, 620 F.2d 930 (1:24: 1); DC Comics v. Filmation Associates, 206 USPQ 112 (2:1:3); Iowa State University v. ABC, 621 F.2d 57 (2:5:2). [ELR 2:9:8]

DEPARTMENTS

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[ELR 2:9:8]