

## RECENT CASES

### **Battlestar Galactica did not infringe Star Wars' copyright, Federal District Court rules**

Judge Irving Hill of the Federal District Court in Los Angeles has ruled that "Battlestar Galactica" did not infringe the copyright to "Star Wars," and that a jury could not reasonably find otherwise. As a result, he has entered a summary judgment against 20th Century Fox, the owner of the "Star Wars" copyright, and in favor of Universal Studios, which distributed "Battlestar Galactica," and the ABC television network, which broadcast the television version.

Judge Hill noted that the leading case in the area is *Krofft v. MacDonald's*, 562 F.2d 1157 (9th Cir. 1977), which held that in cases of this kind, courts must first

determine whether there is substantial similarity in the ideas of the two works involved, and if so, whether there is substantial similarity in the expression of that idea.

In this case, Judge Hill said that "Star Wars" and "Battlestar Galactica" both could be said to be motion pictures "involving a struggle between good and evil in space," and that "on that basic level, the two pictures could be said to involve the same idea." "However," he added, "I am of the belief that when applied to full-length motion pictures, the term 'idea' must be more than the general language that I have just used in expressing the idea of Star Wars."

In motion picture cases, Judge Hill held, the term "idea" must be defined to include something about the plot and characters. As thus defined, Judge Hill found the ideas of the two movies to be dissimilar, because

their story lines and central characters are "substantially different."

Moreover, Judge Hill found that even if the ideas of the two movies are the same, their expressions of that idea are different. This is so, he said, because the "total concept and feel" of the two movies "are vastly different." He explained that "Star Wars" is pure fantasy and a morality play. Its central characters, Luke Skywalker and the Princess, are flawless and purer than life. "Battlestar Galactica," on the other hand, is neither a fantasy nor a morality play. Its characters are very human people, with weaknesses and feelings, placed in situations all can relate to, except that the scenes take place in space. "Battlestar Galactica could just as well be the cowboys versus the Indians except that it is in space garb," said Judge Hill. For these and other reasons, he found that the two movies "are as different as apples and oranges."

Judge Hill also responded to Fox's contention that many elements of "Star Wars" appeared in "Battlestar Galactica." He ruled that even if all of the elements were common to both pictures, they would not establish infringement, in view of his holding that the ideas of the two were different and their expressions were different. Nevertheless, he reviewed several of these elements, including Fox's contention that both pictures featured similar space warrior helmets and chases down corridors and across precipices; that the word "Empire" was part of the description of the bad guys in both; and that both films appealed to youthful audiences.

Judge Hill said that if infringement could be proved by finding five, ten or even twenty such similar elements, "one could expect confidently that dozens, if not hundreds, of pictures would infringe Star Wars." The elements cited by Fox "are certainly commonplace," he

said, and "Most of the pictures produced these days can be said to have youthful audience appeal."

Judge Hill also commented on Universal's motive and state of mind in creating Battlestar Galactica. He did so, he said, because there was evidence that it was attempting to capitalize on the great public interest in space fantasy which "Star Wars" produced. There also was evidence that the first outline of the "Battlestar Galactica" screenplay was entitled "Star World" and was developed within a couple of weeks of "Star Wars" release. And there was evidence that Universal hired many of the technical people who had helped make "Star Wars." Nevertheless, said Judge Hill, "... all of those things do not change, and do not affect, the legal conclusions which this Court has reached. No one owns the genre of space fantasy and of warfare in space. Defendants are privileged to try to carve out a share of the market and to try to gain some benefit from the public

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interest in this genre as long as they avoid substantial similarity with plaintiff's work. They succeeded in avoiding substantial similarity, although they failed to even approach the critical success or financial success which plaintiff has reached."

Judge Hill's decision was announced by him orally in court on August 22, 1980. The transcript of that day's proceedings is the only written decision he intends to issue. On September 22, 1980, Fox's state unfair competition and federal Lanham Act claims were stayed, pending its appeal of Judge Hill's copyright ruling. Fox's lawyers have said that an immediate appeal shall be taken.

Twentieth Century-Fox Film Corporation v. MCA, Inc.,  
Case No. CV 78-2437-IH (C.D.Cal., August 22, 1980)  
[ELR 2:10:1]

**ICM not permitted to receive commissions from Steven Stern on compensation he received for directing the movie "Running," because ICM also received packaging fee from movie's producer**

Arbitrators Naomi Gurian and Myron Slobodien have ruled that International Creative Management (ICM) violated the terms of the January 1977 Memorandum Agreement between the Association of Talent Agents and the Directors Guild of America when ICM collected a commission on the compensation received by its client Steven H. Stern for his directing services on the theatrical film "Running," as well as a packaging fee from the film's producers who were also ICM clients.

In the Memorandum, Paragraph 5 of Rider D (which is a part of all representation agreements between DGA members and signatory agencies) provides that when an agent is engaged as a "package agent" for a photoplay

by the producer or owner of a motion picture, and a director-client of the agent is employed for the same project, "The Agent may not charge or collect any commission whatsoever on the compensation which the Director receives from said owner-client for the Director's said employment in connection with any such photoplay . . ."

ICM contended that Paragraph 5 only applied to television product and did not apply to theatrical motion pictures. ICM further argued that the services which the agency performed were those of a sales agent and not of a packager and that Paragraph 5 specifically did not apply to the distribution services performed by a sales agent.

The arbitrators initially ruled that the use of the word "photoplay" in Paragraph 5 and a reference in the paragraph to distribution activities in connection with "theatrical motion picture industries" demonstrated that the

provision covered the packaging both of television programs and theatrical motion pictures such as "Running."

ICM's services on the project were found to be those of a packager with influence over, and responsibility for, aggregating the key elements of the film (i.e., cast, crew, locations) during its production. According to the arbitrators, Paragraph 16 of the DGA-ATA Memorandum "contemplates the participation of the package agent in the creative and production phases of a package program as well as the ultimate sale and exploitation thereof," and in the case of a package agent and a director member of the DGA, Paragraph 16 requires a contractual commitment on the part of the agent to render the specified services. ICM had been engaged by the producer's production company to act as the exclusive sales agent for theatrical, television, cable and ancillary rights licensing and sales for a fee of 10% of the gross amounts received by the production company for

licensing "Running." However, the agency was also found to have performed the following services which revealed that it was indeed the contractual packager of the film: locating and submitting the screenplay to the producers; negotiating on behalf of the producers for the screenplay and for Stern's services as director; contracting and soliciting the services of Michael Douglas, the lead actor and executive producer; advising the producers about the casting of the female lead; negotiating distribution deals, including television and cable and foreign sales; and arranging the scoring of the film.

The arbitrators concluded that, based on the services performed and on communications relating to those services, ICM "had performed and was available to perform all of the service of a package agent specified in Paragraph 16 and considered itself to be a package agent." And ICM had performed those services pursuant to an agreement with the production company - an

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agreement which predated the negotiations for Stern's services.

The quality of ICM's representation of Stern was not at issue and it was not found relevant that Stern's agent was "fair and even-handed" or negotiated a superior contract. ICM had not placed its own interests ahead of Stern's, but it could not avoid "the posture of conflict between the owner-client and the director-client where the agent in fact represented both clients." This was precisely the situation Paragraph 5 was designed to prevent.

ICM was ordered to account for and pay to Stern the full amount of the commissions it received by virtue of Stern's employment as director of "Running," and to refrain from collecting commissions on future compensation due Stern for such directing services.

N. Joseph Ross, ICM's designated arbitrator, dissented. He pointed out that Paragraph 5 of Rider D was derived from a similar provision found in the agreement

between the Writers Guild and the Artists Managers Guild (the predecessor to ATA). This provision did not prohibit "double commissions" on theatrical motion picture packages, and Ross found no evidence indicating an intent to include theatrical motion pictures in the ATA-DGA Memorandum. Ross also noted that Stern had been paid as both a writer and director of "Running," that ICM was entitled to commission on Stern's services as a writer, and that there was "no justification for distinguishing between Stern as a writer and Stern as a director."

Ross also considered the reference in Paragraph 5 to theatrical motion picture industries as being solely a reference to distribution activities.

Ross also challenged the majority finding that ICM had a contractual commitment to perform packaging services, pointing out that there had been no showing that ICM had been paid by the production company as a

packaging agent, as required under Paragraph 5, rather than as a sales agent. According to Ross, ICM did not have "control and domination" over the film such that it could have controlled who was employed and the amount of compensation paid. The only element brought to the project by ICM was Stern. And Stern was fully and completely represented by ICM and continued to be an ICM client.

Ross also disagreed with the majority finding that Stern should have been estopped from seeking recovery under Paragraph 5 because he accepted the services performed by ICM and only later repudiated his obligation to pay for such services.

In the Matter of the Arbitration between Directors Guild of America, Inc. and Steven H. Stern and International Creative Management, Relating to the agency representation of Steven H. Stern, Before the Arbitration

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Tribunal of the Directors Guild of America, Inc. and the Association of Talent Agents, Case No. 00266 (July 30, 1980) [ELR 2:10:2]

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**Warner Bros. Records and Bootsy Collins are found liable for infringing the registered service mark "The Rubberband"**

A Federal District Court in New York City has ruled that William ("Bootsy") Collins' use of the name "Bootsy's Rubber Band" in connection with concerts and recordings for Warner Bros. Records, Inc. infringed the registered service mark "The Rubberband" held by Thomas Stuart, a performer of rock music. Stuart's band recorded some albums on minor labels and performed live concerts at various locations in the South but these activities had not proved very profitable. Nevertheless,

Stuart registered the "Rubberband" mark in 1971. In March of 1976, Collings' first album using the name "Bootsy's Rubber Band" was released; and Stuart, after demanding that Collins and Warner Bros. cease using the name, brought an action alleging infringement of his registered service mark.

In post trial proceedings, the court accepted the jury verdict that Collins' use of the name "Rubber Band" created a likelihood of confusion "regarding the source of the musical services offered by the parties." Warner and Collins claimed that the word "Bootsy's" would always be used in conjunction with the Rubber Band, in order to avoid any confusion. The court noted, however, that Warners' record jackets, certain news stories and disc jockeys (such as Bruce "Cousin Brucie" Morrow who testified on behalf of Stuart) all referred only to the "Rubber Band" with no mention of Collins.

The jury determined that Stuart's loss amounted to \$50,000; Collins' profits were stipulated to be \$225,000. The jury then reduced the award as against Collins to "\$0" finding that he had not wilfully disregarded Stuart's rights.

However, the jury awarded Stuart \$150,000 (trebling Stuart's loss) against Warner on the basis that the company's infringement was "done in knowing, wilful disregard" of Stuart's rights. Warner's profits were stipulated to be \$999,587, and the jury awarded \$350,000 of this amount to Stuart for a total award of \$500,000.

The court agreed that Collins and Warner had appropriated Stuart's name and that he could not "hope to achieve success or be marketed by any record company using a name so likely to be associated with the successful defendant Collins," and that Collins had lost any goodwill he may have built up in the Rubberband name. But although the court concurred with the jury finding

that Warner had acted in wilful violation of Stuart's rights, Warner's conduct was not found to be the most "reprehensible kind of wilful infringement - there was no attempt to trade on Stuart's goodwill or a bad faith effort to harm Stuart, and no suggestion that Warner Bros. or Collins was even aware of plaintiff at the time the name was selected and first promoted." Warner could not have ceased using the Rubber Band name immediately upon receiving notice from Stuart in any event, due to the expenses and promotional activity already undertaken by the company.

The court therefore ruled that the award of \$350,000 was excessively punitive to Warner and excessively generous to Stuart, who admittedly had never had earnings significantly in excess of his expenses. The court concluded that Stuart was entitled to receive the total sum of \$250,000 (\$50,000 for his losses and \$200,000 based on Warner's profits).

The court refused to grant injunctive relief because Stuart had been adequately compensated by the damages awarded for both past and future harm. And due to the success of Bootsy's Rubber Band, Stuart would be prevented from using the name successfully even if Warner Bros. and Collins were ordered to cease using the name.

Stuart v. Collins, 489 F.Supp. 827 (S.D.N.Y. 1980)  
[ELR 2:10:3]

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**Magazine's publication of a photograph of Ann-Margret partially unclad did not violate the actress' right of publicity or her rights under the New York Civil Rights Act**

The publication in High Society Celebrity Skin Magazine of a photograph of Ann-Margret nude from the waist up did not violate New York's Civil Rights Law or the actress' rights of privacy or publicity, according to a Federal District Court in New York City.

Section 51 of the New York Civil Rights Law provides that a person's name, portrait or picture may not be used without that person's consent for advertising or trade purposes. The court observed that section 51 has been narrowly construed, particularly when public figures are involved. Ann-Margret was found to be "undoubtedly" a public figure who had chosen to appear partially nude during a scene in the widely distributed film "Magic" from which the published photograph was taken. And although public figures do not lose all their rights to privacy, the court noted that "[i]t has been held that when an individual consents to be viewed in a certain manner during the course of a public performance, such as in a

movie, it cannot then be argued that a subsequent faithful reproduction ... of that appearance constitutes an invasion of privacy."

Ann-Margret's unclad appearance in the film also could have been considered a newsworthy event by many moviegoers, according to the court. The actress' unhappiness or embarrassment over the appearance of the photograph in the magazine was not sufficient to create a cause of action under section 51.

The claim that the publication of several other photographs of Ann-Margret by the magazine violated her right of publicity was also rejected. Featuring the photographs was not equivalent to their being used by Celebrity Skin for advertising or trade purposes, even if the magazine were sold for profit.

Celebrity Skin's motion for summary judgment was granted by the court, and its various counterclaims against Ann-Margret were dismissed.

Ann-Margret v. High Society Magazine, Inc., Case No. 80 Civ. 27 (S.D.N.Y. August 27, 1980) [ELR 2:10:4]

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**Little, Brown and Company permitted to sue out-of-state author in its own home state where author agreed to deliver manuscript "in content and form satisfactory to the publisher"**

In what appears to be a precedent-setting decision, Judge Arthur Garrity of the Federal District Court in Boston has held that Massachusetts courts have jurisdiction over a nonresident author if the author agrees to deliver a manuscript to a Massachusetts-based publisher "in content and form satisfactory to the Publisher."

The decision was rendered in a case Filed by the Boston publishing house of Little, Brown and Company

against Dr. Peter G. Bourne of Washington, D.C. Little, Brown's suit seeks to recover an \$18,500 advance it paid to Bourne in 1976 when Bourne signed a contract to write a book about his experiences on the Carter presidential campaign.

The contract contained a common provision requiring Bourne to deliver a manuscript to Little, Brown "in content and form satisfactory to the Publisher." In order to meet a spring 1977 deadline for listing Bourne's book as a new release, he and Little, Brown began an accelerated process of editing by which Bourne submitted each chapter for editing as it was completed. As part of this process, Little, Brown's editors spoke regularly by phone and corresponded with Bourne to discuss editorial changes. This was done by Bourne in Washington, D.C., and at one point an editor flew from Boston to Washington to discuss the book with Bourne.

The only time Bourne had ever been in Boston in connection with the book was in March of 1976, when he had visited Little, Brown "with little more than an idea for a book." At that time, the court found, Bourne was merely "testing the waters, looking for encouragement to continue his efforts." The contract between Bourne and Little, Brown was not signed until more than four months later, after Bourne had retained a New York City literary agency which put his book out for bids on the basis of a fivepage proposal.

The dispute between the parties arose because Bourne's book was not completed in time for its scheduled publication. Originally, the book was to have been a campaign memoir, and the delay required a change in its topic. Bourne and Little, Brown were never able to agree on a new topic, however, and Little, Brown asked that its \$18,500 advance be returned. When Bourne

failed to do so, it filed suit against him in Federal District Court in Boston.

Massachusetts' "long arm" statute gives the courts of that state jurisdiction over nonresidents who transact business or contract to supply services or things there. Bourne, contending that he did neither, moved to dismiss the case for lack of personal jurisdiction, or to transfer the case to Washington, D.C.

Judge Garrity held that Bourne's trip to Boston in March of 1976 did not constitute the transaction of business in Massachusetts, because it had been distinct and unrelated to the negotiation of the contract more than four months later.

Furthermore, said Judge Garrity, "Had Dr. Bourne only mailed a proposal to Massachusetts and received back a contract which he signed and returned to Massachusetts, there would have been no basis for asserting personal jurisdiction in Massachusetts." However, Judge Garrity

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found that in this case Dr. Bourne did more. Judge Garrity noted that Bourne's contract required him to deliver to Little, Brown a manuscript "in content and form satisfactory to the Publisher." Judge Garrity then said,

"Any experienced author understands this to mean that from the bare outline which was the only basis for the publisher's bid, both author and publisher would work together to create a publishable and commercially marketable book. A publishing contract ... cannot be executed through independent acts of performance. Scores of interdependent acts go into the process: chapters and sections are submitted piecemeal, revisions for style are made in the editors' offices, content is reviewed for legal problems, drafts are circulated and recirculated between author and editor, and eventually printers and proofreaders join with the author and the publisher to make a mutual decision on visual format and style. Whether or not [Bourne] was free to do his writing outside of

Massachusetts, he knew that as a consequence of entering into the contract with [Little, Brown] and mailing each of six chapters to Boston, he set in motion a complicated series of editing and printing steps, in every case unique to the particular author and book."

Judge Garrity acknowledged that "A different case might be presented where a manuscript was already written and edited and its author sought only a publisher who would set it into type and market it without changing its contents." The sale of paperback rights to an established hardcover bestseller was cited as an example of such a transaction. In this case, however, Little, Brown had bid on the basis of nothing more than a five-page proposal. Therefore, said Judge Garrity, "It must necessarily have been contemplated that together they would create a final, much expanded product, satisfactory to both."

Accordingly, Judge Garrity held that his court had jurisdiction over Bourne, and that it would not be unfair, unreasonable, or a denial of due process to require him to defend the case in Boston. Judge Garrity also denied Bourne's motion to transfer the case to Washington, finding that the inconvenience to him to defend in Boston would be "slight."

Little, Brown and Company v. Bourne, Civil Action No. 79-2597-G (D.Mass., July 23, 1980) [ELR 2:10:4]

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**A predominant copyright infringement claim is required for federal court jurisdiction, according to three cases**

Federal District Courts in New York City, in three recent cases involving musical compositions, have

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retained jurisdiction over certain claims which were found to have arisen under the copyright laws of the United States, while dismissing other claims which were found to have arisen from the contractual relations of the parties.

In *Kamakazi Music Corp. v. Robbins Music Corp.*, Kamakazi, the owner of the copyrights to songs written by recording artist Barry Manilow, claimed that Robbins, without authorization, had extended by one year an agreement whereby Robbins was granted the right to publish and sell Manilow "personality folios" (printed publications featuring musical compositions by a particular artist). Robbins contended that the action was "grounded in contract" and that the court lacked jurisdiction over the matter. But the court found that Kamakazi's claim was essentially a copyright infringement claim subject to federal court jurisdiction. However, because the agreement provided for arbitration of disputes

concerning its meaning, Robbins' motions to stay the federal court action and to compel arbitration were granted. The court also noted that although it had the power to grant a motion for a preliminary injunction to preserve the status quo pending arbitration, it would not issue such an injunction in order to avoid making a determination on the probable success of the merits of the action which might duplicate or prejudice the arbitrator's ruling.

In *Mister Vee Productions, Inc. v. The Rhythm Makers*, a case involving multiple parties, claims and counterclaims. the District Court retained jurisdiction over a cause of action alleging infringement of the copyrighted song "Soul on Your Side." The court found, however, that the other claims raised were based on a songwriter and recording artist agreement between Mister Vee and The Rhythm Makers and were "separate claims arising out of separate facts brought by different plaintiffs."

Since the state law claims were found to be predominant, the court, in the interest of "judicial economy," declined jurisdiction over, and dismissed, those claims.

In *Chris Hall v. Inner City Records*, lyricist Chris Hall alleged that he had entered into an agreement with Musical Frontiers Publishing Co. whereby he was to receive royalties for his lyrics to the song "So What," composed by Miles Davis and recorded by Eddie Jefferson. Inner City, pursuant to a license from Musical Frontiers, released a record containing Jefferson's recording of the song. Hall received no royalties from the sale of Inner City's record and sought an accounting and statutory damages.

The court, in granting Inner City's motion to dismiss for lack of subject matter jurisdiction, stated that "[j]urisdiction over actions to enforce contracts relating to copyrights lies in state court, even though the subject matter of the contract relates to copyrights." Hall had

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not alleged copyright infringement or the invalidity of the license granted to Inner City, and thus, his action did not arise under the copyright laws.

Kamakazi Music Corp. v. Robbins Music Corp., CCH Copyright Law Reports, Para. 25,159 (S.D.N.Y. 1980); Mister Vee Productions, Inc. v. The Rhythm Makers, CCH Copyright Law Reports, Para. 25,158 (S.D.N.Y. 1980); Chris Hall v. Inner City Records, CCH Copyright Law Reports, Para. 25,163 (S.D.N.Y. 1980) [ELR 2:10:5]

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**Former professional basketball player Joe Caldwell held entitled to receive pension benefits from his ex-employer, but not "commercially impossible" life insurance**

When professional basketball player Joe Caldwell moved from the National Basketball Association to the American Basketball Association in 1970, he signed with the now-defunct Carolina Cougars. The contract he signed was the subject of a recent lawsuit.

At issue were provisions dealing with pension and life insurance benefits. The trial court had ruled that the Cougars were required to provide Caldwell with pension benefits as stipulated in the contract, but that a life insurance provision was impossible to enforce. A North Carolina Court of Appeals has upheld the trial court's rulings.

Caldwell's contract guaranteed him pension benefits of \$600 per month for each year he played pro basketball, with payments to commence at age 55. The Cougars argued that this provision was too vague to enforce. For instance, they claimed that no time limit was established for the funding of the pension plan, nor were there

sufficient details as to the amount, frequency and duration of payments.

The court rejected these arguments, pointing out that both parties had obviously intended that Caldwell was to receive retirement benefits. It was a reasonable implication, the court said, that the pension would be funded by the time Caldwell stopped playing for the Cougars.

As for the amount, frequency and duration of the payments, the court noted that the Cougars had not raised these objections at trial. The Cougars had initially asked the trial court to reform the terms of Caldwell's contract, maintaining that there had been an error in the agreed-upon amount of the monthly pension payments. The \$600, they said, should have been \$60 per month. The trial court found no merit in this claim and ordered that \$600 a month be paid. The Court of Appeals reasoned that since the Cougars had been arguing solely about a specific amount of money, the pension provisions were

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sufficiently clear and definite to understand and to enforce.

The court also rejected the Cougars' claim that enforcement of the contract is not warranted because "traditional" legal remedies are available to Caldwell. The Cougars argued that Caldwell should be required to sue for pension payments when they become due under the contract. The court explained that this "delayed procedure" would defeat the whole purpose of a pension, which is to guarantee a steady source of income when a person is no longer employed. It would be unfair to force Caldwell to wait 20 years before knowing whether he was entitled to pension benefits, said the court.

In addition, the Cougars had argued that Caldwell's actions were designed to "deceive and mislead" their representatives, and that they never fully understood the contract. The court found absolutely no basis in this contention. Presumably, the contract was negotiated and

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prepared by businessmen with a substantial knowledge of pro basketball franchises. In the court's opinion, it would be unreasonable to assume they did not understand the contract they themselves prepared.

While the court found that Caldwell was entitled to receive pension benefits, it declined to enforce the contract terms relating to life insurance. The provision required the Cougars to provide Caldwell with life insurance totalling 100 times the cash value of his pension, until he started receiving retirement benefits. Based on the cash value of Caldwell's pension, the court figured that insurance would range from \$36 million to \$91 million. The court classified the insuring of an individual for such amounts as "commercially impossible," and refused to enforce the provision.

The Munchak Corporation v. Caldwell, 265 S.E.2d 654 (N.C.App. 1980) [ELR 2:10:6]

**Briefly Noted:**

**Arbitration.**

A clerical worker employed by the Screen Actors Guild was found by an arbitrator to have been unjustifiably discharged under SAG's collective bargaining agreement with the Office and Professional Employees International Union. SAG contended that the worker "was rude ... would not follow directions ... made errors ... made disparaging remarks about the production department ... used profanity constantly, was often inebriated at work and, finally, that she specifically informed the production representatives that they would have no peace at work while she was acting as their secretary." The Union's position was that the grievant's attitude

"was no better and no worse than that of other employees." The arbitrator took what he called "a realistic view of the situation," and found "that while grievant may not have been an ideal employee, in fact, the maintenance by her of a hostile attitude was created and fostered by the inability of her coworkers to get along with her, as well as her inability to get along with coworkers." This, found the arbitrator, failed to constitute just and sufficient cause for discharge. The arbitrator concluded that the clerical worker be reinstated to her former, or an equivalent, position with back pay, although he imposed a disciplinary suspension of sixty days on the worker to "give the grievant cause to reflect upon the necessity of making a sincere effort to work efficiently and productively with her co-employees, and the Arbitrator is confident that grievant will be able to meet such expectations in the future."

Screen Actors Guild and Office And Professional Employees International Union, Local No. 30, 1980 CCH Labor Arbitration Awards, Para. 8052 (1979) [ELR 2:10:7]

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### **Radio Programming Services Contract.**

A former radio station employee who purchased prerecorded music and program materials acted within the scope of his authority and the station was obligated to continue making payments on the contract. The program supplier's salesman had no notice of, and no reason to inquire about, any limitation on the employee's authority, and even if the employee had exceeded his authority, the station continued to use and pay for the contracted-for materials, thereby approving the contracts.

White River Valley Broadcasters, Inc. v. Wm. B. Tanner Co., 487 F.Supp. 725 (E.D.Ark. 1979) [ELR 2:10:7]

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### **Trademark.**

The Trademark Trial and Appeal Board has expressly overruled *In Re Great Gorge*, 185 USPQ 572 (TTAB 1975), in which it had held that the title of a periodical publication may be registered as a "service mark" as well as a trademark. Landmark Communications filed an application on the Principal Register to register "THE DAILY BREAK" as a service mark for educational and entertainment services comprising the collection, printing, presentation and distribution by means of a newspaper section of cultural and leisure information such as syndicated features, consumer advice columns, Dear

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Abbey columns, games and horoscopes. The registration of the service mark was refused by the Trademark Attorney on the grounds that the newspaper section was not a "service" within the meaning of the statute. The Board affirmed the refusal, stating that the determination of whether a mark qualifies as a registrable "service mark" depends on the applicant's principal underlying economic activity. The Board reasoned that "To break down a newspaper, or any publication, into the manifold and variegated kinds of articles, stories, reports, columns, comics, advertising and illustrations it contains and to claim that each is a separate 'service' . . . is to ignore the commercial reality that a newspaper is a tangible commodity purchased because of the variety of reading material to be found and that a newspaper is considered by its readers to be a single publication and not a collection of services."

In Re Landmark Communications, Inc., 204 USPQ 692  
(TTAB 1979) [ELR 2:10:7]

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**Tax.**

A local ordinance levying a tax upon the privilege of participating in or witnessing an amusement event was upheld by the Supreme Court of Illinois, reversing a lower court's order declaring the ordinance unconstitutional. The Supreme Court found that exemptions in the law for certain kinds of nonprofit organizations did not constitute un reasonable or arbitrary classifications; mere laxity in enforcement of the tax did not constitute denial of equal protection, absent some conduct which amounts to an intentional violation of practical uniformity; and the tax levied by the ordinance was not invalid as an occupational tax.

Kerasotes Rialto Theater Corporation v. City of Peoria,  
397 N.E.2d 790 (Ill. 1979) [ELR 2:10:7]

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### **Labor Relations.**

When Westinghouse Broadcasting discharged a 65-year-old employee, the union to which he belonged demanded that the company's action be reviewed in an arbitration proceeding. The union relied on a provision in its collective bargaining agreement with Westinghouse calling for arbitration of disputes arising out of company discharges "for just cause." Westinghouse, however, had a rather different interpretation of the bargaining agreement. It claimed the employee's termination was justified under the company Pension Plan which made retirement at age 65 mandatory. Westinghouse pointed to language in its Pension Plan agreement

with the Union which stipulated that there would be no arbitration of disputes arising under the Plan. After hearing the case, a Federal Court of Appeals first decided that it is the court's role, rather than an arbitrator's, to determine whether a dispute ought to be resolved by arbitration. The court went on to conclude that the matter is indeed one for arbitration. Its finding was based on the "array of interrelated agreements" between Westinghouse and the Union. Arbitration is warranted, the court said, in cases where the agreements regarding arbitration proceedings are subject to varying interpretations.

Westinghouse Broadcasting Co., Inc. v. Local 804 International Alliance of Theatrical Stage Employees, 616 F.2d 97 (3d Cir. 1980) [ELR 2:10:7]

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## DEPARTMENTS

### **In the Law Reviews:**

A Review of the World Administrative Radio Conference '79 and Its Implications for the Development of Satellite Communications Services by Thomas A. Hart, Jr., 2 Communications and the Law 21-38 (1980)

Heightened Judicial Scrutiny: A Test for the First Amendment Rights of Children by Denise M. Trauth and John L. Huffman, 2 Communications and the Law 39-58 (1980)

Herbert v. Lando: Threat to the Press, Or Boomerang for Public Officials by Andre E. Briod, 2 Communications and the Law 59-92 (1980)

Three Copyright Books for the Eighties by Theodore R. Kupferman, 2 Communications and the Law 93-95 (1980)

Technology and Copyright: Sources and Materials, reviewed by Charles Lieb, 2 Communications and the Law 97-99 (1980)

The Use of Summary Judgments in Defamation Cases by Joel D. Stern, 14 University of San Francisco Law Review 77-104 (1979)

Tort Liability in Professional Sports, 44 Albany Law Review 696-718 (1980)

The Attempt to Develop an Appropriate Standard of Liability for the Defamation of Public and Private People: The Supreme Court and the Federalization of Libel Law

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by Howard A. Gutman, 10 North Carolina Central Law  
Journal 201-226 (1979)

[ELR 2:10:8]