RECENT CASES

Screenplay for television movie "Murder in Texas" did not infringe Thomas Thompson's book "Blood and Money" because most similarities were simply historical facts

In a recently filed lawsuit, North Branch Road Corp. and David Merrick, the owners of the copyright and movie rights to the book "Blood and Money" by Thomas Thompson, claimed that the screenplay of a television drama entitled "Murder in Texas" infringed the book's copyright. Both works recount the events surrounding the death of Houston socialite Joan Hill and the trial of her father, millionaire Ash Robinson, for the alleged murder of Joan's surgeon husband, Dr. John Hill. North Branch and Merrick's application for a preliminary injunction seeking to restrain Dick Clark Cinema Productions, Inc., from proceeding with the production of "Murder in Texas" has been denied by Judge Pierre Leval of the Federal District Court in New York City on the ground that no infringement has occurred.

Judge Leval, in an oral opinion, noted that "Blood and Money" was "a factual historical account ... of very highly publicized famous events." Under Hoehling v. Universal City Studios, Inc., 681 F2d 972 (2d Cir. 1980) (ELR 1:11:2, 1:24:4), only the original expression conveying historical facts, and not the facts themselves, may be protected by copyright, Judge Leval held.

Judge Leval observed that of the 124 instances of alleged infringement cited by North Branch and Merrick, most, except for a "miniscule number of tiny instances," involved similar facts or quotations which, despite their dramatic impact, "were not any the less historical fact." North Branch and Merrick could not contend that they "owned" the historical episode, according to Judge Leval. Further, the facts appearing in both works were "important" rather than "tiny, insignificant details" which an author might use to evoke atmosphere or an emotional picture. Therefore, the screenplay writer was entitled to draw upon Thompson's prior research as well as upon the many other sources, including trial transcripts and other public records, which were consuited during a large scale research effort.

Judge Leval also stated that in viewing the works in their entirety, apart from his examination of the specific instances of alleged infringement, there had been no "wholesale usurpation" or even any "significant arguable appropriation of Thompson's interpretation or characterization or attitude." Judge Leval "contemplated" that the order of presentation of events might constitute copyrightable expression. However, the works in question differed in this respect also, because "Blood and

Money" involved some flashbacks while the screenplay did not use this technique.

While refusing to issue requested injunction, Judge Leval denied Clark's motion for summary judgment (although stating that "judgement in favor of the defendants is a very likely eventuality") in order to allow North Branch and Merrick to try to improve the quality of their proof.

David Merrick and North Branch Road Corp. v. Dick Clark Cinema Productions, Inc., Case No. 80 Civ. 5877 (S.D.N.Y., November 25, 1980) [ELR 2:18:1]

U.S. Supreme Court to review judgment won by concert promoter against City of Newport on account of city's cancellation of concert by Blood, Sweat & Tears

A $275,000 judgment in favor of a concert promoter against the City of Newport for the city's wrongful cancellation of a concert appearance by Blood, Sweat & Tears will soon be reviewed by the United States Supreme Court.

In 1975, Fact Concerts, Inc., obtained permits from Newport's City Council to conduct summer concerts at Fort Adams, a state owned facility located within the city. Fact Concerts then retained eight well known acts, including Sara Vaughn, Dave Brubeck, Herbie Mann, Miles Davis and Stan Getz, to perform for two shows scheduled for August 30 and 31, 1975. When a conflicting engagement caused Sarah Vaughn to cancel her appearance, the group Blood, Sweat & Tears was retained to replace her.

Concerned that Blood, Sweat & Tears, which the Newport City Council considered to be a rock group rather than a jazz band, would attract an unruly audience, the council voted to cancel the permits for both days unless the group was removed from the program. Fact Concerts agreed to the council's wishes by cancelling Blood, Sweat & Tears and hiring a replacement group, Weather Report. Two days before the August 30th concert, the council reconsidered. Fearing a defamation suit threatened by Blood, Sweat & Tears, the council voted to allow the group to appear if they did not play rock and roll music. Fact Concerts immediately rehired Blood, Sweat & Tears. But the following day, on the eve of the first concert, the council again voted to cancel the permits, an action which received extensive local media coverage. The next morning, Fact Concerts obtained a court order restraining the city from interfering with the concerts. The shows went on with Blood, Sweat & Tears, but only 6,308 of a possible 14,000 tickets were sold for the two days, resulting in a loss of $72,910 to Fact Concerts.

Claiming breach of contract, tortious interference with economic relations, and violation of its First Amendment right to promote and produce a concert, Fact Concerts was awarded $72,910 in compensatory damages and an amount totalling $205,000 in punitive damages against the city and various members of the City council.

On appeal, the city contested the propriety of Fact Concerts' cross-examination of John West, a member of the Newport City Council, and the trial judge's instruction allowing the jury to award punitive damages against the City of Newport.

The city had placed council member John West on the stand as a member of the City Council and as an expert in the area of concert promotion. The purpose of his testimony was to show that the city acted in good faith out of a reasonable concern for public safety. The trial judge allowed Fact Concerts to question West about his participation in an earlier unsuccessful effort of the council to refuse to issue a permit for the exhibition in a city park of a "tiger cage" which opponents of the Vietnam War contended was used to incarcerate Vietnamese citizens. A Federal Court of Appeals affirmed the trial judge's action. "The admission of the testimony concerning the 'tiger cage' case," stated the appellate court, "was probative of the council's knowledge of the law in the area of the First Amendment, and, thus, bore directly on the issue of good faith."

Noting that the United States Supreme Court has never fully addressed the question of whether municipalities may be liable for punitive damages for violations. of the First Amendment, the appellate court nevertheless upheld the punitive damage award against the city. Without any body of law prohibiting such damages, the court was "hard-pressed to say that the trial judge's punitive damage instruction was plain error," it said.

The United States Supreme Court has agreed to consider the case further.

Fact Concerts, Inc. v. City of Newport, 626 F.2d 1060 (1st Cir. 1980); cert. granted by U.S. Sup. Ct. [ELR 2:18:2]

Trademarks having their own "intrinsic utility" may be sold as merchandise without owners' consent, Federal Court of Appeals has held

The unlicensed manufacture and sale by Lindeburg and Company of jewelry bearing the insignia of a fraternal organization known as Job's Daughters, did not constitute trademark infringement, according to a Federal

Court of Appeals in California. The decision was based on the court's determination that the organization's name and emblem were being used on the jewelry as "functional aesthetic components," and not as a trademark, in that they did not designate the origin, sponsor, or endorser of the jewelry.

The Court of Appeals first noted that the Lanham Act creates a "federal remedy against the deceptive use of unregistered trademarks to designate falsely the origin of goods" (citing New West Corp. v. NYM Co. of California, 595 F.2d 1194 (9th Cir. 1979) (ELR 1:6:1). However, the Act does not "bestow" broad property rights on trademark owners. Rather, it seeks "to protect consumers against deceptive designations of the origin of goods and, conversely, to enable producers to differentiate their products from those of others." The court noted that names or emblems, such as those on clothing and cars, as well as on jewelry, are often merchandised for their own "intrinisic utility to consumers." However. in general, Trademark law does not prevent a person from copying socalled "functional" features of a product which constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored or endorsed a product.

The Court of Appeals rejected, as an "extraordinary extension" of the protection afforded trademark owners, the position taken by another Federal appellate court in the case of Boston Professional Hockey Association, Inc. v. Dallas Cap & Emblem Manufacturing, Inc., 510 F.2d 1004 (5th Cir.), cert denied, 423 U.S. 868 (1975). In Boston Hockey, certain National Hockey League clubs brought a trademark infringement action against a company that sold replicas of NHL team-emblems. The court in that case found infringement based on the defendant's unauthorized use of the hockey clubs' trademarks. But a trademark owner does not have a complete monopoly over its use, according to the Court of Appeals in the Job's Daughters case. It held that the property right of the trademark owner extends "only insofar as necessary to prevent consumer confusion as to who produced the goods...."

More recently, in Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd, 604 F.2d 200 (2d Cir. 1979) (ELR 1:4:5, 1:15:2), a name or emblem was determined to be both a "functional component of a product and a trademark." If the Job's Daughters insignia on the jewelry produced by Lindeburg and Company indeed caused a consumer to infer that the jewelry was produced or endorsed by the organization, the insignia might then have served "secondarily" as a trademark. The articles themselves, the merchandising practices of the seller and the consumer's beliefs would have to be examined in considering this question, the court said.

Also cited by the Court of Appeals was the decision in American Footwear Corp. v. General Footwear Co., Ltd, 609 F.2d 655 (2d Cir. 1979) (ELR 1:21:1), cert. denied, 100 S.Ct. 1601 (1980), in which the court stated one can capitalize on a market or fad created by another provided that it is not accomplished by confusing the public into mistakenly purchasing the product in the belief that the product is the product of the competitor.

Job's Daughters had not shown that any customer was misled about the origin or sponsorship of Lindeburg's jewelry.

The Court of Appeals therefore concluded that there had been no trademark infringement and reversed the decision of the District Court.

International Order of Job's Daughters v. Lindeburg and Company, Case No. 78-1674 (9th Cir., Dec. 10, 1980) [ELR 2:18:3]

Plumstead Theatre Society entitled to tax exemption even though it co-produced play in partnership with profit-seeking investors

The Tax Court has held that the Plumstead Theatre Society, a non-profit corporation formed to promote and foster the performing arts, is entitled to tax exempt status because it is operated exclusively for charitable and educational purposes even though Plumstead's only activity was the co-production of a play with the John F. Kennedy Center for Performing Arts. Plumstead had raised its share of the capital for the production of the play by selling part of its rights in the play to two private individuals and a for-profit corporation.

The Plumstead Theatre Society, Inc. was formed in 1977 as a non-profit corporation under the laws of the

State of California. Its purposes were to cultivate and promote public interest in the fields of theater and other performing arts, to institute and organize workshops, to give scholarships, and to assist new and established playwrights and similar personnel in the field. During 1977, Plumstead engaged in negotiations with Ambassador International Cultural Foundation, a non-profit foundation, for joint sponsorship of a season of plays in the Ambassador College Auditorium in Pasadena, California

Also in 1977, Plumstead agreed to co-produce the play "First Monday in October" with the John F. Kennedy Center for Performing Arts, a non-profit tax exempt organization. The agreement provided that each organization would provide one-half of the capitalization required for the production and each would share equally in any profits or losses derived from the presentation. Plumstead's president, Henry Fonda, starred in the play and agreed to accept a lower salary than he would normally command at commercial theaters. Plumstead had difficulties in raising its share of the capitalization for the play. It agreed to sell a portion of its rights in the play to outside investors through a limited partnership. Plumstead was the general partner and two unrelated individuals and Pantheon Pictures, Inc., a for-profit corporation, were the limited partners. Under the partnership agreement, the limited partners were required to contribute capital of $100,000 to the limited partnership in return for a 63.5% interest in any profits or losses resulting from the production.

Shortly after its incorporation, Plumstead filed an application for tax exemption with the Internal Revenue Service. On July 31, 1978, the Service issued a final adverse ruling which denied Plumstead its exempt status. The ruling stated that Plumstead was not operated exclusively for charitable or educational purposes because a substantial purpose of its organization was commercial. The Service also stated that a substantial part of its net earnings inured to the benefit of private individuals and that it was operated for private interests rather than public interests. Plumstead appealed that ruling to the Tax Court.

The Tax Court first noted that a number of organizations which promoted or encouraged the arts were held to be charitable and educational organizations. As an example, the Court cited Revenue Ruling 64-175, 64-1 C.B. 185, in which the Service had ruled that a non-profit corporation organized for the purpose of developing interest in the dramatic arts by the American public qualified as a tax exempt organization. This organization's main activities were producing plays throughout the United States.

The court next noted that the administrative record did not support the contention that Plumstead's activities had a substantial commercial purpose. It noted that

Plumstead's main focus was to organize a regional theater in Pasadena, California. The court did not agree with the Service's reasoning that because the productions contemplated with Ambassador had not as yet materialized, they failed to count as activities. The court also did not agree with the Service that the activity of co-producing the play with the Kennedy Center was indicative of a substantial commercial purpose. The Kennedy Center itself is a tax-exempt organization chartered by Congress and built partially with federal funds. Furthermore, it is standard practice for both non-profit and profit organizations to advertise their productions in newspapers and to solicit ticket sales. The court went on to note that commercial theaters are operated to make a profit, and therefore do not theoretically choose plays without a great mass audience appeal. Tax exempt organizations, however, are not operated to make a profit and they can fulfill artistic and community obligations by focusing upon the highest standards for their theatrical productions.

The court also disagreed with the Service's position that entering into a partnership with two private individuals and a for-profit corporation indicated that Plumstead was operated for private, as opposed to public, purposes. The court indicated that Plumstead had merely sold a portion of its interest for a reasonable price. None of the limited partners had control in any way over the affairs of Plumstead and none of the limited partners or officers or directors of Pantheon Pictures was an officer or director of Plumstead.

The court concluded that Plumstead was organized and operated exclusively for charitable and educational purposes and is entitled to tax exempt status.

Plumstead Theatre Society, Inc. v. Commissioner, 80(10) CCH Standard Federal Tax Reports, Para. 7957 [ELR 2:18:4]

New York appellate court reverses dismissal of libel action brought against New York Daily News by former judge falsely reported to be a convicted felon

Ross DiLorenzo a former Civil Court Judge and an admitted public figure, was indicted in 1973 on eight counts of perjury in the first degree and one count of obstructing governmental administration. He was acquitted of all charges. In 1977, reporter John Toscano wrote an article in the New York Daily News that was an accurate account of DiLorenzo's indictment and acquittal. Later that year, however, in an article published in the Daily News immediately prior to the Democratic primary for Brooklyn Borough President in which DiLorenzo was a candidate, Toscano falsely reported that DiLorenzo had been convicted of a felony. DiLorenzo then brought a libel action against Toscano and the Daily News.

As a public figure, DiLorenzo had the burden of proving that the article was published with "actual malice" - that is, with knowledge of its falsity or with reckless disregard of the truth. A trial court granted the defendants' motion for summary judgement and dismissed the complaint on the ground that DiLorenzo failed to show facts which would have warranted a finding of actual malice.

A New York appellate court reversed the dismissal however in an opinion that emphasized that "the First Amendment should not be transformed into a requirement that the plaintiff prove actual malice to the motion court." The appellate court held that a public figure can bring his case to trial where, as here, he submits evidence from which a jury could reasonably find that there were "reasons to question the truth of the publication." The court emphasized that an accusation of criminal conviction is especially serious when directed at a viable political candidate and "should have triggered further substantiation."

It was clear from Toscano's first article that he had prior knowledge of DiLorenzo's acquittal. At his deposition, however, Toscano testified that "[m]y honest recollection was that [DiLorenzo] had been indicted ... and that subsequently he was thrown out from under the indictment. Whether it was thrown out or whether it was after trial, that wasn't clear in my mind." The court determined that "[a] jury could reasonably find that the reporter's insufficient recall alone should have motivated him to check before he wrote." The court then noted that "[t]he reporter's failure to check the facts becomes more significant when consideration is given to the ease with which those facts could have been checked." At his deposition, Toscano admitted that when he wrote the second article he did not consult his own files or the paper's files; nor did he consult with his colleagues, one of whom testified at DiLorenzo's trial. The court found that the ease of investigation coupled with the lack of time pressure generally associated with "hot news" could well support a-finding of "reckless disregard for the truth."

The reporter's alleged hostility was found by the court to be another circumstance that could support the inference of actual malice. Malice, commonly defined as ill will, spite or hostility, is quite different from actual malice, which "concerns the defendant's attitude toward the truth." The court cited Cochran vs. Indianapolis Newspapers, Inc., 372 N.E.2d 1211 (Ind.App. 1978), in which the Indiana Court of Appeal stated that "motive and intent may be adduced for the purpose of establishing by accumulation and by appropriate inference the fact of defendant's recklessness." The court therefore determined that although proof of malice alone may not justify an inference of actual malice, the jury can consider malice among the more obvious circumstances supporting such an inference.

In conclusion, the court considered the effect of the Daily News' retraction of the allegedly defamatory article, and explained: "Although defendant New York News, Inc. will be liable for publication with actual malice on the theory of respondeat superior if the reporter is found to have acted in reckless disregard, it asserts, in its own right, its concern for the truth as evidenced by the simultaneous publication of its retraction with the defamatory comment. We note merely that the retraction in its traditional role is considered some evidence of lack of ill will and can be used to mitigate damages."

DiLorenzo vs. New York News, Inc. 432 N.Y.S.2d 483 (App.Div. 1980) [ELR 2:18:5]

Obscenity ordinances of Chicago suburb held unconstitutional by Federal Court of Appeals

Two ordinances enacted to prohibit the exhibition of obscene motion pictures in Westmont, Illinois, a suburb of Chicago, have been held unconstitutional by a Federal Court of Appeals. The court affirmed a District Court order permanently enjoining the enforcement of the Westmont ordinances.

One of the ordinances classified adult movie theatres as a "special use" which, in contrast to permitted ones, requires the approval of the Zoning Board of Appeals after a public hearing. The Court of Appeals ruled that the ordinance is unconstitutionally vague, calling it "nothing more than a one-line addition" to Westmont's zoning law. "Because it contains no definition of the term 'adult,' [the theater operator] does not know if it now must apply for a special use permit even if it shows only one 'X' rated or 'R' rated movie," said the court. Furthermore, the ordinance contained no standards for its application by those who administer it, thus granting unfettered discretion to the local officials in deciding whether to grant or deny a special use.

The other ordinance provided for the revocation or suspension of a movie theater's license upon a finding of obscenity by a Movie Review Board and the Mayor. The court found that this ordinance authorized an unconstitutional prior restraint of the type condemned in Vance v. Universal Amusement Co., Inc., 100 S.Ct. 1156 (1980), (ELR 1:24:6). In that case, the U.S. Supreme Court declared unconstitutional a Texas statute allowing the revocation of a theater license for the exhibition of films that have not been finally adjudicated to be obscene.

Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980) [ELR 2:18:5]

Premier is enjoined from commencing pay tv operations due to likelihood of antitrust violations

The United States Department of Justice has blocked the planned entry into the pay television market of Premiere, a joint venture comprised of Columbia Pictures, MCA, Paramount Pictures, Twentieth Century-Fox and Getty Oil Company. Judge Goettel of the Federal District Court in New York City has ruled that the agreement establishing Premiere may constitute price-fixing and a group boycott in violation of section 1 of the

Sherman Act and has issued an injunction restraining the venturers from taking any action to implement Premiere. (The company was scheduled to commence operations on January 2, 1981.)

Premiere, a satellite-fed network programming service offering feature films for exhibition on pay television, was formed in April of 1980 in response to the rapidly expanding demand by pay television for "new, never-before-shown-on-television, theatrical motion pictures." The movie company venturers had supplied approximately one-third of the films in the program service industry and received in return approximately one-half of the revenues paid for films. In forming Premiere, they apparently sought both increased revenue and greater control over distribution of their films.

The joint venture agreement provided that for a 9 month period Premiere would have the exclusive right to exhibit certain new films contributed to the venture by the movie companies - the 9 month "window" - before the films were made available to other programming services. And an "allocation formula" based primarily on the box office rentals of the films would be used to determine the amount of revenue to be paid to the contributing movie company.

The movie companies contended that the allocation formula was necessary for valuing and repaying their non-cash investment in the joint venture. They further argued that the formula was not an illegal price fixing device because prices were set only as among the venturers - the prices to be charged to third parties for the Films was not agreed upon among them. The companies compared the allocation formula to the licensing practices involved in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (ELR 1:1:1), in which the blanket licensing of musical works was ruled not to be a per se violation of the Sherman Act.

Judge Goettel rejected the comparison to the BMI case, noting that that case arose in unique circumstances which were not duplicated in the Premiere joint venture. He then observed that under the joint venture agreement, the participating companies could not negotiate with Premiere for a higher allocation for a particular film than would be received under the formula, even if its value to pay television might not be properly reflected in its box office rentals. The movie companies thus had "agreed on the price that would normally be set by the marketplace with a transaction between themselves and Premiere that placed a value on each film, within a minimum and maximum range and allocated revenues to the movie companies for their pictures by a formula." The effect of this pricing mechanism not only might raise the prices of films licensed to pay television but also might eliminate competition in the network program market through the manipulation of the price of Premiere's product. Judge Goettel ruled that the allocation formula, although difficult to categorize as per se illegal price-fixing, nevertheless was an unreasonable restraint of trade even if the rule of reason were applied.

The court also ruled that the 9 month window was a group boycott and was per se invalid, in that it was designed to coercively influence the trade practices of the boycott victims.

Premiere contended that it was entitled, as a new competitor in the pay television program market, to distinguish its product via the 9 month window. But Judge Goettel pointed out that a 9 month exclusivity period was more a "drastic restraint" than a competitive distinction "to gain a foothold in the market." The court observed that Premiere's films, including the 39 to 45 films subject to the window in 1981, would have far less value to existing programming services at the conclusion of the 9 months. And if the quantity of new films produced by nonventurer movie companies were insufficient to meet programming needs, the quality of overall programming on pay television might also diminish, resulting in increased disconnections by subscribers and reduced revenues within the industry. Judge Goettel concluded that under a rule of reason analysis the 9 month window also appeared to be anticompetitive and unreasonable.

A third type of antitrust analysis was recently applied by the Fifth Circuit in a decision (United States v. Really Multi-List, Inc., 1980-81 CCH Trade Cases, Para. 63,624 (5th Cir. 1980)), in which a real estate multiple listing service was ruled "facially unreasonable" because the restraint in question was not required "in order to reserve the legitimate needs of the association ... and was not sufficiently narrowly tailored to serve its goal." Under this analysis, Premiere's allocation formula and 9 month window provisions were also facially unreasonable, according to the court.

Judge Goettel concluded that the Government had shown a reasonable likelihood that, at a trial on the merits, it would prove that the venturers had engaged in a combination to influence the prices of films licensed to pay television and that Premiere was a concerted action to refuse to deal with, and to boycott, other network programming services, thereby restraining competition.

Premiere argued that the issuance of a preliminary injunction would put the company out of business forever due to the resulting economic hardship. However, Judge Goettel noted that Premiere had no subscribers and few affiliates or employees. He discounted the company's claim that it could not enter the market at a later time by noting the potential for growth in the pay television industry. The possible harm to the existing pay television industry was found to outweigh any hardship to Premiere. And the public interest in enforcement of the antitrust laws and the preservation of competition was of particular significance to Judge Goettel in view of the likelihood of increased prices which might be passed on to consumers if Premiere were implemented.

An appeal of the decision has been filed by Premiere.

United States of America v. Columbia Pictures Industries, Inc., Case No. 80 Civ. 4438 (S.D.N.Y., December 31, 1980) [ELR 2:18:6]

Bruce Springsteen is awarded more than $2 Million in statutory copyright damages in bootleg record lawsuit

In a case that has resulted in what may be one of the largest awards of statutory copyright damages ever made, CBS recording artist Bruce Springsteen has been awarded $2,150,000 for the wilful, unauthorized reproduction of copyrighted musical compositions by Andrea Waters, doing business as Beggar's Banquet Records. Beggar's Banquet manufactured and sold "bootleg records" containing recordings of several live performances by Springsteen recorded without his consent. Approximately 12 tons of bootleg records were seized by the FBI from a storage area leased by Waters. Beggar's Banquet also sold a pirated record - "E Ticket" - consisting of out-takes, that is, rough mixes of incomplete studio recording performances of Springsteen.

Neither CBS nor Springsteen, the owner of the copyrights to the infringed compositions, had licensed or authorized any other person "to record, manufacture, distribute, and sell the musical works and recordings of the performances contained in the four bootleg records ... [or to use] the photograph, name or likeness of Bruce Springsteen in connection with such use."

A Federal District Court in California granted a summary judgment to CBS and Springsteen, and determined that Springsteen was entitled to receive $50,000 per infringement for each of 43 separate infringements of 18 of the singer's copyrighted works and approximately $105,000 in attorney's fees as well as costs.

Waters had also manufactured and sold bootleg records containing performances by the CBS group Cheap Trick. Under California Civil Code section 3344, the court awarded CBS damages of $1,500 for the unauthorized use of the photographs, names and likenesses of Springsteen and Cheap Trick.

The court also issued an injunction barring Waters and Beggar's Banquet from continuing to infringe

Springsteen's copyrights and from recording any concert or performance by Springsteen or Cheap Trick.

CBS, Inc. v. Waters, Case No. CV-79-2559-MML (C.D.Cal., Dec. 8, 1980) [ELR 2:18:7]

Briefly Noted:

Newspapers.

The application of two Chattanooga, Tennessee newspapers for approval of a joint newspaper operating arrangement has been granted by former Attorney General Benjamin Civiletti. However, the newspapers' partial immunity from antitrust suits will not include: the joint physical production of the two papers, the discontinuance of the Sunday Chattanooga Times, or the change in the edition time of the Saturday News-Free Press from morning to afternoon.

Attorney General Order No. 915-80 In re Application of The Times Printing Co. (November 6, 1980) [ELR 2:18:7]

Libel.

Jackie Collins Lerman is a writer whose name was used erroneously and without consent by a magazine both on its cover and in the caption accompanying a photograph of a naked woman and an orgy scene. Lerman has been granted summary judgment by a Federal District Court in New York City on her invasion of privacy claim under sections 50 and 51 of the New York Civil Rights Act against the magazine's publisher and distributor. The court ruled that Lerman's name was used for a "commercially exploitative effect rather than for the purpose of informing the public about a newsworthy event." In response to a motion for reconsideration, the court noted that even if Lerman were a public figure, she would not have had to demonstrate actual malice because her name had been used in a "completely exploitative, commercial fashion." The distributor's contention that it did not "use" Lerman's name was rejected by the court. And the fact that the distributor may not have known that Lerman's name was used without consent was "irrelevant" in considering compensatory damages and injunctive relief.

Lerman v. Chuckleberry Pub., Inc., 496 F.Supp. 1105 (S.D.N.Y. 1980) [ELR 2:18:7]

Previously Reported:

The United States Supreme Court has declined to hear Alioto v. Cowles Communications, Inc., in which the Court of Appeals upheld a $350,000 judgment in favor of former San Francisco mayor Joseph Alioto who claimed that he had been libelled by an article which appeared in Look magazine in 1969. Attorneys for Look have announced that they will seek to have the libel judgment set aside and to have the original case reopened on the ground that new testimony from Jimmy Fratianno would support the magazine's story. (ELR 2:13:3)

The Fourth Circuit Court of Appeals has denied a petition for a rehearing by the six movie company defendants in Wilder Enterprises v. Allied Artists. (ELR 2:17:2)

The following cases have been published: Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (2:15:6; 1:7:7); Lyons v. New American Library, 432 N.Y.S.2d 536 (2:15:2); Carson v. Here's Johnny Portable Toilets, Inc., 498 F.Supp. 71 (2:12:1); Ann-Margret v. High Soc. Magazine, Inc., 498 F.Supp. 401 (2:10:4); Allied Artists Pictures Corp. v. Rhodes, 496 F.Supp. 408, 207 USPQ 630 (2:7:1); Factors Etc., Inc. v. Pro Arts, Inc., 496 F.Supp 1090 (2:9:3); Follett v. New American Library, Inc., 497 F. Supp. 304 (2:8:2); Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905 (2:14:6).
[ELR 2:18:8]

NEW LEGISLATION AND REGULATIONS

Federal Alcohol Bureau proposes regulation to prohibit athletes from appearing in advertisements for alcoholic beverages

The Federal Bureau of Alcohol, Tobacco and Firearms has proposed a regulation which will prohibit active athletes from appearing in advertisements for alcoholic beverages of all kinds, including beer and wine. The proposed regulation also will prohibit "representations" of active athletes - presumably their names and likenesses - from appearing on labels for alcoholic beverages. And it will prohibit the depiction of athletic events in advertisements for alcoholic beverages, where the participants are shown consuming such beverages either before or during the athletic event itself.

The Bureau has proposed these regulations because it believes that the presence of an active athlete in an alcoholic beverage advertisement "conveys the erroneous impression that the use of the advertised product is conducive to the development of athletic skill or physical prowess" whether or not the athlete is shown in uniform or in an athletic setting. The Bureau also has noted that athletes are the objects of "hero-worship," and it has concluded that showing athletes in alcoholic beverage advertisements may mislead "young consumers" into believing that the use of alcohol helps the development of athletic skill.

The proposed regulations, if adopted, will merely codify Revenue Rulings previously issued which already prohibit the use of prominent athletes in advertisements for alcoholic beverages (Revenue Ruling 54-513) and the portrayal of athletic events in connection with such advertisements (Revenue Ruling 54-326).

On the other hand, the Bureau also is considering whether the outright ban it has proposed is necessary to prevent the erroneous impressions it is concerned about. It has therefore specifically solicited comments on whether other means would be adequate, such as requiring the advertisement to include a disclaimer in which the athlete says that drinking is not the way to become a good athlete.

The Bureau also has reported that several people have urged it to prohibit celebrities other than athletes, as well as athletes themselves, from appearing in advertisements for alcoholic beverages. However, the Bureau has not proposed any such regulation at this time and has not indicated an intention to do so.

Comments on the proposed regulations may be submitted not later than March 19, 1981 to: Chief, Regulations and Procedures Division, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 385, Washington, D.C. 20034.

Further information may be obtained from James A. Hunt or Roger L. Bowling, Research and Regulations Branch, at (202) 5667626; or David W. Brokaw, Commodity Classification Branch, at (202) 566-7401.

Notice of Proposed Rulemaking, Labeling and Advertising Regulations Under the Federal Alcohol Administration Act, 45 Federal Register 83530 (December 19, 1980) [ELR 2:18:2]

DEPARTMENTS

In the Law Reviews:

Artists, Art Collectors and Income Tax by Alan L. Feld, 60 Boston University Law Review 625-662 (1980)

Schoolbooks, School Boards, and the Constitution, 80 Columbia Law Review 1092-1124 (1980)

Legal Rights of the Fine Artist by Donald M. Millinger, 30(4) Journal of Communication 10-22 (1980)

Shield Laws and the Separation of Powers Doctrine by Louis A. Day, 2(4) Communications and the Law 1-16 (1980)

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