

RECENT CASES

Unauthorized use of Charlie Chaplin films by CBS results in \$725,000 jury verdict against the network which trial judge has refused to set aside

On December 26, 1977, the day after Charlie Chaplin's death, CBS broadcast a half-hour retrospective on Chaplin's career. Although CBS had a "rough-cut" obituary in its files, primarily comprised of public domain footage, Richard Salant, the president of CBS News, decided to air a newly-prepared biography. Forty percent of the material in the biography consisted of excerpts from copyrighted Chaplin films, including "The Kid," "The Gold Rush," "The Circus," "City Lights," "Modern Times" and "The Great Dictator." The

excerpts were used without the consent of the copyright owner, Roy Export Co.

Roy and its licensees brought an action against CBS for statutory copyright infringement, common law copyright infringement - based on Roy's rights in a tribute Compilation containing highlights from Chaplin's films which was prepared by Bert Schneider and director Peter Bogdanovich for showing at the 1972 Academy Awards telecast - and for unfair competition - based on Roy's rights in "The Gentleman Tramp," a retrospective film biography of Chaplin produced in 1974 by Bert Schneider. The action has resulted in a jury verdict of approximately \$725,000 in compensatory and punitive damages to Roy. The verdict has been upheld by a Federal District Court in New York City which denied CBS' motion for judgment notwithstanding the verdict.

CBS' principle defense was that its use of excerpts from the Chaplin films constituted fair use. According to

CBS, the Chaplin obituary was a news report which required the use of the film clips to illustrate Chaplin's artistic genius. Allowing the copyright owner to prevent such use would deprive the public of historical and biographical information about Chaplin, stated CBS. The court found, however, that CBS did not restrict itself to using facts about Chaplin's life, but instead used Chaplin's artistic works themselves. CBS could have used illustrative excerpts from other films which were in the public domain. Thus, the jury could have determined that commercial gain, rather than educational benefit to the public, motivated CBS' decision to air the retrospective.

Chaplin's films also were not newsworthy in themselves as were the Zapruder films of President Kennedy's assassination (*Times Inc. v. Bernard Geis Associates*, 293 F.Supp. 130). The court pointed out that the newsworthiness argument misconceives the policies

of the copyright laws. Under CBS' view, the more successful an artist is, the less he can protect or demand payment for the use of his work. Yet the copyright law bestows a monopoly right on the copyright owner to encourage artistic creativity and would be undermined by CBS' bootstrapping argument.

CBS also pointed out that only short excerpts from each film were broadcast - the longest being three minutes and 45 seconds from "The Kid." But, CBS' use was quantitatively substantial with respect to some of the films and qualitatively great overall, according to the court, particularly since the scenes used were among Chaplin's best and each was central to the film in which it appeared. The question of the substantiality of CBS' use was properly submitted to the jury, ruled the court.

The jury's finding that CBS' use of the copyrighted material was in bad faith, as opposed to the good faith and fair dealing presumed in a fair use defense, was

supported by ample evidence, the court ruled. On several occasions, CBS sought to use excerpts from the Chaplin films but was denied permission. CBS obtained a copy of the Compilation from NBC by misrepresenting that it would use excerpts only on the nightly news, thereby violating "industry standards of ethical behavior."

CBS also attempted to characterize the Compilation as part of a newsworthy event, again in order to avail itself of a fair use defense. But the fact that the Compilation was broadcast in connection with Chaplin's return to the United States in 1972 after a lengthy absence - admittedly a newsworthy event - did not justify CBS' use of the entire Compilation.

A First Amendment argument was also raised by CBS based on its view of the Compilation as a news film conveying "the detrimental effect that political extremism can have on a nation's cultural and artistic life."

However, the court determined that CBS' bad faith appropriation of the Compilation rendered First Amendment protection inappropriate.

CBS also argued that the common law copyright in the Compilation was invalid because the Compilation consisted of intangible editing and production services and had not been reduced to the tangible form required for copyrightability. However, tangibility, as used in copyright law, only requires that a work exist as more than a mere idea. The presence of previously copyrighted material in the Compilation did not diminish the originality, skill and talent contributed to the project. The editors selected and arranged scenes and selected timing, pacing and theme, resulting in a "separate, individual creative expression."

The parties agreed that the showing of the Compilation during the 1972 Academy Awards broadcast was not a publication. However, CBS claimed that the Academy's

ownership of the statutory copyright in the entire 1972 Awards show precluded a common law copyright for any portion of the presentation. This argument was rejected by the court since the Academy Awards telecast was a derivative or collective work just as the Compilation was a collective work.

And CBS' argument that Schneider and his associates were employees for hire was also rejected. The court ruled that there was insufficient evidence of artistic control over the production of the Compilation by the Academy. It never paid Roy for the use of the Chaplin films or for the creative services of Chaplin, Schneider or Bogdanovich; Roy gave the Academy a one-time only license to broadcast the Compilation and "[a]n owner does not license his own use." The parties never intended that the Academy or the individual creators would own the copyright in the Compilation.

CBS argued that Roy's infringement claims arose under the federal copyright law and could not be the basis of a state unfair competition claim. The court ruled that the unfair competition claim was not preempted because the state and federal causes of action were sufficiently dissimilar. The New York law of unfair competition bans "any form of commercial immorality" while federal copyright law protects copyrighted works against mere copying even when done in good faith. Roy had presented sufficient evidence to establish CBS' unfairness. Further, the Compilation was protected only by state law and CBS could not contend that the state law of common law copyright preempted the state law of unfair competition.

CBS pointed out that in 1972, it had been granted the right by Columbia Pictures, the then United States theatrical distributor for the Chaplin films, to use excerpts from "Modern Times" and "City Lights" in connection

with a "60 Minutes" program. The authorization stated that CBS was granted "in perpetuity, the irrevocable non-exclusive right to use and exploit the footage as part of the [60 Minutes] broadcast or any expanded, abridged or changed version thereof." However, the jury reasonably could have concluded that the Chaplin obituary was not an expanded, abridged or changed version" of the "60 Minutes" segment, and that Columbia, in any event, did not have the authority to license CBS' use of the film for the obituary. Further, CBS had used film clips in the obituary which were not covered under the Columbia licensing agreement.

The court therefore refused to set aside the jury's verdict against CBS for \$7,280 in statutory damages for copyright infringement; \$1 in compensatory damages for common law copyright infringement (because it was not shown that the Compilation was commercially impaired by CBS); \$300,000 in punitive damages for common

law copyright infringement, because the unauthorized use of the Compilation constituted an appropriation of the skilled talent of its creators, and because Richard Salant had testified that he would have used the footage even if he had known of Roy's objection, thereby substantiating a possible finding of reckless indifference by CBS to Roy's rights; \$300,000 in compensatory damages for unfair competition based upon evidence that "The Gentleman Tramp" was commercially impaired; and \$110,000 in punitive damages for unfair competition. The amount of punitive damages was upheld as an effective deterrent in view of CBS income.

In its discussion of damages, the court noted that CBS had profited from its broadcast of the Chaplin biography in that it had achieved an increased audience, unmeasurable goodwill with its affiliates, and increased stature and prestige among its competitors. However, because such profits could not be ascertained readily, an

additional award of statutory damages of \$5,000 was found appropriate. This award was based on the infringement of six separate copyrighted films.

CBS did achieve one small victory however. Roy's motion for an award of attorneys fees was denied. Despite the deliberate quality of the CBS infringement, the company had not been unnecessarily dilatory and, at least for the purpose of awarding attorneys fees, its defenses were found "of sufficient substance to negate a finding [CBS'] conduct was in bad faith or morally culpable," the court rules.

Roy Export Co. v. Columbia Broadcasting System,
CCH Copyright Law Reports, Para. 25,212, 208 USPQ
581 (SDNY 1980) [ELR 3:3:1]

Star Wars' R2D2 did not infringe copyright to robots in Silent Running

"Star Wars" was an epic science fantasy film. It also sparked a copyright infringement lawsuit of epic proportions between its distributor, 20th Century-Fox, and the distributor "Battlestar Galactica" and "Silent Running," Universal City Studios.

Fox originally filed suit against Universal in 1978 alleging that Universal's "Battlestar Galactica" infringed the copyright to Fox's "Star Wars." Judge Irving Hill of the Federal District Court in Los Angeles ruled against Fox on that contention in August of 1980 without even conducting a trial. Judge Hill granted a motion for summary judgment filed by Universal on the grounds that the story lines and central characters of the two films were "substantially different," and on the grounds that the "total concept and feel" of the two "are vastly

different." (ELR 2:10:1) That ruling is now on appeal to the Court of Appeals in San Francisco.

The similarities - or lack thereof - between "Star Wars" on the one hand and "Battlestar Galactica" on the other are only one aspect of the case, however. In response to Fox's lawsuit, Universal filed a counterclaim against Fox alleging that "Star Wars" was itself an infringement of "Silent Running," a science fiction movie released by Universal in 1972. Three of the main characters in "Silent Running" were virtually identical robots named "Huey," "Dewey" and "Louie." According to Universal, "Star Wars" R2D2 bore an uncanny if not intentional similarity to "Huey," "Dewey" and "Louie," and it was on this basis that Universal counterclaimed against Fox for copyright infringement.

Universal's counterclaim was dealt with by Judge Hill even before he disposed of Fox's complaint. In April of 1979, Judge Hill dismissed Universal's counterclaim -

also without a trial - in response to a motion for summary judgment filed by Fox. In an oral decision from the bench, he ruled that "no one has a monopoly on the use of robots in works of art dealing with space. That is an idea, and the idea has apparently been around for a very long time. No one possesses proprietary rights in that idea." Moreover, Judge Hill found that the robots in the two films "are greatly different in appearance and in their style and method of locomotion. R2D2 communicates in sounds, communicates a great deal. The three robots in Silent Running ... do not communicate in sound. The whole relationship of the robot to the picture and to the actors is different in the two movies. The character of R2D2 just doesn't embody and doesn't steal away in any sense the total concept or feel of the three robots in Silent Running. It is just impossible to say that Star Wars has preempted, stolen, taken away or used, or

to put it in legal terms, infringed, the expression of ideas in *Silent Running*," Judge Hill ruled.

Universal immediately appealed that decision. In its brief to the Court of Appeals, Universal itemized seventeen points of similarity between *R2D2* and "*Huey*," "*Dewey*" and "*Louie*," including physical appearance, manner of walking, method of communication, expression of emotions, and relationships with other characters. Universal argued that Judge Hill had incorrectly applied the legal test for similarity - a test which the appellate court itself had enunciated in *Krofft v. MacDonald's*, 562 F.2d 1157 (9th Cir. 1977).

The Krofft test for similarity has not met with general acclaim. Judge Hill himself appeared critical of it in his decision granting Fox's motion for summary judgment. It was, he suggested, less than clear in describing what the requirements for "substantial similarity" are. Nevertheless, the Court of Appeals did not take the opportunity

presented to it by Universal's appeal to clarify its meaning any further. Rather, in a very brief, two and one-half page Memorandum Opinion, the Court of Appeals has affirmed Judge Hill's dismissal of Universal's counterclaim. The appellate court itself viewed "Star Wars" and "Silent Running," and it simply ruled that its review of the movies satisfied it that Judge Hill had correctly concluded, as a matter of law, that they contain no substantial similarity of expression. The Court of Appeals did not explain why it agreed with Judge Hill. Perhaps the Court of Appeals feels that Fox's appeal of Judge Hill's dismissal of its complaint against Universal and "Battlestar Galactica" presents a better case for explaining or amplifying on the test for similarity it expressed four years ago in *Krofft v. MacDonald's*.

Twentieth Century-Fox Film Corp. v. MCA, Inc., Case No. 79-3342 (9th Cir., May 8, 1981) [ELR 3:3:3]

Actors' Equity franchising system for theatrical agents is exempt from antitrust laws

Actors' Equity Association's licensing system for regulating the commissions charged by theatrical agents is exempt from the antitrust laws, the United States Supreme Court has ruled.

Equity, a national union representing approximately 23,000 actors and actresses, has collective bargaining agreements with almost all major theatrical producers, both on and off-Broadway and throughout the United States. During the 1920s, rates of compensation established in the collective bargaining agreements then in effect often were undermined by theatrical agents who would extract high commissions from vulnerable performers. In 1928, Equity adopted regulations requiring

Equity members to deal only with those agents who obtained Equity licenses.

To obtain a license, agents had to agree to forego commissions on employment contracts under which performers received only scale wages. Commissions could not be taken on out-of-town expense money; commissions were limited on wages within 10 per cent of scale pay; and agents had to allow clients to terminate representation contracts if the agent were not successful in procuring employment within a specified period.

In the late 1970s, H.A. Artists & Associates resigned from a trade association representing theatrical agents rather than accept Equity's regulations, and it then brought an action contending that the regulations violated Sections 1 and 2 of the Sherman Act.

In an opinion by Justice Potter Stewart, the U.S. Supreme Court has upheld District Court and Court of Appeal decisions (ELR 2:11:3) dismissing H.A. Artists'

complaint on the grounds that the statutory labor exemption (under the Clayton and NorrisLaGuardia Acts) protects Equity's agent franchise system. The system did not involve a combination or agreement between Equity and any "non-labor groups" such as producers or the franchised agents and therefore did not lose its protected status. And, relying on *American Federation of Musicians v. Carroll*, 391 U.S. 99, the Court determined that the agents themselves were a "labor group" because of their substantial "economic inter-relationship" with Equity. The union could not eliminate wage competition without regulating the fees charged by the agents who are 'in a powerful position to evade the union's negotiated wage structure.'" The franchise system promoted the union's legitimate self-interest by functioning as a substitute for an Equity-run hiring hall, stated the court.

However, the court ruled that the franchise fees charged by Equity, which ranged from \$200 for the

initial franchise to \$60 per year per agent, were not justified. Justice Brennan dissented from the majority opinion concerning the franchise fee, finding that the approximately \$12,000 collected annually by Equity was not incommensurate with Equity's administrative expenses, and that the antitrust immunity for the franchise system would include the franchise fee as "an incident of a legitimate scheme of regulation."

H.A. Artists & Associates, Inc. v. Actors' Equity Association, Case No. 80-348 (U.S.Sup.Ct., May 21, 1981)
[ELR 3:3:4]

"Godzilla" loses showdown with Sears, Roebuck & Co.'s "Bagzilla" in trademark infringement and unfair competition action

"Bagzilla," a "comic, helpful, personified reptilian creature" who appears on boxes of garbage bags sold by Sears, Roebuck & Co. has won a clean sweep in its legal battle with "Godzilla," a "fictitious, gigantic, green, lizard-like monster" who appears in movies and a television cartoon series. A Federal Court of Appeals in California has upheld the dismissal of an action brought by the Toho Company, the owner of the Godzilla name and character, and by its merchandising representative, alleging trademark infringement and unfair competition.

Essentially the court ruled that Toho failed to establish that Sears intended to cause consumer confusion as to the source or sponsorship of its garbage bags; and thus, a requisite element of Toho's claims of false designation of origin, trademark infringement and unfair competition was not proven. The difference in the products and in the names of the creatures and the marketing channels, plus the facts that Sears' name is displayed on its

packages and that the creature Bagzilla is a humorous creature rather than an exact copy of Godzilla rendered "implausible" Toho's argument that Sears intended to confuse consumers. Sears only intended to make a pun, ruled the court.

In a footnote, the court referred to the case of Universal City Studios, Inc. v. Montgomery Ward & Co., Inc., 207 USPQ 852 (ELR 2:23:2) in which Ward's sale of garbage disposals bearing the names "Jaws One," "Jaws Two" and "Jaws Power" was enjoined by a Federal District Court in Illinois. The Illinois court found that Ward had used the "Jaws" name with an intent to capitalize on Universal's trademark. The Court of Appeals, however, noted that "an intent to capitalize on a mark is not enough" demonstrating that a company intended to profit by confusing consumers is required.

Toho's claim of federal common law unfair competition was also rejected since the protection against unfair

competition afforded by the Lanham Act is limited to an action for trademark infringement or for the false designation of the origin of goods, not to all acts defined as unfair competition under various state laws.

Toho's claims under certain international treaties were also unsuccessful as was the company's argument that Sears had violated California's anti-dilution statute (California Business and Professions Code Section 14330). Sears' use of "Bagzilla" did not impair "the effectiveness of the name and image of Godzilla," the court ruled. Allegations by Toho that Sears had engaged in passing off, misleading advertising or misappropriation were also dismissed, again based upon the absence of consumer confusion.

Toho Company, Lid. v. Sears, Roebuck & Co., Case No. 78-3739 (9th Cir., May 18, 1981) [ELR 3:3:4]

New York common law protects jazz recordings made prior to 1972, when federal copyright law was amended to protect recordings

Tono A.G., a Swiss corporation, filed a lawsuit in Federal District Court in New York on November 9, 1978 against Recordcraft Sales Corp., Raleigh Records, Inc., Hall of Fame Records, Inc., and American Album and Tape, Inc., alleging that the defendants misappropriated several of its jazz recordings. In its lawsuit, Tono sought (1) damages for the defendants' past use of recordings containing Tono's works; (2) an accounting for profits realized by the defendants from the sale of records containing Tono's works; and (3) an injunction prohibiting the defendants from manufacturing, distributing, copying and selling any such recordings and ordering them to return to Tono all tapes and metal masters of Tono's

works and to destroy all records in their possession that contained Tono's works.

Denying that they "pirated" Tono's recordings, the defendants contended that Tono failed to establish its title to the recordings and that Tono's claims were barred by the equitable doctrine of laches (which provides that when one delays bringing a lawsuit and that delay is prejudicial to the defendant, the lawsuit will be barred). After a three-day trial without a jury, the court found that Tono had sustained its burden of establishing that it held title to the recordings and that Tono's claim was not barred by laches.

Under the rule of *Capitol Records, Inc. v. Greatest Records, Inc.*, 252 N.Y.S.2d 553 (1964), the Court concluded that "[a]lthough the transfers of title to these recordings took place before federal copyright protection was extended to protect recordings (17 U.S.C. section 102 (1976)), it is undisputed that, when they were

made, the recordings could be owned, and that such ownership was protected by New York common law." The Court added that ownership of recordings is determined from tracing the title to the recordings.

The defendants contended that Dial Records, which had transferred the recordings to Tono, did not possess good title to the recordings because it had previously transferred certain rights to the recordings to third parties. Tono argued, however, that those third-party contracts had been breached and that Dial Records therefore was free to transfer exclusive rights to those recordings to Tono. The court simply noted that under *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955), "[t]he existence of possible rights in third parties is insufficient to defeat plaintiff's title, or to establish defendants' title."

Recordcraft, one of the defendants, further contended that it had been granted non-exclusive rights to use some

of the recordings. Recordcraft did not, however, produce the alleged non-exclusive agreement or any supporting documents. Furthermore, Tono's expert testified that the granting of a non-exclusive right to issue records, using the same label under which the grantor is simultaneously issuing the same records, is not the norm in the recording industry. The Court thus found that Recordcraft had not acquired the nonexclusive rights it claimed.

The defendants also insisted that Tono's claim should be barred under the equitable doctrine of laches because from 1960 to 1970, Recordcraft openly sold albums containing recordings to which Tono later claimed title and because Tono's delay in filing this lawsuit impaired the defendants' ability to substantiate their defense. Tono established, however, that it did not learn of the defendants' sale of such records until shortly before it filed its lawsuit. Relying on Lottie Joplin Thomas

Trust v. Crown Publishers, Inc., 592 F.2d 651 (2d Cir. 1978) and Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976), the court found that Tono "did not unduly delay commencing this action and that defendants have not established prejudice to them caused by any delay which has occurred."

Having found that Tono had succeeded in establishing its title and that its claim was not barred by laches, the court awarded Tono damages, an accounting and injunctive relief. In addition, the court ordered that unless the parties were able to agree upon the amount of damages by March 3, 1981, the action would be referred to a magistrate for supervision of an accounting and a determination of the amount of damages.

Tono, A.G. v. Recordcraft Sales Corp. CCH Copyright Law Reports, Para. 25,228 (SDNY 1981) [ELR 3:3:5]

Trial required in suit against ABC for taping and broadcasting undercover congressional investigation of health insurance abuse

The American Broadcasting Company and the U.S. House of Representatives Select Committee on Aging have been sued by an independent insurance agent over events surrounding a Select Committee investigation of abuses in the sale of supplemental health insurance to the elderly. A member of the Select Committee's staff, after having been hired by the agent to sell insurance, arranged a meeting for the agent with two other members of the committee's staff who posed as potential buyers. At the meeting, the agent presented his standard cancer insurance promotion; the meeting was surreptitiously taped and portions were broadcast on the ABC Nightly News.

In his suit, the agent is charging ABC and the Select Committee with violations of the Federal Eavesdropping Statute (18 U.S.C. Section 2510, et seq.), the Maryland Wire-tapping and Surveillance Act, the Fourth Amendment of the Constitution, and with the common law torts of civil conspiracy, malicious interference with business relations and invasion of privacy.

The court considered ABC's motion to dismiss the agent's Fourth Amendment claim and motion to dismiss his claim under the Federal Eavesdropping Statute, granting the former but denying the latter. The court dismissed the insurance agent's Fourth Amendment claim that he was damaged by ABC's unconstitutional search and seizure, because the Fourth Amendment does not require that a warrant be issued for governmental electronic recording of a private conversation when one of the parties to the conversation consents to the taping. A

person has no reasonable expectation of privacy when he misplaces a confidence, the court explained.

The Federal Eavesdropping Statute prohibits unauthorized electronic surveillance. The court's finding that the insurance agent did not have a reasonable expectation of privacy under the Fourth Amendment did not preclude the possibility that he may have had a reasonable expectation of privacy for purposes of the Federal Eavesdropping Statute. Congress indicated that the question of whether a person had a reasonable expectation of privacy is to be decided on a case-by-case basis. One factor is whether the person was engaged in criminal activity, because "one contemplating illegal activities must realize and risk that his companions may be reporting to the police." In this case, the agent was not engaged in criminal activity; he was making a standard salespitch. In addition, the conversation transpired in a private home into which the agent was invited. Under these circumstances,

concluded the court, it was reasonable for him to expect that his conversation would not be taped or overheard.

The Eavesdropping Statute exempts government officials acting under "color of law." The court rejected ABC's assertion that because it was acting with congressional committee staff members, it was acting under the "color of law" and was therefore exempt. Extending protection to private individuals acting in concert with government officials, when their purpose is self-serving, would thwart the act's overriding concern - the protection of an individual's privacy. To be exempt, decided the court, ABC would at least have to show that its only purpose in taping the meeting was to aid the congressional subcommittee. This must be shown at trial, the court ruled.

The act also exempts private persons who intercept with the consent of one of the parties to the conversation and who do not act "for the purpose of committing any

criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious acts." ABC's purpose in taping and broadcasting the meeting must also be determined at trial, said the court.

In a separate opinion, the court ruled that the select committee and its staff, in allowing the taping and broadcasting by ABC, are not protected by the Speech and Debate Clause. The Speech and Debate Clause of the Constitution does not protect against an alleged violation of an individual's Fourth Amendment rights, because the committee had ample opportunity to obtain a warrant for the taping prior to the meeting. Furthermore, permitting the ABC broadcast was not "an integral part of the deliberative and communicative process' of the select committee. The court refused to extend the doctrine of Official Immunity - conferring absolute immunity on government officials from discretionary acts

within the scope of their authority to the Select Committee, but held that it may assert a qualified privilege. This would absolve the committee and its staff from liability upon a showing that they had good faith, reasonable grounds for believing their conduct did not violate the constitution.

Benford v. American Broadcasting Company, 502 F.Supp. 1148, 1159 (D.C.Md. 1980) [ELR 3:3:5]

Circus, Circus stagehands are an appropriate bargaining unit, and hotel's activities in response to union organizing were unfair labor practices, Federal Court of Appeals decides

A Federal Court of Appeals had ruled that the stagehands of the Circus, Circus Hotel & Casino in Reno,

Nevada are an appropriate bargaining unit and that the hotel management had engaged in unfair labor practices in responding to the stagehands' organizational activities.

The National Labor Relations Board found that the entertainment department supervisor of the hotel had questioned three of the six stagehands about their union membership and had stated his reluctance to see a union formed at the hotel at that time. Questioning of employees concerning union activities is not a per se violation of the National Labor Relations Act. However, the court upheld the Board's decision that the circumstances in this case suggested that the interrogation of the stagehands was coercive and an unfair labor practice.

The firing of two stagehands who were actively organizing fellow employees and the hotel's refusal to replace the fired workers until after an election was held also were ruled unfair labor practices. The employer stated

that, the two discharged employees had been too "obvious" in their union activities. But the employees were bona fide employees and were not on the payroll of the union for organizing purposes, as contended by Circus, Circus.

Wage increases were granted to two stagehands prior to the union election; such increases "generally carry a presumption of illegal motive." However, Circus, Circus had not been given an opportunity to justify the timing of the wage increases and was entitled to do so. The court therefore found that the reference to the wage increases as an unfair labor practice, in the NLRB's order should have been deleted.

The approved unit was small, but all of the manual employees of the hotel and the casino complex did not have to be included in the same unit. And the choice of a unit of stagehands was not arbitrary and capricious," stated the court, as long as the employees shared "a substantial

community of interest sufficient to justify their mutual inclusion in a single bargaining unit." The stagehands all performed identical duties, had similar training or experience, worked in a particular part of the hotel, and did not work with other maintenance workers.

The NLRB order requiring Circus, Circus to cease and desist from its unfair labor practices and to bargain with the union was found appropriate and the court ordered its enforcement as modified.

National Labor Relations Board v. Circo Resorts, Inc.,
Case No. 79-7632 (9th Cir., May 26, 1981) [ELR 3:3:6]

Briefly Noted:

Cable TV.

A local Board of Public Utilities in New Jersey denied with prejudice an application for a cable television franchise because the cable company had violated an Administrative Code provision requiring notice to other applicants before sending any substantive communications to the Board. The company violated the provision by sending the Board an ex parte letter "incorporating changes, modifications, clarifications or further explanations of its initial application" without first giving notice to other applicants of its intent to do so. On appeal, a New Jersey appellate court affirmed, holding that the sending of the letter was in violation of the rule whether or not the letter was intended to be communicated surreptitiously. The court reasoned that "the prior notice

provisions of the Administrative Code are an integral part of the regulatory process designed to eliminate even the appearance of impropriety in the award of CATV franchises at the municipal level."

Micro-Cable Communications Corp. v. Ordinance No. 821, 422 A.2d 780 (N.J.App. 1980) [ELR 3:3:7]

Libel.

In a libel action by a police officer against the Altus Times-Democrat for accusing the officer of kidnapping a youth from his home at gunpoint, the Supreme Court of Oklahoma has affirmed a jury's \$20,000 award to the officer. The reporter based his story on his overhearing a one-sided telephone conversation of an assistant district attorney talking with his superior about the matter. The

reporter made no personal contact with anyone involved in the incident before writing the story. The newspaper's editor assumed the reporter had checked with the district attorney. She asked the reporter if he had "checked it out," and the reporter replied "yes." There was no detailed discussion of the story between the editor and the reporter. The court found this was sufficient evidence to support the jury's finding of "actual malice," knowing or reckless disregard for the truth, or "entertaining serious doubts as to the publication's truth."

Akins v. Altus Newspapers, Inc., 609 P.2d 1263 (Okla. 1980) [ELR 3:3:7]

Previously Reported:

The following cases have been published: United States v. CBS Inc., 1980-81 Trade Cases, Para. 63,594 (2:11:1); Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 1980-81 Trade Cases, Para. 63,736 (2:17:2); U.S. v. Columbia Pictures Industries, Inc., 1980-81 Trade Cases, Para. 63,698 (2:18:6) Columbia Pictures Industries, Inc. v. Moyer. 1980-81 Trade Cases, Para. 63,878 (2:22:2).

DEPARTMENTS

Book Notes:

"The Hollywood Guide to Film Budgeting and Script Breakdown" by Danford Chamness; "Brooks' Standard Rate Book" compiled by Stanley J. Brooks

The cost of producing a "major motion picture" these days is said to be some \$ 10 million, on average. "Heaven's Gate" cost three or four times that average, but some hugely successful films have cost only a fraction of the average. Why do films cost so much? Why the tremendous variations in their costs? And how does a producer estimate in advance what a particular picture is apt to cost? Considering the importance of these questions to every person who has ever wanted to convert a typewritten script into an actual movie, remarkably little has been written about the art and science of film budgeting.

In 1977, however, Danford Chamness did write a 224 page book on this subject which is now available in a revised edition. Organized around a single hypothetical shooting script, the book is a guided tour through the often complex process of estimating the expense of

making what is in reality a one-of-a-kind product. Illustrated throughout with sample forms, it appears to be as practical an education as can be obtained, short of on-the-job training, in the methods involved. Though written four years ago, inflation has not tarnished the book, because it does not purport to be a catalogue of specific costs. For that sort of information, one can turn to the "Brooks Standard Rate Book."

"Brooks Standard Rate Book" is an annual that has been published since 1958. The most recent version is the 1980-81 edition which contains film and videotape wage scales for all of the guilds and unions involved in motion picture and television production, including the new SAG salary schedules.

Both books are published by The Stanley J. Brooks Company, 1460 Westwood Boulevard, Suite 303, Los Angeles California 90024; phones (213) 470-2849, 279-1108. "The Hollywood Guide to Film Budgeting"

retails for \$19.95 including sales tax and postage, and "Brooks Standard Rate Book" is \$17.90 including sales tax and postage. [ELR 3:3:7]

In the Law Reviews:

Artists, Art Collectors and Income Tax by Alan L. Feld, 60 Boston University Law Review 652-662 (1980)

Jurisdictional Antitrust Considerations in the Regulation of the New Communications Technologies by Michael Botein, 25 New York Law School Law Review 863-903 (1980?)

FCC Comparative Renewal Hearings: The Role of the Commission and the Role of the Court, 21 Boston College Law Review 421-454 (1980)

Copyright and the New Communications Technologies
by Edward B. Samuels, 25 New York Law School Law
Review 905-923 (1980)

California Expansion of First Amendment Does Not In-
fringe on Federally Protected Rights, 32 Mercer Law
Review 637-645 (198 1)

Censorship in the Public School Library - State, Parent
and Child in the Constitutional Arena, 27 Wayne Law
Review 167-191 (1980)

How to Prevent Trademarks From Becoming Generic by
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