RECENT CASES

"Tarzan, The Ape Man" starring Bo Derek is approved for theatrical release as a "remake" under 1931 licensing agreement between MGM and Edgar Rice Burroughs

MGM's remake of the film "Tarzan, The Ape Man," starring Bo Derek, was released theatrically this past summer after a series of courtroom escapades rivaling Tarzan's suspenseful rescues of Jane.

Edgar Rice Burroughs, Inc., the owner of author Burroughs' interests in his Tarzan works, previously had been denied injunctive relief which would have restrained MGM from producing the remake, Burroughs v. Metro-Goldwyn-Mayer, Inc., 491 F.Supp. 1220 (ELR 2:9:1). In July of 1981, Burroughs sought to prevent the release of the finished film. Burroughs contended that because the MGM film changed the original story, it was not a remake and therefore violated the 1931 agreement by which Burroughs originally granted MGM a nonexclusive license to use the Tarzan characters in an original screenplay for a motion picture. Judge Henry F. Werker approved the release of the film, as edited, and ruled that Burroughs' motion for a preliminary injunction pending a resolution on the merits "must be deemed to continue."

Judge Werker first noted that MGM's right to use the Tarzan character was protected by the renewal copyright in the literary work Tarzan of the Apes. MGM had argued that it had merely licensed the right to use the Tarzan characters rather than the copyrighted novels in which they appeared, and hence, was not subject to restrictions based upon the copyright laws. But the court declared that the Tarzan character was sufficiently delineated to be entitled to copyright protection itself "After all, Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle, and strong. He is Tarzan," said the court,

The court then held that the film was based substantially on the screenplay for the original film and that there were no material changes from that screenplay. The 1931 agreement stated that each remake had to bear the same title as the original MGM film and had to be based substantially on the first MGM screenplay, without material changes or material departures from the original MGM story line. A comparison by the court of the themes, adventures, plot developments, and characterizations of the "Tarzans" revealed substantial similarities between two films.

Burroughs' claimed that the MGM film was no longer suitable for children because of certain nude scenes. Judge Werker pointed out that the original film contained scenes "which for its time were rather suggestive." And the shift in social mores after 50 years necessitated changes which updated the story without violating the 1931 agreement.

An attempt by the Burroughs heirs to terminate MGM's rights under the original agreement pursuant to section 304(c) of the 1976 Copyright Act, was ruled a nullity in the earlier decision. This finding was reaffirmed by Judge Werker. MGM was not given proper notice of the purported termination.

Burroughs v. Metro-Goldwyn-Mayer, Inc., CCH Copyright Law Reporter, Para. 25,277 (S.D.N.Y. 1981) [ELR 3:10:1]

Styx, The Rolling Stones and The Grateful Dead continue their successful pursuit of unauthorized merchandisers of concert memorabilia

In response to the ELR's recent report on Rock Tours, Ltd., v. Does, 507 F.Supp. 63 (ELR 3:6:2), two subscribers have forwarded decisions which uphold the summary procedures used to seize and dispose of counterfeit merchandise being sold at rock concerts.

A Federal District Court in California has enjoined several individually named defendants, as well as John Does, from manufacturing, selling and distributing "clothing, jewelry, photographs, posters and other merchandise bearing the name, trade name, logo and service mark 'Styx'," or the likenesses of the Styx musicians. At one concert site, the U.S. Marshal seized 400 T-shirts, 200 pins and 300 posters. The court ordered the U.S. Marshal for any district in which Styx sought to enforce the court's order to seize and impound infringing and imitation Styx merchandise.

In Musidor, B.V. v. Great American Screen and in Winterland Concessions Co. v. Great American Screen Designs, Ltd., the criminal contempt conviction of bootleggers of silkscreened T-shirts was upheld by a Federal Court of Appeals. The commercial exploitation of T-shirts which displayed the trademarks of The Rolling Stones, The Grateful Dead and Fleetwood Mac, had been enjoined by a Federal District Court in New York. When it appeared that the preliminary injunction was being violated, the attorneys for Musidor were appointed as special attorneys to prosecute the charges. The court found that Great American had deliberately violated the preliminary injunction - and a sentence of 60 days was imposed against Leon Dymburt, the president and chief operating officer of Great American, and concurrent fines of $10,000 were imposed on Great American itself.

The Court of Appeals found that Great American's guilt had been established beyond a reasonable doubt based on the testimony of a silkscreen technician for the company. Testimony also was presented by a private investigator who had purchased Grateful Dead Tshirts at the Nassau Coliseum after observing the journey of the T-shirts from Great American's factory to the Coliseum.

The appointment of Musidor's attorneys to prosecute the criminal contempt charge did not violate due process, ruled the court. "All of the customary due process rights in a criminal case were accorded," the court said. The court also ruled that since Dymburt's penalty for his offense did not exceed six months, his criminal contempt constituted a petty offense which did not require a jury trial. Great American also was not entitled to a jury trial, because the fines imposed were less than a "serious risk" in view of the $60,000 to $70,000 in gross revenues from the illicit sale of Rolling Stones T-shirts at a single performance by the group.

Rock Tours, Ltd. v. Roach, Civ. Action No. 81-0838 (C.D.Cal., Mar. 6, 1981); Musidor, B.V. v. Great American Screen, Docket No. 81-1140 (2d Cir., August 21, 1981) [ELR 3:10:2]

CBS wins libel suit filed by father referred to in "60 Minutes" broadcast about child custody dispute

CBS has been caught in the cross-fire between two ex-spouses whose earlier battles have been fought in divorce and criminal courts on both coasts. Several years ago, "60 Minutes" broadcast a report on what some call "child stealing" entitled "Take the Children and Run."

The report included several case studies of parents who had taken their children from the custody of their ex-spouses, without consent and in some instances in violation of child custody orders. One of the case studies featured Richard Alfego's child Jolie and his former wife. Alfego was neither named nor shown in the broadcast, but it was reported that he took Jolie from California to Massachusetts in violation of a California custody order. Alfego alleged that although he was not named, his identity was obvious to many, and that his reputation was injured by statements and filmed events which, in context, were inaccurate, unfair and libelous.

CBS contended that it did not libel Alfego, because nothing in the broadcast was false or inaccurate. In response, Alfego did not dispute the truth of the statements and events that were shown. But he asserted that CBS had omitted certain facts that were so significant that the program was unfair and inaccurate. Specifically, Alfego contended that CBS should have reported that he had been awarded visitation rights with his daughter, and that ex-wife had been ordered to post a bond but never did so.

The court acknowledged that a news report must be substantially complete and accurate, and not distorted. However, said the court, the "substantial accuracy" requirement does not prevent broadcasters from airing films which present a specific point of view, nor does it require the inclusion of every fact and detail sympathetic to each side of an issue. It is only necessary that the facts which are selected be substantially true and accurate and do not distort the event being shown. In this case, the court ruled that Alfego's visitation rights, and his ex-wife's failure to post a bond, were minor details the exclusion of which had not undercut the accuracy of those facts and events which were reported.

Alfego also complained that his ex-wife had characterized him, on the air, as a "criminal" and a "thief" The court ruled, however, that these statements were based on objective fact, because Alfego had pleaded "nolo contendere" (no contest) to a felony charge in California based on his having taken his daughter from her mother's custody. Furthermore, the broadcast clearly showed that Alfego's ex-wife was expressing her own personal views and feelings, and she consistently used the phrase "in my opinion." Statements of opinion are not facts, the court noted, and they are not libelous (so long as they are not based on undisclosed falsehoods).

Finally, the court ruled that CBS had not acted negligently in omitting certain details sympathetic to Alfego's view. The court therefore granted CBS' motion for summary judgment.

Alfego v. CBS, 7 Media Law Reporter 1075 (D.Mass. 1981) [ELR 3:10:2]

Under-reporting of admissions by movie theaters results in jury award of $290,000 to nine motion picture distributors

In the motion picture industry, licensing agreements generally provide that exhibitors pay film rental fees based on a percentage of the gross revenues, or gross admissions, received from the exhibition of films. The under-reporting of gross admissions by several Price Enterprise theaters in Virginia resulted in a jury verdict against Price of approximately $290,000, including $170,000 in punitive damages, to nine motion picture distributors.

A Federal Court of Appeals in Virginia has upheld the award, finding that sufficient evidence was presented that Price's theaters were guilty of "a deliberate course of conduct designed to defraud the distributors" by consistently understating their gross receipts over a four year period. Four hundred "blind" checks conducted during that period revealed that gross receipts reported on the days of the checks were substantially less than gross receipts on days when inspectors identified themselves to theater managers. The reports were properly admitted as evidence, ruled the court. The evidence also showed that receipts from "late sales" often were unreported and that unreported strip tickets and duplicate tickets were sold to conceal actual ticket sales. An audit indicated that deposits of substantial sums had been made in undisclosed bank accounts.

Also upheld as admissible was a statistician's testimony regarding the distributor's damages resulting from Price's inaccurate reporting.

American International Pictures, Inc. v. Price Enterprises, Inc., 636 F.2d 933 (4th Cir. 1980) [ELR 3:10:3]

Statements about effects of "free agency" made by Baseball Commissioner and club owners in public, but not during collective bargaining, did not require Major Leagues to disdose financial data to Players Association

The baseball strike of 1981 is now but a footnote in history and in the record books. In addition to whatever else it may have left in its wake, the strike was responsible for at least one judicial ruling that is likely to become an oft-cited precedent in the field of labor law. The case concerned the obligations of team owners - and by analogy, all other employers - to disclose financial data during collective bargaining.

Under the collective bargaining agreement between the players and the club owners that expired at the end of 1979, a player who bad played in the Major Leagues for six years and who had completed one "option year" with his team could become a "free agent" who was able to negotiate with other clubs. Each club that lost a "free agent" (who was selected by more than two clubs) had a right to "compensation" in the form of an amateur player draft choice.

In negotiating a new agreement, the club owners suggested that there is a difference in quality among players who choose to become free agents. Therefore, on May 12, 1980 the owners proposed that a team losing a free agent player selected by less than four clubs would not be entitled to replacement player compensation. A team losing a player selected by four to seven clubs would be entitled to an amateur draft choice from the club signing a contract with the free agent. A team losing a player selected by eight or more clubs, and who meets certain minimum performance standards, would be entitled to not only an amateur draft choice from the signing club, but also a professional player selected from a list of unprotected players under contract with the signing club. (The signing team would have been able to protect from 15 to 18 players of its 40 players). The Players Association adamantly opposed this proposal as having a negative effect on players' salaries.

On May 22, 1980, the owners and players entered into a collective bargaining agreement effective January 1, 1980 through December 31, 1983, establishing the terms and conditions of employment of Major League baseball players, but leaving unresolved the issue of replacement player "compensation." As part of the agreement, a joint study committee was appointed to consider the compensation issue and to report to the players and owners before January 1, 1981. Upon receipt of the report, the parties were to commence negotiations on compensation. The agreement further provided that if the parties are unable to reach an agreement on the matter, the clubs could unilaterally adopt and put into effect their proposal on compensation. If the clubs did so, however, the players could reopen the bargaining agreement with respect to compensation and strike before June 1, 1981. When the report was received, negotiations resumed without success. The owners exercised their right to unilaterally implement their compensation proposal, and the players resolved to strike.

Just 48 hours prior to the strike deadline, the National Labor Relations Board requested a federal court in New York to require the owners to rescind their unilateral implementation of their compensation proposal. If granted, the relief would have precluded the players from exercising their right to strike.

The basis of the NLRB suit was the rule in labor law which requires an employer to disclose its financial condition when, during the course of bargaining, the employer claims an inability to pay higher wages. At various times during negotiations, the Players Association asked the club owners to provide information concerning the financial condition of all the Major League clubs. The Players Association and the NLRB pointed to a speech by Commissioner Bowie Kuhn before the Annual Convention of Professional Baseball where the Commissioner expressed concern about escalating player salaries brought about by "free agency," and to various statements by club owners in television, radio, and magazine interviews expressing the same concern. During the time that these statements were being made, the club owners were refusing to disclose the requested financial information. This, argued the NLRB, constituted an unfair labor practice.

The court, "in struggling with the temptation and even compulsion to prevent a strike in the public interest," rejected this argument. An employer is required to disclose its financial condition only when the employer claims an inability to pay during the course of bargaining, emphasized the court. The Major League Baseball Player Relations Committee, with C. Raymond Grebey designated as its official spokesman, was given the exclusive authority to bargain on behalf of the club owners with the Players Association. The NLRB admitted that at no time during the bargaining process had Grebey or the Player Relations Committee made acclaim of inability to pay. The statements made by the Baseball Commissioner and the individual club owners were not made during the course of bargaining, and the court ruled that it could not accept "collective bargaining through the press" as a basis for the requested relief.

Silverman on behalf of the NLRB v. Major League Baseball Player Relations Committee, Inc., 516 F.Supp. 588 (S.D.N.Y. 1981) [ELR 3:10:3]

Shubert Theater Organization may acquire theaters without prior court approval; 1956 consent decree is partially vacated

The Shubert Theater Organization will be sending more regards to Broadway since a Federal District Court in New York has determined that Shubert may proceed to acquire interests in theaters throughout the United States without obtaining prior court approval. Under a 1956 consent decree, Shubert was required to divest itself of various theaters and was enjoined from acquiring additional theaters unless a showing was made that the acquisition would not unduly restrain competition. Previous applications by Shubert to acquire interests in theaters in Los Angeles and Washington were granted in 1976 and 1980 (ELR 2:6:2).

Judge Morris E Lasker. in an oral opinion, lifted the consent decree's ban on the acquisition, operation or management of theaters by Shubert throughout the country. The court noted that the national increase in the number of theaters indicated the well-being of the theater industry. Shubert's unimpeded participation would be a stimulant rather than a threat to competition, stated Judge Lasker. The fact that Shubert owns approximately 50% of the theaters in the New York City area did not of itself demonstrate improper behavior by Shubert which could require the maintenance of the consent decree.

However, Shubert will be limited to acquiring interests in only two theaters in a proposed 42nd St. Theater Development project. And Shubert must continue to obtain court approval prior to acquiring any other theaters in New York City until 1985 when the consent decree will be vacated entirely.

United States of America v. Shubert, Case 56-72 (SDNY, September 4,1981) [ELR 3:10:4]

Federal Court of Appeals explains its approval of Copyright Royalty Tribunal's increase in compulsory music recording license royalty

As previously reported (ELR 2:21:6; 2:23:4; 3:4:3), on June 23, 1981, the Federal Court of Appeals in Washington, D.C., upheld the recent increase in the statutory royalty rate for compulsory licenses for making and distributing phonorecords containing new renditions of others' previously-released nondramatic musical compositions. On August 27, 1981, the court issued a 38-page opinion which more fully explains its decision.

The rate increase was challenged by record companies and associations and by copyright owners. The court first rejected the record companies' argument that the royalty rate adjustment is arbitrary and capricious. Secondly, the court determined that the copyright owners had no basis for insisting that the statutory rate should be higher. The copyright owners insisted "that the intent of Congress in 1976 was to revive the flexibility of the original compulsory licensing system, and that the Tribunal should have set a rate high enough to leave greater room for individual songwriters to negotiate a fair return on their works by bargaining within a range below the statutory ceiling." The court stated, however, that

Congress did not intend to impose a "bargaining room rationale on the Tribunal's determination of a reasonable rate." The present rate adjustment, said the court, must be reasonable as set, yet not yield an unfairly large return to the copyright owners. The court was satisfied that the adjustment met these criteria.

The court also found, however, that the Tribunal exceeded its authority in adopting a procedure by which it adjusts the statutory rate annually as it sees fit. The Tribunal may permissibly exercise such discretion only "in 1987 and in each subsequent tenth calendar year." The court thus sent the case back to the Tribunal solely to allow the Tribunal to adopt, if it so desires, a permissible scheme of nondiscretionary, interim rate adjustments.

The Record Industry Association of America filed a motion for reconsideration with the Court of Appeals on September 8, 1981.

Record Industry Association of America v. Copyright Royalty Tribunal, No. 80-2545 (D.C.Cir., August 27, 1981) [ELR 3:10:4]

Musician's use of recording studio did not create contract between them; studio may not sell musician's recordings or recover expenses advanced

The importance of making financial arrangements clear in advance has been dramatically brought home to a recording studio in Louisiana which has lost its contract suit against a musician who had used its facilities.

Before singer/songwriter Steve Conn began to record his musical compositions at the insistence of the owner of the Sound Doctor Recording Studio, Conn asked "What's in this for you?" Sound Doctor replied, "We'll worry about that down the line." After Conn recorded the songs, participated in a "musical showcase" arranged by Sound Doctor, and traveled to New York to meet with representatives of a music publishing company, Sound Doctor began to market some of Conn's recorded songs. It also brought suit to recover $3,065 in expenses it incurred on behalf of Conn. A Louisiana Court of Appeal has held that Sound Doctor may not recover its expenses,' and may no longer market Conn's songs, because no express or implied contract entitling it to do either had ever been entered into.

No implied contract was formed when the songs were being recorded, said the court, because the studio time was being provided free of charge - or, at least, it was reasonable for Conn to so believe. Conn felt that Sound Doctor was seeking to gain "prestige through association" by having Conn and other musicians record at the studio. By contrast, Sound Doctor asserted that it was "fronting" time to musicians, and that Conn was aware that theirs was such an arrangement. "Fronting" is a credit arrangement by which a musician records at a studio but does not pay for the time used until the recordings are successfully marketed. The court concluded that if Sound Doctor had, in fact, told Conn of the fronting arrangement, there would be no need for Conn to ask the question, "What's in this for you?," because he demonstrated from his testimony that he was very familiar with the term "fronting."

Sound Doctor had an excellent opportunity to make its intentions clear in the early stages of the relationship when it was questioned by Conn, the court commented. "Instead of answering forthrightly, however, [Sound Doctor's] answer, 'We'll worry about that down the line' was vague and uncertain."

The court also found that Conn's participation in the musical showcase and his acceptance of Sound Doctor's offer to go to New York were not sufficient evidence to support an implied contract. No agreements or commitments had resulted from these efforts by Sound Doctor. If something had developed from them, suggested the court, then Sound Doctor would have been entitled to some type of compensation.

Sound Doctor Recording Studio, Inc. v. Conn, 391 So.2d 520 (La.App. 1980) [ELR 3:10:5]

Home Box Office affiliate obtains injunction barring unauthorized sales of receiving devices

Private Channel Club (a joint venture of American Television and Communications Corporations and Unarco-Midwest Corporation) has obtained a broad injunction barring Pirate T.V. and various other individuals and electronics firms from selling and distributing microwave antennas and "down-converters" to the public. Private Channel was granted the exclusive right to distribute Home Box Office programming via microwave transmission in the South Florida area. The antennas and other equipment at issue were allegedly sold by the defendants to assist others in the unauthorized reception of HBO programming without payment of a monthly subscription fee to Private Channel.

As in several earlier cases, such as National Subscription Television v. S&H TV, 644 F.2d 820 (ELR 2:9:4) and Chartwell Communications Corp. v. Westbrook, 637 F.2d 459 (ELR 2:12:5; 2:19:1), the court noted that section 605 of the Federal Communications Act would protect Private Channel's transmission of signals only if its signals were not "broadcast ... for the use of the general public." Because only paying subscribers were authorized to receive program material using special equipment provided by Private Channel, the company was not engaged in broadcasting under section 605, ruled the court.

The case of Orth-O-Vision, Inc. v. Home Box Office, 474 F.Supp. 672 (ELR 1:11:6), in which a Federal District Court held that MDS transmission of HBO programming was not protected by section 605, was discounted by the court since subsequent decisions and FCC statements have questioned the conclusions reached in Orth-O- Vision.

The loss of potential subscribers and the possible destruction of Private Channel's business in the absence of an injunction were found to outweigh any damages to the defendants due to a temporary interruption in their sales. (A bond in the amount of $100,000 was required, however, pending the final adjudication of the matter.)

In addition to issuing an injunction, the court ordered Pirate TV. to provide Private Channel with all of its customer lists, receipts, purchase orders and other information concerning the identity of purchasers of the devices.

American Television and Communications Corp. v. Pirate TV, Inc., Case 81-869 (S.D. Fla., Aug. 24, 1981) [ELR 3:10:5]

"Joke" results in $65,00O libel judgment against disc jockey and radio station

A jury in Baltimore concluded that a joke, by morning disc jockey "Johnny Walker" of radio station WFBR was not funny. In fact, the jurors decided that the "joke" was libelous, and they awarded Dennis Holly, a television news commentator in Baltimore who was the butt of Walker's joke, a total of $65,000 in compensatory and punitive damages against Walker and WFBR. A Maryland Court of Appeals has affirmed that judgment.

To show how "a joke should prove to be such a costly remark" the court's opinion "set the scene." After a blizzard dumped 24 inches of snow on Baltimore in February of 1979, "looters" took to the streets, carrying off just about everything that could be moved. While many police vehicles were practically immobile, vehicles of some television stations were not. Some looters were actually photographed committing their reprehensible acts of theft - and those responsible were overwhelmingly young, poor, and black.

As part of his routine, Johnny Walker broadcasts "Little News in the Morning," during which Walker says "crazy and wild things about current events" and plays simulated laughter and other prerecorded sounds in response to his jokes. A regular feature of "Little News" is the "Harry Horni" report, in which a station employee assumes the role of "Horni" who telephones Walker and the two of them engage in an ad lib exchange about Hollywood personalities.

On February 28, 1979, "Horni" had said on the 6:15 a.m. report that Dennis Holly was entering a hospital for surgery on his knee. Walker ad libbed on the 8:15 a.m. broadcast: "Too bad about Dennis Holly, though. Hope that comes out okay. Wonder how he hurt his knee. Probably fell down carrying that TV during the blizzard last week, right?"

Failing to see the humor in Walker's remark, Holly, admittedly a "public figure," sued Walker and WFBR for libel. The appellate court has affirmed the jury's verdict for Holly, holding that the jury could reasonably conclude that Walker's remark conveyed to the minds of some listeners that Holly, a black man, was associated with the looting that occurred during the blizzard. "Inasmuch as the overwhelming majority of those apprehended for looting were youths and black males, the Walker remark was particularly offensive to Holly who, along with many other black citizens of Baltimore, was sensitive to that type of comment at that particular time." "Perhaps the jury agreed with Markel's Law," quipped Chief appellate court Judge Gilbert, "'Humor is Okay; wit can be dangerous; wisecracking is disastrous,' inasmuch as one man's 'joke' may be another man's 'choke.'"

Of the $65,000 in damages awarded, $35,000 were levied against Walker's employer Baltimore Radio Show, Inc., the operator of radio station WFBR, as punitive damages. In affirming this award, the appellate court specifically rejected the view advanced in the Restatement (Second) of Torts (Section 909) that limits the situations in which punitive damages may be awarded against an employer, where the employee has made a defamatory remark..

Embrey v. Holly, 429 A.2d 251 (Md.App. 1981) [ELR 3:10:6]

Playboy magazine obtains injunction barring use of the name Playmen in title of competing magazine

Playboy magazine has obtained a permanent injunction barring the use of the name "Playmen" by Chuckleberry Publishing, Inc. and Tattilo Editrice SPA in connection with a magazine title or subtitle.

Upon receiving notice of a Federal District Court's intention to issue a preliminary injunction against its use of "Playmen" as the title of a magazine appealing to a male sophisticate audience, Chuckleberry changed the magazine's name to Adelina (the first name of the president of Tattilo Editrice, who is the publisher, in Italy, of a magazine entitled Playmen). Adelina bore the subtitle "America's Edition of Italy's Playmen." Playboy subsequently sought a permanent injunction against the continued use of the name Playmen.

In granting Playboy's motion, the District Court reaffirmed the conclusions it had reached previously regarding the strength and distinctiveness of the Playboy mark, and the similarity and close competitive proximity between the competing magazines (Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 486 F.Supp. 414, ELR 2:5:5). Other magazines using the word "play" in their titles appeal to different markets than does Playboy, observed the court. It had not been shown that the titles of those magazines diluted the strength of the Playboy mark. Although Chuckleberry no longer was using Playmen as a title, the magazine Adelina was similar in content, format and appearance to Playboy and was ruled the relevant product for purposes of comparison with Playboy in this action. Further, the court noted the substantial likelihood that, absent a permanent injunction, Chuckleberry and Tattilo Editrice "would publish a Playmen magazine that would be similar, if not identical to Adelina."

Chuckleberry had paid Tattilo Editrice a minimum annual license fee of $35,000 for the right to use the Playmen mark. But Playmen magazine was found to have no commercially valuable reputation in the United States. The evidence indicated that the title Playmen was adopted solely to cause confusion among consumers and to obtain unfair commercial advantage with respect to the Playboy trademark. Therefore, a presumption arose that the use of the name Playmen would result in deception and confusion. The likelihood of consumer confusion also was demonstrated to exist as to product and source, and as to consumers' subliminal or conscious association with Playboy's trademark.

The use by Adelina of the subtitle "America's Edition of Italy's Playmen" also was enjoined since the subtitle attempted to increase consumer association of Adelina with Playboy. The subtitle had been moved from its original position below the title to a more prominent position above the title. The size and color contrasts of the title and subtitle also were changed to attract attention to the word "Playmen." In order to avoid the need for a retrial on the confusion issue, the court enjoined the continued use of the name Playmen in the subtitle or anywhere on the cover of a magazine distributed by Chuckleberry for the male sophisticate audience.

Playboy's attempt to enjoin extraterritorial use of Playmen in the title or subtitle of non-English language editions of Playmen or Adelinia was denied on several grounds, including the failure to show that Chuckleberry was to be involved in the foreign distribution of the magazines.

And while Playboy's request for punitive damages was denied, Playboy was awarded the portion of its attorney's fees attributable to the subtitle issue. Chuckleberry's use of Playmen in the subtitle of Adelina, although not a violation of the preliminary injunction, "amounted to a deliberate effort to undercut the injunction s intended effect," stated the court. Chuckleberry thereby had willfully and deliberately increased Playboy's litigation expenses in many forums.

Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 511 F.Supp. 486 (SDNY 1981) [ELR 3:10:6]

Privacy of federal agent was not invaded by novel that contained incidental character with substantially similar name and job

The incidental use of an individual's name in a novel is not an invasion of privacy in violation of Section 50 of New York's Civil Rights Law, according to a decision of a New York County court.

Special Agent Charles S. Boczka of the United States Customs Service made two brief appearances as a character in the novel Provenance written by Frank Macdonald and published by Avon Books. Charles S. Koczka, a Special Agent with the Customs Service alleged that he was identified by the novel's references to Boczka and that his name was used without authorization for purposes of trade.

In dismissing Koczka's action, the court pointed out that the Boczka character played only an insubstantial role in the 500 page novel and that it was not shown that Avon had commercially exploited Koczka's identity. In support of its decision, the court cited the case of University of Notre Dame v. Twentieth CenturyFox, 22

Ad2d 452, in which Notre Dame and its president, Father Hesburgh, sued to enjoin the distribution of a novel and movie concerning Notre Dame football. Father Hesburgh's name appeared in two passages in the 143 page novel. As in Koczka's suit, the action was dismissed as to Father Hesburgh because the references involved were of a "fleeting and incidental" nature.

Koczka v. Avon Books, Index No. 10741/81, N.Y. Sup. Ct. (Aug. 18, 1981) [ELR 3:10:7]

Briefly Noted:

Racial discrimination.

A Federal District Court in New York has held that a minority-oriented theatrical production company does not have standing to enjoin the termination of its CETA funding on the basis of alleged racial discrimination. The court reasoned that the production company had no racial identity, and thus could not have been the target of racial discrimination.

Hudson Valley Freedom Theater, Inc. v. Heimbach, 513 F.Supp. 250 (S.D.N.Y. 1981) [ELR 3:10:7]

Zoning.

A New Jersey appellate court has invalidated a local zoning ordinance which barred "places of amusement or entertainment wherein are to be found games, coin operated amusement, movie or entertainment machines." The court reasoned that "the exclusion bears no reasonable and substantial relationship to the protection or promotion of the public health, safety, morals or general welfare" because "there is nothing inherent in the nature of this commercial use ... that ... affects adversely the legitimate interests of the municipality or its inhabitants."

Supercade Cherry Hill, Inc. v. Eatontown, 428 A.2d 530 (N.J.Super. 1981) [ELR 3:10:8]

Obscenity.

The Supreme Court of Rhode Island has barred the criminal prosecution (under that state's obscenity statute) of two theater managers who had obtained a city license to show two specific R-rated films. The Providence Bureau of Licenses had granted permission to show the films without ever having viewed the films.]Me court held that the theater managers had a right to rely on their license, and thus it dismissed the indictment.

State v. Berberian, 427 A.2d 1298 (R.I. 1981) [ELR 3:10:8]

DEPARTMENTS

In the Law Reviews:

Communications and the Law, a quarterly review edited by the Honorable Theodore R. Kupferman, Judge of the Appellate Division of the New York Supreme Court, has been acquired by Meckler Publishing, 520 Riverside Avenue, Westport, CT 06880. Subscriptions are $40 per year. Issue 1 (Winter 1981) and Issue 2 (Spring 1981) of Volume 3 contain the following articles:

Attitudes of Media Attorneys Concerning Criminal Proceedings by F. Dennis Hale (3/1)

TV in the Courtroom: Right of Access? by Mary Kay Platte (3/1)

What is the Communicator's Task in Preserving "The King's English"? by Joshua L. Smith (3/1)

Television in the Courtroom: Limited Benefits, Vital Risks?, a Conference Proceeding, George Barasch, Edward Thompson, James Goodale and Herald Price Fahringer, Speakers (3/1)

Book Reviews of: Obscenity; Fact and Fancy in Television Regulation; and Politics as Communications (3/1)

The Trials and Tribulations of Courtroom Secrecy and Judicial Craftsmanship: Reflections on Gannett and Richmond Newspapers by David M. O'Brien (3/2)

Comparative Advertising Law and a Recent Case Thereon by Patricia Hatry and Jeffrey C. Katz (3/2)

Implications of First Amendment Doctrine on Prohibition of Truthful Price Advertising Concerning Alcoholic Beverages by Gray B. Wilcox (3/2)

Book Review of Informing the People: A Public Affairs Handbook (3/2)
[ELR 3:10:8]