RECENT CASES

MGM's 1981 film "Tarzan, the Ape Man" complied with 1931 licensing agreement between MGM and Edgar Rice Burroughs, appellate court affirms

It has been seventy years since Edgar Rice Burroughs' book Tarzan of the Apes was first published in an issue of The All Story magazine. Since that time, Tarzan's literary and film exploits have captured the imagination of generations of adventure-lovers, and, recently, of a Federal Court of Appeals in New York. The court - emulating Tarzan's fortitude in its confrontation with the fierce issues of substantial similarity, the copyrightability of fictional characters, and recapture of copyrights - has dismissed a claim brought by Burroughs' heirs charging that Metro-Goldwyn-Mayer's 1981 film "Tarzan, the

Ape Man," infringed their rights under the Copyright Act of 1976 and breached a 1931 license agreement between Edgar Rice Burroughs, Inc. and MGM.

In 1931, ERB, Inc., a corporation formed by Burroughs to own, license and control the rights to his literary works, entered into an agreement with MGM. MGM was given the nonexclusive right to "create and write an original story, using as one of the characters therein, the character of 'TARZAN,' which character was originally created by [Burroughs], and including ... all or any of the other characters used in all or any of the stories heretofore written by [Burroughs]." The agreement allowed MGM to make a film based on its original story and to make subsequent films based substantially on the same story, and using the same title, as the first film. MGM paid ERB the fixed sum of $20,000; ERB received neither a portion of the receipts of the original film or of any remake, nor continuing royalties. Film versions of "Tarzan, the Ape Man" were released in 1932 and in 1959.

In 1980 when MGM announced its plans to produce a second remake of "Tarzan," Burroughs' heirs objected, contending that MGM's rights under the 1931 license agreement were null and void because they had exercised their termination rights under section 304(c) of the Copyright Act of 1976. This section allows a living author or the heirs of a dead author to terminate a copyright grant 56 years after the copyright was originally secured. In December of 1977, Burroughs' heirs purported to terminate the transfer of copyrights from Burroughs to ERB, Inc. Nevertheless, a Federal District Court in New York refused to enjoin MGM's production of the remake. Burroughs v. Metro-Goldwyn-Mayer, Inc., 491 F.Supp. 1320 (ELR 2:9:1) affirmed by order, 636 F.2d 1200 (2d Cir. 1980).

In 1981, the heirs sought to halt the release of the now-completed film starring Bo Derek. The District Court granted summary judgment in favor of MGM. (519 F.Supp. 388, ELR 3:10:1) It ruled that while the grant of a license to use the character Tarzan was a copyright interest subject to termination under section 304, the heirs' purported termination was ineffective because it was served prematurely, was not communicated to MGM, and did not mention five of Burroughs' books from which MGM was entitled to use characters. Furthermore, after viewing the 1932 and 1981 films, the court held that subject to certain suggested changes in the 1981 film, MGM had complied with the 1931 license agreement. This ruling has been affirmed by the Court of Appeals.

In a 60-page opinion by Judge Amalia Kearse, the Court of Appeals declined to discuss whether the literary character Tarzan could be the subject of copyright protection. Instead Judge Kearse focused on the sufficiency of the heirs' notice of termination, and in particular, on the fact that the notice sent by the heirs to ERB omitted the names of five of Burroughs' works: The Son of Tarzan, Tarzan, Lord of the Jungle, Tarzan, Guard o the Jungle, The Tarzan Twins and Tarzan and the Ant Men. A notice of termination under section 304(c) must clearly identify "the grant to which the notice of termination applies." Thus, the omission of the five titles, while "undoubtedly inadvertent," left ERB's interest in those works intact. ERB therefore retained its authority to license to MGM the use of all material contained in those five works, including the character Tarzan, who is central to each of the books.

Burroughs' heirs had argued that if Tarzan were a literary character protectable by copyright, he was copyrightable only in his initial, original appearance in the book Tarzan of the Apes. Thus, by listing this title in the notice of termination to ERB, MGM's copyright license to use the character Tarzan was revoked, according to the heirs. The court rejected this view, however, and stated that even assuming that "Tarzan" was copyrightable only in his first appearance, an author's grant of rights authorizes "the use of all material contained in the licensed work, including material that may be covered by the author's other copyrights" - in this case, the five unlisted Tarzan titles.

The heirs alternately contended that even if the character license survived, MGM had infringed their copyright because MGM did not simply use the Tarzan character, but also based its 1932 film on the book Tarzan of the Apes. If the notice of termination was adequate as to this book, the 1981 film, as a remake of the 1932 film, therefore also infringed the book.

A slippery vine, indeed, stated Judge Kearse, who concluded that as a matter of law, the 1932 film was not based on the book Tarzan of the Apes, since, discounting permitted similarities in characterization, no reasonable jury could find the two works were substantially similar beyond the level of generalized ideas or themes. The book and the 1932 film both recount the story of Tarzan, an ape-man living in the jungle, and Jane, a beautiful woman from civilized society, who meet in the jungle and fall in love. But the differences in the two works "overwhelm" this general similarity. Synopses of the book and the film are set forth at length in the opinion along with detailed observations by the court on the differences in the works. One of the major differences noted by the court was that the book essentially was Tarzan's story, while the film is told from Jane's point of view. Further, in the book, Jane is marooned in Africa near Tarzan's beachfront lair as the result of a mutiny by the crew of her father's treasure-seeking expedition. In the film, Jane's father is a jungle trader who sets out to search for ivory in the fabled Elephant's Graveyard near Tarzan's inland home. The other purported similarities were found to be so general as to be meaningless or not similarities at all, such as the grievous killing by poisonous arrow of the she-ape Kala, Tarzan's foster mother, in the book, and the quite different shooting of a small, unidentified ape in the film. Furthermore, although both works are set in sub-Sahara Africa, the specific locale of the adventures varies. Jane's use of a gun, the wounding and recovery of Tarzan, Tarzan's use of a stranglehold to kill a lion, and Jane's choice between two suitors also were incidents at a level of abstraction "beyond the protection of copyright." Similarities between the works such as Tarzan's strength and agility, his costume, and his jungle cry were within the scope of the character license, the court ruled.

Thus, the 1932 film was not based on the book Tarzan of the Apes, but was MGM's original story "as contemplated" by the 1931 license agreement, concluded the court.

The 1981 "Tarzan" film was found to be based on the same story, without material departure, as that used by MGM in the 1932 film. The 1981 film eliminated certain "gratuitous violence" of the 1932 film, changed certain characterizations, and included two scenes involving nudity without, however, substantially changing the story. It was noted that in the scenes when Tarzan first meets Jane, "if anything, the nudity of the characters contribute[s] to the story, adding some degree of modern-day realism to an otherwise highly improbable scene." And the elimination of the oft-parodied "me Tarzan, you Jane" dialogue (although not spoken as such in the 1932 film) was replaced by an equally effective portrayal of Tarzan's inability to speak English. MGM therefore had satisfied the requirements of the 1931 license agreement, and the judgment of the District Court was affirmed accordingly.

In a concurring opinion, Judge Newman differed with the court's finding that the heirs' notice of termination under section 304(c) was ineffective to terminate MGM's right to use the character Tarzan because of the omission of the titles of five of Burroughs' Tarzan books. Assuming that the character was sufficiently delineated to support a copyright, the works Which appeared after Tarzan of the Apes, including the five omitted titles, were not original with respect to the character himself, stated Judge Newman. The copyright proprietor of the five titles could not use the character Tarzan apart from the five stories, and could not convey rights to MGM, on the basis of those five stories only, to create an original story and films based on the Tarzan character.

As between the heirs and ERB, the termination notice, by including Tarzan of the Apes, effectively restored to the heirs all of their copyright interest in the work, including the character Tarzan. The Burroughs heirs thus obtained the extended renewal term to the copyright in the character Tarzan, in Judge Newman's view.

However, the Copyright Act does require that notice of a termination be served on "the grantee or the grantee's successor in title." "Successor in title" is not defined in the Act. Judge Newman offered his opinion that MGM, as the non-exclusive licensee of the right to use the character Tarzan in an original screenplay, was not required to be served as a "successor in title." Nevertheless, in this case, the existence of MGM's rights was, or should have been, well-known to the Burroughs heirs, particularly since ERB had been involved in prior litigation with MGM concerning the company's 1959 remake of the "Tarzan" film. In addition, ERB is a family-owned corporation, and giving notice solely to the corporation meant that the heirs were "essentially serving themselves." MGM was the realistic "grantee" of Burroughs, stated Judge Newman, and by failing to serve MGM, the heirs failed to recapture MGM's right to use the character of Tarzan in its 1981 film.

Burroughs v. Metro-Goldwyn-Mayer, Inc., Case No. 81-7506 (2d Cir., May 26,1982) [ELR 4:4:1]

Competitive bidding guidelines and trade screening requirements of Ohio's blind bidding statute are upheld; but advance payment and guarantee provisions are remanded by Federal Court of Appeals

The provisions of an Ohio statute which ban "blind-bidding" and establish guidelines for competitive bidding in the marketing of films to exhibitors have been upheld by a Federal Court of Appeals. However, the appellate court has remanded the case to the District Court for further consideration of certain statutory restrictions on distributors' ability to charge theaters advance and guarantee payments in addition to charging a percentage of box office receipts.

In 1980, the District Court had found that Ohio's trade screening and competitive bidding requirements were supported by the state's interest in providing exhibitors with accurate information to assess the quality of new films, with fair bidding procedures to counteract deceptive and unfair trade practices, and with increased negotiating strength when dealing with major distributors. (ELR 2:7:1) The trade-screening requirement is "content-neutral," noted the Court of Appeals, and any delays in the release of a film occasioned by the requirement have been infrequent and "relatively minor in nature." The fact that the impact of the blind-bidding ban may fall on an out-of-state business (there were no in-state distributor-plaintiffs) did not invalidate the statute, stated the court. Moreover, there was no authority for the argument that "state trade regulation which affects distribution procedures, and indirectly, monetary returns from copyrighted property is invalidated implicitly or explicitly by the terms of the Copyright Act. . . ."

Distributors may still license films to exhibitors via negotiations, but if they choose to market films through competitive bidding, Ohio's statutory guidelines require the disclosure of invitation-to-bid lists as well as the bids themselves after they are opened. If all bids are rejected, the distributor must rebid the film rather than negotiate with any exhibitors. These disclosure provisions, which are designed to counteract deception and unfair manipulation of the bidding process, are not burdensome under the First Amendment or the Commerce Clause, stated the Court of Appeals.

On the other hand, Ohio's statutory pricing provisions seem to be supported only by the state's interest in increasing the economic leverage of local exhibitors at the expense of out-of-state distributors. In the absence of a finding of collusion, monopoly power or predatory pricing by the distributors, this interest would not be sufficient to permit state interference with pricing because such interference might impose a burden interstate commerce. Thus, the District Court has been asked to consider whether other state interests might support the pricing restrictions.

Allied Artists Picture Corp v. Rhodes, Case Nos. 80-3566, 80-3600 (6th Cir., June 4, 1982) [ELR 4:4:3]

ABC ordered to increase Interim music license fee payments to ASCAP to $8 million per year

ABC has been ordered to increase its interim annual music license fee payment to ASCAP from $3.8 million to $8 million by Judge Edward Palmieri of the Federal District Court in New York City.

ABC and ASCAP entered into a license agreement in 1972 which provided for gradually increasing license fees through 1976. During the term of this agreement, CBS brought an antitrust suit challenging the legality of ASCAP's use of a blanket music license. The lawsuit was dismissed and certiorari was denied by the United States Supreme Court in 1981. (ELR 1:24:1) In 1977, in view of the then-pending CBS action, ABC and ASCAP executed an interim license agreement by which ABC agreed to pay ASCAP an annual fee of $3.8 million, subject to retroactive adjustment. In August 1981, ASCAP notified ABC of its intention to terminate the interim license. ASCAP already had renegotiated its license fees with CBS which will be paying $8 million for 1981, and greater amounts each year thereafter up to a fee of $9.8 million in 1985.

Judge Palmieri found the CBS-ASCAP agreement relevant and highly probative" in the ABC proceeding and called the CBS license fees a "fair indication of the value of an ASCAP license to a national television network today." Judge Palmieri noted that the ABC and CBS television networks are comparable in size in terms of the number of their affiliated stations, ratings, advertising revenues, program format and use of copyrighted music in the ASCAP repertory. The fact that ABC and NBC pay $5.3 million to Broadcast Music, Inc., another performing rights licensor, would not mandate an identical payment to ASCAP, due both to differences in the management and control of the two organizations and to

BMI's "long association with the broadcasting industry. . . ."

In the 10 years since the parties had last agreed on a license fee, inflation has depreciated the value of the "frozen" $3.8 million fee, thereby harming ASCAP and its members substantially, stated the court. Yet during this period, ABC's profits from its television network operations have increased and ABC, along with other national television networks, has paid yearly increases to suppliers of programming other than ASCAP members.

In order to maintain a reasonable relationship between the parties pending a final determination of fees by the court, ABC was ordered to pay ASCAP a license fee of $8 million on an annualized basis for the period September 11, 1981 through December 31, 1981, and $8.5 million on an annualized basis for the period commencing January 1, 1982.

United States of America v. American Society of Composers, Authors and Publishers, Case No. Civ. 13-95 (S.D.N.Y. May 26, 1982) [ELR 4:4:3]

Federal Court of Appeals upholds injunction barring Casual Corner clothing stores' unauthorized radio play of copyrighted songs

A Federal Court of Appeals in California has upheld a lower court ruling that the Casual Corner clothing store chain infringed the copyrights to songs played over radios in some of its stores.

In 1981 a Federal District Court in Los Angeles granted BMI a summary judgment in a copyright infringement suit it filed against Casual Corner. (ELR 3:7:4) At least three of the stores were equipped with

Bogen receivers and speakers, and the speakers were recessed in the ceilings of the stores. The radios were tuned to stations that played songs (the public performance rights to which were licensed to BMI) including "The Things We Do For Love," "Rocket Man," "When Will I Be Loved" and "My Way." The clothing store chain had no license from BMI, however.

The District Court ruled that the clothing store chain did not enjoy the protection of Section 110(5) of the Federal Copyright Act, under which radio play through stereo equipment "commonly used in private homes" does not result in copyright infringement even though copyright owners neither authorized the radio play nor received performance royalties. The court found that some Casual Corner clothing stores so converted or augmented their standard radios as to have elaborate commercial-type sound systems rather than equipment "commonly used in private homes." The court also found that those stores were "of sufficient size to justify, as a practical matter, a subscription to a commercial background music service," and that Congress did not intend to exempt such establishments from copyright infringement liability for unauthorized radio play of copyrighted songs. As a result, the infringing Casual Corner stores were enjoined from playing any more BMI songs without a license. BMI also was awarded statutory damages, attorneys' fees and costs of suit.

The Court of Appeals, in a three-page opinion, has accepted the lower court's reasoning and has affirmed its decision.

In Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975), the United States Supreme Court held that a small fast-food shop of 1,055 square feet in which radio programs were played by means of a radio receiver and four speakers was exempt under the thenexisting Copyright Act. The Court of Appeals here emphasized, however, that Section 110(5) of the 1976 Copyright Act was enacted to limit the Aiken exemption. "The legislative history of Section 110(5) shows," said the Court of Appeals, "that Congress expressly considered the Aiken decision and regarded Aiken as the 'outer limit' of the exemption under the new law. . . . Casual Corner exceeds this limit. . ."

Not surprisingly, the Court of Appeals relied on Sailor Music v. The Gap Stores, Inc., 668 F.2d 84 (2d Cir. 1981), cert. denied, 50 U.S.L.W. 3858 (1982) (ELR 3:22:4). In Sailor Music, a Federal Court of Appeals in New York affirmed an injunction barring The Gap clothing stores from playing radios under circumstances nearly identical to those here.

The Court of Appeals here swiftly disposed of Casual Corner's contention that the language of the Section 110(5) exemption is unconstitutionally vague. The Court of Appeals stated that "a person of ordinary intelligence can understand and apply the requirements of the Act. The affidavits of the experts in this case showed it." The Federal Courts of Appeals in New York and California have now uniformly interpreted the Section 110(5) exemption. Thus, commercial establishments would be wise to pay the requisite license fees to BMI or ASCAP, before playing copyrighted songs over elaborate sound systems.

Broadcast Music, Inc. v. The United States Shoe Corp., No. 81-5162 (9th Cir., June 2, 1982) [ELR 4:4:4]

"Good faith" negotiation clause in television broadcast rights agreement between Candid Productions and International Skating Union is ruled vague and unenforceable

For 16 years, the International Skating Union, the governing body for amateur competitive ice skating, granted Candid Productions, Inc. the exclusive North American television rights for certain championship skating events. In the past few years, the relationship between the parties chilled, and in 1980 the ISU granted the television rights for the next series of its championship events to the Columbia Broadcasting System. Candid contended that the ISU had glided by the good faith negotiation clause contained in its contracts by reaching an agreement with CBS prior to negotiating with Candid, and Candid sought to enjoin the ISU from negotiating a broadcast license contract without first negotiating with Candid.

A Federal District Court has ruled that the ISU's promise to negotiate was so vague and uncertain as to be unenforceable. In one of the contracts in question, the provision reads: "The ISU agrees that it will not negotiate any further contract for the rights to the European Championships after 1981 without negotiating in good faith with Candid." A similar provision appears in the contract for broadcast rights to another ISU-sponsored event. The court found that such an agreement to negotiate was "amorphous and nebulous since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise." This was not a case involving the application of the obligation of good faith performance that is read into every contract, stated the court. The parties never had assented to the same obligation. They had not even committed themselves to contract.

In so ruling, the court noted that the ISU had demanded that a first refusal clause be deleted from its contracts with Candid. If the court required the parties to continue negotiations for a given time period or to otherwise meet certain negotiating requirements, as suggested by Candid, this might amount to reinstating the first refusal provision. The court, refusing to make a contract for the parties, granted partial summary judgment to the ISU.

Candid Productions, Inc. v. International Skating Union, 530 F.Supp. 1330 (S.D.N.Y. 1982) [ELR 4:4:5]

Networks' denial of air time to Democratic National Committee to respond to Republican National Committee editorials did not violate Fairness Doctrine

In response to a Fairness Doctrine complaint by the Democratic National Committee, the Federal Communications Commission has ruled that neither CBS nor NBC denied the DNC reasonable opportunities for presenting its views on the issue of the Reagan Administration's domestic economic program and tax cut legislation.

The DNC had alleged that the timing and frequency of a series of paid editorial announcements by the Republican National Committee created a programming imbalance with respect to the Administration's economic policy, particularly in view of the network's previous airing of speeches and press conferences by the President and his advisers on this issue. But the FCC has ruled that the networks were not required to provide free time to the DNC to respond to RNC announcements since "the amount of time and frequency afforded each side [was not] so disparate as to warrant Commission intervention." According to the DNC, the frequency of viewpoint presentation ratio was approximately 3 to 1 for CBS and 4 to 1 for NBC. This imbalance was not a "glaring" disparity, stated the Commission, and, most significantly, the networks' overall programming did not leave the public uninformed.

The FCC concluded that CBS and NBC had not failed "in their obligations to encourage and implement the presentation of contrasting viewpoints in their overall programming.

In re Complaint of Democratic National Committee v. Columbia Broadcasting System, Inc., FCC 82-248 (Before the Federal Communications Commission, May 27, 1982) [ELR 4:4:5]

New York Cable TV Commission may not regulate MDS transmissions to master antenna TV systems, FCC and Court of Appeals rule in case involving distribution of Home Box Office signals

One means of enhancing the reception of locally broadcast video signals is the delivery of programs via Multipoint Distribution Service (MDS). MDS consists of a fixed station which transmits high frequency signals to fixed receivers with directional antennas. The signal is intercepted by the antenna, converted from microwave frequency to a selected lower frequency by a downconverter, passed through a decoder and displayed on an unused channel on the viewer's television set.

Station WQQ-79, operating under a license granted to Microband Corporation of America by the FCC, transmits MDS signals from the top of the Empire State Building in New York City to receivers within a 35 mile radius, including points in New York, New Jersey, and Connecticut. In order to reach an apartment resident, WQQ-79 sends video material to a rooftop antenna connected to the necessary downconverter and decoder. The signal then is delivered to the customer's home television set through the wire of a master antenna television system (MATV). MATV systems are also used in conjunction with rooftop antennas which receive locally broadcast VHF and UHF signals for relay to viewers.

The New York State Commission on Cable Television, which has regulatory jurisdiction over all cable television systems operating within the state, ruled that under New York law, "master antenna television systems" are not "cable television systems. But in orders issued in 1976 and 1977, the Commission declared that the statutory definition of a MATV system did not encompass any MATV system which provides pay programming or which allows the reception of programming which could not be received from locally viewable off-the-air broadcast signals. Thus, a MDS utilizing MATV wiring would be subject to regulation by the Commission as a cable television system. Most significantly, such a system could not operate without first obtaining a municipal franchise.

Orth-O-Vision, the marketer of Home Box Office's pay television programming service (which is transmitted by WQQ-79) asked the FCC to bar the State Commission from regulating the reception of HBO's programming. In 1978, the FCC ruled that the State to Commission's policies were void, because they were preempted "to the extent that their effect will be to prohibit the receipt of federally-authorized MDS transmissions of HBO's programming. In re Ortho-O-Vision, Inc., 69 F.C.C.2d 657 (1978), reconsideration denied in In re Ortho-O-Vision, Inc., 82 F.C.C.2d 1978 (1980).

A Federal Court of Appeals has upheld the FCC's order, finding that regulation by the State Commission was preempted under the Supremacy Clause of the United States Constitution. The Commission bad argued that alternative systems were available for the delivery of

MDS signals to residents of multi-unit dwellings. But the FCC's finding that MATV distribution was an integral and economical part of MDS service was not arbitrary or capricious, stated the court. The FCC had concluded that the object of the Commission's action was to permit municipalities, via the denial of a franchise, to terminate MDS programming and curtail MDS as a competitor of conventional cable television systems.

The actual impact of MDS service was demonstrated by New York City's 1977 denial of Ortho-0Vision's application for a cable television franchise. As a result, HBO refused to supply Orth-O-Vision with programming. The FCC's conclusion that the Commission's regulation of MATV use would have an adverse effect on MDS development therefore was well-founded.

Also upheld was the FCC's determination that New York's regulations would burden interstate MDS development. A reduction in the number of reception points causes the cost for each program per receiver to increase. Hence, a reduction in reception points in New York increases per viewer costs in New Jersey and Connecticut. Also, it would be impractical to attempt to regulate WQQ-79's transmissions on the basis of inter- and intrastate components.

In addition, Microband plans to create a nationwide link among various MDS transmitters in order to provide simultaneous, inexpensive transmission of programming. The State Commission's policy, with its likely effect of reducing the number of reception points in New York, could frustrate the development of such an interstate service. The Court therefore ruled that the FCC was not engaged in impermissibly regulating an intrastate communications service, and the State Commission's petition for review of the preemption order was denied accordingly.

New York State Commission on Cable Television v. Federal Communications Commission, 669 F.2d 58 (2d Cir. 1982) [ELR 4:4:5]

Federal District Court refuses to dismiss NABET from antitrust action brought by Cable News Network against ABC and CBS

When Atlanta's Cable News Network brought an action alleging various antitrust violations on the part of ABC and NBC, CNN joined as a party The National Association of Broadcast Employees and Technicians, AFL-CIO (NABET). NABET, which is a party to collective bargaining agreements with ABC and NBC, challenged its joinder on the grounds that it could not be sued in Georgia. NABET also argued that the National

Labor Relations Board has exclusive jurisdiction to beat claims concerning the validity of NABET's contracts with ABC and NBC.

Federal District Court Judge Orinda D. Evans noted that the court possessed subject matter jurisdiction over the union on several bases, including the fact that under the doctrine of pendent jurisdiction, in a federal question case, jurisdiction may be asserted over a new party even if the claim against the new party does not involve a federal question.

Personal jurisdiction also was established. Although NABET presently does not have a local union in Georgia, Local 15 of NABET has filed a petition with the NLRB seeking certification to represent certain of CNN's Atlanta employees. The international president of NABET ultimately will be responsible for any contract negotiations resulting from a successful organizational effort at CNN. Based upon NABET International's role in approving organizational activity, in accrediting new members and deriving financial support from such new membership, and its final say in contract negotiations by NABET locals, the court concluded that Local 15's organizational efforts could be imputed to the international union.

Further, there are approximately 40 NABET-represented employees in the ABC and NBC news bureaus in Georgia. NABET did have a local in Atlanta which was disbanded only recently, and also recently filed suit in Georgia against an employer. These facts were sufficient to establish "a fairly continuous course of representation and/or of organizing on the part of NABET in this forum," such that it was reasonable for the court to assert personal jurisdiction over the union. Venue also was proper and nontransferable in view of these facts and in the absence of any showing by NABET of inconvenience in litigating in Georgia.

The labor law questions raised were found to be collateral to the central constitutional issues in the case. The court noted that the networks had raised the validity of their collective bargaining agreements as a defense to the antitrust claims against them. Said the court, this is "precisely the context in which the Supreme Court has held such collateral labor law issues may properly be considered by the district court."

Cable News Network, Inc. v. American Broadcasting Companies, Inc., 528 F.Supp. 365 (N.D.Ga. 1981) [ELR 4:4:6]

City ordinances regulating display of sexually explicit material are ruled unconstitutionally overbroad by California Court of Appeal

The cities of Paramount and Redondo Beach, California attempted to restrict the display at business premises of non-obscene but graphic "sexually motivating matter." The ordinances, which were enacted in response to the increasing appearance of such matter in supermarkets and other locations easily accessible to minors, required that books or other publications containing photographs of specified anatomical features or sexual acts be sealed so as to prevent "browsing" prior to sale. Materials were exempt from the sealing requirement if they were placed beyond the reach of minors. However, if the specified matter appeared on the cover of the publication, the publication had to be covered from view regardless of whether it was sealed or inaccessible to minors. Businesses might choose not to seal or restrict access to the publications if they posted a warning prohibiting admission to minors unaccompanied by a parent or guardian.

Various book and periodical dealers sought to enjoin the enforcement of the ordinances, and a California appellate court has agreed, somewhat reluctantly, that the regulations are unconstitutionally overbroad. The court first noted that dissemination of sexually motivating matter which is not classifiable as "obscene" may be regulated if the regulation addresses the time, place and manner of the display, and is necessary to further a significant governmental interest. But the "sealing" requirement precluded browsing by minors accompanied by adults, as well as minors alone, and therefore was overbroad. Equally overbroad was the out-of-reach requirement, because a publication inaccessible to a minor might well be equally inaccessible to many adults or accompanied minors. Further, minors, whether accompanied by an adult or not, cannot be excluded from a significant number of retail establishments only because the establishments sell some restricted materials.

The court pointed out that the ordinances "ironically" were underinclusive because they permit the unrestricted sale to minors of the materials sought to be restricted.

Because of their overbreadth and invasion into areas of free expression, the "mere existence" of the ordinances might exert a chilling effect on the exercise of protected speech, the court ruled. This chilling effect constituted irreparable harm to the trade association plaintiffs, and the Los Angeles Superior Court therefore was directed to issue a preliminary injunction against enforcement of the ordinances.

American Booksellers Association, Inc. v. The Superior Court of Los Angeles, Case 2d Civ. Nos. 62692 and 62693 (Cal.Ct.App., Feb. 25, 1982) [ELR 4:4:7]

Briefly Noted:

Sports.

Auto racing promoters may use releases to contractually release themselves from liability for simple, but not gross, negligence, according to a Federal District Court in Georgia. Parents of a racing pit-crew mechanic who had been struck and killed in the pit area during a race brought a wrongful death action against the driver, the raceway, and the National Association for Stock Car Auto Racing, alleging gross negligence. Defendants moved for summary judgment, arguing that the release forms signed by the deceased exculpated them from any liability for the accident. The court denied the motion, so that the degree of negligence involved in the accident could be determined at trial.

Wade v. Watson, 527 F.Supp. 1049 (N.D.Ga. 1981) [ELR 4:4:7]

Employee Misconduct.

From 1976 through 1978, a production clerk at Paramount Studios, who had formed a business called Scripts Unlimited, submitted fraudulent invoices to the studio amounting to over $472,000 for the purported reproduction of scripts. In contesting his conviction on three counts of grand theft, the clerk argued that there had been but a single theft pursuant to one intention and general plan to steal from Paramount. A California appellate court has agreed. The court noted that in the absence of any evidence from which it could reasonably be inferred that the clerk had three separate yearly plans, he should have been convicted of only a single count of grand theft. The clerk also argued that his sentence was improper since it was imposed on the basis of a California Penal Code section which did not become effective until July 1, 1977, a date subsequent to the crime "committed" in 1976. The court stated that this argument was wholly without merit. Even if the series of takings constituted a single theft, the crime was a continuing one and the clerk was properly subject to punishment for the amounts be continued to take after the effective date of the statute,. In 1978 alone, more than $100,000 was taken. Thus, the judgment as to the counts based on the takings in 1976 and 1977 was reversed, but the judgment based on the 1978 taking was affirmed.

People v. Packard, Case 2d Crim. No. 39434 (Cal.Ct.App., May 11, 1982) [ELR 4:4:7]

DEPARTMENTS

Book Notes:

Counseling Clients in the Entertainment Industry 1982

This two-volume set of materials was compiled for distribution in connection with a program of the same name sponsored by the Practicing Law Institute this past spring in New York and Los Angeles. As has been the case in prior years, publication of these materials has provided the entertainment bar with a remarkable opportunity to rummage around, as it were, in the files of some of the industry's most experienced practitioners, because these books consist, for the most part, of sample agreements for a wide variety of transactions. The table of contents alone runs six pages. Among the documents included in the set are personal management, talent agency and legal representation agreements; songwriter, musical artist and record label agreements; performer, director and movie producer agreements; pay-tv and home video agreements; and endorsement, commercial spokesman and personality licensing agreements. Those interested in theatrical stage productions will find more than 300 pages of materials concerning the acquisition of stage rights, the employment of directors and cast, and the financing of plays. Also included is a valuable discussion of tax planning for entertainers, especially the advantages - and problems - of using loan-out corporations. The two-volume set is available directly from PLI, 810 Seventh Avenue, New York, N.Y. 10019, at a cost of $25. [ELR 4:4:8]

Current Developments in TV and Radio

These materials were compiled for a Practicing Law Institute program conducted in New York City last January. The program was intended for those who manage or counsel radio and television stations, and thus this 600-page volume contains forms, reports and regulations of the Federal Communications Commission, as well as sample contracts. Also included are provisions of the Code of Federal Regulations concerning copyright issues of day-today concern to broadcasters. Among the topics covered by these materials are: acquisition of broadcast stations and FCC licensing procedures; equal employment opportunity regulations for radio and television stations; network affiliation agreements; acquiring and licensing television, radio and cable programming; political broadcasting; pay television; satellite distribution of programming; and direct broadcast satellite services. This book is available directly from PLI, 810 Seventh Avenue, New York, N.Y. 10019, at a cost of $25. [ELR 4:4:8]