RECENT CASES

Universal does not have exclusive right to use Bionic as a trademark for footwear, even though bionic was popularized by Universal s TV series The Six Million Dollar Man and The Bionic Woman

In 1974, Universal City Studios began televising the series "The Six Million Dollar Man," which depicted the adventures of a "bionic" man. "The Bionic Woman" series followed in 1976. Universal applied for several trademarks pertaining to the two shows, but as of January of 1976 its only registered mark was for "The Six Million Dollar Man" in the field of entertainment services. In late 1976, Merchandising Corporation of America, a subsidiary of Universal, and General Footwear Company entered into a licensing agreement providing

for General's commercial exploitation of "The Six Million Dollar Man" series in the footwear field.

In January of 1976, American Footwear adopted the name "Bionic Boot" for a newly designed hiking boot. A trademark search revealed that the term "bionic" had not been registered previously in connection with footwear, and American applied for federal registration of the mark. When American began advertising its "Bionic Boot," Merchandising charged the company with trademark infringement, and announced in a footwear trade publication advertisement that Universal alone had the right to use "Bionic" as a trademark. American subsequently brought an action for trademark infringement and unfair competition in a Federal District Court in New York City. The court granted an injunction restraining General and Universal from asserting exclusive rights to use the term "Bionic" in connection with the promotion and sale of footwear.

The District Court found that no statutory trademark issues were involved because Universal had not registered or applied for trademark registration of "Bionic" for any goods prior to American's registration of the mark. Relying primarily on American's priority of use, the court concluded that American had established its rights to use the term "Bionic." The court pointed out that the Merchandising-General licensing agreement referred to the Six Million Dollar Man and to the Bionic Woman and did not refer to the trademark "Bionic" or "to licensing the use of Bionic alone or indeed licensing anything separate and apart from the TV shows mentioned." And Universal had not shown that the term "bionic" had acquired a secondary meaning "so that the public associates the term with Universal or its TV series."

On appeal, Universal contended that it had developed and popularized the term "bionic" and was therefore

entitled to exclusive rights to use the term. Universal and General sought to enjoin American's use of the term, claiming that the public might otherwise be confused as to the source of American's boot (even though the manufacturer was identified). Universal argued that its use of the phrases "Bionic Man" and "Bionic Woman" on products marketed by its licensees was an arbitrary rather than a descriptive use, and that the company should be protected against a subsequent user.

The Court of Appeals noted that "while American certainly to capitalize on universal's popularization of the word `bionic'... it did not so capitalize by confusing consumers," and stated "... in view of [the] descriptive usage [by Universal] there would be no apparent reason for a consumer to assume that because the boots bore the mark `Bionic' the creators of `The Six Million Dollar Man' or the `Bionic Woman' were automatically

engaging their creations in the sponsorship of hiking boots."

The Court of Appeals also found that the defendants had not established that "bionic" had acquired a secondary meaning. The doctrine of secondary meaning requires that the public identify a certain word with a particular producer, the crucial question being "whether the public is moved in any degree to buy an article because of its source." Universal's popularization of the term "bionic" was held insufficient to support a finding of secondary meaning. The amount of money spent by Universal in producing its shows and the royalties it received from its merchandising program also did not serve to create legally protectable rights. Universal had taken a survey that purportedly demonstrated public association of the term "bionic" with Universal. The Court of Appeals found that the District Court's refusal to admit the results of this survey was not clearly erroneous.

In any event, the survey had not shown the existence of any consumer confusion as to the sponsorship or source of manufacture of the boot.

The Court of Appeals also pointed out that the right to exclusive use of a trademark is derived from its actual use "in the marketplace." The trademarks registered to Universal were in the areas of television entertainment and toys and, according to the court, "[t]his market area bears little if any relationship to footwear, and diminishes the strength of Universal's contention that it had established a right to the term `bionic' as a fanciful mark in the field of footwear." The court noted, however, that an evaluation of the interests of the public as well as the users of the term in question, and not priority of use alone, would determine whether the first user of a mark was entitled to injunctive relief. And it was found that American had not shown that consumer confusion was

likely between the hiking boots and the children's sneakers General sought to market.

The Court of Appeals therefore concluded that neither party had established the necessity for equitable relief in connection with any trademark or unfair competition claims and ordered the dissolution of the injunction against Universal and General. Thus, American may market its "Bionic Boot" and General may continue to market its footwear products displaying the term "bionic" and containing references to the Universal television series.

American Footwear Corporation v. General Footwear Company Limited, 609 F.2d 655 (2d Cir. 1979) [ELR 1:21:1]

Suit by convicted killer Ronny Zamora against networks alleging intoxication by TV violence dismissed for failure to state a claim and on First Amendment grounds

A Federal District Court in Miami has dismissed a highly publicized action brought by a 15-year-old convicted killer, Ronny Zamora, and his parents against NBC, CBS and ABC. The Zamoras alleged that the networks had breached their duty to avoid broadcasting violent programs and that as a result, Ronny became desensitized to, and incited to duplicate, the violent behavior he viewed on television.

Due to the novelty of the claim and consequent lack of precedent, the court cited general principles of tort law and a few cases discussing the liability of magazine publishers to their readers in reaching its conclusion that the standard of care espoused by the Zamoras had "no valid

basis and would be against public policy." Under Florida common law "negligence unconnected with physical injury will not provide the basis for mental or emotional injuries." The court found that expanding Florida law to encompass the Zamoras' claims would not be warranted, particularly since imposing such an undefined and undefinable duty on a broadcaster would be unconstitutional. Holding the networks liable for damages might act as a restraint on their first amendment rights. And the suggested standard of care would impermissibly discriminate among television productions on the basis of content.

Further, the complaint did not state that the killing "was in reaction to any specific program of an inflammatory nature or that [Zamora] was `incited' or goaded into unlawful behavior by a particular call to action." The court concluded that the particular sensitivities of certain individuals may not inhibit "the right of the

public to have broad access to programming and the right of the broadcaster to disseminate."

Zamora v. Columbia Broadcasting System, 480 F.Supp. 199 (S.D.Fla. 1979) [ELR 1:21:2]

Cable system s practice of granting nearby TV station 2 1/2 hours of non-duplication protection for Boston Red Sox baseball games satisfies FCC s network programming exclusivity rules, even though games frequently last longer

In his best-selling book "The Summer Game," Roger Angell observed that within a baseball park. ". . . time moves differently, marked by no clock except the events of the game . . . Since baseball time is measured only in

outs, all you have to do is succeed utterly; keep hitting, keep the rally alive, and you have defeated time."

Within television studio, however, there is no defeating time. Time is marked by the clock, even when a baseball game is being broadcast. This conflict led to a dispute between a television station in Springfield, Massachusetts, which is a member of the Boston Red Sox regional network, and a nearby cable system.

Because the cable system is within 35 miles of Boston, the system is required by FCC rules to carry the signals of all Boston television stations, including the Boston station which is the "flagship" of the Red Sox regional network. (47 C.F.R. sections 76.59 and 76.61) On the other hand, the FCC's network programming exclusivity rules prohibit the cable system from carrying the Boston station's broadcast of Red Sox games when the Springfield station is broadcasting those games itself. (47 C.F.R. sections 76.92 et seq.)

The cable system sought to satisfy its obligations by granting the Springfield station 2 1/2 hours of exclusivity whenever a Red Sox game was being broadcast, 2 1/2 hours being the "scheduled" length of the games. Frequently however, for the reasons noted by Angell in his book, Red Sox games last longer than 2 1/2 hours. On those occasions, the Springfield station and the Commissioner of Baseball contended that the cable system was required to give the television station exclusivity for the entire time the game was being broadcast. The cable system did not want to do so, because it would have required the cable system to monitor the TV station's broadcast and then manually switch back to the Boston signal when the game was over. Manual switching is apparently a difficult and expensive procedure, and the cable system had installed automatic switching equipment which could be set in advance to return to the Boston signal at a particular time.

In a brief opinion and order, the FCC ruled that "Given the difficulties inherent in manual switching of programs which occasionally run over, we are persuaded that providing nonduplication protection instead for the 2 1/2 hour length of the broadcast is a reasonable alternative." The Springfield station and the Commissioner of Baseball appealed, and a Federal Court of Appeals has affirmed.

The Court of Appeals pointed out that it could not assess the wisdom of the FCC's policy determination. All it could do, it said, was inquire whether the FCC acted reasonably and gave "reasoned consideration to each of the pertinent factors." The court reviewed the FCC's decision and order and determined that the FCC had done so, saying that although the FCC may have come close, it did not "cross the line from the tolerably terse to the intolerably mute."

Springfield Television Corporation v. Federal Communications Commission, 600 F.2d 1014 (1st Cir. 1979) [ELR 1:21:3]

U.S. Supreme Court to decide whether FCC should consider proposed format changes in connection with its review of radio station license transfers

The United States Supreme Court has agreed to decide whether the Federal Communications Commission should consider proposed entertainment format changes at the time it reviews applications for the transfer of radio station licenses. This issue has been the subject of unusually sharp disagreement between the FCC and the Federal Court of Appeals in Washington, D.C., for almost ten years. Surprisingly, the FCC has taken the position that it should not consider proposed radio format

changes when it passes upon applications to transfer licenses, while the Court of Appeals has held that the FCC should.

The case which the Supreme Court has just agreed to hear was prompted by events which began in 1974 when the Court of Appeals decided a similar but unrelated format case known as WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974). In that case, the Court of Appeals held that when the FCC is asked to approve a radio station license transfer, it must consider whether any proposed format change, involving the abandonment of a distinctive programming format, was in the public interest. In response to that decision, the FCC, after notice and comment proceedings, issued a "Policy Statement" disagreeing with WEFM. The FCC argued that the public interest in diversity of entertainment formats is best served by unregulated competition among licensees; and the FCC urged the Court of Appeals to repudiate the

approach it had taken. Memorandum and Order, 60 FCC 2d 858 (1976); 66 FCC 2d 78 (1977).

Citizens groups interested in fostering and preserving distinctive entertainment formats petitioned the Court of Appeals for review of the FCC's Policy Statement. In June of 1979, the Court of Appeals issued its Oust published) opinion in which the court refused to repudiate the approach it had taken in WEFM. Instead, the Court of Appeals held the FCC's Policy Statement to be unavailing and of no force or effect. It is this decision which the Supreme Court now has agreed to review.

The Court of Appeals' reasons for holding the FCC's Policy Statement to be of no force or effect were essentially four-fold. First, the FCC had relied upon a staff study which had not been disclosed for public comment prior to the issuance of the Policy Statement. The court concluded that the FCC's failure to disclose the study not only diminished the assurance that it was accurate,

but also raised questions of procedural fairness to parties who were opposed to the Statement.

Second, the FCC had said that implementing the court's earlier format decisions would be an administrative nightmare — a description which the court characterized as being "almost frenzied rhetorical excess." It was also an argument which the court found to be lacking in factual merit.

Third, the court found that throughout the format controversy, the FCC had "displayed a deep-seated aversion to the decisions of this court (and to the advocates of those decisions)." And fourth, the court found that the FCC had misinterpreted and exaggerated the meaning of the court's earlier format decisions.

The case now goes to the United States Supreme Court where it will be independently reviewed. Interestingly, however, the long-term significance of the Supreme Court's forthcoming decision is difficult to predict.

There are several bills pending in Congress which, if enacted, would deregulate radio. At least one of them would do so to such an extent that this case would be made entirely moot. (H.R. 3333, 96th Cong., 1st Sess.)

WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979), cert. granted by U.S. Sup. Ct. (March 1980) [ELR 1:21:3]

Liquidators of City of Paris department store were not public figures, and criticism of close-out sale is not protected First Amendment speech requiring the actual malice test

Conductors of the close-out sale of "City of Paris," a landmark San Francisco department store, were not "public figures" required to prove malice in a slander

action, the California Supreme Court has ruled. The Supreme Court's decision overturned a trial court's judgement in favor of defendants ABC Television and the Better Business Bureau.

Plaintiffs Vegod Corporation and Western Institute of Retailing, Inc. advertised sales of the famous department store's inventory. They also rented space at the close-out sale to concessionaires who brought in outside merchandise.

The slander action was prompted by television news broadcasts in which the Better Business Bureau was quoted as saying that the City of Paris closeout sale was not being conducted by the City of Paris management but by the plaintiffs. The Better Business Bureau further stated that the close-out run by the plaintiffs was deceiving the public by promising bargains which were not really bargains.

The trial court had ruled that the plaintiffs were public figures who had to prove "actual malice" on the part of the defendants, citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964), which applied the "actual malice" requirement to public officials, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), which extended the requirement to public figures, and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), which extended the actual malice requirement to private persons who have become public figures by voluntarily injecting themselves into a public controversy. The plaintiffs conceded at trial they were unable to prove actual malice, and the trial court's decision was affirmed by the Court of Appeal. (Reported at ELR 1:3:2)

In reaching its decision that the plaintiffs who conducted the City of Paris close-out sale were not "public figures," the Supreme Court of California ruled that even if the destruction of a landmark store like the City

of Paris were a public controversy, ... those conducting the subsequent close-out sale cannot be said to have thrown themselves into the vortex of that controversy. It does not appear that plaintiffs urged Citv of Paris publicly or otherwise to terminate business or to destroy the "landmark." Merely doing business with parties to a public controversy does not elevate one to public figure status.

Further, the Supreme Court found that selling goods and advertising the sale to the public did not make the plaintiffs public figures, because the test under Gertz and under Time, Inc. v. Firestone, 424 U.S. 448 (1976), is a test of public "controversy," not of public "interest." Therefore, a business advertising goods does not necessarily become a part of an existing public controversy. The court balanced the limited First Amendment interest the defendants claimed against the plaintiffs' reputation interest and concluded that . . . a person in the business

world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denegrate such entrepreneur.

Vegod Corporation v. American Broadcasting Companies, Inc., 25 Cal.3d 763 (1979) [ELR 1:21:4]

Evans and Novak granted summary judgment in libel suit flied by college professor, because their column expressed opinion only

The columnists Rowland Evans and Robert Novak have been granted summary judgment in a defamation action brought by a professor of political science. The columnists questioned the professor's nomination for a

departmental chairmanship at the University of Maryland, referring to him as "a political Marxist," "a political activist," and a "pamphleteer." The professor was denied the chairmanship and claimed that the column had damaged his reputation as a scholar.

A Federal District Court in the District of Columbia concluded that Evans and Novak's statements were expressions of opinion and not actionable. The columnists had quoted the professor's writings and speeches; no evidence was presented that the facts supporting their conclusions were false or defamatory. Liability for the expression of "opinion qua opinion," was therefore precluded by the First Amendment, according to the court.

Oliman v. Evans, 479 F.Supp. 292 (D.D.C. 1979) [ELR 1:21:5]

Regulation of adult entertainment businesses is considered by California Courts of Appeal in several recent decisions

In Long Beach, California, the plaintiff obtained a business license to operate a motion picture theater; the city then enacted an ordinance prohibiting the establishment of an "adult entertainment business" in certain areas of the city, and in particular, within 500 feet of a residential area or 1000 feet of a public school. The Long Beach City Council found that both the location of the plaintiff's theater and the films that would be exhibited would violate the ordinance and revoked the plaintiffs business license.

The California Court of Appeal has affirmed a lower court's denial of a writ of mandamus by which the plaintiff sought to compel the city to set aside its revocation

of the license, and has upheld the validity of the ordinance.

The plaintiff contended that the ordinance infringed free speech and that it was vague and overbroad. The appellate court noted that in Young v. American Mini Theatres, 427 U.S. 50 (1976), the United States Supreme Court upheld a Detroit ordinance identical, in key provisions, to the Long Beach ordinance on the basis that it did not have a significant deterrent effect on the exhibition of films protected by the First Amendment, and that any vagueness or overbreadth could be remedied by a narrowing construction by the state courts.

The Court of Appeal, while agreeing with the plaintiff that films are protected by the First Amendment, stated that "[i]t does not follow . . . that a motion picture exhibitor has absolute freedom to exhibit every motion picture at any place and under any circumstances that it desires." A municipality may impose regulations upon

the operation of any business including that of a motion picture theatre. The primary purpose of the Long Beach ordinance apparently was "to prevent the concentration or clustering of [adult entertainment] businesses in any one area." And, as in Young, there was no evidence that the ordinance restricted access to adult films or eliminated access to the adult movie market "[i]t simply specifie[d] the area within the city where certain well-described types of films may be exhibited."

The court also rejected the plaintiffs argument that the ordinance had been applied to its business retroactively, noting that the plaintiff did not begin exhibiting films until after the effective date of the new ordinance.

A Los Angeles municipal ordinance required operators of picture arcades showing coin-operated films to obtain a permit and provided that a permit would be denied if, within the past 2 years, the applicant had knowingly allowed various sexual acts to be committed or solicited

in any picture arcade (L.A. Mun. Code, section 103.101, subd (c)(4).) Subdivision (i) of section 103.101 required the entire interior of the viewing area to be visible when entering the area and prohibited the partial or entire enclosure of booths. The plaintiffs, a group of 9 arcade proprietors, were granted preliminary injunctive relief against the enforcement of the cited subdivisions of the ordinance but the California Court of Appeal has reversed this judgment. The court held that the plaintiffs had not shown that they would be irreparably injured by the enforcement of subdivision (c)(4) of the ordinance pending trial. The court went on, however, to consider the validity of the ordinance and concluded that the denial of a permit on the basis of prior conduct would be an unconstitutional prior restraint on freedom of expression in violation of the First Amendment. The court also found that the prohibition on closed or concealed booths was a "valid, reasonable regulation of the manner of

arcade operation ... not preempted by state law" and that the enforcement of subdivision (i) should not have been enjoined.

The court pointed out that the operation of a picture arcade is protected by the First Amendment and the denial of a permit, being a "total prior restraint" would be sustained only "if there is a clear and present danger that serious substantive evil would result from granting that license." The California Supreme Court in Perrine v. Municipal Court, 5 Cal.3d 656 (1971), several state supreme courts and a Federal District Court in New York City (Natco Theatres, Inc. v. Ratner, 463 F.Supp. 1124 (S.D.N.Y.1979)) have invalidated ordinances denying movie theater licenses on the basis of an applicant's prior conduct. Further, subdivision (c)(4) would permit the denial of a license based on conduct that had not even resulted in a conviction, and according to the Court of Appeal, was therefore unconstitutional on its face.

However, since the plaintiffs had not alleged or shown that they would be precluded from obtaining a permit, the issuance of the preliminary injunction was improper.

The court also noted that the unconstitutionality of subdivision (c)(4) was severable from subdivision (i) which set forth "content-neutral reasonable regulations of the time, place, and manner of protected speech" (citing Young v. American Mini Theatres). The city was found to have a substantial interest in preventing the dangerous or unlawful conduct and possible health and safety problems which might occur in concealed arcade booths and the regulation did not restrict the content or dissemination of the pictures.

The court also found that the open booth requirement was not an attempt to regulate sexual conduct that was preempted by state law since the ordinance did not "create a new standard of sexual conduct" or "purport to

criminalize sexual activity which is not criminal under state law."

The constitutionality of a California Penal Code provision exempting non-managerial employees without financial interest in their place of employment from criminal liability for exhibiting obscene matter has been upheld by the California Court of Appeal (Pen. Code, section 311.2, subds. (c) and (d)). A bookstore clerk, who had been convicted of selling an obscene film contended in a petition for a writ of habeas corpus that section 311.2 denied him equal protection of the law. The court noted that the classification was based on conduct and not occupation and concluded that "the legislative classification distinguishing between the exhibition and distribution of obscene matter by nonmanagerial employees" was not palpably arbitrary or without any rational basis and did not violate the equal protection provisions of the United States or California

Constitutions. In making its classification, the Legislature might have considered "the distinction between the impact of a transient exhibition of an obscene film and its distribution in permanent form, with the potential for unlimited redistribution even to juveniles . . . [and] the different function of the two classes of employees with respect to their potential influence over the selection of obscene matter to be disseminated."

The California Court of Appeal has also upheld a judgment ordering the closing of a San Mateo the club as a public nuisance under the "Red Light Abatement Act" (Pen. Code sections 11225-11235). Evidence had been presented that lewd acts regularly occurred on the premises and that prior police warnings had been ignored. The court found that any interference with the defendant's rights of free speech and expression were "minimal in view of the availability of other locations . . ."

Walnut Properties, Inc. v. Long Beach City Council, 100 Cal.App.3d 1018 (1980); EWAP, Inc. v. The City of Los Angeles, 97 Cal.App.3d (1979); In re Kimbler, 100 Cal.App.3d 453 (1979); People ex rel. Sorenson v. Randolph, 99 Cal.App.3d 183 (1979) [ELR 1:21:5]

Hockey player and referee may not sue professional leagues and teams under Immigration and Nationality Act for alleged national origin discrimination

The Immigration and Nationality Act governs the granting of visas to nonimmigrant aliens. The Act defines the term "nonimmigrant alien" as an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarity to the United States to perform services of an exceptional nature requiring

such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

Canadian citizens employed by professional hockey leagues in the United States are covered by this definition. Consequently, this Act has formed the basis for two recent lawsuits alleging discrimination on account of national origin in professional hockey.

In Dowling v. United States, a discharged professional hockey referee alleged that the National Hockey League and World Hockey Association conspired to employ only Canadians as referees and thus denied him employment on account of his United States citizenship in violation of the Immigration and Nationality Act. A Federal District Court in Massachusetts, however, disagreed. According to the court, the relevant section of the Immigration and Nationality Act merely defines the term

nonimmigrant alien and "cannot be construed to create a private right of action." The court thus dismissed the referee's claims under the Act. (The referee also sued on grounds of antitrust and civil rights violations, but both of these were also set aside by the court, the former for lack of sufficient particularity, the latter for lack of relevance.)

In Collyard v. Washington Capitals, an aspiring American hockey player alleged that he was denied employment on account of his national origin. According to the player, the Capitals employed mainly Canadian-born players despite the fact that there were many qualified Americans who could play as well as, if not better than, some of these Canadians. Thus the player contended that the hockey team was in violation of the Immigration and Nationality Act because it employed aliens even though equally qualified as well as superior Americans sought identical employment. But just as in Dowling, a

Federal District Court in Minnesota dismissed the action on the ground that the Immigration and Nationality Act fails to create a substantive right upon which a private claim may be based. The court noted: "There is no clear indication in the Act or the legislative history of the Act that Congress intended to create a private cause of action. The Act evidences, rather, a narrow intention to draft a statute which would merely regulate the immigration and naturalization process."

From these two decisions, it is apparent that the Immigration and Nationality Act does not form the basis upon which relief may be granted in a private cause of action.

Dowling v. United States, 476 F.Supp. 1018 (D. Mass. 1979); Collyard v. Washington Capitals, 477 F.Supp. 1247 (D.Minn. 1979) [ELR 1:21:7]

Briefly Noted:

Copyright.

In two recent cases, music publishers have been granted summary judgment against the operators of clubs where copyrighted musical compositions were performed publicly for a profit and without a license or without authorization from the copyright owners. In Broadcast Music, Inc. v. Tadych, a Federal District Court in Wisconsin found that there was no genuine issue on any of the essential elements for copyright infringement. The court awarded the plaintiffs injunctive relief against further infringement of such compositions as "Mr. Bojangles," "Proud Mary," and "Gentle on My Mind," statutory damages of $7,000 ($1,000 per infringement), and attorney's fees. In Chess Music, Inc. v. Bowman, a Federal District Court in Nebraska has granted summary judgment on the pleadings to the

copyright owner of two musical compositions upon the failure of the defendant club owner to respond to requests for admissions.

Broadcast Music, Inc. v. Tadych, CCH Copyright Law Reports, Para 25,122 (E.D.Wisc. 1979); Chess Music, Inc. v. Bowman, CCH Copyright Law Reports, Para. 25,112 (D.Neb. 1979) [ELR 1:21:7]

Labor Arbitration.

A Federal Court of Appeals in Ohio has held that there was no evidentiary support for an arbitrator's award in favor of union members in a dispute concerning the amount of payments due under a profit-sharing plan; and thus it reversed the District Court's refusal to vacate the award. The dispute arose when the Storer Broadcasting

Company entered into a collective bargaining agreement and agreed to make contributions to AFTRA's pension and welfare plan rather than to the voluntary profit-sharing plan previously used. The Court of Appeals concluded that there was no factual basis for the arbitrator's finding that the employees who had participated in the prior, voluntary plan were entitled to receive payment of the amounts "credited" to their accounts, as contended by the union, rather than the smaller amounts "vested" in their accounts which had been offered by the trustee of the voluntary profit-sharing plan.

Storer Broadcasting Company v. American Federation of Television and Radio Artists, Cleveland Local, AFL-CIO, 600 F.2d 45 (6th Cir. 1979) [ELR 1:21:7]

Libel.

A Massachusetts Court of Appeals has affirmed a lower court opinion granting summary judgment to a defendant newspaper publisher. The court found that the newspaper had not acted negligently in publishing a photograph of the plaintiff who was present, though not

no libel or invasion of privacy had occurred.

Cefalu v. Globe Newspaper Company, 391 N.E.2d 935 (Mass.App. 1979) [ELR 1:21:8]

NEW LEGISLATION AND REGULATIONS

IRS rules that any amount paid for movie distribution rights in excess of their fair market value may not be included in distributor s basis

Generally speaking, the tax basis of any asset is its cost, that is, the amount the tax payer paid in order to acquire it. The IRS has recently ruled, however, that a limited partnership could not include in its basis the full amount it paid for United States distribution rights to a foreign film, because the partnership had been unable to demonstrate that the fair market value of those rights was as much as the partnership had paid.

It is probable that the IRS was influenced by the roundabout way the limited partnership acquired the distribution rights, and by the amount it paid for them. The partnership acquired the rights from a corporation, the majority shareholder of which was the limited partnership's general partner. The corporation originally acquired U.S. distribution rights from the movie's foreign producer, and then sold the rights to the partnership.

When the corporation transferred the rights to the limited partnership, the partnership paid the corporation, in cash, 25% more money than the corporation had paid the movie's producer only a few months before. The partnership also gave the corporation a nonrecourse promissory note for additional money. In all, the limited partnership paid, in cash and by note, five times the amount the corporation had paid for the same distribution rights.

The IRS ruled that the limited partnership's basis could not exceed the fair market value of the distribution rights, and that the partnership had been unable to show that the fair market value exceeded the amount paid by the corporation for those rights, even though the partnership had paid the corporation more money, in cash, than the corporation had paid.

The IRS also ruled that the partnership could not include any portion of the nonrecourse note in its basis. In

so ruling, the IRS relied on Revenue Ruling 77-110, 77-1 C.B. 58, where it had earlier held that the amount of a nonrecourse note given as part of the purchase price of film distribution rights could not be included in the basis of those rights, and no deduction was allowable for interest accrued on the note, where the value of the distribution rights could not be shown to approximate the amount of the note.

Rev. Rul. 80-42, I.R.B. 1980-7, 14; 80(10)CCH Standard Federal Tax Reports, Para. 6381. [ELR 1:21:4]

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[ELR 1:21:8]