RECENT CASES

Massachusetts appellate court affirms dismissal of Polish-American Guardian Society's group libel action against Burt Reynolds Production Company for allegedly defamatory remarks in the film "The End"

This action arose out of a claim by Walter J. Mikolinski and the Polish-American Guardian Society, on behalf of persons of Polish descent, that they were defamed by Burt Reynold's film "The End." Following well-settled principles of group libel law, the Massachusetts Court of Appeals in a oneparagraph opinion swiftly affirmed the trial court's dismissal of the action, concluding that neither Mikolinski nor the Polish-American Guardian Society (a corporation) was the object of the alleged defamation. The court explained that "the

allegedly defamatory remark [must] be directed at some specific individual or individuals and not," as here, "merely at an indeterminate class."

The court also determined that the plaintiffs were in no better position by styling their suit a "class action." As the California Court of Appeal so aptly stated in Mullens v. Brando, 13 Cal.App.3d 409, 423 (1970), cert. denied sub nom. Brando v. Coffman, 403 U.S. 923 (1971), "if no single member or [the group] could have stated a cause of action..., neither can all of them together."

It seemed obvious to the court that a corporation cannot, as it attempted to here, state a cause of action for emotional distress on behalf of individuals of Polish descent. Furthermore, the court explained that such an action is "subject to the same limitation as an action for group libel...." Apparently, the court determined that remarks giving rise to a cause of action for emotional

distress must similarly "be directed at some specific individual or individuals and not merely at an indeterminate class."

Of the many authorities the court cited, Section 564A of the Restatement (Second) of Torts is perhaps the clearest, most concise statement of the rule of law determinative of this case. Section 564A provides:

"One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if, (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member."

In his book The Law of Defamation, Professor Eldredge illustrates this rule by quoting from the English case of Knupffer v. London Express, [1944] A.C. 116,

119, in which Lord Atkin wrote: "The reason why libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfound generalizations is ingrained in ill-educated or vulgar minds, Or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or, at any rate, of himself .... It will be well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class."

Mikolinski, Jr. v. Burt Reynolds Production Co. 409 N.E.2d 1324 (Mass.App. 1980) [ELR 2:20:1]

Warner Amex fails in bid to obtain order permitting it to cable cast Ohio State football games

An order sought by Warner Amex Cable Communications giving it the right to cable cast live, regular season football games of Ohio State University through Warner's QUBE system in Columbus, Ohio, has been denied by a Federal District Court in Ohio. The court denied Warner's motion for a preliminary injunction which charged the American Broadcasting Company and the National Collegiate Athletic Association with violating federal antitrust laws.

The NCAA regulates television appearances by the football teams of its member colleges and universities under its Football Television Plan. The plan provides for the NCAA to award to a single network the exclusive

right to simultaneously telecast a series of 23 games and the first right of refusal for "exception telecast" approved by the NCAA Television Committee. ABC Sports had obtained these exclusive broadcast rights for the years 1972 through 1977 and for the years 1978 through 1981.

On December 1, 1977, Warner Communications launched its innovative cable television system known as QUBE. The computerized experimental system is capable of simultaneous multiple channel cable casting and two-way communications allowing audience interaction with the programming. The system was introduced in a carefully selected geographic area of Columbus, Ohio, which happens to be the home of OSU and its popular football team. In 1976, Warner proposed to OSU the cable casting of two of its 1977 football games. OSU was receptive and the NCAA Television Committee approved the proposal under Article 20 of the Plan. Article

20 permitted the Television Committee to authorize telecasts by wired systems of games that did not conflict in time with a series game being broadcast in the geographical area of the carrying network. ABC, however, strongly disagreed with the committee's interpretation, pointing out that the terms of the Plan and contract permitted it to select games after September, up to the Monday preceding a Saturday telecast. NCAA concurred and no cable casts of OSU games were approved for 1977.

In 1978, after the NCAA awarded exclusive telecast rights to ABC for the period 1978 through 1981, Warner again proposed to cable cast OSU games, but met continued resistance from the NCAA and ABC. On June 28, 1978, Warner filed an antitrust action against ABC and the NCAA and moved for a preliminary injunction. Just prior to the scheduled hearing on the motion, the parties reached agreement, under which Warner was

permitted to cable cast ten OSU games not broadcast by ABC in 1978 and 1979. Warner agreed to discontinue its suit and refrain from further litigation until the conclusion of the 1979 football season. The NCAA television plan was then revised to reflect this agreement, but not without protest from ABC. The changes consisted of the deletion of Article 20 and the revision of Article 16, which put cable systems on a virtually equivalent footing with broadcast systems with respect to "exception" telecasts.

For an exception to be granted under Article 16, all other admission-charging college games scheduled for the same time in the prescribed geographic area must be sold out. The NCAA was concerned that the OSU cable cast in the Columbus area might adversely affect attendance at the home football games of four small colleges and universities within a 30-mile radius of the QUEB subscription area. In fact, in fulfillment of its settlement

obligation, Warner employed its two-way communication technology to poll the OSU game audiences asking, for example, whether they would have attended a local college game if QUEB were not cable casting OSU football. The results proved inconclusive. ABC ultimately agreed to the revisions on February 13, 1980.

Meanwhile, Warner Amex conducted its ten OSU football cable casts in 1978 and 1979 and communicated to OSU and the NCAA its desire to continue them in 1980. The NCAA Television Committee notified Warner it would approve of its 1980 cable casts but said such action would be governed by Article 16. Since most of the OSU games conflicted with football games scheduled by local colleges, it was suggested that Warner could secure the games by either persuading OSU or the smaller schools to alter their 1980 football schedules or by buying out all the empty seats in the stadiums of the schools affected by the proposed cable casts. Warner found both

alternatives "unrealistic" and attempted to persuade ABC to waive its right of exclusivity. When ABC refused, Warner filed a second antitrust action along with a motion for preliminary injunction to allow it to cable cast the 1980 OSU games.

A requirement for preliminary injunction relief is a showing of "irreparable harm," which means "substantial injury to a material degree coupled with the inadequacy of money damages." The court determined that Warner had failed to make such a showing. On the contrary, said the court, "It lies within [Warner's] own power to put a price tag on potential damages." The court pointed out that "the only thing standing between Warner Amex and the 1980 OSU games is money in an amount well within its capacity to expend in anticipation of a decision of its antitrust action on the merits." By its own reckoning, Warner could have bought out four conflicting dates for $32,118, or all conflicting dates for

$173,072. With revenues of $81.3 million dollars and operating income of $12.2 million dollars in 1979, Warner "can scarcely be heard to complain that it could not bear this expense, which it would regain should it prevail on the merits," said the court.

Warner Amex Cable Communications v. American Broadcasting Companies, 499 F.Supp. 537 (S.D. Ohio 1980) [ELR 2:20:2]

Illinois villages permitted to challenge construction of open-air music theater in neighboring town

Two Illinois villages have standing to challenge an adjacent municipality's ordinances which permit the construction of an open-air music theater within its boundaries, the Supreme Court of Illinois had held.

The village of Hoffman Estates had authorized RKO General and others to build the Toplar Creek Music Theater, which was to contain approximately 6,000 seats in an auditorium structure and space in the open for an additional 14,000 people. Among the performances contemplated by the developers were rock concerts, jazz festivals, and country-and-western musical programs, all. of which were to be electronically amplified. The property upon which the theater was to be built is located a substantial distance from the residentially developed area of Hoffman Estates, but is in close proximity to residentially developed areas within the corporate limits of the villages of Barrington Hills and South Barrington, Illinois.

Barrington Hills and South Barrington have alleged that Hoffman Estates violated their due process rights in approving the theater's construction, and they have charged that the proposed theater will constitute a public

nuisance. Specifically, the municipalities claim that they will suffer special damages in their corporate capacities in the form of a loss of municipal revenues due to the diminution in property values, and increase in municipal expenditures for the hiring of additional police manpower and squad cars to monitor traffic congestion, the additional expense of clearing litter from the roads and highways, the degradation of air quality due to vehicular exhaust and the increase in sound level resulting from the electronic amplification of music and traffic flow.

The court held that these effects of Hoffman Estates' approval of the development "portend direct, substantial and adverse effects" upon Barrington Hills and South Barrington in the performance of their corporate obligations. Thus, the two municipalities have "a real interest in the subject matter of the controversy," thereby giving them standing to challenge the zoning ordinances of Hoffman Estates.

Village of Barrington Hills v. Village of Hoffman Estates, 410 N.E.2d 37 (Ill. 1980) [ELR 2:20:3]

Motion picture copyright valid even if not "promptly" registered; liquidated damages provision of consent decree is enforceable

A Federal Court of Appeals in California has affirmed a $40,000 contempt-of-court award in favor of MGM, Paramount and Avco Embassy against a company known as Thunderbird Films. Thunderbird is itself a movie distributor that sells non-copyrighted and public domain films to the public. In 1972, eleven major and independent distributors caught Thunderbird selling prints of their copyrighted movies. They filed an infringement suit against Thunderbird, and Thunderbird

signed a consent decree permanently enjoining it from selling motion pictures copyrighted by any of the eleven companies. The consent degree also provided that if Thunderbird violated its terms, it would have to pay a specified amount of money in damages.

MGM, Paramount and Avco were among the eleven companies that sued Thunderbird in 1972, and thus were among those whose copyrighted films Thunderbird was enjoined from selling. Nevertheless, several years later, Thunderbird did sell, or offer for sale, movies by each of the three: "Let That Be Your Last Battlefield," "The Producers," and "The MGM Story." Proceedings were initiated against Thunderbird as a result. A Federal District Court found it in contempt and ordered it to pay the three companies $40,000 in accordance with the damages provision of the 1972 consent decree.

On appeal, Thunderbird argued that the copyrights to the three films in question were invalid. Apparently, the

movies were not registered and deposited with the Copyright Office immediately after they were first released, despite the Copyright Act's requirement that copies of works be "promptly" deposited. The Court of Appeals held, however, that despite the language of the Copyright Act, it is merely necessary that registration and deposit take place before an infringement action is filed. In so holding, the court cited decisions of the United States Supreme Court and another Court of Appeals in which it had been ruled that registration delays of 14 months and 27 years had not invalidated the copyrights at issue in those cases. In this case, the movies in question had been registered and deposited prior to the original lawsuit and prior to Thunderbird's infringements. (The Court of Appeals made it clear, however, that their copyrights would have remained valid even if the films were not deposited with the Copyright Office until after Thunderbird's infringement, and that deposit

and registration simply must occur prior to the filing of suit.)

Thunderbird also challenged the $40,000 damage award on the grounds that it was an unenforceable penalty. Under California state law, penalty provisions of contracts may be unenforceable. The Court of Appeals held, however, that a consent decree is not a contract, even though its provisions are reached by agreement, and therefore California state law has no bearing on the enforceability of a consent decree. Only federal law may be considered in deciding whether there are grounds for setting aside a federal court judgement, including a consent decree, and none of the grounds recognized by federal law applied in this case, the court held.

Twentieth Century-Fox Film Corp. v. Dunnahoo, Case No. 78-3242 (9th Cir., Feb. 2, 1981) [ELR 2:20:3]

Federal District Court enjoins enforcement of Boulder, Colorado ordinance restricting growth of established cable television system

The battle for cable television franchises is nowhere more evident than in the city of Boulder, Colorado. An order enjoining the enforcement of two Boulder ordinances which imposed a temporary moratorium on the growth of an area cable system (previously reported at ELR 2:8:6) has been reversed by a Federal Court of Appeals. Encouraged by that reversal, the city of Boulder enacted a new ordinance placing a permanent geographical limitation on the cable system. The enforcement of that ordinance has now been enjoined by the same judge who struck down the original moratorium.

In 1964, Boulder entered a twenty year, nonexclusive license-contract with a predecessor of Community Communications Company (CCC), under which CCC was

licensed to supply cable television throughout the city. The company has since supplied news, information, and entertainment to many of Boulder's citizens via its cable television operation. In 1979, Boulder Communications Company (BCC), informed the city that it had been formed by six citizens of Boulder, and offered to supply Boulder with "the best that cable has to offer." BCC tendered a resolution under which it would receive a permit to build its system if CCC's license were revoked or if CCC agreed not to expand. In December 1979, Boulder enacted an ordinance imposing a ninety day moratorium on CCC's expansion. When CCC continued building, city authorities arrested its construction crews and tore down its cables. CCC then sought and obtained a federal court order enjoining Boulder from taking any action to restrict the conduct of its cable television business. The trial judge found the direct and immediate

effect of the ordinance to be a restraint of trade, and thus a violation of federal antitrust laws.

The Court of Appeals has reversed that decision on the grounds that the city of Boulder is exempt from the antitrust laws under the authority of Parker v. Brown, 317 U.S. 341 (1942). In that case the Supreme Court held that restraints of trade imposed by a state are not prohibited by the Sherman antitrust act.

A second ordinance was adopted by Boulder after the appellate court announced its decision to uphold the city's ninety day moratorium on CCC's expansion. The new ordinance permanently reduces CCC's right to provide services to a prescribed area encompassing only one-third of the city's residents. The enforcement of the new ordinance has been enjoined by the same trial judge who had ruled against the earlier ordinance. He narrowly interpreted the appellate court's holding, restating it as follows: "A home rule city in Colorado can claim

immunity for a temporary moratorium imposed to foster competition for obtaining a franchise." The permanent exclusion of CCC from two-thirds of the city is a much different action with more far reaching consequences, the court warned. The city of Boulder's latest action, said the court, concerns control over the quantity and quality of communication, which may not be considered a matter of such local concern as to justify the exercise of sovereign authority by a home rule city. "To achieve its stated purposes by exercising pervasive controls over cable communication is to violate the First Amendment, and a failure to exercise just such control is to lose any legitimate claim of antitrust exemption," stated the court.

The city contended that cable is a "natural monopoly" and the ordinance is justified since there can be only one cable operator in any one area of the city. The court asked, "Does the economic reality of one-newspaper cities justify government regulation of that business? Of

course not." The court found that the city's policies would not only violate First Amendment rights but would severely inhibit the possibility of naturally-occurring competition. Under present technology, more than one cable company can be on the same poles without adversely affecting the public ways, noted the court. "With the cost of satellite receivers rapidly going down, CCC may soon even be competing with private individuals who decide to invest in such equipment, in the same manner as private persons now invest in video tape recorders," added the court.

The battle between CCC and the city of Boulder, as one of the judges explained, has "spawned delay in service to new consumers, arrests, equipment teardowns, two lawsuits, an appeal, continuing litigation, and the concomitant expense to all local and federal taxpayers." The battle is likely to continue until at least another

appellate opinion is filed after the case is finally presented on the merits.

Community Communications Company, Inc. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980); Community Communications Company, Inc. v. City of Boulder, 496 F.Supp. 823 (D.Colo. 1980) [ELR 2:20:4]

Maine statute restricting billboard messages is ruled unconstitutional

In a decision of interest to record and movie companies, as well as others that advertise by billboard, Maine's Traveler Information Services Act has been declared an unconstitutional restriction on the content of billboard communications. Maine's asserted state interest in highway safety was found not to be substantially

related to the Act's "universal" condemnation of billboards and roadway signs.

A Federal Court of Appeals noted that the state's other avowed purposes in enacting the legislation preserving scenic beauty and advancing tourism were legitimate state interests which might be sufficient to justify restrictions on commercial advertising. (A San Diego ordinance banning offsite advertising billboards was upheld by the California Supreme Court in Metromedia, Inc. v. San Diego, 26 Cal.3d 848 (1980) (prob. juris noted, 49 U.S.L.W. 3270, 10/14/80) (ELR 1:24:7). But a significant percentage of the billboard messages in the state were noncommercial in nature and the exemptions in the Act for political, social, cultural and religious matters "did not go far enough," according to the court. Communications such as "Save The Whales" or "No Nukes" would be altogether banned. Imposing too great a burden on ideological speech rendered the Act

unconstitutional and the District Court judgment of dismissal therefore was reversed.

in a lengthy concurring opinion, Judge Pettine took exception to his colleagues' description of the Act either as an "incidental" restriction on expression that might be justified by a "sufficiently important governmental interest in regulating the nonspeech elements present," or as a time, place or manner restriction. In his view, the Act would "virtually obliterate the right to speak by sign at any place visible from Maine's public roads," far exceeding the limitations on expression generally found in time, place and manner restrictions. In effect, a medium of communication would be removed from the public.

Judge Pettine, observing that "content-based distinctions are the most suspect form of First Amendment restriction," concluded that the Act was unconstitutional because the state's aesthetic concerns were not sufficiently compelling to justify such an extensive ban on

ideological speech. As opposed to the majority opinion, he regarded the ban as more extensive in restricting commercial speech, as well as ideological speech, than was required to achieve the state's aesthetic goals.

Donnelly & Sons v. Campbell, Case No. 79-1575 (1st Cir., Dec. 22, 1980) [ELR 2:20:5]

New York Yankee pitcher awarded workman's compensation benefits on account of disabling injury from repeated trauma

The New York Yankees have struck out in their efforts to deny former pitcher John Sielicki workman's compensation benefits arising out of a disabling nerve injury in his pitching arm.

A Florida Judge of Industrial Claims originally denied Sielicki's claim on the grounds that the pitcher failed to show his disability resulted from an accident on April 7, 1978, the last day he played for the Yankees. However, a Florida Court of Appeals reversed and held that a compensable accident is not necessary to the claim. Injuries resulting from "repeated trauma" are compensable, said the court, if the claimant shows (1) prolonged exposure, (2) the cumulative effect of which is injury or aggravation of a preexisting condition, and (3) that he bad been subjected to a hazard (trauma) greater than that to which the general public is exposed.

In 1974, while pitching for the San Francisco Giants, Sielicki underwent surgery to his left elbow, relocating the ulnar nerve. He had some trouble with the elbow in 1975, but he went on to pitch the remainder of the 1975 season. He also pitched all of the 1976 and 1977 seasons and performed those seasons without elbow

trouble. After signing with the Yankees for the 1978 season, Sielicki reported to Yankee spring training in March, 1978. From that time until April 7, 1978, he pitched nine innings in exhibition games for the team. On the morning of April 8, 1978, Sielicki experienced tightness in his left elbow and muscle spasms in his left arm and reported to the Yankee trainer. Shortly thereafter, Sielicki was unconditionally released.

Undisputed testimony from four doctors revealed that the pitcher was suffering from ulnar neuritis, causing weakening in his left hand, loss of motion in his arm, pain, and occasional numbness in the arm. The prognosis was that Sielicki would never professionally pitch again. it was explained that the ulnar neuritis was related to the strain of pitching and one doctor, a specialist in sports medicine, testified that the injury was the result of attempting to throw too hard too early in the season.

Another doctor added simply that Sielicki reinjured himself by continuing stress on his left arm while pitching.

The court found these facts to meet the requirements of workman's compensation for "repeated trauma." Because the Yankees had purchased a workman's compensation insurance policy, the "professional athlete exclusion" under Florida Workman's Compensation Law was not applicable.

Sielicki v. New York Yankees, 388 So.2d 25 (Fla.App. 1980) [ELR 2:20:5]

Briefly Noted:

Child Labor Law.

A complaint against a New Jersey licensed casino-hotel for alleged violations of state child labor laws was reinstated by the Superior Court of New Jersey, Appellate Division, reversing an earlier Municipal Court dismissal of the case. The complaint, which charged that Resorts International Hotel, Inc. violated the state's child labor laws in hiring four minors as acrobatic dancers in the casino's night club show, was dismissed by the Municipal Court on the grounds that the "regulation of minors in casino employment was preempted by the [New Jersey] Casino Control Act." In reversing the lower court's ruling, the Superior Court held that "under ... known principal(s) of statutory construction,. . . the general preemption section of the Casino Control Act may not be interpreted as repealing the specific provisions of the Child Labor Law where the Casino Control Act lacks specific reference to the employment of minors." The Superior Court also noted that the child labor law,

being a "so-called regulatory or public welfare criminal statute," imposed "strict criminal liability" on the defendant in the case and, as such, negated the lower court requirement of "specific criminal intent" for a conviction in the case.

State of New Jersey v. Resorts International Hotel, Inc., 414 A.2d 269 (N.J.App.Div. 1980) [ELR 2:20:6]

Libel.

The NBC and ABC television networks have been held amenable to a libel suit in a Federal District Court in New Hampshire, which denied the networks' request to transfer the case to a Federal Court in New York. Dr. Peter Galonis and International Educational Services, Ltd. allege that the networks defamed them in separate

broadcasts which, by innuendo, accused them of engaging in corrupt and dishonest business practices in their dealings with foreign students and small American colleges. The court weighed the relative convenience of the parties, taking into account the disruption of the parties' businesses, the financial Strength of the parties, and the location of the witnesses. Although the key witnesses for the networks are located in New York, the court found that the networks can compel them to testify in New Hampshire because most, if not all, of these key witnesses are presently employed by the networks. On the other hand, transferring the action to New York would probably result in Galonis losing some of his "live" witnesses and would increase his deposition costs, the court concluded.

Galonis v. National Broadcasting Company, Inc., 498 F.Supp. 798 (D.N.H. 1980) [ELR 2:20:6]

Obscenity.

An Imperial Beach, California ordinance requiring adult bookstores to obtain a conditional use permit has been declared unconstitutional by the California Court of Appeal. The ordinance set "subjective" standards for issuance of the permit, conferred "unlimited authority to deny any application for an adult bookstore license" and was vague, overbroad and a prior restraint on First Amendment protected activity.

City of Imperial Beach v. Palm Avenue Books,Inc., Cal.Ct.App., 4 Civ. No. 22490 (Jan, 23, 1981) [ELR 2:20:6]

Obscenity.

In an action to abate a public nuisance brought by the Santa Ana City Attorney against the owners and operators of a motion picture theater, the California Court of Appeals has upheld a trial court decision granting injunctive relief barring the exhibition and advertising of movies found to be obscene. However, certain other remedies granted by the trial court were ruled excessive and improper, including: a jury award of $76,400 in compensatory damages, allowing the City's officers "free and total access to all parts of the theater" for a 2 year period for monitoring purposes, requiring the deposit of $100,000 in trust against future costs which might be incurred by the City in abating future nuisances by the defendants, and ordering the destruction of the 11 films that were found obscene.

People v. Mitchell Brothers Santa Ana Theater, Cal.Ct.App., Case No. 4 Civ. 19940 (Jan. 20, 1981) [ELR 2:20:6]

Obscenity.

The City of Covina's comprehensive zoning ordinance, which prohibited the location of adult entertainment businesses within 500 feet of a residential area, has been upheld as narrowly construed by the California Court of Appeal. The operator of the Covina Cinema, a theater which occasionally exhibited X-rated films, and a patron of the theater, had unsuccessfully sought a preliminary injunction barring the City of Covina from instituting any actions against the Cinema under the zoning ordinance. The ordinance defined an adult motion picture theater as "an enclosed building ... used for presenting

material distinguished or characterized by an emphasis on depicting or describing 'Specified Sexual Activities' or 'Specified Anatomical Areas.'" In order to sustain the validity of the statute, the court determined that a theater would be deemed an adult motion picture theater within the ambit of the zoning ordinance only when the "preponderance" of the films shown had as their dominant or predominant character and theme, "the depiction of the enumerated sexual activities or anatomical areas." The Court of Appeal noted that the ordinance as construed would not apply to the Covina Cinema's proposed exhibition of serious, artistic X-rated films and that the Cinema had suffered irreparable injury pending trial since the ordinance deterred the Cinema's exhibition of such films. However, a preliminary injunction pending trial was found unnecessary since, unless the Cinema drastically changed its exhibition policy, the theater would not

be subject to prosecution under the narrow interpretation given the ordinance.

Pringle v. City of Covina, Cal.Ct.App. 2d Civ. No. 58388 (Jan. 26, 1981) [ELR 2:20:6]

Tax.

A Federal District Court in California has ruled that various foreign organizations created by a Dutch corporation equally owned by MCA, Inc. and Paramount were associations taxable as corporations. These organizations were used to distribute films within the country of their incorporation. The importance of the characterization results from the fact that under provisions of the Internal Revenue Code, MCA and Paramount would have to include all of the income from the foreign

organizations in their gross incomes if the foreign organizations were corporations but not if they were partnerships. The court first analyzed the foreign organization's corporate attributes by utilizing the standard approach found in the Treasury Regulations under IRC Sec. 7701. These Regulations provide that an organization must have more corporate attributes than non-corporate attributes in order to be an association taxable as a corporation. There are six corporate attributes, two of which are common to both associations and partnerships, so the real analysis depends upon the remaining four corporate attributes. These attributes are (1) centralized management, (2) limited liability, (3) free transferability of interests, and (4) continuity of life. Despite the fact that none of these organizations had more than two of these corporate characteristics, the court reanalyzed the corporate attributes utilizing the so-called "separate interest test" first enunciated by the Service in

Revenue Ruling 77214. The court held that where there are no separate interests involved in the entity, the corporate attributes of free transferability of interests and continuity of life were present despite the governing instruments and local law. Therefore, on account of the presence of a third corporate attribute - limited liability - in most of these foreign organizations, in addition to the presumed presence of free transferability and continuity of life under the "separate interest test," the court held that these foreign organizations were associations taxable as corporations.

MCA, Inc. v. United States, 80-2 USTC Para. 9617 (C.D.Cal. 1980) [ELR 2:20:7]

Tax.

The Internal Revenue Service has ruled that a tax exempt organization did not lose its exempt status by publishing a newsletter that contained the voting records of members of Congress, even though the newsletter also contained statements of the organization's position on the votes involved. Key to the Service's determination that the newsletter would not constitute political activity (which tax exempt organizations are prohibited from engaging in) were the following facts: the voting records of all Congressmen were presented; candidates for reelection were not identified as such; no comments on the individual's overall qualifications were made; no endorsements were made; the newsletter was distributed only to the organization's members who were nationwide; and no attempt was made to target the newsletter to areas in which elections were about to occur.

Revenue Ruling 80-282, I.R.B. 1980-41, 7; 80(10) CCH Standard Federal Tax Reports, Para. 6818 [ELR 2:20:7]

Unfair Competition.

An agreement terminating a joint venture between a manufacturer of waistreducing belts and a marketing firm prohibited the marketing firm from further using "the likeness of the persons depicted" in promotional photographs used during the term of the venture. That provision has been interpreted by a Federal Court in New York to prohibit the marketing firm from using in its advertisement models who substantially resemble the models shown in the original photographs. The court quoted the preferred definition of the word "likeness" in Webster's Third New International Dictionary, "The

quality or state of being like; resemblance; similarity," and concluded that any other interpretation would fail to provide practical protection to the manufacturer and would permit the publication of advertisements which would tend to confuse the public as to the source of the products in violation of Federal Trademark Law (Lanham Act, Section 43(a)).

Vibrant Sales, Inc. v. New Body Boutique, Inc., 496 F.Supp. 854 (S.D.N.Y. 1980) [ELR 2:20:7]

Previously Reported:

California Superior Court Judge Earl F. Riley has held that the California Franchise Tax Board may not impose a state franchise tax on the Boston Bruins of the National Hockey League for income the Bruins did not

receive in California. (Los Angeles Superior Court Case No. C317618). In so ruling, Judge Riley reversed a 1979 decision of the California State Board of Equalization that the Bruins were subject to California franchise taxes even though the team does not maintain a place of business within California and even though it does not receive any portion of the gate receipts from games played within the state. (ELR 1: 18:5) The case is considered a test case and the Franchise Tax Board is expected to appeal.

As previously noted (ELR 1:18:5), California, Minnesota and the city of Cleveland hold individual athletes responsible for personal income taxes if they play games within their borders, even if those games are "away" games and the players live elsewhere. California calculates the amount of income on which players must pay California personal income taxes based on the number of "duty days" they spend in the state as compared to

the number of such days they spend elsewhere. The Entertainment Law Reporter has just learned that the state of New York also imposes state income taxes on nonresident professional athletes who play games in New York. The New York Tax Commission uses a "games played" formula, and it has just ruled that nonresident athletes may count exhibition games in determining the portion of their income that is subject to New York state taxes. [ELR 2:20:7]

DEPARTMENTS

In the Law Reviews:

"Unequal Opportunities": Unneeded, Undesirable, and Unfair by Heidi P. Sanchez and Andrew J. Schwartzman, 2 Comm/Ent 623-633 (1980)

The Public Interest in Political Broadcasting: Evaded, Eroded, and Eviscerated by Frank J. Kahn and Erwin G. Kirasnow, 2 Comm/Ent 635-643 (1980)

Civil Rights in the Locker Room: Ludtke v. Kuhn by Mary L. Brennan, 2 Comm/Ent 645-669 (1980)

Reading Copyright Cases: The Ad Hoc Approach by Charles Schug, 2 Comm/Ent 671-705 (1980)

Peeking Behind Judicial Robes: A First Amendment Analysis of Confidential Investigations of the Judiciary by Cydney A. Hurowitz, 2 Comm/Ent 707-731 (1980)

California's Resale Royalties Act by Phil McLeod, 2 Comm/Ent 733-743 (1980)
[ELR 2:20:8]