RECENT CASES

Producers of "Boulevard Nights" are not liable for injuries inflicted on movie-goer by assailant in vicinity of theater

A California Court of Appeal has ordered the dismissal of a suit against the producers of "Boulevard Nights" for injuries inflicted on a young woman who had viewed the film in a movie theater in San Francisco.

On March 24, 1979, Jocelyn Vargas attended a showing of "Boulevard Nights." After leaving the theater, Vargas was shot by an individual who, it was claimed, was "a member of the general public prone to violence ... who had been attracted to (the theater) by the showing of said violent movie." Vargas' action against Tony Bill, Bill Benenson, and Michael Pressman, who were

the executive producer, producer and director of the film, and against Eastside Productions, Inc. (Bill and Benenson's corporation), contended that they knew or should have known that "Boulevard Nights" was a violent movie that "would attract certain members of the public to view said movie who were prone to violence and who carried weapons ... (and) were likely to cause grave bodily injury upon other members of the general public at or near the showing of said movie, and that the filmmakers had failed to warn patrons such as Vargas of these facts." It also was alleged that the filmmakers impliedly represented to members of the general public, in advertising, that the film could be viewed in safety, and that Vargas had relied on these representations.

The trial court denied the filmmakers' motion for summary judgment. On appeal, Judge Joseph R. Grodin (who has since been appointed to the California Supreme Court) issued an extraordinary writ to compel the

trial court to dismiss the suit, on the basis of both First Amendment considerations and traditional tort principle of foreseeability of harm.

Initially, it appeared that the case of Olivia N. v. National Broadcasting Co., 126 Cal.App.3d 488 (1981) (ELR 3:16:2) should have been dispositive of Vargas' action. But Vargas distinguished Olivia N. by claiming that the film's attraction to violence-prone persons rather than the content of "Boulevard Nights" was at issue. Vargas conceded that there was nothing tortious about the content of "Boulevard Nights" and that the film was "within the ambit of protected expression." Judge Grodin did not agree that distinction made by Vargas resolved the First Amendment concerns in the case. If violent individuals were attracted to the vicinity of theaters showing "Boulevard Nights" it was because of the film's content, stated the court. Vargas herself pointed out that the media had linked "Boulevard Nights" with another

purported "gang movie" entitled "The Warriors," the exhibition of which allegedly resulted in actual incidents of violence. Thus any liability imposed on the producers would implicate the First Amendment, because any producer considering a movie about gangs or violence would be required to assess his or her potential liability to theater patrons. If a producer were required to issue a warning to patrons concerning the risk of attending a film, attendance in all likelihood would decrease. And the cost of providing security protection at every theater at which a "troublesome" film is shown undoubtedly would have a chilling effect on a producer's selection of subject matter. Further, since it is also difficult to predict which subjects will cause a violent reaction in today's society - even Mary Poppins is not without detractors - the "sensitive" members of an audience might "dictate, in effect, what is shown in the theaters of our land," noted Judge Grodin.

Vargas also was unsuccessful in her claim that the First Amendment did not apply to her cause of action for fraud, that is, the erroneous implication that the film could be viewed in safety. Misrepresentation is a class of speech which may be regulated by the states. However, there was no argument made or evidence presented that any facts were misrepresented by the producers of "Boulevard Nights."

Regardless of the First Amendment issues, Judge Grodin stated that he would refrain from deciding the case on First Amendment grounds alone, since there may be circumstances "in which the state could hold a party responsible for a warning, or taking protective action, against the foreseeable reaction of persons to protected speech without violating the First Amendment."

Judge Grodin therefore proceeded to consider the tort issue of foreseeability of harm, particularly in relation to Weirum v. RKO General, Inc., 15 Cal.3d 40 (1975), a

case cited by Vargas. Weirum involved a rock radio station contest which rewarded listeners who were the first to drive to various locations announced over the air. In the course of engaging in the contest, a minor driver precipitated a car accident in which another driver was killed. The court in Weirum found ample evidence of foreseeability of harm and pointed out, as stressed by Judge Grodin, that "neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk." In contrast to Weirum, the producers of "Boulevard Nights" engaged in an activity that was "socially unobjectionable" and "cannot be the predicate for imposition of liability on the theory of Weirum. "

Practical obstacles such as the fact that we live in a violence-prone society and the difficulty of devising and displaying an effective warning to theater patrons also

were noted by the court as it ordered the issuance of a preemptory writ of mandate.

Bill v. Superior Court, Case No. A017025 (Ca.Ct. App., Dec. 9, 1982) [ELR 4:16:1]

Bystander's brief appearance in an ABC television documentary on sex-related businesses was capable of a defamatory meaning, Federal Court of Appeals rules in overturning lower court decision granting summary judgment to ABC

In April of 1977, ABC broadcast a documentary entitled "Sex for Sale: The Urban Battleground." The program examined the effects of sex-related businesses on local communities. In many instances, the sex businesses have led to an increase in street prostitution.

While residents of one middle class community in Detroit commented on the impact of street prostitution in their neighborhood, the accompanying visual portrayed three women walking down a local street. Two of the women were middle-aged and somewhat heavy; they were carrying packages and appeared to be area residents. The third woman, Ruby Clark, was a young black woman, attractive and stylishly dressed and coiffed. During the three to five seconds when a close-up of Clark's head and shoulders appeared on screen, the program's narrator commented: "But for black women whose homes were there, the cruising white customers were an especially humiliating experience." Soon after this comment, a resident of the neighborhood stated: "Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute."

Clark, who has never been a prostitute, brought an action against ABC claiming defamation and invasion of privacy. A Federal District Court granted ABC's motion for summary judgment. However, the decision has been reversed by a Federal Court of Appeals which has ruled that the District Court had applied an incorrect standard when it concluded that the broadcast was not libelous. Summary judgment should have been granted only if the broadcast was not reasonably capable of a defamatory meaning, declared the Court of Appeals. However, Clark's appearance in the broadcast was capable of a defamatory meaning, given the program's focus on street prostitution, and the contrast between Clark and the two more matronly figures who preceded her appearance. It will remain for a jury to decide whether the broadcast was understood as being defamatory.

The Court of Appeals also rejected ABC's argument that it was entitled to the protection of a qualified

privilege under Michigan law even if the broadcast was capable of a defamatory meaning. In Schultz v. Newsweek, 668 F.2d 911 (6th Cir 1982)(ELR 4:3:6), the court held that Michigan's privilege applies "even though the plaintiff is a private individual," and that the scope of the privilege is a question of law. But in this case, Clark's participation in the broadcast possessed "only the most tenuous connection with the public interest subject matter," ruled the court, and was not within the scope of Michigan's qualified privilege as a matter of law.

First Amendment principles also did not require granting summary judgment to ABC. Clark was not a public figure who would be required to establish that ABC acted with actual malice since Clark (1) did not voluntarily participate in the public controversy surrounding the effect of street prostitution on the Detroit neighborhood in question; (2) has no access to channels of

effective communication in order to counteract "the erroneous impression that she was a prostitute," and (3) was an incidental figure in the broadcast.

In a strong dissent, Senior Circuit Judge Baily Brown stated that he believed that the District Court was correct in determining that the portrayal of Clark could not reasonably be construed as defamatory because there was nothing in Clark's appearance that would suggest that her activity "would ... parallel that of the act of prostitution." ABC clearly identified as such the prostitutes who did appear on the program. And the focus of the documentary was the impact sex-related businesses on women in the area who were not prostitutes. Clark's appearance suggested to the viewer that she was among this group of neighborhood women.

Judge Brown also would have found that ABC was entitled to Michigan's qualified privilege. An individual's appearance in a public interest documentary is within

the scope of the privilege "as long as the individual has a reasonable connection with the subject matter of the documentary." Clark's presence in the Woodward Avenue area presumably would subject her to the indignities addressed by the documentary, and this was not an unrelated or incidental connection with the public interest topic of the broadcast. Judge Brown concluded by observing that "the majority's disposition of this case will make the filing of television documentaries unduly risky and therefore ... is not in the public interest."

Clark v. American Broadcasting Companies, Inc., 684 F.2d 1208 (6th Cir. 1982) [ELR 4:16:2]

Bruce Jenner television commercial for Tropicana orange juice is ruled to be false and further broadcasts are enjoined by Federal Court of Appeals

Tropicana Products, Inc. makes frozen orange juice. As part of a promotional campaign, Tropicana hired Olympic decathlon champion Bruce Jenner to do a television commercial.

The commercial first depicted Jenner squeezing a fresh orange and praising Tropicana orange juice by saying, "It's pure, pasteurized juice as it comes from the orange." Then the commercial showed Jenner pouring the fresh-squeezed juice into a Tropicana carton. At the same time, Jenner told the viewers that "it's the only leading brand not made with concentrate and water."

Coca-Cola, the maker of Minute Maid orange juice, brought suit against Tropicana for false advertising in violation of Section 43(a) of the Lanham Act. Coca-Cola alleged that the ad was false because it suggested that Tropicana contained fresh-squeezed orange juice, when in fact, it did not. Moreover, CocaCola alleged

that the ad informed the viewer that pasteurized juice comes from the orange which is, of course, false.

Coca-Cola sought a preliminary injunction enjoining the broadcast of the commercial. According to the Lanham Act, anyone who uses a false description or representation in connection with goods placed in commerce, "shall be liable to a civil action by (anyone) ... who believes that he is or is likely to be damaged by the use of ... such false description or representation." The trial court denied the preliminary injunction, ruling that the advertisement was not false on its face. Coca-Cola appealed.

The Court of Appeals has reversed the ruling of the District Court and has ruled instead that the preliminary injunction should issue. According to the Court of Appeals, the trial court abused its discretion because it did not properly consider the two-pronged test for determining whether to issue a preliminary injunction. The lower

court admitted survey evidence with respect to the likelihood of success on the merits element, but erroneously failed to admit survey evidence with respect to the irreparable harm element. The appellate court reasoned that this constituted an error of fact as well as an error of law.

The court first recognized that in cases of misleading advertising under section 43 (a) of the Lanham Act, the fact that Tropicana and Minute Maid were direct competitors was significant. Moreover, the court held that the only showing Minute Maid was required to make in seeking the injunction was that if consumers were misled by Tropicana's commercial, Coca-Cola would probably suffer irreparable injury. The court concluded that Coca-Cola had made the requisite showing by virtue of a survey which demonstrated that at least some viewers were misled by the Bruce Jenner commercial.

The appellate court reasoned that it was in as good a position as the trial court to draw an appropriate inference whether the commercial was implicitly or explicitly false. In this respect, the appellate court held that Bruce Jenner's squeezing-pouring sequence was false on its face and that as a reviewing court it was not bound by the lower court's finding on this factual issue. The court concluded that Tropicana's orange juice is not made by squeezing fresh orange juice into its cartons. Rather, the juice is pasteurized, that is, it is heated at 200 degrees Fahrenheit to kill natural enzymes which cause spoilage. Accordingly, the court enjoined the Bruce Jenner commercial.

The Coca-Cola Company v. Tropicana Products, Inc., Docket No. 82-7422 (2d Cir., September 29, 1982) [ELR 4:16:3]

Actor's residual payments are income, for purposes of determining unemployment eligibility, only when payments are received by the actor, not when payments are issued by producer to actor's agent or SAG

When actors are paid residual fees for the re-use of television commercials, televison programs, and movies shown on television, residual checks generally are mailed by the producer of the project to the actor's talent agency. It is customary in the industry for the agency to deposit the residual check in its general account, and then issue the client its own check in an amount reduced by the agency's commission. In the case of television programs and movies shown on television, residual fees often are mailed to the Screen Actors Guild which records the payment and forwards the original check to the actor. Under either arrangement, the actor is not

notified that the commercial or program will be rerun or that a residual payment has been sent to his agent or to the Guild.

In 1980, Mariano J. Bellina, an actor, filed unemployment claim forms certifying that he had no work or earnings during the weeks ending October 11, October 25 and December 20. However, during an audit in June of 1981, a television producer reported that use or residual fees were paid to Bellina in those weeks for the later showing of a television commercial in which Bellina had performed. Bellina was paid the amounts of $159.20, $79-60 and $250.00. Accordingly, the Department of Unemployment Insurance issued a Notice of Overpayment holding that Bellina had been fully employed in the weeks ending October 11 and December 20, 1980 and was entitled to only partial benefits in the week ending October 25, 1980.

An administrative law judge found that the residual fees were wages in the weeks they were mailed to Bellina's talent agent and affirmed the Department's determination that Bellina was liable for an overpayment in the sum of $237.

The California Unemployment Insurance Appeals Board recently has reversed the decision of the administrative law judge. In so doing, the Board overruled a portion of its decision No. P-B-422. In Decision P-B-422, the Board had held that use or residual fees are wages for unemployment insurance purposes, and also that such wages are to be allocated to the week in which they are personally delivered to the claimant, or when a check is mailed by the employer to a claimant or a designated agent, or when a notice is mailed to the claimant or his or her agent that a check is available for the claimant.

The Board agreed with Bellina that the allocation provision of P-B-422 was unreasonable in light of industry practices in processing residual fees. Bellina "had no reason to believe, much less to report, that residual fees had been paid to his talent agent during (the weeks in question.)"

The Board concluded that allocating residual fees as wages in the week they are actually received by the claimant is "more equitable and practical." Bellina therefore was not liable for an overpayment of benefits since, being unemployed in the weeks in question, he was entitled to the weekly unemployment insurance benefits he received.

In the Matter of Mariano J. Bellina, Before the California Unemployment Insurance Appeals Board, Precedent Benefit Decision No. P-B-429 (Dec. 9, 1982) [ELR 4:16:4]

Consumer Reports not guilty of actual malice in publishing disparaging article about Bose loudspeaker; libel judgment therefore reversed by Federal Court of Appeals

In an opinion of interest to all who write and publish critical reviews, a Federal Court of Appeals has reversed a judgment of more than $115,000 that had been entered against Consumers Union on account of an article published in its Consumer Reports magazine that disparaged the Bose 901 loudspeaker system. (ELR 3:11:7 & 3:24:5) The article, which was published in the May 1970 issue of Consumer Reports, said that when the Bose 901 was tested, musical instruments "heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room." The

District Court found that the statement that instruments "seemed to grow to gigantic proportions" was not proven false. However, the statement that they "tended to wander about the room" was both false and disparaging.

During the trial, the Consumers Union employees who conducted the test testified that the wandering sounds they had heard actually were confined to an area within a few feet of the wall near which the Bose 901 loudspeakers had been placed. According to the District Court, this was not the same thing as wandering "about the room," and the employee who wrote the article was too intelligent not to know the difference. Thus the District Court concluded that Consumer Reports had published the disparaging statement with knowledge that it was false or with reckless disregard of its falsity.

On appeal, Consumers Union argued that when considered in context, it is clear that the statement was merely

the opinion of those who conducted the test and wrote the article. The Supreme Court has ruled that opinions cannot be false and thus cannot be libelous. The Court of Appeals said that while the opinionony argument was "plausible, the seeming scientific nature of the article ... would support the position that the statements are factual." On the other hand, the appellate court also noted that "Given the subjective nature of a listener's perceptions and the imprecise language employed in the article, we are not sure that the statement that instruments tended to wander about the room is false."

Ultimately, however, the court determined that it did not have to decide whether the statement was one of fact or opinion, or even whether it was false. Instead, the appellate court assumed that the statement was both factual and false. And it specifically stated its agreement with the lower court that the statement was disparaging. However, it did not agree with the lower court that the

evidence showed that Consumers Union published the statement knowing it to be false or in reckless disregard of its falsity. This is the "actual malice" standard of New York Times v. Sullivan which the lower court applied because it found that Bose was a public figure with respect to the subject of the article. Bose and the Court of Appeals accepted this conclusion for the purposes of this case.

The Supreme Court has ruled that in order to prove actual malice in libel cases, it is necessary to introduce sufficient evidence to prove that the defendant "in fact entertained serious doubts as to the truth of his publication." Naturally, it would be rare for a defendant to admit such doubts, and therefore they may be proved by inference from an accumulation of evidence of negligence, motive and intent. However, "Such evidence is lacking in this case," the appellate court concluded. In so ruling, the court emphasized that those who

conducted the test were themselves experts and that Consumer Reports' editorial procedures had revealed no evidence of actual malice. Instead, the testimony had indicated that normal editorial procedures had been followed in publishing the loudspeaker article, including review by a technical director, alterations by the editorial department, line-byline checking by the tester, and review by the associate technical director. "The most we can conclude from this is that in reviewing the manuscript, (Consumers Union) employees could have inquired more painstakingly into the precise language used," said the Court of Appeals. "The evidence presented," the court continued, "merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. (Consumers Union) was guilty of using imprecise language in the article - perhaps resulting from an attempt to produce a readable article for its mass audience.

Certainly this does not support an inference of actual malice," the court ruled in reversing the lower court's judgment.

Bose Corporation v. Consumers Union, No. 82-1230 (1st Cir., November 2, 1982) [ELR 4:16:4]

School board's motives in removing books from school library must be examined in order to determine if First Amendment rights of students were violated, rules United States Supreme Court

In February of 1976, the Board of Education of a Long Island, New York school district ordered the removal of nine books from the district's elementary and secondary school libraries, characterizing the removed books as "anti-American, anti-Christian, anti-Semitic, and just

plain filthy." Included among the nine books were Slaughterhouse Five, The Naked Ape, Down These Mean Streets, Black Boy, and Soul on Ice. Several students challenged the board's action as a violation of their First Amendment rights. A Federal District Court granted summary judgment in favor of the board. This decision was reversed on appeal (ELR 3:18:7) and the matter was remanded for a trial on the merits of the students' claims. The United States Supreme Court has affirmed the Court of Appeals decision.

Justice Brennan, writing for the plurality, rejected the board's argument that it possessed absolute discretion to remove books from the district's school libraries. This was not a question of determining curriculum, stated Justice Brennan. At stake was the First Amendment right of the students to receive ideas in order to effectively exercise their own rights of free speech and press. Further, a school board, while possessed of "significant

discretion to determine the content of their school libraries," may not exercise this discretion "in a narrowly partisan or political manner." It therefore will remain for the district court, on remand, to determine whether the board intended to suppress student access to ideas with which the board disagreed, or whether the decision was based solely on "educational suitability."

Chief Justice Burger, in dissent, questioned whether the Constitution would support the distinctions suggested by the plurality opinion between actions involving school libraries and school curriculum and between removing as opposed to acquiring particular books.

Justice Powell also objected to the rejection by the plurality of "a basic concept of public school education ... that the states and locally elected school boards should have the responsibility for determining the educational policy of the public schools."

And Justice Rehnquist observed that the Court has never held that the First Amendment grants junior and senior high school students a right of access to certain information in school. "Not every educational denial of access to information casts a pall of orthodoxy over the classroom," concluded Justice Rehnquist.

Board of Education, Island Trees Union Free School District No. 26 v. Pico, Case No. 80-2043 (U.S.Sup.Ct., June 25, 1982) [ELR 4:16:5]

County art museum's claim of exemption from National Labor Relations Act because of government control is denied, and museum is ordered to bargain collectively with audiovisual employees

An art museum's conflict with a craft union, predictably, has not resulted in a masterpiece. The Los Angeles County Museum of Art has been ordered by a Federal Court of Appeals to bargain collectively with Local 150, Moving Picture Projectionists, of the International Alliance of Theatrical and Stage Employees, the representative of three audiovisual assistants employed by the museum.

The museum argued that it is so substantially controlled by a governmental subdivision - the Board of Supervisors of Los Angeles County - that it is exempt from the jurisdiction of the National Labor Relations Board under section 2(2) of the National Labor Relations Act. The museum noted that the Board of Supervisors provided for the construction of the museum pursuant to agreements entered into in 1958 and 1960 with Museum Associates, a nonprofit corporation. The Board of Trustees of Museum Associates operates and maintains the

museum; the Board of Supervisors does not select the board of trustees or the officers of Museum Associates. The museum's operations are financed from state and federal grants, private individuals and foundations. The county does bear the cost of maintaining the museum, including the payment of salaries to employees determined by Museum Associates to be within county areas of responsibility. However, as budget cutbacks reduced the number of positions funded by the county, Museum Associates continued to fund some of these jobs. The county has about 180 employees of the museum on its payroll; Museum Associates funds 75 positions, including three audiovisual assistants. The assistants are within the county area of responsibility, but have been paid and supervised by Museum Associates.

The court first noted that while political subdivisions are statutorily exempt from the NLRA, Museum Associates did not claim to be a political subdivision. Rather, it

contended that the substantial control of the museum by the county would impair Museum Associates' ability to bargain meaningfully with the union regarding working conditions. The court concluded that, to the contrary, the facts showed that Museum Associates is not dependent on the county for operating revenues, and that no showing was made that the county requires wage parity between county employees and its own employees, or that the county can control the wages and benefits of Museum Associate employees.

Museum Associates advised the court of the likelihood that the county will resume funding for a number of positions including the audiovisual assistant jobs. The court suggested that if this re-funding occurs, Museum Associates may then apply to the NLRB for an appropriate remedy.

Museum Associates v. National Labor Relations Board, Case Nos. 81-7695 and 81-7789 (9th Cir., Sep. 28, 1982) [ELR 4:16:6]

Federal Trade Commission drops advertising price discrimination charges against Los Angeles Times

In 1977, the Federal Trade Commission instituted a proceeding against the Times-Mirror Company, Inc. in which Times-Mirror was charged with adversely affecting competition in violation of the RobinsonPatman Act by its use of a discriminatory rate structure for selling run-of-the-paper and suburban display advertising space. Large advertisers allegedly were charged substantially lower rates than their competitors whose advertising volume was smaller.

In November 1980, Times-Mirror entered into a negotiated agreement to resolve the FTC proceeding, and a consent order was submitted for consideration by the FTC. The consent order would have allowed the Los Angeles Times to continue using a volume discount pricing structure so long as the pricing system reflected the actual differences in cost associated with dealing with different purchasers of advertising space. The FTC sought public comment on the provisional order; of the 99 comments received, 98 urged the FTC to reject the consent order. The FTC has done so.

The comments suggested that smaller advertisers were not significantly injured by the Times' cumulative volume discount rate structure. And economists in the mass media field observed that the order might raise prices to all advertisers; might motivate newspapers to refuse to sell to smaller advertisers; and might injure newspapers "in their competition with other advertising media." The

FTC therefore concluded that the beneficial effects on competition of the proposed consent order were "much more uncertain than was originally believed."

The FTC also concluded that extending the principle of the order beyond the Los Angeles Times would be "unwise" due to the possible adverse effect on the pricing flexibility of smaller newspapers. Commissioner Pertschuk, in a separate statement, further observed that if newspapers were prohibited from giving discounts to large advertisers which are not costjustified, the same principle might have to be applied to other advertising media, including network and cable television. In all, agreed Commissioner Patricia P. Bailey, it would be "inappropriate" to leave the Los Angeles Times as the only seller of advertising space subject to the Robinson-Patman Act. Accordingly, the consent agreement was rejected and the FTC ordered the dismissal of the complaint issued in the matter.

In the Matter of Times-Mirror Company, Inc., Before the Federal Trade Commission, Docket No. D-9103 (July 8, 1982) [ELR 4:16:6]

New Jersey Supreme Court rejects challenge by prospective Atlantic City casino employees to the constitutionality of Casino Commission's license application form

Casino employees in Atlantic City must obtain casino employees licenses from the New Jersey Casino Control Commission. Two women who applied for licenses in order to work as casino dealers refused to answer several questions on the application form then used by the Commission. Objections also were raised to a required consent to search form and a release form authorizing

institutions to provide confidential information concerning the applicants to the Casino Control Commission. The Supreme Court of New Jersey has upheld the constitutionality of the sections of the Casino Control Act pursuant to which the application form was promulgated. The challenged questions did not violate the applicants' rights of freedom of association or privacy, freedom from unreasonable searches and seizures or their privilege against selfincrimination, the court has concluded.

Most significantly, the court held that the statute does not coerce consent to otherwise unlawful searches. The application states that licensed employees are subject to certain warrantless searches while on the licensed casino premises, but the expectation of privacy in such circumstances is limited in any event.

On June 1, 1982, the Commission adopted a new application form which omitted most of the challenged

questions. This application form appears to accommodate the private interests of casino licensees in being free from unreasonable intrusions into their private lives and the state's need to protect the public interest through the regulation of casino gambling. The court did question the constitutionality of the release authorization in which an applicant authorizes access by the Commission to confidential institutional records. In order to "pass constitutional muster," the court suggested that the Commission promptly promulgate regulations to safeguard the confidentiality of this material, including guidelines on its storage and concerning access to it.

In re Martin, 447 A.2d 1290 (N.J. 1982) [ELR 4:16:7]

Progressive slot machine jackpot totals accrued at the end of casino's fiscal year are not a deductible business expense

Even casino owners venture forth in search of elusive jackpots - in the case of the Club Cal-Neva, a tax refund claim for $54,460. This was the amount for which the casino would have been liable if a player had won a progressive slot machine payout on June 30, 1973, the close of the fiscal year for Sierra Development Company, the operator of Club Cal-Neva. Sierra claimed that the $54,000 was deductible as an accrued business expense. A Federal Court of Appeals has disagreed.

The court assumed, without holding, that the requirement of reasonable accuracy of computation of the claimed expense was met because the accruedamount was certain. Nevertheless the requirement of section 162(a) of the Internal Revenue Code that "all events"

determining the fact of liability have occurred, had not been met, because the progressive jackpot was not won during the year by some "fortunate gambler." And, stated the court,"Until that event occurs, no actual liability has been incurred." The theoretical odds of winning a progressive jackpot on the machines in operation at Club Cal-Neva vary from one chance in 8,000 to one chance in 9,765,625. There were too many contingencies to permit accrual of the liability.

Another factor considered by the court was that if the casino went out of business, it would not owe the jackpots to anybody, Further, the jackpots would not be taxable as income to any individual until they are won. If a deduction were allowed prior to this event, there might be no corresponding income for many years.

Nightingale v. United States, Case No. 81-4585 (9th Cir., Aug. 16, 1982) [ELR 4:16:7]

Briefly Noted:

Copyright Infringement.

Juke box operators pay annual fees to, and obtain compulsory licenses from the Register of Copyrights. These fees are then paid in proportionate shares to BMI and other licensing organizations, which in turn pay their affiliated writers and publishers. Fox Amusement Company, Inc., the operator of 125 jukeboxes in Illinois, failed to pay its 1981 fee until late November 1981. The company's failure to promptly obtain the required license certificates for its jukeboxes rendered their public performances of copyrighted musical compositions actionable as infringements. BMI therefore was awarded $250 in statutory damages on each of its 57 claims

against Fox for copyright infringement as well as attorneys' fees and costs. Fox also had filed late applications in previous years, but the court did not find that this pattern of late payment was willful so as to justify a higher than minimum damages award. Injunctive relief was denied in view of the fact that Fox made timely payment of its 1982 fees.

Broadcast Music, Inc. v. Fox Amusement Company, Inc., Case No. 81C6216 (N.D.Ill., Nov. 16, 1982) [ELR 4:16:7]

DEPARTMENTS

In the Law Reviews:

Hastings College of the Law has published Issue 3 of Volume 4 of Comm/Ent. A Journal of Communications and Entertainment Law. Subscriptions and single issues are available from Hastings College of the Law, 200 McAllister Street, San Francisco, California 94102. The issue contains the following articles:

The Courts in Broadcast Regulatory Policy-Making by Lawrence D. Longley, Erwin G. Krasnow and Herbert A. Terry, 4 Comm/Ent. L.J. 377 (1982)

Law, Medicine and the Mass Media: Uneasy Partners by Bernard Rubin, 4 Comm/Ent L.J. 389 (1982)

Fair Use and Audiovisual Criticism by Brian S. O'Malley, 4 Comm/Ent. L.J. 419 (1982)

Media Access to Videotape Evidence in Criminal Trials by Geoffrey Robinson, 4 Comm/Ent L.J. 445 (1982)

The Author, the IRS and Prepublication Expenditures by David Walton, 4 Comm/Ent L.J. 465 (1982)

Music and the Law: A Comprehensive Bibliography of LawRelated Materials by Gail Fleming Winson, 4 Comm/Ent L.J. 489 (1982)

Issue of 4 of Volume 4 of Communications and the Law has been published by Meckler Publishing, 520 Riverside Avenue, Westport, Connecticut 06880. The issue includes the following articles:

At Last: Longer Station License Terms by Stanley D. Tickton, 4/4 Communications and the Law 3 (1982)

Scuttling the Air Pirates: Theories of Pay Television Signal Theft Liability by Charles F. Luce, Jr., 4/4 Communications and the Law 17 (1982)

Property Rights, Risk Sharing, and Player Disability in Major League Baseball by Kenneth Lehn, 25 Journal of Law & Economics 343 (1982)

Is There an Afterlife: The Effect of Patent or Copyright Expiration on License Agreements by Louis Altman, 64 Journal of the Patent Office Society 297 (1982)

The Video Game: Our Legal System Grapples with a Social Phenomenon by Elliott N. Kramsky, 64 Journal of the Patent Office Society 335 (1982)

Freedom of the Press and Defamation: Attacking the Bastion of New York Times v. Sullivan by Alexander

D. Del Russo, 25 Saint Louis University Law Journal 501 (1981)
[ELR 4:16:8]