

## LEGAL AFFAIRS

### Choice of Law in Sound-Alike Cases

by **Stanley Rothenberg, David Rabinowitz  
and Helene Godin**

The scenario is not difficult to imagine: you represent a successful singer who resides in California -- she's never been a headliner, but several of her songs have made it onto the Billboard charts. One song was used as the theme song for a fairly successful movie. The song was written by an up and coming song-writing team, and copyrighted by the publishing arm of the motion picture company. The recording reached a high of 11 on the sales charts and the song has been sung by and identified with your client since it was first released.

Now, the problem: a major food company is using the song as part of a commercial to introduce a new line of ice cream, which is being test-marketed only in New York. Accordingly, the radio and television campaign is limited to the area where the ice cream is available. In the commercials, the song is sung by an unseen woman who without question sounds like your client. Three times during the thirty second commercial she sings two lines -- six words in about four bars. You are confident that the food company or its advertising agency obtained a license from the copyright owners of the song. Can you bring a meritorious action against the food company and its advertising agency, and if so, where should the action be brought?

The Substantive Law of Sound-Alike Claims

Several cases have discussed various legal theories in which sound-alikes were used in radio and/or television commercial advertisements. Most, but not all, of these decisions have been fearful of and hostile to the concept of identifiability by reason of vocal style alone, and have therefore denied the plaintiff relief. See, e.g., *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971); *Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1240 (C.D. Cal. 1987); *Davis v. Trans World Airlines*, 297 F. Supp. 1145, 1147 (C.D. Cal. 1969); see also *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973). However, a few courts have been more hospitable, at least where the plaintiff's singing voice is distinctively recognizable, independent of the copyrighted song made popular by the plaintiff. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, (9th Cir. 1992) petition for cert filed 61 U.S.L.W.3420 (U.S. Nov. 18,

1992)(No. 92-863); see also *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962). See generally J. Thomas McCarthy, *The Rights of Publicity and Privacy* section 4.14[C] (1991).

Bette Midler was the first singer to have a court accept a sound-alike claim like the hypothetical discussed above. In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1513, 1514 (1992), the singer sued Ford and its advertising agency when they used a sound-alike in a television commercial featuring Midler's hit song "Do You Want to Dance." The sound-alike had been instructed "'to sound as much as possible like the Bette Midler record.'" *Id.* at 461. Neither Midler's name nor her likeness were used in the commercial. Thus, the only issue in the case was the protectability of Midler's voice against imitation.

The district court dismissed the action for failure to state a claim but the Ninth Circuit Court of Appeals reversed. The Ninth Circuit did not find unfair competition because it deemed that one minute commercials would not have saturated Midler's audience or curtailed her market. (The court noted that Midler had not done television commercials.) In addition, the Ninth Circuit held that Midler's statutory right of publicity was not violated because an imitation, not her actual voice, was used in the commercial.<sup>1</sup> However, the court determined that because the statute states that its remedies are merely "cumulative", it did not preclude protection of a common law right of publicity.

The court found that the defendants sought an attribute of Midler's identity, the value of which was what the defendants would have paid for Midler to have sung the commercial herself. The court held that "when a distinctive voice of a professional singer is widely known and

is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California." *Id.* at 463. Nevertheless, the court warned: "We need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable." *Id.*

In reaching its decision, the *Midler* court relied on *Lahr v. Adell Chem. Co.*, *supra*, wherein comedian Burt Lahr brought an action against the manufacturer of a cleaning solvent for invasion of privacy, defamation, and unfair competition for the unauthorized use of his voice in a television commercial. Lahr's claim withstood a motion for judgment on the pleadings for failure to state a claim. The court also relied on *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 (9th Cir. 1974), wherein a national television commercial featuring a photograph of a well-known race car driver's race car

and an unidentifiable driver was held to have invaded the plaintiff's proprietary interest.

The Midler court distinguished *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970), cert. denied, 402 U.S. 906 (1971). There, Nancy Sinatra sued Goodyear Tire for its use of a sound-alike in radio and television advertisements for Goodyear's "Wide Boots" auto tires. Sinatra had achieved fame from her recording of the song "These Boots Are Made For Walking." Goodyear's advertisements used another female vocalist's rendition of the song, which Goodyear admitted was an attempt to imitate Sinatra's voice and style. The district court rejected Sinatra's claim for "passing off" and the Court of Appeals affirmed.

The Midler court noted that Sinatra involved only an unfair competition claim; Sinatra claimed that the song and the arrangements had acquired "secondary meaning." The court noted that because Midler did not seek

damages for the use of "Do You Want to Dance," her claim, unlike Sinatra's, was not preempted by copyright law. Midler was therefore able to defeat defendants' motion for summary judgment that there was no legal principle preventing imitation of Midler's voice.<sup>2</sup>

The analysis in the Midler case was wholly rejected by a federal court applying New York law in *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990). There, the singing group "The Fat Boys" brought an action against the makers of Miller brand beer, its advertising agency and comedian Joe Piscopo for the use of a group which imitated both the appearance and sound of the Fat Boys in a television commercial in which Piscopo also appeared. Plaintiffs alleged, inter alia, violation of their right of publicity under the New York statute. The court declined to follow Midler, stating:

The commercial did not use Midler's name or picture, but the Ninth Circuit, construing California law, articulated a cause of action for commercial use of a sound-alike. The court of appeals [in Midler] derived from California statutes protecting use of a person's "name, voice, signature, photograph or likeness" comparable common law rights which by analogy also constituted "property rights," . . . defendants were held to have misappropriated Midler's property and thus committed a tort under California law. I do not presume to comment on the Ninth Circuit's exegesis of the law of another state. I hold only that the New York Civil Rights Law 3 does not yet extend to sound-alikes. 737 F. Supp. at 838 (citation omitted).

It should be noted that the Tin Pan Apple plaintiffs, unlike Midler, did not allege a violation of their common law rights. However, in *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 183, 485 N.Y.S.2d 220,

224 (1984), the New York Court of Appeals specifically held that the right of publicity is solely a creature of statute in New York and that there is no independent right of publicity. In *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 586 (1990), the Second Circuit reiterated that the New York right of publicity statute preempts any common law right of publicity claim. *Stephano* involved a common law claim for the unauthorized use of a model's photograph in a magazine, and in *Pirone*, Babe Ruth's heirs and their licensees asserted that there was a descendible right of publicity under common law. There is no reason to believe that the holdings in these cases would not be applied to an action for the imitation of a singer's voice and singing style.

This brings us back to our hypothetical: the plaintiff lives in California, but the commercial is broadcast only in New York. *Tin Pan Apple*, *Stephano*, and *Pirone* demonstrate the New York federal and state courts'

refusal to recognize a New York common law right of publicity. As the New York statute does not include a reference to voice, it is unlikely that your celebrity client has a cause of action under New York law for right of publicity. On the other hand, Midler indicates that the client may have a common law right of publicity claim under California law - if California law applies.

### Choice of Law in Sound-Alike Cases

It is clear from the foregoing that choice of law determines whether your client has a claim. Where "the law varies from state to state,...the choice of law may be decisive in a given controversy." Comment, Choice of Law in Right of Publicity, 31 UCLA L. Rev. 640, 644 (1984). Which state's law applies to your client's common law right of publicity claim?

The decisions thus far on this point have generally agreed that the law to be applied to right of publicity claims is that of plaintiff's domicile. The traditional rule for tort claims, *lex locus delicti* (the place where the wrong is committed), has not commanded a substantial following. Instead, the courts have treated the whole matter as a question of property law and applied the law of the place where the property is "located." Although this may fairly be said to be the current consensus, we do not believe that it may be taken as completely settled and certainly has serious theoretical problems.

The treatment of the matter under the heading of property law choice of law rules may well be a mere historical accident. As the cases cited below show, the choice of law question became prominent principally where parties were disputing the descendibility of a celebrity's rights. With its strong association with estates and property law, this kind of question readily suggests the

application of the law of the state of the decedent. It is otherwise, however, with issues relating to the invasion of the right, once the rights are established, but the courts have tended not to draw this line and have applied the law of the plaintiff's state of domicile to all issues. This approach is of questionable durability.

In New York, where the leading cases have arisen, the state courts generally have adopted an "interest analysis" choice of law rule in tort cases. The state having the "greatest interest" in the particular issue is the one whose law will be applied. *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90, 95 (1985). The significant state contacts in tort cases "are, almost exclusively, the parties' domiciles and the locus of the tort." *Id.* Moreover, where the issues at stake are "the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort 'will usually have a predominant, if not exclusive

concern." Id. at 198, 491 N.Y.S.2d at 95 (quoting Babcock v. Jackson, 12 N.Y.2d 473, 483, 240 N.Y.S.2d 743, 750 (1963)). Where the parties have a common domicile, that state's law will tend to apply to issues of allocation of loss or damage once wrongful conduct has been found. Schultz, 65 N.Y.2d at 198, 491 N.Y.S.2d at 96. However, if the tort occurs in New York and there is no common domicile, "the law of the place of the tort will normally apply."<sup>4</sup> Id. at 201, 491 N.Y.S.2d at 98; see also Rader v. Purdom, 841 F.2d 38, 40 (2d Cir. 1988) (New York applies *lex locus delicti* to torts absent "special circumstances"); LaForge v. Normandin, 158 A.D.2d 990, 551 N.Y.S.2d 142 (4th Dep't 1990) ("the law of the place of the tort will normally apply.") (citations omitted.)

Failing to apply the law of the state where the wrong takes place to standard-of-conduct issues can lead to anomalous results. As we have seen, New York does

not recognize a common law right of publicity, while California does. Applying the personal (domicile) law of the plaintiff, California plaintiffs in New York courts would recover in cases where New York plaintiffs would not.<sup>5</sup> This would be so even where all of the offending conduct took place within New York.

The current right of publicity rule therefore effectively allows the courts of one state to set the standards of conduct in all jurisdictions, at least to protect its own citizens. But if California law does not govern the conduct of individuals inside New York State regarding negligence or other torts, why should it govern the invasion of an individual's right of publicity? To paraphrase the famous remark of Lord Ellenborough in *Buchanan v. Ricker*, 9 East. 192 (K.B. 1808), "Can the state of California pass a law to bind the whole world?"<sup>6</sup>

This difficulty is the result of treating the right to be free from invasions of the rights of publicity as a

property right in the first place. We may well ask why such a right is a property right any more than the right to be free from being run over by an automobile. Nevertheless, the accumulated authority now weighs in favor of applying the law of the plaintiff's domicile, as the following cases show.

As noted above, the principal battleground for the choice of law issue has been cases on the descendibility of the right of publicity. In two major decisions on this point, the Second Circuit applied the law of the place of plaintiff's domicile. In *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978), a preliminary injunction against the sale of posters in New York picturing the late Elvis Presley was affirmed. However, in a second decision in the same case, after the Sixth Circuit held that Tennessee would not recognize a post-mortem right of publicity,<sup>7</sup> the Second Circuit applied Tennessee law and vacated a permanent injunction.

Rejecting plaintiff's argument that New York law should apply because it was the place of infringement, the court found that it was more important--at least to the descendibility issue--that Presley had been a Tennessee resident, that the licensing company to which he had assigned his publicity rights was a Tennessee corporation, and that the agreement between plaintiff, the licensing company's exclusive licensee, and the licensing company was made in Tennessee. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 281 (2d Cir. 1981), cert. denied, 456 U.S. 927 (1982).<sup>8</sup>

A similar result was reached by Second Circuit in *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982). There, heirs of the Marx Brothers sued to enjoin the theatrical presentation in New York of a play which imitated the distinctive style of the Marx Brothers. Applying New York law, the district court granted summary judgment to the plaintiffs. The

Second Circuit reversed. The court held that California law should apply to determine whether plaintiffs owned a right of publicity by descent from the Marx Brothers, because the three imitated brothers were domiciled in California at the time of their deaths. 689 F.2d at 319-20. The Court found no descendible right of publicity under California law.<sup>9</sup>

The New York State Court of Appeals followed Factors and Marx on the issue of standing to assert a descendible right of publicity in *Southeast Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 498 N.Y.S.2d 775 (1985). There, the heirs of Tennessee Williams brought an action to enjoin theater owners from using the playwright's name to designate their theater. Applying the law of Florida, the playwright's domicile, the Court determined that only widows and children (of which Williams had neither) had an enforceable property right in such circumstances. Accordingly, the case was dismissed,

because the plaintiff, Williams' personal representative, lacked standing to sue.

Professor J. Thomas McCarthy states in his treatise *The Right of Publicity and Privacy* that Factors and Marx "occupy a distinct category of conflicts of law applicable only to determination of what property is includable in a decedent's estate." McCarthy, *supra* section 11.3[D][3], at 11-18. However, later cases applying New York choice of law rules have applied the same domicile rule to other issues concerning the right of publicity of living persons.

In *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), actress Ginger Rogers brought an action against the producers and distributors of the movie "Ginger and Fred" for, among other things, violation of her common law right of publicity. The Second Circuit, in determining the scope of Ms. Rogers' right of publicity, stated, "...right of publicity' claims are governed by the substantive law

of the plaintiff's domicile because rights of publicity constitute personalty." 875 F.2d at 1002 (citing *South-east Bank, N.A. v. Lawrence*, 66 N.Y.2d 910, 498 N.Y.S.2d 775 (1985)). As *Rogers* was a domiciliary of Oregon, the substantive law of that state was held applicable. (It may be noted that no actual conflict was presented there: because the Oregon courts had not determined the scope of Oregon's common law right of publicity, the court presumed that the unsettled law of Oregon would resemble New York common law, thereby presuming away any conflict issue. *Id.* at 1003.)

Ironically, while the court in *Rogers* recognized the possibility of a state's interest in fostering free expression within its borders, at the expense of rights of publicity, it failed even to consider an "interest analysis" which would have supported the application of New York law. The Second Circuit mentioned in *Rogers* that the New York courts, because of their concern for free

expression, would hold that the Oregon right of publicity would not bar the use of a celebrity's name in a movie title unless it were "wholly unrelated" to the movie, or "simply a disguised commercial advertisement for the sale of goods or services." 875 F.2d at 1004 (citation omitted).<sup>10</sup>

California has not spoken definitively on the conflicts. *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), a case relied on by the Midler court, involved the unauthorized use of a photograph of a well-known race car in a nationally televised commercial. The court held that California law applied to the issue of whether an individual had a right to be free from commercial appropriation of his identity. It found that, as plaintiff's domicile, California "ha[d] a greater interest in compensating its residents for injuries of the type here alleged than other jurisdictions may have in compensating foreigners so injured within their respective

borders." *Motschenbacher*, 498 F.2d at 823 n.4. In addition, the court stated that California, as the forum, had an interest in convenience and could most easily ascertain its own law. *Id.* However, the issue was not sharply presented in *Motschenbacher* because the commercial was broadcast nationally, including in California. See also *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (California law applied in action on facts similar to *Motschenbacher*, but without any dispute by the parties on the choice of law issue).

On the other side of the issue we find the Restatement of Conflict of Laws and one New York case. Section 152: ("Right of Privacy") of the Restatement (Second) of Conflict of Laws (1971) states that in an action involving a right of privacy, the local law of the state where the invasion occurs determines the rights and liabilities of the parties. Comment (c) of that section states that when the invasion involves the appropriation

---

of a person's name or likeness (i.e., a violation of the right of publicity), the place of the invasion is where the complained-of matter was communicated to a person other than the plaintiff.<sup>11</sup>

The relatively early case of *Negri v. Schering Corp.*, 333 F. Supp. 101, (S.D.N.Y. 1971), is in accord with the Restatement view. The New York federal court there applied New York law to a right of publicity claim brought by a Texas resident. The plaintiff, silent screen actress Pola Negri, sued for and recovered damages for the unauthorized use of her photograph in a magazine advertisement for the defendant's pharmaceutical products. The magazine was circulated in several states, including New York. Noting that under Texas law the plaintiff would not have a cause of action, the court stated "[i]t has long been settled New York law that protections afforded by [New York's right of publicity statute] apply equally to nonresidents and residents,

alike." Negri, 333 F. Supp. at 106 (citing Hill v. Hayes, 27 Misc. 2d 863, 865, 207 N.Y.S.2d 901, 903-04 (Sup. Ct. N.Y. Co. 1960), aff'd, 13 A.D.2d 954, 216 N.Y.S.2d 497 (1st Dep't 1961)); Jackson v. Consumer Publications, 169 Misc. 1022, 10 N.Y.S.2d 691 (Sup. Ct. N.Y. Co.), aff'd, 256 A.D.2d 965, 10 N.Y.S.2d 694 (1st Dep't 1939).) However, this decision affirming the principle of local control of the right of publicity obviously has not been widely followed.

## Conclusion

As the foregoing suggests, choice of law rules are not completely settled in the right of publicity area. Accordingly, McCarthy offers the following suggestion:

If the state of plaintiff's domicile does recognize rights of publicity or privacy and the state of the forum and of

infringement does not, a court might well apply the law of the infringement state and deny the claim in order to further the policy of free and unhindered use of identity. Plaintiff would be well advised not to file suit in states with dubious or weak rules on publicity or privacy. And if the domicile state does have adequate rules and some infringement took place there, plaintiff would be well advised to file at home and hope for the home court advantage, since courts tend to favor forum residents. McCarthy, *supra* section 11.3[E], at 11-19 (footnote omitted).

Although McCarthy does not specifically address a situation where the domicile state provides greater protection, but no infringement occurred there, it may nevertheless be in our hypothetical client's best interest to "hope for the home court advantage" and sue in California. However, should the decision be made to sue in

New York, there is sufficient case law to support the argument that in right of publicity cases involving living celebrities, the law of the plaintiff's domicile controls as to all issues, regardless of where the infringement occurred.

## NOTES

1. California's right of publicity statute provides in relevant part:

Use of Another's Name, Voice, Signature, Photograph or Likeness in Advertising or Soliciting Without Prior Consent:

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, or in products, merchandise, or goods, or for purposes

of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

\* \* \*

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

Cal. Civ. Code section 3344 (1985).

2. On remand, Midler was awarded \$400,000 by a jury in Los Angeles in her action against the advertising agency. *Midler v. Young & Rubicam Inc.*, 944 F.2d 909 (Table), 22 U.S.P.Q.2d (BNA) 1478, 1479, (9th

Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1513, 1514 (1992).

3. New York's "Right of Privacy/Right of Publicity" statute provides in relevant part:

Section 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor, of his parent or guardian, is guilty of a misdemeanor.

Section 51. Action for injunction and for damages.

Any person whose name, portrait or picture is used within this state for advertising purposes or for the

purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages.

N.Y. Civ. Rights Law sections 50-51 (McKinney 1976).

4. Schultz applied New Jersey law to a New York tort on the issue of whether the New Jersey wrongdoer was

immune from liability to the New Jersey plaintiff as a charitable institution.

The Court of Appeals in *Schultz* also applied New Jersey law on the same issue to an Ohio defendant, because most of the activities through which the parties were connected (although not the tort) took place in New Jersey, and that state's policy of protecting charitable institutions was therefore the predominant state interest involved in the issue.

5. There can be no question that the public policy of each state will differ due to local idiosyncrasies, producing different substantive rules. See e.g. *Motschenbacher*, *supra*, in which California recognized plaintiff's property interest in the distinctive appearance of his car.

6. Lord Ellenborough thought not, although, to be fair, he was speaking of the laws of the island of Tobago.

7. *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953 (1980). In 1984, Tennessee enacted the "Personal Rights Protection Act", which provides for a descendible right of publicity lasting until ten years after death. sections 47-25-1101 - 47-25-1108 (1984). In 1987, the Tennessee Court of Appeals held that under the common law of Tennessee, there is also a descendible right of publicity. *Tennessee ex rel. Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987). Shortly thereafter, the Sixth Circuit acknowledged that the Tennessee Court of Appeals had rejected the holding in *Memphis Development*, and held that there was a post-mortem right of publicity under Tennessee law. *Elvis*

Presley Enters. v. Elvisly Yours, 817 F.2d 104 (Table), 2 U.S.P.Q.2d (BNA) 1660, 1662-63 (6th Cir. 1987).

8. Significantly, the court in *Factors Etc.* suggested that, although Tennessee law governed the descendibility of the asserted right, New York law might govern the issue of whether that right, if found to exist, had been infringed. 652 F.2d at 287. Later cases have not observed this distinction, however.

9. The Second Circuit based its decision on *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1975). *Lugosi* was superseded by California Civil Code section 990 (1985), which creates a statutory post-mortem right of publicity which lasts for fifty years after the death of the deceased personality.

10. See also *Mathews v. ABC Television, Inc.*, No. 88 CIV. 6031, 1989 WL 107640, at \*3 (S.D.N.Y. 1989) (applying law of plaintiffs' domicile to right of publicity claim, but using "significant relationship" standard to determine law applicable to right of privacy claim); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1197 (S.D.N.Y. 1983) (applying the law of plaintiffs' domicile to all aspects of right of privacy and publicity claims); *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 982 (S.D.N.Y. 1981) (California law applied to measure of damages for conceded invasion of right of publicity by magazine located in New York).

11. As to multistate invasions of privacy, the Restatement, in section 153, would "usually" apply the law of plaintiff's domicile "if the matter complained of was published in that state".

Stanley Rothenberg and David Rabinowitz are partners of and Helene Godin is an associate with Moses & Singer in New York. The authors would like to thank Eric P. Bergner, an associate at Moses & Singer, for his assistance in the preparation of this article. [ELR 14:8:3]

---

## RECENT CASES

### **Distributors of "The Lawnmower Man" may state that film is "based upon" Stephen King story, but may not use possessory credit**

In July 1992, a Federal District Court in New York granted Stephen King a preliminary injunction in connection with the author's claims against Allied Vision, Ltd. and New Line Cinema Corporation, the producer and North American distributor, respectively, of the film

"The Lawnmower Man." King had objected to the use of a possessory credit, describing the film as "Stephen King's The Lawnmower Man," and a "based upon" credit, representing that the film was "based upon" a short story by King.

A Federal Court of Appeals affirmed the District Court's order to the extent that it prohibited the use of the possessory credit, but reversed the order with respect to the use of the "based upon" credit.

Judge Miner, after describing King's 1970 short story and the various assignments of the film rights in the work, stated that the District Court had correctly noted that a false reference to the origin of a work, or a reference which, while not literally false, is misleading or likely to confuse, may form the basis of a claim under section 43(a) of the Lanham Act. Judge Miner agreed that King was likely to succeed on the merits of his objection to the possessory credit. The evidence indicated

that a possessory credit ordinarily is given to the producer, director or writer of a film; and that the credit, at a minimum, refers to an individual who had some involvement in, and/or gave approval to, the screenplay or film itself. King had no such involvement with "The Lawnmower Man" screenplay or film.

The court then pointed out that although some evidence of public confusion was presented, such evidence was not required where, as was the case with the possessory credit, the attribution was false on its face.

In turning to the based upon credit, Judge Miner referred to the District Court's determination that the climactic scene from King's short story was inserted into the film in a manner wholly unrelated to the plot of the film, and that the credit "grossly exaggerate[d]" the relationship between the short story and the film. Judge Miner stated that the District Court applied a standard without sufficient support in the testimony and

---

applicable law in finding that the "based upon" credit was misleading and confusing.

The District Court, in evaluating the "based upon" credit, should have emphasized the proportion, in quantitative and qualitative terms, of the short story appearing in the film, stated Judge Minor, who continued by noting that "where a movie draws in material respect from a literary work, both quantitatively and qualitatively, a 'based upon' credit should not be viewed as misleading absent persuasive countervailing facts and circumstances." In "Lawnmower Man," observed the court, the apparent "core" of King's ten page short story - a scene in which a character called "the lawnmower man" uses psychokinetic powers to chase another character through his house with a running lawnmower and thereby kill him - was used in the film. The film contained several other features of the story as well.

In all, the resemblances between King's story and the film established for the court that the film drew in sufficiently material respects on the short story in both qualitative and quantitative aspects, and the "based upon" credit was proper.

Judge Miner distinguished the case from *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976) in which original Monty Python programs were edited by ABC and then rebroadcast as Monty Python's work. Gilliam supported the court's view of the possessory credit, but was not helpful, according to Judge Miner, in evaluating the accuracy of a "based upon" credit, a credit which deals with altered and derivative works.

The film rights assignment agreement referred to the possibility of substantial alterations to King's story and required a credit for King if a film was "based wholly or substantially upon" the short story - King would have

had cause to complain if he had not been granted a based upon credit.

With respect to the issue of irreparable harm, King testified that his name and artistic reputation were his major assets, and cited certain unfavorable reviews of the film. The reviews discussed the film, as described by the court, "as a kind of failure on the part of King personally," and thus demonstrated the type of damage and confusion caused by the possessory credit.

The court concluded by finding that the District Court did not abuse its discretion in rejecting the New Line parties' laches defense, and that the results reached by the court under the Lanham Act would be the same under the applicable New York law.

King v. Allied Vision, Ltd., 976 F.2d 824 (2d Cir. 1992)  
[ELR 14:8:9]

## **Court affirms decision granting summary judgment to author of "The Enneagram" in copyright infringement action**

As reported at ELR 13:10:11, the Arica Institute, a nonprofit educational institute founded by Oscar Ichazo, offered training "for the total development of the human being." In 1973, Arica registered with the Copyright Office eight separate volumes comprising "The Lectures of Oscar Ichazo." The Arica system used "enneagons" or "enneagrams" - nine-pointed stars typically surrounded by a circle - as part of Ichazo's training system.

In 1984, Helen Palmer published a book entitled "The Enneagram," a guide to understanding human personality based on nine dominant personality types. Palmer used various sources for the book, but had never attended an Arica training and had not, with the exception

of the book "Interviews with Oscar Ichazo," seen any of Arica's copyrighted materials.

A Federal District Court denied Arica's motion for a preliminary injunction to prevent the release of the paperback edition of "The Enneagram," and subsequently granted Palmer's motion for summary judgment with respect to Arica's claims of copyright infringement.

Federal Court of Appeals Judge John M. Walker, in affirming the District Court's decision, noted that of the approximately 250 instances of alleged copying from the "Interviews" material, all but twenty or so referred to single words or short phrases which did not exhibit the minimal creativity required for copyright protection.

The court rejected Arica's claim of "comprehensive non-literal similarity," a doctrine which allows copyright protection where there is no word-for-word or literal similarity, but where a party has appropriated the "fundamental essence or structure" of a work. The

---

material presented by Arica was insufficient to require the application of the doctrine, declared Judge Walker.

Arica also claimed that Palmer's chapter titles, banner listings and enneagrams appropriated the words labeling Ichazo's seven core enneagrams. Arica established Palmer's access to the Ichazo material and substantial similarity from which copying might be inferred, noted the court, but did not demonstrate the similarity of copyrightable elements. The District Court therefore properly granted summary judgment to Palmer with respect to this claim.

Judge Walker next found that although Ichazo's sequence of presenting ego fixation labels lacked the requisite originality for copyright protection, Ichazo's attachment of labels to the enneagram figure did contain the minimal degree of creativity necessary to make it copyrightable.

In proceeding to consider Palmer's fair use defense with respect to the unauthorized use of three passages from "Interviews" and with respect to Palmer's use of Ichazo's decision to attach labels to the enneagram figures, Judge Walker determined that the Copyright Act's goal of encouraging creative and original work "would be better served by allowing the use than by preventing it, and affirmed the District Court's ruling granting Palmer's motion for summary judgment on Arica's causes of action alleging false designation of origin, common law unfair competition, and palming off.

Arica Institute, Inc. v. Palmer, 970 F.2d 1067 (2d Cir. 1992) [ELR 14:8:10]

---

## **Lack of substantial similarity is found in copyright infringement action involving baseball pitching statistics forms**

George L. Kregos developed a form, for distribution to subscribing newspapers, listing pre-game statistics for scheduled starting pitchers; the information was arranged in a tabular format with a legend explaining the nine categories of information concerning the pitchers' past performances. Kregos claimed a copyright in his particular selection of categories of statistics.

In 1984, the Associated Press began publishing a pitching form which was almost identical to Kregos' 1983 form. The wire service changed its form in 1986 by including, among other items, a pitcher's win-loss records and earned run averages for all games against the day's opponent.

When Kregos sued the Associated Press, a Federal District Court in New York dismissed the copyright and trademark infringement claims (ELR 12:3:12). A Federal Court of Appeals affirmed the dismissal of the trademark claims, but found that Kregos was entitled to a trial on the copyright claim, although the available relief "may be extremely limited" (ELR 13:10:12).

The District Court has granted the Associated Press parties' motion for summary judgment on Kregos' copyright claims and their motion to dismiss Kregos' claims of fraud and unfair competition.

Judge Gerard L. Goettel first found that all infringement claims accruing before March 1986 were barred by the statute of limitations. The court rejected the argument that the substantial identity between the 1984 and 1986 Associated Press forms justified treating them as a continuing infringement, stating that the wire service

created "two distinct, identifiable forms" that allegedly infringed upon Kregos' form.

Kregos claimed that the filing of the lawsuit was delayed two years pending Copyright Office action on his application. But the court declined to toll the statute of limitations with respect to the 1984 Associated Press form. It was noted that Kregos was warned of a delay in copyright applications involving textual screen displays, but nonetheless, did not file applications for copyright registration until mid-1985 and late 1986.

In all, there was no equitable reason to preclude the application of the statute of limitations to bar Kregos' claims associated with the 1984 Associated Press pitching form.

In turning to the issue of substantial similarity between the Kregos pitching form and the 1986 Associated Press form, Judge Goettel observed that of the ten performance statistics compiled in the 1986 wire service form,

five were different from those used in the Kregos form, and stated that "no reasonable person could conclude that the inclusion of five different statistics out of the ten used by the 1986 AP form still leaves it substantially similar to the Kregos form."

The court concluded that there was no substantial similarity between the Kregos form and the 1986 Associated Press form, and granted the wire service's motion for summary judgment on those claims associated with the 1986 form.

After dismissing various fraud claims raised by Kregos, the court concluded by finding that Kregos' unfair competition claim was preempted under section 301 of the Copyright Act and by denying the Associated Press parties' motion for Rule 11 sanctions.

Kregos v. Associated Press, 795 F.Supp. 1325 (S.D.N.Y. 1992) [ELR 14:8:10]

---

---

## **Microsoft's Windows software does not infringe Apple Computer's copyrights in Macintosh computer's visual displays**

In 1988, Apple Computer, Inc. sued Microsoft Corporation and Hewlett-Packard Company, claiming that Microsoft's Windows 2.03 computer software and Hewlett-Packard's NewWave computer software infringed seven copyrights held by Apple. The copyrights protected the audiovisual works comprising part of the graphical user interface of Apple's Macintosh computer.

An earlier dispute concerning Microsoft's Windows 1.0 software was resolved by a 1985 agreement whereby Apple granted to Microsoft a non-exclusive license to some of the graphic elements contained in Windows 1.0.

However, in 1989, a Federal District Court in California found that the agreement was not a complete defense to Apple's action because it was limited to the visual displays in Windows 1.0 and did not cover the displays in Windows 2.03 that were not in the prior work.

In the instant proceeding, Judge Vaughn R. Walker described certain basic computer operations, noting that the combination of a computer monitor's visual displays and the user command functions on the keyboard or other input devices is called the computer's user interface. On the Macintosh, stated the court, "the screen displays include icons or symbols to represent programs or information, pull down menus or lists of commands or information, use of windows to display information and the ability to move, re-size, open or close those windows to retrieve, put away or modify information, and a display of text by a proportionally spaced font in all menu items, title bars, icon names and text directories

---

for a consistent and distinctive appearance." When a computer's visual displays incorporate significant graphic elements, as does the Macintosh, it is referred to as a graphical user interface.

Apple claimed that the Macintosh interface presented a "look and feel" which constituted protectable expression apart from its individual elements. However, after careful review, Judge Walker declined what the court characterized as "Apple's invitation to use the advent of the microcomputer and its interface to abandon traditional standards which govern copyrights and invent some new law based [on] highly indefinite constructs such as 'look and feel.'" The court proceeded to consider which elements of the Macintosh interface constituted protectable expression.

The use of overlapping windows to display multiple images on a computer screen in order to facilitate the organization of information and the user's interaction with

the information was central to Apple's claimed similarities. The court found unprotectable the use of the overlapping windows, the use of windows which may appear partly on and partly off the screen, and the use of the top-most overlapping window displayed as the active window. Certain design animation features in issue also were ruled unprotectable.

The court next rejected, again after lengthy review, the protectability of various aspects of the iconic representation used by the Macintosh interface; of the opening and closing of objects as a means of retrieving, transferring or storing information; of the use of menus to store information; and of icon manipulation.

Judge Walker granted Microsoft and Hewlett-Packard's request seeking to declare that the above-noted items on Apple's list of alleged similarities were not protectable under copyright either under the scenes a faire doctrine, due to the merger of ideas and

expression, due to the limited number of ways to express the idea, or due to lack of originality.

Apple was entitled to proceed against Hewlett-Packard with respect to one claim relating to the NewWave program.

Apple Computer, Inc. v. Microsoft Corporation, Case No. C-88-20149 (N.D.Ca., Aug. 7, 1992) [ELR 14:8:11]

---

### **Decision that "Game Genie" device does not infringe Nintendo's copyrighted video game displays is upheld**

The Game Genie, as described by Federal Court of Appeals Judge Jerome Farris, is a device manufactured by Lewis Galoob Toys that allows a player to alter up to

---

three features of a Nintendo game. A player controls the changes made by the Game Genie by entering codes provided by Galoob. The device functions by blocking the value for a single data byte sent by the game cartridge to the central processing unit in the Nintendo Entertainment System and replacing it with a new value - the Game Genie does not alter the data stored in the game cartridge, and its effects are temporary.

When Nintendo of America sued Galoob for copyright infringement, arguing that the Game Genie created an unauthorized derivative work, a Federal District Court (ELR 14:3:6) found that Galoob was neither a contributor nor a direct infringer of Nintendo's rights. Judge Farris, in affirming the District Court's ruling, noted that the Copyright Act defines a derivative work as a work "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization...or any other form in which a work may be recast, transformed,

or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'" (emphasis added by the court). The examples of derivative works provided by the statute all physically incorporated the underlying works or works, noted the court, in further commenting that a derivative work "must be fixed to be protected under the Act,...but not to infringe."

The District Court correctly found, stated Judge Farris, that no independent work was created by the Game Genie - the device's display had no form and merely enhanced the audiovisual displays originating in Nintendo game cartridges.

Judge Farris next distinguished the case of Midway Manufacturing. Co. v. Artic International, Inc., 704 F.2d 1009 (7th Cir.; ELR 5:4:8), cert. denied, 464 U.S. 823 (1983). Artic marketed a computer chip that could be

inserted in certain video games to speed up the rate of play. The court held that the speeded-up version of the video game was a derivative work - the chip substantially copied and replaced the chip originally distributed by Midway.

The Game Genie was useless by itself, emphasized Judge Farris, and would only enhance and not duplicate, a Nintendo game's output. "Such innovations rarely will constitute derivative works under the Copyright Act," declared the court.

The District Court also had concluded that even if the audiovisual displays created by the Game Genie were derivative works, the displays were a fair use of Nintendo's copyrighted displays. Nintendo had not argued that Galoob was a direct infringer, but that the promotion and sale of the Game Genie would contribute to creating infringing derivatives of Nintendo's games. The District Court, stated Judge Farris, properly focused on

whether consumers who use the Game Genie would be infringing Nintendo's copyrights and properly determined that the use of the device would not harm the potential market for derivative works based on Nintendo game cartridges. The court, among other findings, pointed out that Nintendo had not issued or considered issuing altered versions of existing games, and had failed to show the reasonable likelihood of such a market.

In denying Nintendo's request for injunctive relief, the court concluded by finding "not dispositive" Nintendo's "most persuasive argument," i.e., that the creative nature of its audiovisual displays weighed against a finding of fair use.

Judge Rymer concurred in the judgment for the reasons stated by the District Court.

Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.,  
964 F.2d 965 (9th Cir. 1992) [ELR 14:8:12]

---

**Decision granting Sega injunctive relief in copyright  
and trademark infringement action against video  
game manufacturer is reversed**

As described at ELR 14:3:7, Sega Enterprises develops and markets video entertainment systems, including the Genesis console and video game cartridges. Accolade, Inc. manufactures computer entertainment software, including game cartridges that are compatible with the Genesis console.

Accolade, in order to render its video games compatible with the Genesis console, "reverse engineered" several of Sega's video game programs. Upon completing the "disassembly" or "decompilation" process, Accolade

employees created a manual containing functional descriptions of the requirements for a Genesis-compatible game; the manual did not include any of Sega's codes. Accolade then relied on the manual to create its own games for the Genesis console.

Sega, seeking to protect its trademark rights, used a trademark security system. Upon the insertion of a game cartridge, the microprocessor contained in the Genesis III console would search for four bytes of data consisting of the letters "S-E-G-A." If the Genesis III console found the initialization code in the right location, the game would operate on the console. The security system code prompted a visual display for about three seconds; the display read: "Produced by or under License from Sega Enterprises." All of Sega's game cartridges contained the security system initialization code.

Accolade, continuing the reverse engineering process, discovered a segment of code - the security system

initialization code - and added the code to the company's manual as a standard header file to be used in all games. Apparently, the header file was the only portion of Sega's code that Accolade copied into its own programs. Accolade claimed that it did not learn until after the Genesis III was released on the market in September 1991, that in addition to enabling its software to operate on the Genesis III, the header file resulted in the Sega display.

Sega sued Accolade alleging trademark infringement and false designation of origin in violation of sections 32(1) and 43(a) of the Lanham Act and copyright infringement. Accolade filed a counterclaim against Sega for false designation of origin.

A Federal District Court granted Sega's motion for a preliminary injunction, rejecting Accolade's functionality defense to Sega's trademark infringement claim. The

court also rejected Accolade's fair use defense to Sega's copyright infringement claim.

A Federal Court of Appeals has found, although noting that the question was "fairly debatable," that, based on the policies underlying the Copyright Act, the disassembly of copyrighted object code is, as a matter of law, a fair use of the copyrighted work if such disassembly provides the only means of access to those elements of the code that are not protected by copyright and the copier has a legitimate reason for seeking such access. Sega failed to demonstrate a likelihood of success on the merits of its copyright claim and the court, accordingly, dissolved the preliminary injunction issued on behalf of the company.

Judge Stephen Reinhardt, in considering Accolade's arguments, rejected the company's claim that intermediate copying would not infringe the exclusive rights granted to copyright owners under the Copyright Act unless the

end product of the copying was substantially similar to the copyrighted work. It was observed that the computer file generated by the disassembly program, the printouts of the disassembled code, and the computer files containing Accolade's modifications of the code that were generated during the reverse engineering process satisfied the statutory requirements of a "copy." Accolade's intermediate copying fell "squarely within the category of acts that are prohibited by the statute," declared the court, in holding that intermediate copying of computer object code may infringe the exclusive rights granted to a copyright owner, regardless of whether the end product of the copying also infringes those rights.

Accolade also claimed that the disassembly of the computer object code was necessary to gain access to the ideas and functional concepts embodied in the code. Judge Reinhardt stated the court previously had rejected the argument that object code version of a computer

program was not eligible for the full range of copyright protection, noting that the 1980 amendments to the Copyright Act extended copyright protection to computer programs and did not distinguish between the copyrightability of those programs which directly interact with the computer user and those which manage the computer system. However, rather than recognizing a per se right to disassemble object code, as argued by Accolade, the court stated that the unique nature of computer object code would be more appropriately considered as part of a fair use analysis.

Accolade next cited section 117 of the Copyright Act, pursuant to which the lawful owner of a copy of a computer program may copy or adapt the program if the new copy "is created as an essential step in the utilization of the computer program in conjunction with a machine and...is used in no other manner." It was clear to the court that Accolade's use "went far beyond" the use

authorized by the statute, which did not protect a user who disassembles object code, converts it from assembly into source code, and makes printouts and photocopies of the refined source code version.

In turning to Accolade's fair use argument, the court rejected Sega's claim that asserting a fair use defense in connection with the disassembly of object code was precluded by section 117. Also rejected was Sega's argument that the language and legislative history of section 906 of the Semiconductor Chip Protection Act of 1984 established that Congress did not intend that disassembly of object code would be considered a fair use. The court pointed out that the instant case dealt with the copying of a computer program, which was governed by the Copyright Act.

Judge Reinhardt, in reversing the District Court's finding on fair use, first reviewed the purpose and character of the challenged use, including whether such use was of

a commercial nature or was for nonprofit educational purposes. The court noted that the use in issue was an intermediate use and that any commercial "exploitation" was indirect or derivative. Although Accolade's ultimate purpose was to release Genesis-compatible games, the company's direct purpose in copying Sega's code was "simply to study the functional requirements for Genesis compatibility so that it could modify existing games and make them usable with the Genesis console." The court determined that Accolade copied Sega's code for a legitimate, "essentially non-exploitative purpose."

It was further found that the public benefit was served by Accolade's identification of the functional requirements for Genesis compatibility - the number of independently designed video game programs offered for use with the Genesis console increased. The Copyright Act was intended to promote such "growth in creative expression, based on the dissemination of other creative

---

works and the unprotected ideas contained in those works," and the fact that Genesis-compatible video games may not be scholarly works was not found significant by the court.

The court next considered the fourth statutory factor - the effect on the potential market for the copyrighted work - in light of the distinction between the copying of works in order to encourage independent creative expression and the exploitation of another's creative efforts. Unlike *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985; ELR 7:2:8), *Accolade* did not attempt to preclude Sega from releasing any games, but sought to become a legitimate competitor in the field of Genesis-compatible video games. *Accolade's* disassembly of Sega's software "affected" the market for Genesis games in an indirect fashion, observed the court, but video game users generally purchase more than one game.

Furthermore, any attempt to monopolize the market by making it impossible for others to compete would counter the statutory purpose of promoting creative expression. Thus, notwithstanding the minor economic loss to Sega, the fourth statutory factor was found to weigh in Accolade's favor.

Returning to the second statutory factor, the nature of the copyrighted work, the court recalled that to the extent a work is functional or factual, it may be copied; that works of fiction receive greater protection than works with strong factual or functional elements; and that the copyright in compilations of fact is "thin."

Computer programs may be "highly creative and idiosyncratic," stated the court, but in essence, computers programs are utilitarian articles containing "many logical, structural, and visual display elements that are dictated by the function to be performed, by considerations

of efficiency, or by external factors such as compatibility requirements and industry demands."

Judge Reinhardt noted the absence of a settled standard for identifying what is protected expression and what is unprotected idea in cases involving the alleged infringement of a copyright in computer software. Accolade's disassembly activities constituted "wholesale copying," but Accolade could not gain access to the unprotected ideas and functional concepts contained in object code without disassembling that code, i.e., making copies.

The District Court had agreed with Sega that the disassembly of its object code was the only available method for gaining access to the interface specifications for the Genesis console. But the record established that humans cannot read object code - the translation of a program from object code into source code cannot be accomplished without making copies of the code. And there

---

was no support for the argument that there existed a viable alternative to disassembly. In all, disassembly of the object code in Sega's video game cartridges was necessary in order to understand the functional requirements for Genesis compatibility.

If disassembly of copyrighted object code is per se an unfair use, continued the court, the owner of the copyright gains a de facto monopoly over the functional aspects of the work. Judge Reinhardt noted that those aspects were expressly denied copyright protection by Congress. The functional principle underlying a work may be protected by the patent laws, but Sega did not hold a patent on the Genesis console. Thus, Sega's video game programs were entitled to a lower degree of protection than more traditional literary works, and, in view of the above-noted considerations, the second statutory factor weighed in favor of Accolade.

The third statutory factor weighed against Accolade because the company disassembled entire programs written by Sega. The fact that an entire work was copied, however, did not preclude a finding of fair use, particularly since the ultimate use was so limited.

The "key" to the case, declared Judge Reinhardt, in summarizing the result of the fair use analysis, was the fact that the court was dealing with computer software - a "relatively unexplored area in the world of copyright law." While the work in issue may not have been largely functional, it incorporated functional elements which were not entitled to protection. The equitable considerations involved weighed on the side of public access, and, again, the court concluded that disassembly, under specified circumstances, was a fair use of the copyrighted work. The court cautioned that its conclusion did not insulate Accolade from a claim of copyright infringement with respect to its finished products.

---

In turning to Sega's trademark infringement claim, the court pointed out that both parties agreed that there was misuse of a trademark, unlawful mislabeling, and the likelihood of confusion. Sega's trademark security system initialization code enabled video game programs to operate on the Genesis III console, but also prompted a screen display of the Sega trademark and message. Accolade's inclusion of the initialization code in its video game programs meant that a Genesis III owner who purchased a video game made by Accolade would see Sega's trademark associated with Accolade's product each time the game cartridge was inserted into the console.

Judge Reinhardt found that Sega was primarily responsible for any confusion resulting from the use of the initialization code. The court therefore dissolved the preliminary injunction with respect to Sega's trademark infringement claim. However, the court declined to

instruct the District Court to grant Accolade's request for preliminary injunctive relief pending further factual and equitable findings on remand.

It was noted that section 32(1)(a) of the Lanham Act creates a cause of action for trademark infringement when a party, without the consent of the trademark owner, uses "in commerce any reproduction...of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive." Section 43(a) prohibits the use in commerce of a false designation of origin in connection with goods or services where such use is likely to cause confusion, or...mistake."

Accolade did not intend to cause the Sega message to appear or to create any appearance of associating itself with Sega - Accolade used the initialization code only to

gain access for its products to the Genesis III, observed the court, and was aware of no other method for doing so. And Accolade included disclaimers on its packaging of any association with Sega.

Sega, however, deliberately decided to include in the Genesis III a device which would both limit general access and cause false labeling. The company had sought a basis for prosecuting software pirates who sell counterfeit cartridges in Taiwan and South Korea, as well as in the United States. Sega then marketed its redesigned console throughout the world, using its trademark as an essential element of a functional device regulating access, with the trademark and message being displayed whenever the functional device was triggered.

Sega should have foreseen that a competitor might discover how to utilize the initialization code, stated the court, and that when the competitor included the code in its cartridges, the competitor's video game programs

---

would be falsely labeled. Sega also should have known that the initialization code might discourage some competitors from manufacturing independently developed games for use with the Genesis III console. The former conduct, at least, clearly was unlawful under the Lanham Act, declared the court.

The initialization code limited competition in the market for Genesis-compatible games and mislabelled the products of competitors. And by seeking injunctive relief based on the mislabeling, Sega again attempted to take advantage of its trademark to exclude its competitors from the market - the use of a mark for such purposes was ruled inconsistent with the Lanham Act.

Sega further claimed that Accolade could have "engineered around" the initialization code. Accolade responded that the code was a functional feature that a manufacturer would have to include in a video game

program in order for the game to operate on the Genesis III console. Judge Reinhardt found that Sega did not meet its burden of establishing nonfunctionality.

The District Court had concluded that the initialization sequence was not a necessary component of a Genesis-compatible game. Judge Reinhardt stated that the District Court's finding of nonfunctionality was based on the use of an incorrect legal standard, and that Accolade was entitled to use the code.

The Lanham Act does not protect essentially functional or utilitarian product features because such protection would constitute a grant of a perpetual monopoly over features that could not be patented, noted the court. The initialization code provided compatibility with the Genesis III console. The evidence presented by Sega did not establish that a competitor with no knowledge of the workings of the code could "engineer around" the system. And there was no evidence that there was any

public or industry awareness of any alternate method for gaining access to the Genesis III. The District Court erred in concluding that a Sega engineer's declaration and certain modified cartridges were sufficient to establish nonfunctionality.

The court agreed that Sega was not required to disclose its trade secrets to Accolade in the course of the trademark infringement litigation. The company was entitled to seek a protective order for evidence important to resolving the dispute, but did not do so.

Judge Reinhardt concluded by declining to order the District Court to grant Accolade preliminary injunctive relief on its Lanham Act claim. Thus, pending further proceedings, the court allowed the matter to "rest where it stands, with each party as free to act as it was before the issuance of preliminary injunctive relief."

Sega Enterprises, Ltd. v. Accolade, Inc., Case No. 92-15655 (9th Cir., Oct. 20, 1992) [ELR 14:8:15]

---

**Nintendo prevails in copyright infringement claim involving Atari's replication of home video system security program code**

Nintendo of America Inc. and Nintendo Co., Ltd. sell the Nintendo Entertainment System. Atari Games Corporation and its wholly-owned subsidiary, Tengen, Inc. sued Nintendo for, among other things, unfair competition, Sherman Act violations and patent infringement. Nintendo sued Atari for unfair competition, patent infringement, copyright infringement and trade secret violations.

A Federal District Court in California consolidated the two cases and granted Nintendo's motion for a

---

preliminary injunction barring Atari from exploiting Nintendo's copyrighted computer program. The Federal Circuit Court of Appeals has affirmed the District Court's decision.

Judge Randall R. Rader described how Nintendo's program, known as the IONES, works to prevent the company's home video system from accepting unauthorized game cartridges. The system's console and authorized game cartridges contain microprocessors or chips programmed with the IONES. The console contains a "master chip" or "lock." Authorized game cartridges contain a "key," such that when an authorized cartridge is inserted into a console, the console will accept the cartridge.

In 1987, Atari became a Nintendo licensee, but the license terms strictly controlled Atari's access to Nintendo's technology, including the IONES program.

In early 1988, Atari's attorney applied to the Copyright Office for a reproduction of the IONES program, stating, apparently falsely, that the company was a defendant in a copyright infringement proceeding in California and that the copy would be used in connection with the litigation. Atari did not sue Nintendo until December 1988, and Nintendo did not file an infringement action against Atari until November 1989.

Atari obtained the IONES source code from the Copyright Office, and used the material to assist in replicating the IONES object code. Atari then developed its own program, known as the Rabbit program, to unlock the Nintendo entertainment system. Although the instructions of the IONES and Rabbit programs differed, the Rabbit program's signals were "functionally indistinguishable" from the IONES program. Atari thus obtained access to Nintendo systems owners without complying with Nintendo's strict license conditions.

The Federal Circuit, noting that the court would follow Ninth Circuit law, sought to determine whether Nintendo showed a likelihood of success on its prima facie case of copyright infringement and a likelihood that the company would overcome Atari's copyright misuse defense.

Judge Rader stated that the IONES program contained more than an idea or expression necessarily incident to an idea. Nintendo incorporated within the program "creative organization and sequencing unnecessary to the lock and key function [and] chose arbitrary programming instructions and arranged them in a unique sequence to create a purely arbitrary data stream." This creative element of the IONES program was protectable, declared the court. The unique arrangement of computer program expression which generated the data stream did not merge with the process - alternate data streams could be generated which would unlock the

console - and there was no error in the District Court's conclusion that IONES contained protectable expression.

Judge Rader next found that Atari's acquisition of the IONES source code violated Copyright Office rules; the District Court therefore did not err in determining that Nintendo was likely to show successfully that Atari infringed the IONES copyright by obtaining and copying the source code from the Copyright Office.

Atari was not in authorized possession of the Copyright Office copy of IONES and any copying or derivative copying of the IONES source code did not qualify as a fair use. Judge Rader commented that if Atari had engaged in reverse engineering, "untainted by the purloined copy of the IONES program," and such engineering was necessary to understand the program, the company's activity would have been a fair use.

The District Court had assumed that reverse engineering was copyright infringement, but Judge Rader disagreed, stating that Atari did not violate Nintendo's copyright by deprocessing computer chips in Atari's rightful possession. Atari was entitled to engage in such deprocessing to learn the unprotected ideas and processes contained in such chips, but any copying beyond that necessary to understand the IONES program was infringement. "Atari," stated Judge Rader, "could not use reverse engineering as an excuse to exploit commercially or otherwise misappropriate protected expression."

With respect to the issue of substantial similarity between the IONES and Rabbit programs, the court noted that the Rabbit program incorporated elements of the IONES program unnecessary for the chip's performance. And although Atari could use the idea or process of the IONES code, the copying of "fully extraneous

instructions unnecessary to the IONES program's function" supported issuing the requested injunction.

Atari had claimed copyright misuse based on the license terms between Nintendo and software developers. Copyright misuse is an equitable doctrine. The District Court's statement that "Atari lied to the Copyright Office in order to obtain the copyrighted IONES program" suggested that Atari's unclean hands prevented it from invoking equity, concluded the court.

In May 1992, a Federal District Court jury in California determined that Nintendo had not attempted to monopolize the video game market and that its licensing policies did not damage Atari.

The jury had been asked to consider Nintendo's policy requiring third party software developers with licenses from Nintendo to refrain for two years from making versions of the games for other computer console systems. Nintendo has abandoned the policy.

Atari Games Corp. v. Nintendo of America Inc., Case No. 911293 (Fed. Cir., Sep. 10, 1992) [ELR 14:8:16]

---

**Court upholds summary judgment to licensed manufacturer of official sports team jackets in retailer's antitrust action**

A Federal Court of Appeals has affirmed a District Court decision (ELR 13:11:14) granting summary judgment to Starter Sportswear in an antitrust action brought by Trans Sport, Inc.

Starter Sportswear has held a license to manufacture "authentic" satin team jackets bearing the trademarks of Major League Baseball, the National Football League, the National Hockey League and the National Basketball Association. The jacket design resembles the

---

jackets worn at athletic events by players, coaches, and referees.

Stickley Corporation, described as a sister company of Trans Sport, sold Starter's team jackets on a retail basis. When Stickley began reselling the jackets to other retailers, Starter advised Stickley that Starter would discontinue its business with the retailer if Stickley did not limit its resale of the team jackets to retail and consumer catalog sales.

Starter refused to honor outstanding orders from Stickley after February 1987. Trans Sport, on behalf of Stickley, then sued Starter alleging that Starter had monopoly power in the market for authentic jackets and intentionally used its monopoly power to eliminate Trans Sport as a competitor.

The District Court had held that even assuming that Starter possessed monopoly power in the relevant market, preventing Trans Sport from participating in the

wholesale distribution market did not constitute an unreasonable exercise of Starter's distribution monopoly in violation of section 2 of the Sherman Act.

The Honorable Thurgood Marshall, Associate Justice Retired of the Supreme Court of the United States, sitting by designation, found no merit to Trans Sport's argument that Starter's no-transshipment policy and refusal to deal with Trans Sport unless it agreed not to sell Starter products established Starter's willful intent to exclude intra-brand competition. The fact that Starter entered various licensing agreements with the leagues was not, of itself, unlawful. And there was no evidence from which a trier of fact could infer that Starter's decision to prevent authorized retailers from selling to other dealers was intended to fix prices or to exclude competition.

Starter presented legitimate business justifications for the intrabrand restrictions, and such justifications would prevent a rational trier of fact from finding liability

under section 2. Starter claimed, in addition to protecting against counterfeiting, that it wished to select retailers with high standards of "quality and image," who would be willing to make long-term investments in advertising, displays and other promotional activities.

The valid business rationales were sufficient to establish a prima facie case of lawful conduct. Starter's intra-brand restriction helped convey to consumers a message of quality, stated Justice Marshall. Most significantly, Starter had an interest in combatting counterfeiting, particularly because the company's agreements with the leagues required Starter to protect the trademarks in the authentic products.

Justice Marshall also rejected Trans Sport's argument that Starter established a no-transshipment policy in order to engage in illegal tying. Trans Sport failed to show that it ever felt compelled to purchase Starter's non-authentic products in order to receive the authentic

jackets, and did not present any evidence from which a trier of fact could infer actual coercion or willful intent to fix prices.

Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186 (2d Cir. 1992) [ELR 14:8:17]

---

**Trademark search company's antitrust action against owner of copyright on state trademark computer database is rejected**

Thomson & Thomson, Inc. provides on-line state trademark computer information services to corporations, law firms and other parties purchasing trademark searches. Corsearch, Inc. used a Thomson computer information services, known as Trademarkscan-State, to provide trademark information to Corsearch clients.

---

When Thomson terminated Corsearch's right to access to the database, Corsearch alleged that Thomson violated section 2 of the Sherman Act.

Federal District Court Judge Robert P. Patterson, Jr. described the development of Thomson's computerized trademark database, and Thomson's role, along with two other companies, in providing the United States Patent and Trademark Office with a computerized database. In 1989, the entire computerized federal database, prepared by Thomson and a company known as CompuMark, became available for purchase from the Patent and Trademark Office. Corsearch and other companies purchased copies of the federal database and offered trademark research services in competition with Thomson.

In 1990, Thomson began providing federal and state trademark database information in CD-ROM versions. Thomson declined to license its databases on CD-ROM

to companies, such as Corsearch, that presumably would resell the information.

Judge Patterson, after reviewing the nature of competition in the trademark search business, upheld the copyrightability of Thomson's CD-ROM version of the Trademarkscan-State database to the extent of the company's "internally generated information and to its particular enhancements to the items of information collected from the state trademark records..." Thomson permissibly enforced its copyright by terminating Corsearch's permission to resell reports from Trademarkscan-State, since those reports copied the database exactly; the court refused to enjoin Thomson from enforcing its copyright notice for Trademarkscan-State.

The court then found that Thomson's termination of permission to use the Trademarkscan-State for resale did not violate section 2 of the Sherman Act, for "a

copyright owner has a right to license the use of its intellectual property and to terminate or limit that use in such manner as it deems appropriate."

Judge Patterson next considered the changes in the trademark information market during the 1980s, particularly the increase in the number of companies offering trademark search information; stated that the relevant submarket was the market for comprehensive trademark search reports in the United States; and found that Thomson's acquisition of two smaller competitors was not undertaken in order to maintain Thomson's monopoly of the trademark search business in the United States or to prevent competition.

It also was noted that there was no entry barrier in the industry resulting from an ownership of scarce resources, nor was Thomson's copyright ownership a factor that limited any other company's ability to compete - the copyrights, again, applied only to Thomson's work

product, not to the items of information themselves. Furthermore, Thomson's pricing policy was not designed to deter market entry, for the pricing of the state and federal database services was such that competitors "were easily able to piggyback on [Thomson's] work product and enter into competition with [Thomson's] exhaustive full search reports."

Corsearch argued that Thomson was not entitled to refuse to deal with Corsearch by terminating the use of Trademarkscan-State without a valid business justification. Judge Patterson declared that Thomson had presented valid business reasons for the termination of Corsearch and other resellers. In all, although Thomson terminated Corsearch's right to resell Trademarkscan-State in order to prevent Corsearch from competing with Thomson by using the service, "it was a valid act of an owner of a copyright to protect its marketing strategy..."

Judge Patterson, upon finding that Thomson did not intend to monopolize the comprehensive trademark search market and that the company's actions were undertaken for valid business reasons, rejected Corsearch's attempted monopoly claim.

Corsearch v. Thomson & Thomson, 792 F.Supp. 305 (S.D.N.Y. 1992) [ELR 14:8:17]

---

### **Judgment entered on \$675,000 jury award to youth struck by foul ball at Cubs game is upheld**

During a 1983 Chicago Cubs game, Delbert Yates, Jr., who was seated behind the home plate in an area not protected by a screen, was hit in the face by a foul ball. The young man subsequently suffered headaches and double vision.

An Illinois trial court jury returned a verdict for Yates in the amount of \$675,000.

An appellate court has upheld the trial court's decision denying the team's motion for judgment notwithstanding the verdict. It was noted that the jury may have agreed with testimony that the team's failure to screen the area between the extended first and third base lines behind home plate was a breach of the duty of reasonable care in this case.

The court also found that the trial court did not err in admitting certain expert testimony; in admitting evidence of other foul ball injuries; and in precluding the team from presenting a defense based on a disclaimer of liability printed on the back of the team's ticket. The trial court had ruled that the disclaimer could not provide a defense because the print was so small that it was not legibly reproduced on the photocopy submitted to the trial court.

The Cubs were aware that spectators seated in the area behind home plate were at some risk despite the presence of a screen in the area. Having undertaken to protect spectators in that area, the team was obligated to exercise reasonable care; the jury was not misled by the trial's court refusal to instruct the jury that Yates was required to prove that the Cubs knew or should have known of the hazard which injured Yates.

The trial court correctly instructed the jury that Yates would be allowed to recover for future pain and suffering, concluded Judge Campbell.

Yates v. Chicago National League Ball Club, Inc., 595 N.E.2d 570 (Ill.App. 1992) [ELR 14:8:18]

---

## **Operator of municipal facility is not liable in third party's shooting of concertgoer**

After attending a concert at the August civic center, an individual identified only as Reid was shot and severely injured outside the building. Reid claimed that the Coliseum Authority negligently failed to provide adequate security and that the security measures that were undertaken were negligently performed.

A trial court decision granting summary judgment to the Coliseum Authority has been affirmed by a Georgia appellate court.

The court found that the August Police Department adequately provided security at the civic center. The police department was an independent contractor; the Coliseum Authority did not exercise control over the police department and was not liable for any negligence of the independent security service.

It was further found that there was no support for the claim that inadequate security measures at the concert caused Reid's injury. Generally, noted the court, "an owner is under no duty to anticipate a criminal assault against an invitee by a third party." The general rule does not apply where the owner has reasonable grounds for knowing that such a criminal act would be committed. Reid did not present evidence to show a pattern of substantially similar acts sufficient to attract the Coliseum Authority's attention in advance to a dangerous condition. The assault apparently arose from an ongoing dispute between Reid and his attacker and was not part of a pattern of foreseeable assaults for which advance security measures should have been taken. In all, there was no showing that the level of security was below a reasonable standard of care.

An outside security service hired by the Coliseum Authority to collect tickets and prevent unauthorized

---

entry into the building had been instructed to remain at their posts, and had no authority or duty to intervene in the incidents at issue, stated the court.

Judge Andrews concluded by observing that Reid, with full knowledge of the likelihood of potential injury, remained at the concert after an initial encounter with his attacker and waited outside the building for about an hour as the concert concluded before the attacker arrived and shot him. Reid "had superior knowledge of the danger of a repeat attack, and it appear[ed] from the circumstances that he could have exercised ordinary care to avoid the second encounter."

Reid v. Augusta-Richmond County Coliseum Authority,  
416 S.E.2d 776 (Ga.App. 1992) [ELR 14:8:19]

---

## **Previously Reported:**

It has been reported that a Federal District Court in Seattle has awarded Janis Joplin's heirs \$1500 in a copyright infringement claim against the producers and author of the play "Janis." The court, which previously rejected the heirs' right of publicity claim and the producers' defense of copyright misuse (ELR 14:6:9; 13:9:3), awarded Joplin Enterprises \$500 per song for the use in the play of the late performer's works "Me and Bobby McGee," "Kosmic Blues," and "Move Over."

The California Supreme Court has declined to review a Los Angeles trial court decision (ELR 12:12:19) awarding Peggy Lee damages of \$2.3 million in the singer's lawsuit against Walt Disney Co. Lee had sought royalties from the sale of videocassettes of the animated film "Lady and the Tramp." Disney had paid Lee \$3,500 for

providing the voices for four characters in the 1955 film, for which Lee also co-wrote several songs.

The following cases, which previously were reported in the Entertainment Law Reporter, have been published: *Americana Trading Inc. v. Russ Berrie & Co.*, 966 F.2d 1284 (14:3:8); *Bachchan v. India Abroad Publications Incorporated*, 585 N.Y.S.2d 661 (14:2:13); *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457 (14:3:3); *Reebok International, Ltd. v. Marnatech Enterprises, Inc.*, 970 F.2d 552 (14:4:12); *Stone v. Williams*, 970 F.2d 1043 (14: 6:8); *United States v. Lande*, 968 F.2d 907 (14:5:10); *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (14:4:3).

The United States Supreme Court has let stand the decisions in *Chicago Professional Sports Limited Partnership v. National Basketball Association* (12:12:11) and *Luke Records, Inc. v. Navarro* (14:2:3).

The correct cite for the case report beginning at 14:5:8 is United States Equal Employment Opportunity Commission v. Century Broadcasting Corporation. [ELR 14:8:19]

---

## IN THE NEWS

### **Cleveland Orchestra obtains credit on Michael Jackson album**

The Cleveland Orchestra, its chorus and the late conductor George Szell will receive credit on future releases of Michael Jackson's "Dangerous" recording for the orchestra's performance of Beethoven's Symphony No. 9. The credit agreement will settle a Federal District Court lawsuit filed by the orchestra arising from the uncredited use of 67 seconds of the performance at the

---

beginning of the song "Will You Be There." Other details of the settlement were not disclosed. [January 1993] [ELR 14:8:20]

---

**Los Angeles trial court jury awards \$2.45 million to producer Bud Yorkin in antitrust action involving alleged blockbooking**

A Los Angeles trial court jury has found that ITC Entertainment violated the antitrust laws in packaging the film "Twice in a Lifetime" for syndication, and has awarded \$2.45 million to Bud Yorkin, the producer of the film.

According to news reports, ITC packaged the film with fifteen other films of varying commercial value, and allegedly refused to allow television stations to buy any of the films individually.

ITC has announced that it will appeal the decision.  
[January 1993] [ELR 14:8:20]

---

**Federal Communications Commission fines radio station owner \$600,000 due to Howard Stern's airing of "indecent" material**

The Federal Communications Commission has fined Infinity Broadcasting Corp. \$600,000 due to the allegedly indecent material broadcast during talk show host Howard Stern's radio programs. Fines of \$200,000 each were imposed against Infinity stations in Philadelphia, Washington, D.C. and New York. However, the Commission, in a 4-1 vote, approved Infinity's \$100 million purchase of three radio stations owned by Cook Inlet Radio Partners.

The Commission has proposed a \$105,000 fine against Los Angeles radio station KLSX-FM. KLSX broadcasts Stern's program from 6:00-11:00 A.M. It has been reported that the station has asked the government to withdraw the proposed fine on the basis of a study indicating the virtually no unsupervised children listen to Stern's programs, and on the basis that community standards have changed significantly. [January 1993] [ELR 14:8:20]

---

**Federal District Court jury awards copyright in "Why Do Fools Fall in Love?" to two members of Frankie Lymon and the Teenagers**

According to news reports, a Federal District Court jury in New York has awarded the copyright for the song "Why Do Fools Fall in Love?" to Jimmy Merchant

---

and Herman Santiago, two members of the group Frankie Lymon and the Teenagers.

The copyright in the song, which was registered in 1956, was held by Morris Levy, the owner of Roulette Records, and by Patricia Music Corp. in the name of George Goldner and Frankie Lymon.

Merchant and Santiago claimed that they wrote the song before Lymon joined the group, but that Lymon's name was used on the copyright to market the work. [January 1993] [ELR 14:8:20]

---

### **Court awards runner Butch Reynolds \$27.3 million in lawsuit against International Amateur Athletic Federation**

A Federal District Court in Ohio has awarded Butch Reynolds \$27.3 million in the runner's lawsuit against

the International Amateur Athletic Federation, the governing body for track and field.

The Federation suspended Reynolds for two years after an August 1990 meet, stating that he had tested positive for an anabolic steroid. Reynolds denied the charge.

Judge Joseph Kinneary, according to news reports, found that Reynolds lost \$6.8 million in potential earnings while he was suspended. The court also awarded Reynolds \$20.5 million in punitive damages.

The London-based Federation, claiming that the court lacked jurisdiction, did not contest the action and has announced that it will not comply with the court's order. [January 1993] [ELR 14:8:20]

---

## DEPARTMENTS

### **In the Law Reviews:**

Comm/Ent, Hastings Communications and Entertainment Law Journal, published by University of California Hastings College of the Law, has completed Volume 14, Number 4 with the following articles:

Docudramas: The Legality of Producing Fact-Based Dramas-What Every Producer's Attorney Should Know by Jacqui Gold Grunfeld, 14 Comm/Ent, Hastings Communications and Entertainment Law Journal 483 (1992)

Legislating Canned Performances by Janet Boessecker, 14 Comm/Ent, Hastings Communications and Entertainment Law Journal 545 (1992)

Regulating Slate Mailers: Consumer Protection or First Amendment Infringement? by Carol Federighi, 14 Comm/Ent, Hastings Communications and Entertainment Law Journal 567 (1992)

"Son of Sam" Laws After *Simon & Schuster v. New York Crime Victims Board*: Free Speech Versus Victims' Rights by Kelly Franks, 14 Comm/Ent, Hastings Communications and Entertainment Law Journal 595 (1992)

From the Land of Bondage: The Greening of Major League Baseball Players and the Major League Baseball Players Association by Michael J. Cozzillio, 41 Catholic University Law Review 117 (1991)

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 Copyright Bulletin 13 (1992)

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 26 Copyright Bulletin 19 (1992)

Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, 26 Copyright Bulletin 28 (1992)

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties and Additional Protocol, 26 Copyright Bulletin 32 (1992)

The Concept of Originality in Anglo-Australian Copyright Law by Sam Ricketson, 39 Journal of the Copyright Society of the USA 265 (1992)

Passing Off and Image Marketing in the UK by Mark Elmslie and Margaret Lewis, 14 European Intellectual Property Review 270 (1992)

Seton Hall Journal of Sport Law has published Volume 2 with the following articles:

The Professional and Amateur Sports Protection Act-Policy Concerns Behind Senate Bill 474 by Senator Bill Bradley, 2 Seton Hall Journal of Sport Law 5 (1992)

From Shoeless Joe to Charley Hustle: Major League Baseball's Continuing Crusade Against Sports Gambling

by Thomas J. Ostertag, 2 Seton Hall Journal of Sport Law 19 (1992)

Sentencing the Sick: Compulsive Gambling as the Basis for a Downward Departure Under The Federal Sentencing Guidelines by Lawrence S. Lustberg, 2 Seton Hall Journal of Sport Law 51 (1992)

Courts Leave Legislatures to Decide the Fate of the NCAA in Providing Due Process by Kevin M. McKenna, 2 Seton Hall Journal of Sport Law 77 (1992)

Wanted: Tickets-A Reassessment of Current Ticket Scalping Legislation and the Controversy Surrounding Its Enforcement by Phyllis L. Zankel, 2 Seton Hall Journal of Sport Law 129 (1992)

The Time Has Come: Ending the Antitrust Non-Enforcement Policy in Professional Sports by John J. Scura, 2 Seton Hall Journal of Sport Law 151 (1992)

The National Football League's Ban on Corporate Ownership: Violating Antitrust to Preserve Traditional Ownership-Implications Arising from William H. Sullivan's Antitrust Suit by Drew D. Krause, 2 Seton Hall Journal of Sport Law 175 (1992)

Sports Bars' Interception of the National Football League's Satellite Signals: Controversy or Compromise? by Lynne S. Sutphen, 2 Seton Hall Journal of Sport Law 203 (1992)

Targeting Sports Agents with the Mail Fraud Statute: United States v. Norby Walters & Lloyd Bloom by Landis Cox, 41 Duke Law Journal 1157 (1992)

Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts has published Volume 16, Number 1 with the following articles:

The 1992 Horace S. Manges Lecture-People or Machines: The Berne Convention and the Changing Concept of Authorship by Sam Ricketson, 16 Columbia-VLA Journal of Law & the Arts 1 (1991)

Law for Art's Sake in the Public Realm by Barbara Hoffman, 16 Columbia-VLA Journal of Law & the Arts 39 (1991)

Typeface Design After the Desktop Revolution: A New Case for Legal Protection by Phillip W. Snyder, 16 Columbia-VLA Journal of Law & the Arts 97 (1991)

Paying the Price Under the Internal Revenue Code: For How Much Should Fine Art Appraisers Be Liable? by Yvonne E. Lee, 16 Columbia-VLA Journal of Law & the Arts 143 (1991)  
[ELR 14:8:22]