

LEGAL AFFAIRS

**Forum on Attorney's Fees in Copyright Cases:
Are We Running Through the Jungle Now,
or Is the Old Man Stuck Down the Road?**

Featuring contributions by
Paul Marcus and David Nimmer
with a postscript by Lionel Sobel

Copyright infringement actions can involve enormous economic stakes. Moreover, the Copyright Act itself leverages the financial impact of such cases by allowing courts to award attorney's fees, in contrast to the traditional American rule that parties bear their own fees. It is therefore surprising that the statutory language is so spare. Section 505 of the Copyright Act simply

provides that "the court may . . . award a reasonable attorney's fee to the prevailing party. . . ."

Courts in the Third, Fourth and Eleventh Circuits have long understood Section 505 to require an even-handed approach to awards of attorney's fees, one that treats prevailing plaintiffs and defendants alike for the purpose of deciding whether to award attorney's fees. But other courts used to interpret Section 505 differently. In the Second, Seventh, Ninth and D.C. Circuits, courts adopted a "dual" standard, one in which prevailing plaintiffs almost always were awarded their attorney's fees but prevailing defendants rarely were. Since the Second, Seventh, Ninth and D.C. Circuits include courts in New York, Chicago, Los Angeles and Washington - where so much significant copyright litigation takes place - this conflict among the circuits really mattered.

The conflict was finally resolved by the Supreme Court in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). That case arose over Fantasy's allegation that John Fogerty's 1985 song "The Old Man Down the Road" infringed Fantasy's copyright to "Run Through the Jungle," a song that Fogerty had written and sold to Fantasy some 15 years earlier. Fogerty won the case when a jury found that "Old Man Down the Road" had not been copied from "Run Through the Jungle" (ELR 10:7:20). Though Fogerty was the "prevailing party," the District Court denied his request for attorney's fees, and the Ninth Circuit affirmed (ELR 15:1:7). The Supreme Court however reversed, because it held that District Courts should use their discretion "evenhandedly" in awarding attorney's fees in copyright cases, so that successful plaintiffs and defendants are treated alike. (ELR 15:11:14)

At first blush of course it looked as though the Supreme Court's decision changed the law significantly, at least in New York, Chicago, L.A. and Washington. But first appearances are not always accurate. Just over three years have now passed since the Supreme Court handed down its Fogerty decision - then and even still its only opinion on the matter of fees in copyright infringement cases. So the time has come to ask: "Has the Supreme Court's ruling left undisturbed, or has it significantly altered, the landscape for recovery of attorney's fees in copyright infringement actions?"

David Nimmer: Even After the Court's Ruling, the Old Man Remains Stuck Down the Road

The upshot of the Supreme Court's opinion is less than epochal. In the vernacular of Mr. Fogerty, his old man remains languishing down the road even after

issuance of his eponymous ruling. In other words, for most purposes, no operative difference will ensue, and concrete cases may have been resolved identically even if Fogerty had gone the other way.

Unmaking a Procrustean Bed

Let's posit some cases, to test both the even-handed and the dual approaches to awards of attorney's fees. Eight plaintiffs lose copyright infringement cases. District judges must determine whether to award attorneys' fees to each of the prevailing defendants.

Case One: The plaintiffs case was poorly founded in law.

Case Two: Though the plaintiff enunciated a valid legal theory, the plaintiff could adduce no facts to support that theory. In fact, the entire case seemed like a

"strike suit" against a wealthy (individual or corporate) defendant.

Case Three: The case itself was well-founded in fact and in law. In testifying on her own behalf, however, the plaintiff engaged in perjury, albeit in matters not relating to the essence of the infringement claim.

Case Four: The case was well-founded in fact and law, and the plaintiff testified truthfully. The plaintiff was, however, a thoroughly repulsive human being.

Case Five: Same as case four, but here the problem was the plaintiff's attorney - rude, obstreperous, and poorly versed in Federal Rules of Evidence. The attorney converted what should have been a simple two-day trial into a three-week endurance contest.

Case Six: The case was well-based in fact and law; the plaintiff testified truthfully. Her attorney also comported himself professionally - except that his tone

of voice was screeching, his mannerisms obnoxious, and his wardrobe abominable.

Case Seven: All parties comported themselves professionally. Plaintiff's claim was objectively colorable, notwithstanding its ultimate failure. Plaintiff's motivation seemed to be to recover on a valid claim.

Case Eight: Same as case seven, except that the plaintiff's true motivation was personal animus against the defendant - notwithstanding that the claim itself was facially colorable.

In which of these cases should attorneys' fees be awarded? What is a district judge to do? The answer is not evident - either under the evenhanded standard governing today or under the rejected dual standard. If any President were so improvident as to appoint me to the bench, I would probably view it as my duty to award attorneys' fees in cases one, two, three, five, and eight. Sitting judges, undoubtedly, would see their obligations

a bit differently, given no mechanistic possibility under any of the standards promulgated of pronouncing one resolution kosher and another treif. In fact, the lack of clarity under both the evenhanded and dual standards means that the Supreme Court's Fogerty pronouncement has not altered the governing law meaningfully.

Four-Square Resolutions

Let's pretend for a moment that I were a district judge sitting in a circuit that followed the dual approach in the period before the Fogerty decision. In the conscientious discharge of my duties, I would award fees, as noted above, to the prevailing defendant in each case except four, six, and seven. Why?

The Second Circuit's classic rationale for the dual standard is as follows:

Because the Copyright Act is intended to encourage suits to redress copyright infringement, fees are generally awarded to a prevailing plaintiff. The logical converse of this legislative purpose, however, requires that attorneys' fees to prevailing defendants be awarded circumspectly to avoid chilling a copyright holder's incentive to sue on "colorable" claims. This is particularly true since an award of attorneys' fees is deemed to serve the additional purpose of penalizing the losing party.

In light of those factors, let's review first the cases in which I am denying fees. In case four, as much as the plaintiff offended me, I cannot penalize people for falling short - even if miserably short - of Greek ideals. Repulsive to me though he may be, the plaintiff here bears no culpability at law. I must be circumspect in awarding fees to prevailing defendants in order to avoid chilling a copyright holder's incentive to sue on "colorable" claims, for which this plaintiff clearly qualified. I would

therefore leave him to lick the wounds of his defeat without further injury.

All the more so does that conclusion pertain to case six. Though I would not spend any time with such an obnoxious lawyer at a cocktail party, my oath of office obligates me to spend time in the courtroom with people not of my choosing - they may like me no more than I them. I could scarcely penalize them any further than their compulsory confinement to my courtroom, so no fees.

Case seven, finally, is completely straightforward. The plaintiff tried but lost-no shame there. Given my duty not to chill valid claims, this case is the very easiest of all.

Now to the cases in which I would award fees: cases one and two are easy - the plaintiff acted in bad faith under the facts and law respectively. Nothing in the Second Circuit's articulation of the dual standard forbids

me absolutely from awarding fees to a prevailing defendant; given that I have at least some discretion in the matter, these are the cases in which I definitely want to exercise it. Moreover, I am fortified in my conclusion by the command that I act circumspectly with respect to "colorable" claims. Cases one and two are not colorable, so I feel sanctioned in blowing my top.

Case three is not much harder - my amour propre as an Article III appointee would cause me to look askance at any perjurer - even one whose mendacity did not relate directly to the subject matter of the suit. The dual standard is so far afield from condoning perjury that I would not even hesitate to award fees here.

Case five is a bit more problematic. Should a litigant be punished for injudicious choice of counsel? I say "yes." (Now that I am a judge, how dare you question my determination?) The defense had to suffer through an expensive and bootless exercise through no fault of its

own. If the plaintiff later decides to sue his counsel for malpractice in causing fees to be taxed, I would be sympathetic to that suit, but it is not the one before me. In running my courtroom in the way justice and efficiency dictate, I say, "Let the culpable parties pay." If I am thereby chilling plaintiffs, proponents of the dual standard can hardly be heard to complain, given that it is, in fact, ineffective assistance of counsel that I am chilling.

Case eight is the most difficult decision. If a case is objectively well-founded, how can I penalize a party based on what I perceive to be a subjective motivation? How - because the President appointed me and the Senate confirmed me, that's how! Motive is a slippery thing, but ultimately the law concludes from the evidence the content of a person's mind in the same manner that it deduces the contents of her stomach. Copyright doctrine should take note. Though I am, admittedly, going a bit beyond the reference in the dual standard to "colorable"

claims, I believe it not amiss to add subjective good faith to the stated requirement of objective good faith.

Lingering Reservations

We now know how I would resolve these eight cases under the dual standard. What about those same cases under the evenhanded standard that actually governs since *Fogerty* was decided? For these purposes, we must look to the Court's language.

A unanimous Supreme Court handed down *Fogerty*, so it must be right. Right? Try as I might, I cannot understand two aspects of the case.

First, the Court rejected the approach of Justice Thomas, concurring only in the judgment, who stated that the Copyright Act's attorney's fees standard should be treated the same as the parallel provision of the Civil Rights Act of 1964. Thus, whereas the Court had

concluded that the 1964 law should be governed by the dual standard, it nonetheless adopted the evenhanded approach for the "virtually identical language" of the Copyright Act. Curious though that juxtaposition might be, this is not the part that confuses me - my brain is flexible enough to accept that identical language may mean two utterly different things in radically different contexts. Where I lose the Court is in its enunciation of the evenhanded standard as governing law in the copyright sphere:

Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion. "There is no precise rule or formula for making these determinations," but instead equitable discretion should be exercised "in light of the considerations we have identified." It is the shining of that light that blinds me. For the case from which Fogerty draws that quotation

arose in the civil rights context. When one reflects that the civil rights context was the precise body of law for which the Court earlier rejected any attorney's fee gloss, that provenance is rather startling, to say the least. My eyes strain, but still fail to see the "light of the considerations we have identified" when that very light has been filtered out from its source!

Second, no matter how earnestly the Court believed it was adopting evenhandedness as governing law, the very structure of the Act belies those protestations. The Copyright Act accords discretion to award fees "[e]xcept as otherwise provided by this title." Elsewhere, the Act allows fees for infringement only subject to timely registration. Courts have construed that provision uniformly to bar prevailing plaintiffs who establish infringement from recovering fees, absent satisfaction of the registration formality. The courts have not, however, applied this provision to bar a defendant from collecting

its fees by defeating an infringement claim brought by the proprietor of a not-timely-registered work. Thus, when a late-registered work is at issue, the defendant may recover its fees, notwithstanding that the plaintiff in the very same action may not. The upshot is that the structure of the Act lies far afield from evenhandedness, even in the post-Fogerty world.

Resolutions Redivivus

Notwithstanding those two sources of confusion in matters that the Court did not address, can one hope that what it did say is so pellucid as to leave no question in how attorney's fees should be awarded in the future? No such luck. The only guidance that the Supreme Court's ruling gave, apart from adverting to the general purpose of copyright law to serve the public interest and the benefits wrought by both plaintiffs and defendants in

delimiting its boundaries, is its reference in a footnote to "several nonexclusive factors to guide courts' discretion deemed worthy by courts of appeal that had adopted the evenhanded standard." In particular, the footnote enumerates "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." Based on that language, let me now imagine myself a district judge in the same eight cases hypothesized above, applying Fogerty's mandate. How would I rule?

Cases one and two, exemplifying "frivolousness [and] objective unreasonableness (both in the factual and in the legal components of the case)," definitely deserve fees. These awards are like shooting fish in a barrel.

Case three of the perjurer does not fall within the stated factors, but the Supreme Court did after all label

those factors "nonexclusive." I hardly believe that the nine most prominent wearers of black robes in Washington, D.C. intended to suborn perjury any more than did the Second Circuit, so I'm awarding fees here too.

In case four, I choose to deny fees. To be evenhanded, I would likewise deny fees to a prevailing plaintiff whose sole basis for recovery was the repulsiveness of the defendant. In case five, by contrast, I choose to award fees. What we have here is a prime example of "objective unreasonableness . . . in the legal component[] of the case," thus falling within Fogerty's guidelines for such an award.

In case six, I would deny fees. Parallel to case four, I would likewise deny fees to a prevailing plaintiff whose sole basis for recovery was the screeching of opposing counsel.

Case seven is easy. Only a bright-line rule that the winning party always recovers fees would cause me to

issue an award here. Given that the Court in Fogerty explicitly rejected the English bright-line rule, I choose to award no fees here.

Finally, there is case eight. The Supreme Court's explicit enumeration of "motivation" next to "frivolousness" amply warrants my award here.

What is the tally under Fogerty's evenhanded standard? Surprise, surprise - each and every case reaches a deny/award resolution identical to that which pertained under the dual standard. Thus, though the evenhanded standard may have won the duel, it can hardly be concluded that the culpability factors animating the dual standard have been extirpated.

Some Actual Cases

An examination of representative post-Fogerty opinions validates that perspective. In an ideal

laboratory, we would scrutinize how a district judge evaluated a particular case under the dual standard, and then alter the sole variable of the governing standard to determine how that same judge evaluated the same facts under the new evenhanded standard. Though real-world law seldom affords such laboratory conditions, the instant case is an exception. The experiment validates the armchair predictions of the preceding discussion.

In particular, a case from the nation's hothouse of copyright litigation, the Southern District of New York, supplies the experimental data. In *Robinson v. Random House, Inc.* (ELR 17:3:16), the court awarded fees under the Second Circuit's dual standard, without taking account of the Supreme Court's discarding of this standard. When made aware of its error, the court reexamined the situation and concluded "it is clear that my decision to award fees was wholly appropriate." Another case from that district, *Screenlife Establishment v.*

Tower Video, although not subject to the same unique split consciousness as can be observed in Robinson, nonetheless self-consciously reached the same conclusion: "[A]lthough I conclude that under the Fogerty approach, the defendants should be granted fees, I am convinced that even under this Circuit's pre-Fogerty case law, defendants' motion for fees could also have been granted." (ELR 16:11:7)

These cases are consistent with the vast majority of post-Fogerty case law. One still discerns the basic underlying truth that cases awarding fees to prevailing defendants do so overwhelmingly on the basis of the plaintiffs culpability. Correlatively, defendants who prevail against earnest and honest plaintiffs still do not stand to recover any appreciable attorney's fees. Indeed, the Fourth Circuit pushes the point home: "[W]hen a party has pursued a patently frivolous position, the failure of a district court to award attorney's fees and costs

to the prevailing party will except under the most unusual circumstances, constitute an abuse of discretion." Thus, without denying that Fogerty "gives the district court greater discretion than did" prior law in dual circuits, the question remains, as a practical matter, whether prevailing litigants will actually benefit from that new discretion. I submit that realization of that hypothetical benefit, as the eight hypotheticals posited above illustrate, will occur seldom indeed.

In sum, although Mr. Fogerty's victory before the Supreme Court was no fantasy for himself personally, it seems doubtful that his efforts will bring appreciable benefits to other defendants who prevail in copyright litigation. Isn't the point sufficiently rebutted by the realization that in the case of John Fogerty himself, the district judge initially awarded nothing and then after the Supreme Court's ruling and remand awarded fees of unprecedented magnitude? Though Dean Marcus argues

the point admirably in the contribution that follows, I am no more convinced by his analysis than by his protestations that he was not the one caught redhanded stealing my turkey wing and cranberry sauce last Thanksgiving.

The hallmark of a revolutionary ruling is that it affects the world, not simply the litigants before the Court. It is therefore perilous to generalize the fate of other defendants from Mr. Fogerty's ultimate recovery. I sense at work here a legal application of Godel's Theorem - the internal structure of any mathematical system cannot adequately account for all the workings within that system. (See Maxwell L. Stearns, *Standing Back From the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309, 1375 n.207 (1995).) In other words, we must step outside the confined sphere under examination to appreciate its import. The law of the case of *Fantasy v. Fogerty* cannot reveal whether this case is itself revolutionary; to draw that conclusion, we need to examine

how other cases have fared. As set forth above, the have, on the whole, fared after the Supreme Court's ruling just about exactly the same as before.

The old man remains stuck down the road.

Paul Marcus: The Supreme Court Has Sent Attorney's Fees Running Through the Jungle

I choose though to divide the issue into two parts to demonstrate the grave misgivings I have about Mr. Nimmer's rather uncharitable view of the Court's opinion. The narrow question, as my learned colleague states it, is whether overthrowing the dual standard "has produced an operative result in those circuits that formerly followed it." The broader question relates to the impact of the decision generally: Has it "significantly altered the landscape for recovery of attorney's fees?" To cut directly to the chase, let me state that my answer to both

questions is "yes." My brother-in-law's contrary view does not, unfortunately, correctly paint the legal landscape that existed either before the Supreme Court's opinion or after it. I grant that he has written an effective brief for the negative position, one in which he may dazzle the reader with a recitation of cases big and small dealing with attorney's fees under the Copyright Act. I focus almost exclusively, on the other hand, on just one case to demonstrate my point that major changes have occurred and will continue. But the case I use is a most telling one, for it is the copyright infringement action brought by Fantasy, Inc. against a well known rock and roll composer by the name of John Fogerty.

The Death of Culpability

When Fantasy, Inc. sued Fogerty it did not do so in a vindictive fashion attempting to pursue a worthless

action. Indeed, the district judge "expressly found that the infringement action was neither frivolous nor prosecuted in bad faith." The court denied Fogerty's fee request in a rather routine fashion based on "a well-settled circuit rule predicated fee awards to prevailing copyright defendants on a showing of bad faith or frivolousness." The Ninth Circuit's affirmance was just as routine. The opinion indicated that the principal purpose for its policy was "to avoid chilling a copyright holder's incentive to sue." The Ninth Circuit's position in Fogerty was completely consistent with the other courts that had relied upon the dual standard previously. The point of the attorney's fee provision of the Copyright Act, according to these courts, was not to encourage defenses, but rather to promote the pursuit of colorable actions by copyright holders. Of course, the Supreme Court utterly rejected this view, finding instead that the "policies served by the Copyright Act are more complex, more

measured, than simply maximizing the number of meritorious suits for copyright infringement."

Lest one rely too heavily on my colleague's contention that the Supreme Court's decision does not matter very much, let me mention one individual to whom it mattered a great deal: John Fogerty. Before the Supreme Court's decision, Fogerty was not given reimbursement of his substantial attorney's fees. After the decision, the trial judge granted his request and the court, on appeal, approved the judge's action. I remind the reader that in the first instance of consideration by the district judge, the requested award was denied because defense requests were simply rejected as the common practice in the Ninth Circuit. On remand, still with no showing of frivolousness on the part of the plaintiff, the defense motion for fees was granted. (ELR 17:4:20)

The trial court sided with Fogerty for several reasons. Fogerty's defense "secured the public's access to

an original work . . . and paved the way for future original compositions." An award would help "restore . . . some of the lost value of the copyright [the defendant] was forced to defend," and the defense was "on the merits." Moreover, the award would not pose an undue burden on Fantasy "which was not an impecunious plaintiff."

On appeal, the court affirmed (ELR 19:1:8), though Fantasy once again pursued the notion that a defense attorney's fee award is not appropriate where a "blameless" plaintiff "conducted a 'good faith' and 'faultless' lawsuit upon reasonable factual and legal grounds." The Ninth Circuit put to rest, finally, the notion that fault is required before an award to a defendant will be allowed: "blameworthiness is not a prerequisite to awarding fees to a prevailing defendant." Noting that its opinions following the Supreme Court's decision recognized that "a plaintiff's culpability is no longer

required," the Ninth Circuit stated conclusively that "exceptional circumstances are not a prerequisite to an award of attorneys fees, district courts may freely award fees, as long as they treat prevailing plaintiffs and prevailing defendants alike and seek to promote the Copyright Act's objectives."

Certainly it is true, as my colleague writes, that courts have considered - and will continue to consider - the good faith of the parties. I concede that point and emphasize that such consideration is indeed perfectly proper, but - and this is the key matter of significance - the courts are not required to base their determinations on views of good faith or seemingly virtuous claims. The defendants will now be treated alike with the plaintiffs. In courts such as the Ninth Circuit, that simply was not the situation prior to the Supreme Court's opinion. In *Fogerty*, on remand, the trial judge specifically found no bad conduct on the part of the plaintiff, yet he awarded

fees to the defendant. Mr. Nimmer appears to question whether "maybe news of culpability's death has been exaggerated?" I think not - not if culpability is seen as an absolute requirement. After all, before the Supreme Court's action, no fault was found on the part of Fantasy, Inc., and John Fogerty lost his attorney's fee claim. After the Court's action, on the very same record, still with no culpability seen on the part of the plaintiff, John Fogerty won his attorney's fee claim. "No operative difference" resulting from the Supreme Court's Fogerty opinion? Hardly.

The Supreme Court's decision truly does mark a dramatic shift in the instances in which attorney's fees will be awarded to prevailing defendants throughout the country. We now see a uniform (albeit murky) standard, one which eschews any undue emphasis on the plaintiff's culpability. While there is considerable debate over the manner in which district judges should make these

awards, one additional matter should be discussed. What I have in mind here is not when awards are to be made. Instead, the inquiry goes to the amount of fees judges will award to successful defendants. Prior to Fogerty, the amounts of fees awarded to prevailing defendants varied tremendously. It is fair to conclude, however, that few cases involving large awards can be found, certainly without a predicate of improper behavior on the part of a plaintiff.

The decision of the trial judge on remand in Fogerty, therefore, is particularly striking. Again, the trial judge found no blameworthy behavior on the part of the plaintiff. Indeed, this point was not, in any way, a part of the judge's written consideration of the request for fees. Instead, the court reviewed a variety of factors, and especially emphasized that the case was a complicated one that involved "novel and difficult questions." Moreover, the copyright practice is a specialized area of

law in which reasonable fees of attorneys run high. The court found, and the Ninth Circuit affirmed, reasonable fees and costs to be \$1,351,369.15. This huge award was given in a case in which nothing had been awarded at the first review stage and in a field in which the highest previous award of fees was well less than half that given here.

This change can only be viewed as startling, due without question to the Supreme Court's decision. Without that opinion, no money award is made. With the opinion, the award is the highest in the history of our nation. The point here is reiterated because it is important to emphasize that the great amount of the award is not linked to any finding of fault; rather the court methodically reviewed the actual costs sustained in a lengthy, complicated, and extremely expensive copyright defense action.

Seven Imagined Cases, One Concrete Case

You, poor reader, reviewing my thoughts, may finally have thrown up your hands in exasperation with the declaration: "You never mention that clever David Nimmer's eight concrete cases, the ones that he uses to demolish the notion that Fogerty matters very much." True, to this point I have ignored his plaintive pleas regarding the eight cases. I do this because I believe only one of them is worthy of note, and that one case will prove my point, not his. First, though, some observations on the cases that he has laboriously constructed for you.

It is, of course, very difficult under any body of law - real, hoped for, or otherwise - to disagree with the conclusion that attorneys' fees ought to be awarded in cases in which no possible legal claim existed, or no facts were offered to support an arguable claim, or the

plaintiff committed perjury, or the attorney for the plaintiff disrupted court proceedings, or personal hatred was shown to be the chief basis for an otherwise serious claim. Surely, Congress - given the opportunity - would have said that a district judge could properly award fees to deter frivolous actions, intentional lies, or bumbling incompetence. While other sanctions - both criminal and civil - are also available, such multiple sanctions cannot be viewed as mutually exclusive.

We are, then, in agreement on cases one, two, three, five and eight. We are also in agreement on cases four and six in which Mr. Nimmer finds that fees should not be awarded. To be sure, it is difficult to support fees being granted simply on the basis of slovenly or disgusting characteristics of one party or the presence of an attorney with less than impeccable taste. Attorney's fees can be used to support a host of rationales in copyright litigation, but not these two.

So, then, we reach the same conclusions in the overwhelming number of cases posited. Does that end the debate? Has he prevailed with the view that Fogerty does not matter much because he and I agree, as do courts before and after the decision, as to these seven cases? Not at all and let me suggest two reasons.

First, these seven hypothetical cases are just that, hypothetical. I grant that there is a wide range of copyright infringement cases in which attorney's fees may be requested and seriously considered. In reviewing the case law over the past several decades, however, one is struck by the paucity of precedent on the sorts of factors that are emphasized in the hypothetical cases: wholly frivolous matters, perjured testimony, repulsive parties/lawyers, utterly unprofessional trial conduct, or "personal animus" shown to be the major basis for the claim. Such cases may well be out there, but if they are,

there are not very many of them, at least not many which result in reported decisions.

Second, the one case which is very real and not at all hypothetical is exactly the one over which your two commentators disagree strongly. That case is number seven:

Case seven. All parties comported themselves professionally. Plaintiffs claim was objectively colorable, notwithstanding its ultimate failure. Plaintiff's motivation seemed to be to recover on a valid claim. Mr. Nimmer views this case as one in which attorney's fees should not be awarded. As he states, "only a bright-line rule that the winning party always recovers fees would cause me to issue an award here." Correctly noting that the Supreme Court rejected such an English-style rule, he concludes that the defendant's motion must be denied.

I disagree strongly with both the instant analysis and this conclusion. Viewed in the abstract, case seven may seem to offer little hope to the prevailing defendant. Let us, however, put some real flesh on these bare bones, for this case is not an imagined one at all. Case seven, in fact, is *Fogerty v. Fantasy, Inc.* After all, the trial court expressly found that Fantasy's claim, while not prevailing, was "colorable" and the plaintiff's motivation was not based upon any sort of personal disagreement with the defendant. Still, the trial judge and the Ninth Circuit panel found reasons aplenty to award attorney's fees to the prevailing defendant. Giving such fees allowed the public access to a music work; it encouraged future compositions by Fogerty; and the burden on the plaintiff was not excessive.

Case seven/*Fogerty* is neither hypothetical nor terribly unusual. Cases can be found throughout the country in which the plaintiff makes a reasonable,

legitimate claim of copyright infringement on the merits but ultimately does not shoulder her burden of proof. It certainly takes no bright line rule to suggest that attorney's fees for the prevailing defendants in some of those cases may be both defensible and sensible.

After reviewing the foregoing analysis and the resolution of my co-author's "Big Eight" cases, can there truly be any question that Fogerty has made an enormous difference? Without the decision, the prevailing defendant loses the one significant case discussed above. With the decision, he collects the largest award in our history. Fogerty is a case that will, and must, be read carefully by counsel for plaintiffs and defendants alike in determining whether to pursue copyright litigation. It certainly has changed considerably the way in which lawyers will evaluate copyright infringement actions now that successful defendants have at least a

fighting chance to recover substantial fees without a showing of improper conduct by the plaintiff.

Thus the Supreme Court's ruling has indeed "significantly altered the landscape for recovery of attorney's fees in copyright infringement actions."

Postscript

Lionel Sobel: The Supreme Court has Made Copyright Litigation Almost as Dangerous a Jungle for Plaintiffs to Run Through as It is for Defendants to be Caught In

I agree . . . with David and Paul, both, but for entirely different reasons than either of them relied on here. I agree with Paul that the Supreme Court's decision in *Fogerty v. Fantasy* was a significant marker in the development of copyright law, and that as a consequence of it, things are very different now than they were

before. On the other hand, I agree with David that the changes caused by Fogerty will not be dramatically illustrated in very many published decisions dealing with attorney fee awards.

Instead, I think that the real impact of the Supreme Court's ruling in Fogerty will be felt in two other places. It will (or should) affect the number of copyright infringement cases that get filed in the first place. This consequence won't show up at all in advance sheets, though it may in statistics maintained by the federal judiciary. Fogerty also will (or should) affect the strategy employed by plaintiffs when responding to defense motions for summary judgment - motions which are quite common, even routine, in most copyright cases. This consequence will show up in advance sheets, but not in decisions dealing with attorneys' fees.

Why Fewer Plaintiffs will Enter the Copyright Infringement Jungle

Plaintiffs file lawsuits for lots of reasons, chief among them this: they think they have been damaged and they hope to recover money to compensate them for at least some of that damage. Filing lawsuits is not free, however. So cases get filed only when plaintiffs think there is a likelihood they will win enough to cover their costs and then some, and that the likelihood of winning is great enough to make the effort worthwhile.

In the copyright context, this means that if a plaintiff thinks it has a 75% chance of winning \$500,000, and it will cost \$100,000 to sue, the case will be filed. This is so because the chance of winning is worth \$375,000 ($0.75 \times \$500,000$), which is much greater than the \$100,000 cost. On the other hand, if the plaintiff thought it had a 75% chance of winning only

\$100,000, or only a 15% chance of winning \$500,000, the case would not be filed. This is so because this time the chance of winning is worth only \$75,000 ($0.75 \times \$100,000$; or $0.15 \times \$500,000$); and that is less than the \$100,000 cost.

This type of analysis is done, consciously or unconsciously, in connection with every case, by plaintiffs and defendants alike. (Defendants do it to see whether the cost of defending exceeds the amount demanded, after the plaintiffs' demands are discounted to reflect the possibility the defendant will win altogether and not have to pay anything at all.) There are several techniques and tools for performing this analysis (including computer programs). These techniques can be used to do much more sophisticated analyses than the one-paragraph version just described. They include techniques that enable lawyers to carefully estimate (rather than guess at) the probability of winning or losing, and

that enable lawyers to take into account that winning (or losing) may result in a judgment over a wide range of damage amounts rather than a single certain amount.

The specifics of these techniques are outside the topic of this article. (Readers who are curious should see the article *When should you go to court?* by Samuel E. Bodily, *Harvard Business Review*, May-June 1981 at page 103.) One point is important, however. Every case has an "expected value" for the plaintiff, and an "expected risk" for the defendant.

The expected value of a case to a plaintiff is the anticipated amount of the plaintiff's recovery, discounted to reflect the less than 100% probability the plaintiff will win, reduced by the amount of the plaintiff's (unrecoverable) costs.

Before Fogerty, a successful copyright plaintiff had few if any unrecoverable costs, because of the likelihood that it would be awarded its attorney's fees as

well as damages. Fogerty changes the equation, however. Now, prospective copyright plaintiffs must take into account the possibility that if they lose, they will not only have to bear their own costs, they also may have to pay the defendant's costs and attorney's fees. The expected value of a copyright case is less than it used to be, by an amount that is equal to the defendant's attorney's fees discounted by the estimated probability the plaintiff will lose. In other words, if the plaintiff thinks it has a 75% chance of winning, the plaintiff must acknowledge it has a 25% chance of losing. If the plaintiff estimates the defendant's attorney's fees will be \$100,000, Fogerty reduces the expected value of the case to the plaintiff by as much as \$25,000 ($0.25 \times \$100,000$).

Moreover, in many cases the possibility that the plaintiff may have to pay the defendant's attorneys fees will have an impact that exceeds its mathematical

reduction of the expected value of the case. This is because many plaintiffs are "risk adverse": they are willing to sue, even though they may lose, so long as losing does not cost them anything (or at least not very much). If, however, losing means they may have to make a significant payment to the defendant, they will be less willing to run the risk of losing. Indeed, if the defendant's attorney's fees are likely to be large, even a small probability of losing will discourage some plaintiffs.

This is so, because although the defendant's attorney's fees are discounted (by the estimated probability of the plaintiff losing) for the purpose of calculating the affect of those fees on the expected value of the case, it is not the discounted amount of those fees that worries risk-adverse plaintiffs. If the plaintiff loses, it will not be required to pay the discounted amount of the defendant's fees. The plaintiff will have to pay their full amount. Some plaintiffs will simply be unwilling to take even a

small risk that they may have to pay a large attorneys fee award if they lose. And those plaintiffs will not sue in the first place.

Why Plaintiffs Ought to Change their Strategy for Responding to Defense Motions

Copyright defendants quite commonly make motions for summary judgment, especially in plagiarism cases involving the movie, television, music and publishing industries. Typically, these motions seek dismissal of the case on two grounds: (1) the defendant did not actually copy the plaintiff's work, as proved by the defendant's lack of access to the plaintiff's work; and (2) the defendant's work is not substantially similar to the plaintiff's. As a matter of copyright law, either of these grounds is adequate to require dismissal of the case. So plaintiffs typically respond by: (1) offering elaborate

theories about how the defendant may have had access to the plaintiff's work; and (2) arguing that whether the two works are substantially similar is a disputed issue of fact.

The number of cases in which exactly this sort of thing has happened is huge. Three of the most recent were suits against Warner Bros. by a man who complained that its movie "Out for Justice" infringed the copyright to his novel (ELR 19:4:20), against John Grisham by a woman who claimed that his novel *The Chamber* infringed the copyright to her non-fiction book *Defending the Devil* (ELR 19:2:7), and against Michael Crichton by a man who asserted that Crichton's novel *Jurassic Park* infringed the copyrights to the plaintiff's series of children's books set in "Dinosaur World" (ELR 18:10:5).

Plaintiffs make these kinds of arguments because they want to get their cases in front of juries which, they

think, will be more responsive to their claims than judges. Moreover, if a defendant's motion for summary judgment is defeated, the anticipated cost of preparing for trial and then trying the case becomes great. And this may increase the amount the defendant is willing to pay to settle the case, even if the defendant thinks that it has an excellent chance of winning a defense verdict from the jury. In the pre-Fogerty days of course, even a successful defendant was likely to have to pay its own attorney's fees, so going to trial represented a virtually certain and unrecoverable cost.

Fogerty changes things in two ways. First, it means that a defendant's decision to go to trial rather than settle no longer means it will incur virtually certain and unrecoverable costs. Second, it means that a plaintiff's decision to pursue a trial will substantially increase the defendant's attorney's fees (as well as the plaintiff's

own), and thus substantially increase the plaintiff's costs if the defendant wins at trial.

The question for plaintiffs now is whether trying a case before a jury increases the likelihood of victory enough to justify the risk of having to pay substantial attorney's fees to the defendant if the defendant ultimately wins. In many cases, the answer ought to be "no." This is because in many cases the most important issue is whether the two works in question are "substantially similar." The relevant items of evidence are the two works themselves - nothing more. A judge's ruling on whether works are substantially similar ought to be a good predictor of what a jury would rule, and an even better predictor of what a judge would rule in response to a post-trial motion for judgment as a matter of law (a judgment notwithstanding the verdict) if the jury were to find for the plaintiff in a case where the judge would not.

In short, in this post-Fogerty era, a plaintiff's strategic response to a defense motion for summary judgment ought to be a counter-motion for partial summary adjudication - one that seeks a judicial ruling that the defendant's work is "substantially similar" to the plaintiff's, as a matter of law. This response is especially appropriate on behalf of a risk adverse plaintiff who now may have to pick up the tab for the defendant's very substantial attorney's fees if the plaintiff defeats the defendant's summary judgment motion but goes on to lose at trial anyway.

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The contributions written by David Nimmer and Paul Marcus are excerpted from a longer law review article entitled "Forum on Attorney's Fees in Copyright Cases: Are We Running Through the Jungle Now or Is the Old Man Still Stuck Down the Road?" which will be published, fully and properly footnoted, later this year in the William and Mary Law Review. Copyright 1997 by Paul Marcus and David Nimmer.

[ELR 19:4:4]

INTERNATIONAL CASES

Elvis Presley Enterprises fails in bid to register Presley's name and signature as trademarks for toiletries in Great Britain; Chancery Court rules that marks are not distinctive

Elvis Presley Enterprises has suffered what must have been an aggravating setback in its efforts to register the names "Elvis" and "Elvis Presley" and Elvis Presley's signature as trademarks in Great Britain. Elvis Presley Enterprises first sought to register these marks in that country for use in connection with toiletries (including perfume, soap, deodorant and cosmetics) back in 1989. All three applications were opposed by Sid David Shaw, the owner of a British trading company known as "Elvisly Yours Limited" which sells a wide

range of goods, including toiletries, bearing Elvis Presley's name or likeness.

In 1982, Shaw registered the "Elvisly Yours" mark as his own in Great Britain. And in that year he was, he says, "the exclusive supplier of Elvis Presley souvenirs to Graceland." Whatever cordial relations may have existed between Shaw and Elvis Presley Enterprises back then have since evaporated. The two have been involved in litigation in the United States, as a consequence of which Shaw has been enjoined from selling Presley memorabilia in this country. That litigation may explain why Shaw so tenaciously opposed Elvis Presley Enterprise's trademark applications in his country, even to the point of appealing from an initial failure.

The first round of the trademark registration process went well for Elvis Presley Enterprises. The Registrar dismissed Shaw's opposition. But Shaw then

appealed to the Chancery Court which has ruled entirely in his favor.

To be eligible for trademark registration in Great Britain, a mark must be "distinctive" in the sense that it distinguishes the goods made by the owner of that mark from goods made by others. Justice Laddie ruled that the names "Elvis" and "Elvis Presley" failed that test, because they do not indicate that goods bearing those names come from Elvis Presley Enterprises in particular, rather than from other companies that also make Elvis Presley merchandise. The Justice explained his thinking this way.

"When people buy a toy of a well known character because it depicts that character, I have no reason to believe they care one way or the other who made, sold or licensed it. When a fan buys a poster or a cup bearing an image of his star, he is buying a likeness, not a product from a particular source. . . . He is likely to be

indifferent as to the source. . . . In particular there is nothing here which indicates that any significant section of the public seeing any of Enterprises' products would associate them with Enterprises by reason of the use of the words `Elvis' or `Elvis Presley.' On the contrary, everything is consistent with those words being used and recognized as what the relevant public want not because of any trade source they may indicate but because they are a reminder of the famous musician. . . . The motivation for buying Elvis Presley after shave must have something to do with Elvis Presley. That does not indicate distinctiveness of trade origin."

Justice Laddie held that the signature mark was ineligible for registration, because it too lacked distinctiveness. It "is not highly stylized writing of Elvis Presley's name," the Justice said. "In fact its most notable features are the words of the name itself. There is nothing graphically or visually distinctive about the style

in which the words are written. It is just a simple, if not very fluent, cursive rendition of the name. On the face of it, the signature does not appear to me to be adapted to distinguish." Moreover, he added, "other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the name `Elvis' or `Elvis Presley' in a cursive script which is the same as or nearly resembles the script in the signature mark upon or in connection with their own goods."

Editor's note: This result is not one that would be expected in the United States. The difference can be accounted for by what appears to be a dramatic difference between the law of the United States and Great Britain. American and British trademark laws are quite similar with respect to the characteristics a mark must have to be eligible for trademark registration. In the United States, however, if the name "Elvis Presley" appeared on a product, customers may not care who made or

authorized the product, but they would know that it was made or authorized by Elvis Presley Enterprises. The reason they would know this is that by virtue of American right of publicity laws, no company could make or sell products bearing the "Elvis Presley" name without the consent of Elvis Presley Enterprises. Great Britain, by contrast, does not appear to have an equivalent law. Justice Laddie himself said as much in this decision: "Elvis Presley did not own his name so as to be able to prevent all and any uses of it by third parties, so Enterprises can have no greater rights. Similarly, Elvis Presley did not own his appearance. . . . For the same reason under our law, Enterprises does not own the likeness of Elvis Presley. No doubt it can prevent the reproduction of drawings and photographs of him in which it owns copyright, but it has no right to prevent the reproduction or exploitation of any of the myriad of photographs, including press photographs, and drawings in

which it does not own the copyright simply by reason of the fact that they contain or depict a likeness of Elvis Presley." This is why Shaw's company "Elvisly Yours" is able to sell Elvis Presley merchandise in Great Britain without a license from Elvis Presley Enterprises. And that is why the name "Elvis Presley" does not tell British customers which company made or authorized merchandise bearing that name. In the United States of course, things are different.

Re Elvis Presley Enterprises, U.K. Chancery Court (1997) (available in the LEXIS Enggen Library, Cases File) [ELR 19:4:13]

WASHINGTON MONITOR

NLRB Administrative Law Judge dismisses complaint asserting that Warner Bros. violated federal labor law by refusing to furnish information demanded by Script Supervisors union when it suspected that studio had hired non-members to do "script supervisor" work on "Outbreak" and other movies; judge rules that Script Supervisors did not have legal authority to demand information it had requested

Studio movie-making is a heavily unionized business. Virtually everyone who works on such movies - perhaps all but producers, composers, lawyers and studio executives - belong to one union or another. Most below-the-line employees belong to IATSE and one of its affiliated locals. There are of course historic reasons

for the union relationships that exist in the movie business, and those relationships may have an internal logic to those who have worked in the field for a long time. But they are unlike union relationships in other industries. Indeed, NLRB Administrative Law Judge Timothy Nelson recently observed that movie-making is "a unique industry with esoteric labor relationships and practices of Byzantine complexity."

Judge Nelson made this observation in a case brought against Warner Bros. by the NLRB Regional Director for Los Angeles on behalf of IATSE and its affiliated Script Supervisors Local # 871. The dispute which gave rise to the case had its origins in the Northern California city of Ferndale where a "second unit" was doing location shooting for the movie *Outbreak*. The Script Supervisors claimed that Warner Bros. had hired a woman who is not a member of that union to do "script supervisor" work during the Ferndale shoot, in

alleged violation of two collective bargaining agreements to which IATSE, the Script Supervisors and Warner Bros. all are signatories.

One of these collective bargaining agreements was the IATSE Basic Agreement, and the other was the Script Supervisors Local Agreement. Outsiders and movie industry novices would suppose that the relationship between these two collective bargaining agreements would be clear. But they would be wrong. Even to Judge Nelson's experienced eyes, the case required him to deal with "complex and elusive bargaining relationships" whose "features . . . can be discerned only by studying and comparing the sometimes maddeningly wordy, obscure, convoluted, cross-referential, and occasionally inconsistent texts of both the Basic Agreement and the Local Agreement."

When the Script Supervisors learned that a non-member was doing what it believed was union work on

Outbreak, it became suspicious that Warner Bros. had used non-members to do such work on other movies as well. As a result, the Script Supervisors demanded that Warner Bros. furnish it with "a vast amount of information" concerning all of the movies the studio had made for a full year. Among the items of information demanded were: the names, job titles and duties of each employee who had worked on each movie during that year, and the locations from which each of those employees was hired; call sheets for each day of production for each such movie; and copies of notes of any kind made by anyone that were used, directly or indirectly, during editing those movies.

Warner Bros.' labor relations vice-president later testified that the request covered "thousands" of people, and that he would have had to take a "sabbatical" from his job in order to respond to the Script Supervisors' demand. Indeed, he acknowledged that he had told the

union that he had neither "the time nor the inclination" to produce the information. And he didn't. That's what prompted the NLRB's Regional Director to initiate the case, alleging that Warner Bros.' refusal to furnish the information the Script Supervisors had demanded was a violation of Section 8(a)(5) of the National Labor Relations Act.

As matters turned out, the case did not require Judge Nelson to decide whether Warner Bros. actually had violated the IATSE Basic Agreement or the Script Supervisors Local Agreement by hiring a non-member to do whatever work she had done on *Outbreak* in Ferndale. Nonetheless, in the course of his long opinion explaining the factual background for the dispute, the judge all but found that the Ferndale shoot "merely involved `helicopter stuff,' and that a script supervisor was not `required' for such work," under the terms of the two collective bargaining agreements themselves.

In order to decide the case, Judge Nelson had to resolve a narrower question: whether under the two collective bargaining agreements, the Script Supervisors had the power to demand the kind of information it had, or whether instead a demand for that kind of information had to come from IATSE itself. The distinction was important, because even if the information Warner Bros. had refused to furnish could have been demanded by IATSE, it wasn't IATSE that had demanded it. The information was demanded only by the Script Supervisors.

A close reading of the IATSE Basic Agreement and the Script Supervisors Local Agreement led Judge Nelson to conclude that only IATSE was the bargaining representative of script supervisors, and only it had the power to demand information from Warner Bros. He concluded that the Script Supervisors Local is not a bargaining representative of its members.

While the Script Supervisors' Local Agreement does give it certain rights and powers, the judge found that the Script Supervisors Local Agreement and IATSE's Basic Agreement "did not themselves purport to confer on [the Script Supervisors] any generalized right to demand and obtain information from [Warner Bros.]. . . Accordingly, if [the Script Supervisors] can be said to have enjoyed any statutory `right' at all to demand information from [Warner Bros.], such a right could only arise by virtue of IATSE's status as the exclusive representative. . . . In short . . . , [the Script Supervisors'] information demands could enjoy statutory support only insofar as they were made as an `agent' of IATSE, i.e., on IATSE's behalf, not its own." But IATSE's Constitution and By-Laws specifically provide that no "agency relationship exists" between it "and its affiliated local Unions for any purpose whatsoever."

Thus, since the Script Supervisors had no legal authority to demand the information it had, Warner Bros.' refusal to furnish it was not a violation of the National Labor Relations Act. And that is why Judge Nelson dismissed the Regional Director's complaint.

Warner Bros. and International Alliance of Theatrical Stage Employees, Script Supervisors Local #871, National Labor Relations Board Case 31-CA-21066, 1997 NLRB LEXIS 523 (1997) [ELR 19:4:15]

RECENT CASES

NBA loses case against makers of Sports-Trax real-time game information pagers; appellate court rules that game information is not protected by copyright, and that SportsTrax makers did not engage in unlawful misappropriation under narrow "hot news" test

The NBA has been dealt a legal setback in its efforts to control the marketing of information about its games. The loss was no doubt doubly disappointing, because losses always are and because it was inflicted by federal Court of Appeals Judge Ralph Winter. In earlier unrelated cases involving different issues, Judge Winter has issued important rulings that greatly favored the NBA (ELR 16:11:15, 8:12:12). But not this time.

At the heart of this case is a tiny, battery-operated pager known as a "SportsTrax." The device is manufactured by Motorola, and it provides detailed statistical information about NBA games while they are still being played. The statistics are compiled by reporters, employed by a company known as Stats, Inc., who watch NBA games on television or listen to them on radio. Working with personal computers connected by modem to Stats' computer, the information is relayed to the pagers over a network that includes phones, satellites and radio transmitters. Stats also markets real-time NBA game information on an America Online site.

In the beginning, Motorola and Stats talked with the NBA about a potential business relationship among the three for the sale of SportsTrax devices. Eventually, however Motorola and Stats decided to proceed on their own, without the NBA's involvement. That is why the

NBA sued when SportsTrax was introduced to the public early in 1996.

The NBA's complaint alleged a variety of causes of action, the two most significant of which were copyright infringement and misappropriation. The first period was won by the NBA. Federal District Judge Loretta Preska ruled against the NBA on its copyright claim, but nevertheless granted the NBA the injunction it sought on the grounds that Motorola and Stats had misappropriated NBA property in violation of New York state common law.

Within months however, that injunction was vacated by the Court of Appeals, which ordered that the NBA's case be dismissed. Judge Winter's decision is significant for its explanation of why the NBA's copyright claims were unsuccessful, and even more significant for its discussion of the NBA's misappropriation claim.

The NBA's copyright claims were a stretch, and while worth the effort, were simply beyond its reach. The games themselves, Judge Winter ruled, are not protected by copyright, because "athletic events . . . are neither similar nor analogous to any of the listed categories" of "works of authorship" that are set forth in section 102 of the Copyright Act. The radio and television broadcasts of NBA games which Stats' reporters relied on to get game information may well have been protected by copyright. But Judge Winter explained that "Because the SportsTrax device and AOL site reproduce only factual information culled from the broadcasts and none of the copyrightable expression of the games, [Motorola and Stats] did not infringe the copyright of the broadcasts."

The NBA's state law misappropriation claim was based on the United States Supreme Court's 1918 decision in *International News Service v. Associated Press*

which held that INS had misappropriated "hot news" from AP by selling facts and information INS had lifted from AP sources to INS-affiliated newspapers. The *INS v. AP* decision had spawned several others involving misappropriation of entertainment and information from radio broadcasts, including baseball game broadcasts; and the NBA relied on those cases too of course.

The problem with *INS v. AP* and its progeny was that they were decided before the Copyright Act of 1976 was enacted, section 301 of which now preempts all state law claims involving works that are of a type protected by copyright and that assert rights that are equivalent to copyright. An elaborate body of caselaw has developed exploring the specific circumstances under which state law claims are or are not now preempted. Many legal commentators believed that section 301 would now preempt the type of misappropriation

claim recognized in *INS v. AP*. And that is precisely what Motorola and Stats argued in this case.

Judge Winter was only partly persuaded by Motorola and Stats' preemption argument; but that part was enough. He ruled that "'hot-news' INS-like" claims do survive preemption, but only in limited circumstances. The claim survives, he said, where a plaintiff has incurred costs to compile time-sensitive information, which is used by a directly competing defendant under circumstances that amount to "free-riding" of a kind that would so reduce the plaintiff's incentive to compile the information that the existence of the plaintiff's product or service would be substantially threatened.

"SportsTrax does not meet that test," Judge Winter ruled, and thus the NBA's misappropriation claim was preempted. The NBA's information was time-sensitive, but that was the only element that was satisfied. According to Judge Winter, the NBA creates three

"informational products": (1) the games themselves; (2) broadcasts of the games; and (3) strictly factual information about the games. The NBA had not shown that SportsTrax had any competitive effect on the first two; and it did not show any free-riding by SportsTrax on the third.

The reason that SportsTrax did not free-ride on strictly factual information about NBA games was because Stats had to collect and transmit that information itself. The NBA has plans to start a similar service of its own, to be called "Gamestats"; and Judge Winter agreed that if Motorola and Stats got their information from Gamestats, that would be free-riding. "However, that is not the case in the instant matter," he said.

Editor's note: From the NBA's point of view, this case is about whether "one has a right to one's own harvest" - a right that courts have recognized in other contexts. Judge Winter did not seem to doubt that the NBA

has the exclusive right to market two informational products that are the "harvest" of its efforts: NBA games and broadcasts of those games. Why not strictly factual information about those games, as well? The National Football League had once taken a similar position in a lawsuit in which the NFL sued Delaware over its state lottery which was based on the results of NFL games. *NFL v. Governor of Delaware*, 435 F.Supp. 1372 (D.Del. 1977). The court ruled against the NFL in that case, and Judge Winter quoted that court's explanation for why a sports league's harvest does not include strictly factual information about its games. The "proposition [that one is entitled to one's own harvest] has not been construed to preclude others from profiting from demands for collateral services generated by the success of one's business venture." In the NFL case, the court acknowledged that Delaware was making "profits it would not make but for the existence of the NFL." But

the court said it found "this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing [NFL] fans who want to go the stadium or, indeed, the sidewalk popcorn salesman who services the crowd as it surges towards the gate." Apparently Judge Winter found SportsTrax to be analogous to bus companies and popcorn salesmen. Left unexplained, however, is "why"?

National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 1997 U.S.App.LEXIS 1527 (2d Cir. 1997) [ELR 19:4:17]

Russian hockey club fails to enjoin Detroit Vipers and International Hockey League from employing Sergei Samsonov for 1996-97 season; court finds that Samsonov's contract with Russian team was signed while he was a minor, and thus was voidable under Russian law

The cold war between the United States and Russia is over, but the ice (hockey) wars are not. The first battle in this latest conflict took place in federal District Court in New York City, and the Americans have won.

The battle in question is one over the right to employ Sergei Samsonov, who has been proclaimed (even in the U.S.) "The Greatest Russian [hockey player] ever." The disputants are the owner of a Russian hockey club known as the Central Sports Army Club ("CSKA" for short), and the Detroit Vipers of the International Hockey League.

Samsonov signed a contract with CSKA when he was just 15 years old, and in 1996 - when he was 17 - he signed a contract "addendum" to play for the Russian team for the 1996-97 season. Before that season began, however, Samsonov decided to leave CSKA, apparently because he had not been paid in full for the prior season and because the team did not plan to play him in Russia's "premier hockey league" during the '96-97 season.

Once Samsonov decided to leave CSKA, he and his father met with a sports agent associated with Athletes and Artists, Inc., a New York city based agency that quickly got Samsonov a contract with the Detroit Vipers.

CSKA sued the Vipers (and the IHL) for interference with contract, and it sought a preliminary injunction that would have barred the Vipers from playing Samsonov. But Judge Barbara Jones has denied CSKA's motion.

Russian law provides that contracts signed by those younger than 18 years of age may be voided by the minor, unless the minor's parents expressly consented to the contract in writing. Samsonov's parents had not consented to his CSKA contract, and thus it was voidable. This was significant, because Judge Jones ruled that "Under New York Law, there is no liability for interference with such an agreement absent employment of wrongful means, unlawful restraint of trade, or lack of competitive motive."

CSKA had not shown that the Vipers and IHL had acted wrongfully. "Rather," the judge found, "all their actions were undertaken with the justifiable business motive of securing a business asset - in this case, a star hockey player." Thus, CSKA had not shown a likelihood that it would succeed in the case, nor had it raised serious questions going to the merits of its claims,

one or the other of which is necessary for a preliminary injunction.

Central Sports Army Club v. Arena Associates, Inc., 952 F.Supp. 181, 1997 U.S. Dist. LEXIS 615 (S.D.N.Y. 1997) [ELR 19:4:18]

NBA's Washington Wizards defeat trademark infringement claim by Harlem Wizards basketball team; District Court finds no likelihood of confusion among basketball fans

The NBA's Washington Wizards have yet to play a single game, using the "Wizards" name, but they have scored an important victory already - against a basketball team from outside their league. Their opponent was the Harlem Wizards, a "show basketball" team in the

tradition established by the world famous Harlem Globetrotters."

NBA fans will recall that the league's Washington franchise was known as the "Bullets" until the end of last season. Abe Pollin, the Bullets' owner, decided to change his team's name, because "'Bullets' had a negative connotation," especially in the Nation's capital. The name the NBA team selected was "Wizards," even though the Harlem Wizards had been using that name since 1962.

The Bullets announced it would change its name to the Washington Wizards with the start of the 1997-98 season. And that provoked the Harlem team to claim that its trademark rights in the "Wizards" name would be infringed by the use of that name by the team from Washington. But Judge William Walls disagreed, and has dismissed the Harlem team's complaint.

The judge found that "Wizards" is an inherently distinctive name, as used by the Harlem team; and thus the Harlem team owns trademark rights to it. But Judge Walls also found there was no likelihood that basketball fans would be confused by Washington's use of the Wizards name. In reaching this conclusion, the judge did a 10-factor analysis and made such findings as these.

He found that the services offered by the two teams are different, because the Washington team plays NBA-level competitive basketball in a league while the Harlem team plays non-competitive "show" basketball without a league. He found that the two teams' target audiences are different. He found that although the Harlem's mark is distinctive, it also is "weak." And he found that NBA tickets are so much more expensive than tickets to the Harlem team's exhibition games, and NBA fans are so sophisticated and knowledgeable, that it is "unlikely that consumers will attend a Harlem Wizards'

game expecting to see NBA basketball or purchase NBA tickets expecting to see the Harlem Wizards perform show basketball."

Editor's note: This is not the first time a court has found no likelihood of confusion despite the use of identical names by companies selling very similar, if not identical, goods and services. In the entertainment industry alone, a recent ruling permitted a rap record company to call itself "Uptown Records" over the objection of a jazz record company that already used that name. (ELR 17:11:7, 18:7:32). Still, the result in this case could not have been confidently predicted in advance. Perhaps the court was influenced by the fact that the Harlem Wizards once thought it was acceptable for them to select a name that is almost as similar to "Harlem Globetrotters" as "Washington Wizards" now is to "Harlem Wizards."

Harlem Wizards Entertainment v. NBA Properties, 952 F.Supp. 1084, 1997 U.S.Dist.LEXIS 262 (D.N.J. 1997) [ELR 19:4:19]

Nike and CBS win dismissal of lawsuit alleging their "Hoop Summit" high school all-star basketball games were copied from Hoopla Sports' "Father Liberty Game"; court rejects Hoopla's trademark, copyright and other claims

Basketball is an old and well-established sport, played all around the world by amateurs and professionals alike. But in 1994, promoter John Walsh conceived a new twist on the old game - one that he thought would be popular, profitable, and socially beneficial. Walsh decided to stage a "U.S. versus the world" basketball game between all-star teams of high school players.

Walsh called his event the "Father Liberty Game," and assigned his rights in it to Hoopla Sports and Entertainment, Inc. More significantly, Walsh persuaded Nike to sponsor the inaugural game; and it was in fact played at DePaul University in 1994.

Walsh began making plans for the second annual "Father Liberty Game," which he thought would be played the following year. Much to his dismay, however, Nike decided to sponsor its own "Hoop Summit," which according to Walsh was a "nearly exact replica" of Hoopla's "Father Liberty Game." Nike's "Hoop Summit" was played in 1995, and then again in 1996, and both games were televised by CBS.

Nike's decision to stage its own "Hoop Summit" provoked Hoopla into filing a lawsuit against Nike and CBS, alleging trademark and copyright infringement as well as other claims. Nike and CBS responded with a

motion to dismiss; and federal District Judge Ruben Castillo has granted their motion.

Since Nike and CBS had not used Hoopla's "Father Liberty Game" name, its trademark claim was based on the assertion that they had taken Walsh's idea for the event. But Judge Castillo ruled that the Lanham Act does not protect the idea behind a product. And since Hoopla had not alleged that Nike and CBS had misappropriated anything more than the idea itself, the judge dismissed that claim.

Hoopla's copyright claim was based on a copyright-protected "Event Profile" Walsh had written, describing the "Father Liberty Game" concept in some detail. Walsh had sent Nike a copy of the Event Profile when he solicited Nike's sponsorship of the game. And according to Hoopla, Nike and CBS had copied the Event Profile in staging their "Hoop Summit." However, Nike and CBS had not reproduced the Event Profile

itself. They allegedly copied the game described in it. But this did not entitle Walsh to prevail, Judge Castillo ruled, for several reasons.

The idea for the "Father Liberty Game" is not protected by copyright. And neither sports events nor games are copyrightable either. Moreover, even though the Event Profile itself is protected by copyright, not a single case holds that "the recreation of an event described in a copyrighted promotional document infringes the copyright of that document," the judge said.

Judge Castillo also rejected Hoopla's breach of contract, interference with economic advantage, deceptive trade practices and fraud claims.

Hoopla Sports and Entertainment v. Nike, Inc., 947 F.Supp. 347, 1996 U.S. Dist. LEXIS 17540 (N.D. Ill. 1996) [ELR 19:4:19]

Warner Bros. and Steven Seagal movie "Out for Justice" is not substantially similar to unpublished novel, so court dismisses novelist's copyright infringement suit

In 1991, Warner Bros. released "Out for Justice," a movie about an Italian-American police detective - played by Steven Seagal - who seeks revenge for a Mafia-related killing of another police detective. Many years earlier, Emilio Sinicola wrote a novel entitled "The Family . . . and Some." It too was about an Italian-American who seeks revenge for a Mafia-related killing.

Sinicola's novel was never published, but he did submit it to a number of agents and producers. When "Out for Justice" was released, Sinicola noted numerous similarities between the movie and his book, 32 of which he eventually documented. So despite assurances by Warner Bros. and Seagal that they had had no

connection with any of the people to whom Sinicola had submitted his novel, he filed a copyright infringement suit against them anyway.

Warner Bros. and Seagal responded, as defendants in such cases often do, with a motion for summary judgment, asserting that their movie and Sinicola's novel are not substantially similar. Judge Leonard Wexler compared the two works with considerable care, and has granted the defendants' motion, because he found that the works are not substantially similar.

Judge Wexler explained that his comparison "immediately reveals profound differences in the overall works." The movie is "visceral, action-packed succession of violent confrontations, culminating in the villain's death at the hands of the avenger." The novel "by contrast . . . is neither action-packed nor filled with violent confrontation. . . ."

The list of 32 purported similarities relied on by Sinicola did not persuade the judge, because he found that "many of the purported `substantial similarities' in events, characters, and settings are nonexistent or insignificant, while the remaining ones concern unprotected ideas and thematic concepts or merely scenes a faire and stock figures."

Judge Wexler explained that "At a most general level, both works tell a story of a villain, linked to organized crime, who commits a homicide and then is pursued and vanquished by a close friend or relative of the victim before other characters who were hoping to capture the villain for their own purposes. However, one cannot monopolize a story at this level of abstraction; such a stock theme is not protected by copyright."

The more specific similarities cited by Sinicola were not protected either. "Given that both the Film and the Novel are set in an Italian-American neighborhood

and involve the mob, drugs, murder, and revenge - which are all unprotected ideas and thematic concepts - predictably, a number of details are common to both works." And they are "unprotectible scenes a faire."

Moreover, the specific similarities that are shared by Sinicola's novel and "Out for Justice" were elements that Sinicola had not originated. They "have appeared repeatedly in fictional police-gangster stories, fictional street justice stories, and other types of fictional works," Judge Wexler found.

Sinicola argued that these similarities showed that the movie had been "adapted" from his novel. But this did not help his case, because "a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to that of the plaintiff's." In other words, the judge explained, "Copyright infringement requires a showing of substantial similarity

whether or not a work is `adapted' from another." This means that "Even if a subsequent work reminds people of an earlier work, there is still no infringement in the absence of substantial similarity." And insofar as Sinicola's case was concerned, this meant that "even if the Film were inspired by or adapted from the Novel, that would still not be sufficient for copyright infringement, given the absence of substantial similarity of copyrightable material in the works."

Sinicola v. Warner Bros., Inc., 948 F.Supp. 1176, 1996 U.S. Dist. LEXIS 19476 (E.D.N.Y. 1996) [ELR 19:4:20]

Unauthorized 3-D videocassette of trailer for "The Starlets" infringed movie's copyright, but not trademark, federal court rules

In 1975, producer John Lamb made a 75-minute movie entitled "The Starlets," as well as a 2-minute 40-second trailer containing scenes from the movie that Lamb used to advertise it. The movie was registered for copyright, but the trailer wasn't.

Two decades later, inventor Michael Starks designed a device that allows movies to be viewed on television in 3-D. For reasons best left to the imagination, "The Starlets" was a perfect movie to display the qualities of Starks' invention; and he sought a 3-D license from Lamb on two separate occasions. By the time Starks approached him, Lamb had not exhibited "The Starlets" for years; but the two men reached no agreement. So Starks did the next best thing: he used the trailer, without permission, possibly believing the trailer was not protected by copyright, or that his use of it would be a non-infringing "fair use."

When Lamb learned that Starks was selling 3-D videos of the trailer for \$50 to those who had purchased his "3D TV" device, Lamb sued for copyright and trademark infringement. Starks responded with a motion for summary judgment. Judge Justin Quackenbush has granted Starks' motion with respect to the trademark claim, but has ruled in Lamb's favor on his copyright infringement claim.

Starks attempted to overcome the copyright claim by arguing that the trailer was produced and published before the full-length movie, so the movie's copyright would not protect the trailer. But Starks provided no evidence to support that factual assertion. Rather, the judge found that the trailer was "clearly . . . derivative of the full-length copyrighted movie," so that Starks' use of the trailer infringed the movie's copyright. This was so, Judge Quackenbush ruled, even though the trailer - and thus Starks - used only a small portion of the movie.

"Even a small taking may sometimes be actionable," the judge explained.

Judge Quackenbush also rejected Starks' fair use defense. Starks' 3-D video "was sold for strictly commercial profit purposes," which is "presumptively unfair," and Starks had "not presented facts sufficient to rebut that presumption."

The judge did, however, grant Starks' motion for summary judgment with respect to Lamb's trademark claim. Starks' 3-D video indicated that Lamb was the movie's producer. The video did not attempt to mislead the public into thinking that Starks had created the movie or the trailer. Thus, no Lanham Act violation had been alleged or could be found, the judge concluded.

Lamb v. Starks, 949 F.Supp. 753, 1996 U.S. Dist. LEXIS 18704 (N.D. Cal. 1996) [ELR 19:4:21]

Sega wins copyright and trademark infringement case against on-line computer bulletin board operator who permitted users to upload and download Sega game software; court grants Sega's summary judgment motion, issues permanent injunction and awards damages and attorneys' fees

Sega Enterprises has triumphed over the operator of "MAPHIA," an on-line computer bulletin board system that permitted users to upload and download software, including Sega game software, without the consent of the software's owners.

Like the play of many Sega games themselves, victory came in stages. Early in the case, Sega sought and won a preliminary injunction against MAPHIA's operator (ELR 16:7:20). Now, Sega has put MAPHIA down for good. Federal District Judge Claudia Wilken

has granted Sega's motion for summary judgment. The judge also has issued a permanent injunction prohibiting MAPHIA's further infringement of Sega's copyrights and trademarks, has awarded \$10,000 in statutory copyright damages, and has ruled that Sega is entitled to treble damages or profits for trademark infringement as well as reasonable attorneys' fees.

MAPHIA's operator was successful on one legal point: Judge Wilken ruled that he was not liable for direct copyright infringement, because Sega had not shown that he had uploaded or downloaded software himself. Sega was able to prove that he knew others had done so, and even that he had solicited them to. But that activity amounted to contributory infringement, rather than direct infringement. This ruling was of little comfort to MAPHIA's operator, however, because the judge ruled that his role in the software copying done by others, such as "providing facilities, direction, knowledge,

encouragement, and seeking profit, amounts to a prima facie case of contributory copyright infringement." And since he knowingly allowed others to upload and download Sega software, his contributory infringements were "willful." The judge rejected his fair use defense.

Sega also proved its trademark infringement claims, because Judge Wilken found there was a "likelihood of consumer confusion regarding the sponsorship and origin of the game files available on the MAPHIA BBS."

Sega Enterprises Ltd. v. MAPHIA, 948 F.Supp. 923, 1996 U.S. Dist. LEXIS 20385 (N.D. Cal. 1996) [ELR 19:4:21]

Record companies are awarded more than \$7 million in copyright and trademark case against owner of company that sold blank cassettes and duplicating equipment to counterfeiters

Twenty-six major record companies have been awarded a judgment of more than \$7 million in a copyright and trademark infringement suit against the owner of a company that sold blank cassettes and duplicating equipment to record counterfeiters.

The defendant, Mohammad Abdallah, was not himself a counterfeiter and did not himself infringe any of the record companies' copyrights or trademarks. But the record companies successfully sued him nonetheless for contributory copyright and trademark infringement, because they were able to prove that he knew his customers were counterfeiters and yet continued to sell to them anyway.

Federal District Judge Laughlin Waters awarded the record companies a total of \$156,000 in statutory copyright damages - \$1,000 for each of 56 recordings for which Abdallah had supplied counterfeiters with "time-loaded" blank cassettes. (Time-loaded cassettes contain tape that has been cut to the correct length for particular albums, rather than the usual 60 or 90 minute lengths found in over-the-counter blank cassettes.)

The judge also awarded the record companies \$7 million in trademark damages. This amount represented three times Abdallah's estimated profits from the sale of time-loaded cassettes and duplicating equipment for a two-year period.

A & M Records, Inc. v. Abdallah, 948 F.Supp. 1449, 1996 U.S.Dist.LEXIS 20927 (C.D.Cal. 1996) [ELR 19:4:22]

Military Honor and Decency Act is declared unconstitutional, and an injunction against its implementation is issued, because the Act prohibits military exchanges from selling or renting sexually explicit material even if the material is not obscene

The Military Honor and Decency Act of 1996 has been declared unconstitutional by federal District Judge Shira Scheindlin. The Act prohibits military exchanges from selling or renting "sexually explicit material"; and it defines "sexually explicit material" to include records, videos and magazines "the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way."

While the Constitution permits governments to prohibit and punish the sale and rental of "obscene" material, the Act's definition of "sexually explicit material" includes - and thus prohibits - much more than

"obscene" material, as the Supreme Court has defined "obscene." As a result, the publisher of Penthouse, which is the third most popular magazine sold by Army and Air Force Exchanges, filed suit against the Secretary of Defense. Several trade associations whose members distribute magazines, records and videos joined in the suit.

Judge Scheindlin acknowledged that many of the pictures published in Penthouse "offend commonly shared ideals of decency because of their explicit nature." But that did not make the Act constitutional.

Instead, the judge held that the Act violates First Amendment free speech protections, unconstitutionally violates Fourteenth Amendment equal protection guarantees, and violates the Fifth Amendment's Due Process clause because it is vague. For these reasons, the judge has issued an injunction permanently barring the Department of Defense and its employees from "changing, as a

result of the Act, their existing stock, display and selling policies or practices with respect to materials that may be deemed subject to the Act."

General Media Communications, Inc. v. Perry, 952 F.Supp. 1072, 1997 U.S. Dist. LEXIS 1932 (S.D.N.Y. 1997) [ELR 19:4:22]

Music publishers obtain judgment against radio station that broadcast music without ASCAP license

Several ASCAP-member music publishers have obtained a judgment for \$40,000 in statutory damages against radio station WAUN-FM in Kenwaunee, Wisconsin, on account of its broadcast of recordings of 10 songs without an ASCAP license.

Judge Myron Gordon found the station's unlicensed broadcasts to be "willful" infringements of the songs' copyrights, because ASCAP had sued the station once before for broadcasting music without a license, and because ASCAP had warned the station in writing several times of its need to have an ASCAP license in order to broadcast songs whose copyrights are owned by ASCAP members.

The judge also issued an injunction permanently barring the station from broadcasting any songs in the ASCAP repertory. And he awarded the publishers more than \$3,000 in attorneys fees and costs.

Canopy Music Inc. v. Harbor Cities Broadcasting, Inc.,
950 F.Supp. 913, 1997 U.S.Dist.LEXIS 371 (E.D.Wisc.
1997) [ELR 19:4:23]

In lawsuit by Don King Productions against bar owner that exhibited pay-per-view telecast of Chavez vs. Lopez boxing match to customers without a license, bar owner is not entitled to indemnity from satellite TV company that carried the fight without scrambling its signal

Boxing promoter Don King has rigorously sought to protect his company's pay-per-view TV rights to the 1994 Chavez vs. Lopez professional boxing match. So when a number of bars in California showed the fight without a license to do so, King sued them. (See ELR 18:3:7)

One bar owner responded with a third-party complaint against the satellite TV company that carried the pay-per-view signal. According to the bar owner, he was able to show the fight to his customers - without a license - only because the satellite company failed to

scramble the signal. And thus the bar owner claimed that he was entitled to be indemnified by the satellite company for whatever damages he might have to pay to King.

A federal District Court has rejected the bar owner's claim for indemnity. Judge William Shubb has ruled that no federal or state legal principle entitles the bar owner to indemnity under the circumstances of this case. And thus the judge has granted the satellite company's motion for summary judgment and has dismissed the bar owner's third-party complaint.

Don King Productions/Kingvision v. Ferreira, 950 F.Supp. 286, 1996 U.S.Dist.LEXIS 19692 (E.D.Cal. 1996) [ELR 19:4:23]

Previously Reported:

The United States Supreme Court has denied certiorari in two "Glendora" cable access cases: *Glendora v. Cablevision Systems*, 117 S.Ct. 1444, 1997 U.S.LEXIS 2347 (1997), previously reported at ELR 17:11:9; and *Glendora v. Hostetter*, 117 S.Ct. 1708, 1997 U.S.LEXIS 2973 (1997), previously reported at ELR 18:5:16. Glendora also filed a similar suit against another cable company, complaining that her rights were violated when that company removed her cable access program from its system. That case has been dismissed on the grounds that the cable system was not liable to her under any of several theories she had asserted. *Glendora v. Marshall*, 947 F.Supp. 707, 1996 U.S.Dist.LEXIS 17273 (S.D.N.Y. 1996). A similar lawsuit filed by another cable access program producer also has been dismissed, on the grounds that the Cable

Communications Act provision on which he had relied does not create a private cause of action. *McClellan v. Cablevision of Connecticut*, 949 F.Supp. 97, 1997 U.S. Dist. LEXIS 297 (D.Conn. 1997).

The United States Supreme Court has denied certiorari: in *Murray v. Cable National Broadcasting Co.*, 117 S.Ct. 689, 1997 U.S. LEXIS 108 (1997) (ELR 18:11:13); and in *Bery v. City of New York* (ELR 19:2:21) in an order published under the name *City of New York v. Bery*, 117 S.Ct. 2408, 1997 U.S. LEXIS 3407 (1997).

The United States Supreme Court's decision in *Reno v. American Civil Liberties Union* (ELR 19:2:7) has been published at 117 S.Ct. 2329 (1997); and the Supreme Court has affirmed, without opinion, the related case of *Shea v. Reno* (18:9:18) in an order published under the name *Reno v. Shea*, 117 S.Ct. 2501, 1997 U.S. LEXIS 4253 (1997).

The order of the United States Supreme Court granting certiorari in *L'Anza Research International v. Quality King Distributors* (ELR 19:2:15) has been published under the name *Quality King Distributors v. L'Anza Research International*, 117 S.Ct. 2406 (1997). [ELR 19:4:23]

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[ELR 19:4:24]