WASHINGTON MONITOR

Copyright Office Report to Congress sides with copyright owners on digital resale questions, webcasters on music streaming and download licenses, and consumers on digital backups

When Congress passed the Digital Millennium Copyright Act of 1998 (DMCA), it asked the Copyright Office to answer a very important question. Simply stated, Congress asked what effect digital technology and the anticircumvention provisions of the DMCA (ELR 20:6:4) would have on two rights that have been in the Copyright Act for a long time:

* the right of owners of legitimate copies of copyrighted works to resell their copies without the consent of the works' copyright owners (what lawyers call the "first sale doctrine"), and

* the right of owners of legitimate copies of computer programs to make backup copies without the consent of the programs' copyright owners.

At first blush, this question seems technical, and its relationship to the entertainment industry unclear. In fact, however, the Copyright Office's answer was critical to entertainment industry copyright owners, because of positions taken by those who oppose protective encryption and those who want to make and disseminate digital copies of movies, music and books with as little regard as possible for copyright owners.

First sale doctrine

The opponents of copyright owners would like to be able to decrypt the Content Scrambling System and region codes used to protect movie DVDs. And they would like the right to freely transmit digital works of all kinds, including music recordings, movies, and electronic books, so long as they promise to delete the files on their own computers after they've transmitted them to others. These activities are currently barred by the anticircumvention provisions of the DMCA and the Copyright Act's long-standing right to distribute. During the Copyright Office's in-depth study of the question asked by Congress, copyright opponents urged the Copyright Office to recommend amendments to the law that would permit what they want to do.

The Copyright Office has now completed its study, and in a lengthy report to the Senate and House of Representatives, it has recommended that no changes be made to the law that would permit any of these things. In short, entertainment industry copyright owners carried their burden of persuasion, and came away with an important victory.

Copyright opponents argued that the Content Scrambling System used to protect movie DVDs requires consumers to buy two things - an authorized decryption player as well as a DVD, rather than just a DVD - and this reduces the resale value of DVDs by interfering with its "free alienability." Copyright opponents also argued that region codes used to protect DVDs (by allowing them to be played only on players designed to be used in the region where the DVDs are licensed for sale) interfere with the resale of DVDs in a similar fashion. This amounts to an improper end-run around the "first sale doctrine," copyright opponents asserted.

The Copyright Office rejected both of these arguments. "The first sale doctrine does not guarantee the existence of a secondary market or a certain price for copies of copyrighted works," it explained. Nor does the first sale doctrine give consumers the right to use DVDs "on any electronic device."

Copyright opponents also argued that "the transmission of a work that was subsequently deleted from the sender's computer is the digital equivalent of giving, lending, or selling a book" - acts long permitted by the first sale doctrine - and thus the first sale doctrine should be amended to expressly permit such digital transmissions.

The Copyright Office acknowledged these "similarities" but found "the analogy to the physical world to be flawed and unconvincing." Its Report explains that "Physical copies degrade with time and use; digital information does not. Works in digital format can be reproduced flawlessly, and disseminated to nearly any point on the globe instantly and at negligible cost. Digital transmissions can adversely affect the market for the original to a much greater degree than transfers of physical copies. Additionally, unless a 'forward-and-delete' technology is employed to automatically delete the sender's copy, the deletion of a work requires an additional affirmative act on the part of the sender subsequent to the transmission. This act is difficult to prove or disprove, as is a person's claim to have transmitted only a single copy, thereby raising complex evidentiary concerns."

For these and other reasons, the Copyright Office concluded that "The benefits to further expansion [of the first sale doctrine] simply do not outweigh the likelihood of increased harm."

Temporary copies

Copyright owners were not the only winners. Webcasters too made persuasive arguments, and came away with two Copyright Office recommendations.

There were two issues of importance to webcasters. One was whether temporary buffer copies of digital music streams - made in the course of licensed transmissions of recordings - constitute "reproductions" of recordings and musical compositions, for which reproduction and mechanical licenses are necessary in addition to public performance licenses. The other question was whether authorized digital music downloads require public performance licenses from music publishers in addition to mechanical licenses.

The Copyright Office concluded that a "strong case" could be made that temporary buffer copies of digital music streams are not infringing because they are a "fair use." Nevertheless, the Office acknowledged that the application of the fair use doctrine by courts is "uncertain." It therefore recommended that Congress amend the Copyright Act "to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work."

The Copyright Office explained that "The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance of these works. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place - to the detriment of other copyright owners, webcasters and consumers alike - or to extract an additional payment that is not justified by the economic value of the copies at issue. Congressional action is desirable to remove the uncertainty. . . ."

The Copyright Office also reported that in its opinion, digital downloads do not constitute public performances, and if they do, they are permitted (without performance licenses) by the fair use doctrine. Though it did not recommend any specific amendment to the Copyright Act on this issue, the Copyright Office did plainly state its "view that no liability should result from a technical 'performance' that takes place in the course of a download."

Backup copies of digital works

Finally, the Copyright Office appears to have endorsed the argument that the law should be amended to authorize backup copies of digital works of all kinds - not simply computer programs, as is now the case. On the other hand, the Office also recommended adding to the law provisions that would provide some additional protection to copyright owners that they may not enjoy now.

Under current law, the fair use doctrine may already authorize backups of all types of digital works. And, under one reading of the first sale doctrine, current law may now permit the sale of those backups.

The Copyright Office believes that Congress never intended to authorize the sale of backup copies. It therefore recommended that the first sale doctrine be amended to clearly indicate that it only authorizes the resale of works that were legitimately distributed - not works that were made as backups. Alternatively, the Copyright Office recommends that the law be amended to expressly permit backups of digital works, provided the originals are "on a medium that is subject to accidental erasure, damage or destruction in the ordinary course of its use." If Congress enacts this change, the Copyright Office also recommends that the law should specify that the backup copy may not be transferred unless the original is transferred as well.

United States Copyright Office DMCA Section 104 Report (August 2001), available at www.loc.gov/copyright/reports/studies/dmca/dmca_study.html [ELR 23:4:4]

American Federation of Musicians did not fail to fairly represent cello player Daniel Laufer by refusing to bring grievance against Atlanta Symphony Orchestra when Orchestra failed to seat Laufer in second (rather than third) chair, NLRB decides

Daniel Laufer is the son of "internationally acclaimed" cellist Wolfgang Laufer, and an outstanding cello player in his own right. Though the world of symphony musicians is "highly competitive," Daniel Laufer began his professional career when he was just 18, as a cellist with the Dallas Symphony Orchestra.

After only three years as a professional, Laufer auditioned with the Atlanta Symphony Orchestra to be its "Associate Principal Cellist" - the title customarily given to an orchestra's second-ranking cello player. Despite his relative youth and inexperience, Laufer won the job, over competition from the Orchestra's "longtime" Assistant Principal Cellist, Dona Klein, who thought the "Associate" position should be her's. The Orchestra gave the job to Laufer, because its Music Director and Principal Cellist agreed that Laufer was a "better" and "stronger player" than Klein.

Klein however had something that eventually provoked an NLRB proceeding: a written agreement with the Orchestra that she would retain her "second chair" seating, regardless of who was hired to be "Associate Principal Cellist." Indeed, when Laufer was offered the "Associate Principal" position, he was told that he would be seated third chair until the issue of Klein's seating as second chair could "be resolved."

Those who have never played in an orchestra may find it difficult to understand why the difference between second and third chair matters - especially because third chair is actually closer and more visible to the audience than second chair. But it did matter to Laufer (as well as to Klein). Laufer spoke repeatedly with the Orchestra's Music Director about being seated second chair, and he waited patiently, for years, for the issue to "be resolved."

Finally, when Laufer could wait no more, he asked his union, the Atlanta local of the American Federation of Musicians, to initiate a grievance with the Orchestra over its refusal to seat him second chair. The

AFoM investigated Laufer's complaint, twice, but declined to bring a grievance.

As a result, Laufer filed a charge with the National Labor Relations Board, asserting that the AFoM had violated its statutory duty to represent him fairly. The NLRB's General Counsel agreed, and filed a complaint against the union.

The case was heard by NLRB Administrative Law Judge Jane Vandeventer who, after a six-day hearing, recommended that the General Counsel's complaint be dismissed. The General Counsel took "exception" to Judge Vandeventer's recommendation. ("Exception" is the intra-NLRB equivalent of an appeal.) But NLRB Chairman John Truesdale, joined by Members Wilma Lieberman and Peter Hurtgen, affirmed Judge Vandeventer's findings and conclusions and adopted her recommendation that the case be dismissed.

According to the General Counsel, the AFoM violated its duty of fair representation in a variety of ways: by intentionally misleading Laufer about how it intended to handle his grievance; by withholding information from him; by showing favoritism towards Klein; by conducting only a cursory investigation; and by deciding too hastily that his grievance lacked merit. For the most part, these were fact-based assertions, and Judge Vandeventer simply interpreted the facts differently than the General Counsel.

Two issues, however, are likely to be of importance to others, in addition to Laufer and the AFoM: the question of whether the union showed favoritism towards Klein, and whether Laufer's grievance had merit.

With respect to the "favoritism" issue, the AFoM was in a difficult position, because "Two musicians in an orchestra cannot possibly sit in the same seat at the same time." Thus, whatever the union did would work against the interests of one of its members. "It would beggar logic," Judge Vandeventer reasoned, "to hold that whenever a union was forced to such a choice between two competing interests, it 'discriminated' against one employee or group of employees in violation of the duty of fair representation."

With respect to the merits of Laufer's claim, the judge found it to be "of doubtful merit." This was so, she said, because the AFoM's collective bargaining agreement gave the Orchestra's Music Director "discretion" to decide where musicians should be seated, because Klein's individual employment agreement gave her the right to be seated second chair, and because Laufer's individual employment agreement provided that he would be seated third chair.

Laufer contended that he was entitled to be seated second chair, because it is industry practice for

"Associate Principal" cellists to be seated there, and because the Orchestra's Music Director had orally assured him he would be seated there eventually. But Judge Vandeventer concluded that it was "unlikely in the extreme that an arbitrator would rely upon such evidence, even assuming [the AFoM] could surmount the hurdle of the parol evidence rule, to force management to exercise its discretion to contravene the specific terms of two written contracts."

The NRLB General Counsel was represented by Lauren Rich. The AFoM was represented by Lesley A. Troope and James D. Fagan Jr., of Stanford Fagan & Giolito. Laufer was represented by Robert Thompson Jr. and Gordon J. Rose of Thompson & Associates.

American Federation of Musicians and Daniel O. Laufer, 333 NLRB No. 139 (2001), available at www.nlrb.gov/slip333.html [ELR 23:4:5]

INTERNATIONAL DEVELOPMENTS

Canadian Broadcast Standards Council rules that demeaning, racist and sexist comments made by Howard Stern on his radio show breached Canadian Association of Broadcaster Codes, but statements opposing U.S. immigration did not

The "Howard Stern Show" is broadcast by radio stations on both sides of the U.S.-Canadian border, where it regularly offends the sensibilities of listeners of both nationalities.

In Canada, offended listeners can do something specific and concrete: they can file written complaints with the Canadian Broadcast Standards Council (CBSC). When they do, broadcasters must respond in writing. And the CBSC then issues written rulings.

Apparently, Stern was in a particularly offensive mood in July 2000, because comments he made on two separate shows that month triggered complaints from two separate listeners. One complaint took exception to the degrading and racist statements Stern made to and about a call-in listener. The other complaint accused Stern of making sexist comments about a Playboy bunny, as well as racist comments about U.S. immigration policy.

The CBSC is not a government agency. It was created by private broadcasters to administer program content "Codes" adopted by the Canadian Association of Broadcasters (CAB) and the Canadian Radio-television and Telecommunications Commission. The CBSC is, in other words, part of the Canadian broadcast industry's effort to regulate itself, insofar as program content is concerned. More than 470 Canadian radio and television broadcasters are now CBSC members.

The CBSC administers four Codes in all: the CAB Code of Ethics; the CAB Voluntary Code Regarding Violence in Television Programming; the CAB Sex-Role Portrayal Code for Radio and Television Programming; and the Radio Television News Directors Association of Canada Code of Ethics.

Stern's July 2000 broadcasts allegedly violated two of these Codes.

His degrading and sexist comments were said to violate two provisions of the CAB Code of Ethics: one that requires broadcasters to "ensure . . . that their programming contains no abusive . . . material," and another that states that the "fair . . . presentation of . . . comment" is the broadcaster's "fundamental responsibility." These statements also were said to violate the Sex-Role Portrayal Code, which requires broadcasters to "refrain from the exploitation of women" and to avoid "negative or degrading comments on the role and nature of women."

Stern's racist comments were said to violate a provision of the CAB Code of Ethics that bans comments that discriminate on the basis of race or national or ethnic origin.

Toronto radio station CILQ-FM broadcast Stern's offending programs, and thus it was the entity against which the complaints were filed. (Neither Stern himself nor his originating station, WXRK-FM in New York, were parties to the proceeding.)

CBSC's five-member Ontario Regional Panel unanimously reached a split decision in the matter: it agreed with CILQ-FM that Stern's comments about U.S. immigration policy did not violate the Code of Ethics; but it agreed with the complaining listeners that his degrading, racist and sexist statements did violate both the Code of Ethics and the Sex-Role Portrayal Code.

The CBSC determined that Stern's comments about immigration - in which he said, among other things, "I am against all immigration into this country" - were said as part of a political discussion that was "a defensible view in terms of the freedom of expression."

On the other hand, the CBSC determined that Stern's degrading comments about a Playboy bunny breached the Sex-Role Portrayal Code, and his racist and sexist remarks about a call-in listener breached both the Code of Ethics and the Sex-Role Portrayal Code.

As a result of these breaches, CILQ-FM was required to announce the CBSC's decision on-air, once during peak listening hours and a second time during the "Howard Stern Show" itself. The station then had to provide written confirmation that it had aired these announcements to the complaining parties and the CBSC, and it had to provide the CBSC with air check copies of the announcements.

CILQ-FM re the Howard Stern Show, CBSC Decision 99/00-0717 (June 28, 2001), available at www.cbsc.ca/english/decision/010829.htm [ELR 23:4:7]

European Commission closes its inquiry into CD prices after record companies changed co-op advertising practices

The European Commission has closed its investigation into what it called the "vertical relationships" between the five major record companies - BMG, EMI, Sony Music, Universal Music and

Warner Music - and their retailers. The investigation focused on allegations of "retail price maintenance" by the majors through the use of contracts with retailers that were said to link co-operative advertising with minimum advertised prices.

The Commission's investigation found that three of the majors had included minimum advertised prices in some of their co-operative advertising agreements in Germany. The Commission did not identify the companies that used these provisions; but the Commission did indicate that all three have ended their use of such agreements. The Commission's investigation also uncovered "a limited practice" used by one of the majors - also unidentified - in Italy that could have the effect of maintaining retail prices in that country.

Because these practices were confined to the territory of a single country, and because the

Commission has a policy of decentralizing the enforcement of competition law "in appropriate cases," the Commission announced that it has informed the national competition authorities in Germany and Italy of the results of its inquiry so they could then determine whether or not further investigation or action at their national levels would be "appropriate."

The Commission also noted that the United Kingdom's competition authority, the U.K. Office of Fair Trading, is investigating allegations that the majors are restricting the importation of CDs into the United Kingdom, in an attempt to maintain high retail prices there.

The European Commission's CD pricing inquiry was opened in January of this year, after the settlement of Federal Trade Commission proceedings in the United States in which the majors agreed to consent orders that required them to drop the minimum advertised price provisions of their cooperative advertising programs (ELR 22:1:8).

European Commission CD Pricing Inquiry, Press Release IP/01/1212 (August 17, 2001), available at http://europa.eu.int/index_en.htm [ELR 23:4:9]

IN THE NEWS

Federal court denies Random House's motion for preliminary injunction that would have barred Rosetta Books from publishing digital editions of books by William Styron, Kurt Vonnegut and Robert B. Parker

In the latest in a long line cases involving new media uses of old works, Rosetta Books has defeated a preliminary injunction motion filed by Random House - a motion which, if granted, would have barred Rosetta Books from publishing "ebook" versions of several works by authors William Styron, Kurt Vonnegut and Robert B. Parker.

Styron, Vonnegut and Parker granted Rosetta Books the right to sell digital versions of several of their books over the Internet. So although they weren't parties to the case, their interests were aligned with Rosetta Books rather than with Random House.

Random House has sued Rosetta Books for copyright infringement, because long before Rosetta Books acquired any rights from the three authors, Random House acquired from each of them the exclusive right to "publish and sell . . . in book form" the books that are at issue in this case. Those books include Styron's The Confessions of Nat Turner and Sophie's Choice, Vonnegut's Slaughterhouse-Five, Breakfast of Champions, The Sirens of Titan, Cat's Cradle and Player Piano, and Parker's Promised Land.

According to Random House, Rosetta Books' versions of these books are "in book form," even though they are digital rather than printed on paper. And thus, Random House contends, Rosetta Books' activities violate Random House's exclusive rights.

Federal District Judge Sidney Stein has rejected Random House's interpretation of its contracts with Styron, Vonnegut and Parker. The judge has found that "the most reasonable interpretation of the grant . . . to 'print, publish and sell the work in book form' does not include the right to publish the work as an ebook."

In reaching that conclusion, the judge noted that in addition to the right to publish the authors' works "in book form," the contracts contain "separate grant language . . . used to convey the rights to publish book club editions, reprint editions, abridged forms, and editions in Braille." The judge reasoned that "This language would not be necessary if the phrase 'in book form' encompassed all types of books."

Moreover, Judge Stein found that the phrase "'To print, publish and sell the work in book form' is understood in the publishing industry to be a 'limited' grant . . . [which] the publishing industry generally interprets . . . as granting the publisher 'the exclusive right to publish a hardcover trade book in English for distribution in North America.'"

Random House sought to bolster its case by emphasizing that its contracts also contain a "non-compete" clause. That clause prohibits the authors from authorizing the publication of any material based on the books Random House is entitled to publish which is "likely to injure its sale." This clause is evidence, Random House argued, that it acquired "broad, exclusive rights" to the books in question, including the right to publish ebooks.

Judge Stein was not persuaded that the non-compete clause had this effect. Nevertheless, he concluded that "even if the authors did violate this provision of their Random House agreements by contracting with Rosetta Books - a point on which this Court does not opine - the remedy is a breach of contract action against the authors, not a copyright infringement action against Rosetta Books."

Random House, Inc. v. Rosetta Books LLC, Case No. 01 Civ. 1728 (SHS) (S.D.N.Y., July 11, 2001), available at www.nysd.uscourts.gov/courtweb [ELR 23:4:10]

Dustin Hoffman's $3 million right of publicity judgment against Los Angeles Magazine is reversed on appeal; altered "Tootsie" photo was part of article protected by First Amendment, appellate court rules

Los Angeles Magazine has dodged liability for its unauthorized publication of a photograph of Dustin Hoffman, but it had to go to the Ninth Circuit Court of Appeals to do so. Had the magazine not won on appeal, it would have had to pay Hoffman more than $3 million. That was the amount federal District Judge Dickran Tevrizian awarded the actor in his right of publicity lawsuit - a lawsuit triggered by the magazine's publication of a digitally altered photo of Hoffman dressed as a woman in his leading role in the 1982 movie "Tootsie" (ELR 21:3:8)

The altered photo was part of an article entitled "Grand Illusions" that was published in Los Angeles Magazine's March 1997 issue. Hoffman's head was taken from a still photo from "Tootsie," and was superimposed on the body of a model wearing a gown and shoes designed by Richard Tyler and Ralph Lauren for their Spring 1997 collections. Photos of fifteen other actors and actresses were altered in a similar way and were used in the article as well.

Judge Tevrizian had rejected Los Angeles Magazine's First Amendment defense, because he concluded that the photo was commercial speech and in any event was published with actual malice. On appeal, however, the Ninth Circuit disagreed with both of these conclusions.

Writing for the appellate court, Judge Robert Boochever explained that if the article had been commercial speech, Hoffman would not need to prove actual malice. Since most right of publicity cases involve advertising, most such cases do involve commercial speech, and that is why actual malice is so rarely an issue in right of publicity cases.

In this case, however, Judge Boochever ruled that "the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors," and as such was not commercial speech. As a result, to sustain his judgment against the magazine, Hoffman needed to show that Los Angeles Magazine "knew (or purposefully avoided knowing) that the photograph would mislead its readers into thinking that the body in the altered photograph was Hoffman's."

The evidence did not show this, however, because the article stated, more than once, that its photos had been digitally altered, Judge Boochever concluded. Moreover, many of the other photos in the article were of actors and actresses who had passed away long before 1997 and thus couldn't have been photographed wearing Spring 1997 fashions.

Because there was no clear and convincing evidence of actual malice, the appellate court reversed the $3 million judgment Hoffman had won, and it directed that judgment be entered in favor of Los Angeles Magazine.

Hoffman was represented by Charles N. Shepard of Greenberg Glusker Fields Claman & Machtinger in Los Angeles. Los Angeles Magazine was represented by Steven M. Perry of Munger Tolles & Olson in Los Angeles. Several amicus curiae were represented by Mark S. Lee of Manatt Phelps & Phillips in Los Angeles, and by Floyd Abrams and Landis C. Best of Cahill Gordon & Reindel in New York City.

Hoffman v. Capital Cities/ABC, Inc., Case No. 99-55563 (9th Cir., July 6, 2001), available at www.ca9.uscourts.gov/ [ELR 23:4:10]

Court of Appeals affirms $31.7 million jury verdict in favor of Columbia Pictures in copyright infringement case against owner of TV stations that continued to broadcast programs after Columbia terminated licenses for non-payment

Columbia Pictures has prevailed again in its long-running copyright infringement lawsuit against Elvin Feltner, the owner of three television stations that continued to broadcast episodes of "Who's the Boss?," "Silver Spoons," "Hart to Hart" and "T.J. Hooker," after Columbia had terminated the stations' licenses for non-payment of license fees. The Ninth Circuit Court of

Appeals has affirmed a $31.7 million judgment entered in Columbia's favor, after a jury returned a verdict against Feltner for that amount (ELR 20:11:18).

Ironically, Feltner was hit by the big jury verdict only because he wanted a jury trial. Columbia preferred to try the case directly to District Judge Edward Rafeedie. At an earlier stage of case, Columbia did just that; and Judge Rafeedie entered judgment against Feltner for $8.8 million.

Apparently unable to quit while he was ahead, Feltner appealed, arguing that he had a Seventh Amendment right to a jury trial, even though Columbia sought only statutory damages, not its actual damages or Feltner's profits. At the time, it was generally believed that statutory damage claims in copyright cases were to be tried to a judge, rather than to a jury. As a result, the Court of Appeals rejected Feltner's jury trial argument (ELR 19:9:9). Eventually, however, Feltner persuaded the Supreme Court that he was right, and therefore he was entitled to a jury trial on Columbia's claim for statutory damages (ELR 19:12:6).

When the case was remanded to Judge Rafeedie for retrial, Feltner made the bold argument that because the Copyright Act itself does not provide for jury trials to determine statutory damages, the Supreme Court had effectively declared unconstitutional the entire statutory damages remedy, at least until Congress amends the Copyright Act's statutory damages section to provide for jury trials. Judge Rafeedie rejected that argument, and once again, the Ninth Circuit has affirmed.

In an opinion by Judge Harry Pregerson, the appellate court ruled that the Supreme Court's "holding in no way implies that copyright plaintiffs are no longer able to seek statutory damages under the Copyright Act. Indeed, the position urged by Feltner is contrary to the Supreme Court's decision in this case [where the]

Court stated, 'if a party so demands, a jury must determine the actual amount of statutory damages. . . ."

Feltner also argued that the jury's verdict was "excessive" and should have been set aside for that reason. Judge Pregerson acknowledged that the jury's verdict amounted to $72,000 per infringed work, a much greater amount than Judge Rafeedie's original judgment of $20,000 per infringed work. On the other hand, Judge Pregerson noted that the Copyright Act authorizes statutory damages of as much as $100,000 per infringed work if the infringement is "willful." In this case, "there was substantial evidence to support a finding of willfulness," Judge Pregerson concluded. And therefore, the jury's verdict - though substantial - was "well within the statutory range. . . ."

Columbia was represented by Henry J. Tashman of Davis Wright Tremaine in Los Angeles. Feltner was represented by Richard L. Chaifetz of Columbia, Maryland, and William H. Shibley of Long Beach.

Columbia Pictures v. Krypton Broadcasting, Case No. 99-56215 (9th Cir. July 9, 2001), available at www.ca9.uscourts.gov [ELR 23:4:11]

RECENT CASES

International Amateur Athletic Federation's suspension of runner Mary Decker Slaney for "blood doping" is sustained by federal Court of Appeals, because some of her legal theories were barred by treaty, others were preempted by Amateur Sports Act, and one failed to state a claim

Mary Decker Slaney has lost her case against the International Amateur Athletic Federation (IAAF) - a case in which she sought to set aside her 1997 suspension by the IAAF on charges of "blood doping." In an opinion by Judge Joel Flaum, the Seventh Circuit Court of Appeals has affirmed a lower court ruling dismissing her case, though it did so on grounds that have nothing to do with the factual merits of Slaney's claims.

Slaney denies that she ever engaged in the prohibited practice, and indeed, a United States of America Track and Field (USATA) Hearing Board determined that she had not. Nonetheless, under IAAF rules, the IAAF was able to compel USATA to arbitrate the dispute; and the IAAF Arbitration Panel determined Slaney had engaged in doping. The IAAF Panel found as it did, because an IAAF rule provides that if the ratio of testosterone to epitestosterone in the body exceeds six to one, doping is presumed, and the burden then shifts to the athlete to prove by clear and convincing evidence that other factors were the cause.

A woman's menstrual cycle or a change in her birth control pills could cause an elevated "T/E ratio," and that is exactly what Slaney said was the explanation for hers. Nevertheless, Slaney withdrew from the IAAF arbitration before it concluded, because she felt she couldn't prove her case by clear and convincing evidence, and because she argued that there was no scientific basis for concluding that blood doping may be inferred from a T/E ratio exceeding six to one.

The actual cause of her high T/E ratio was never litigated in federal court, nor was her argument that science does not support the IAAF's presumption of doping whenever that ratio exceeds six to one. Instead, Slaney's case was dismissed on what can be described as "jurisdictional" grounds.

The United States is a signatory to an international treaty for the recognition of arbitration awards. That treaty is known as the New York Convention, and it requires U.S. courts to give effect to international arbitration awards. Moreover, it prohibits courts from relitigating issues already decided in arbitration. Judge Flaum concluded that Slaney's state law claims against the IAAF raised the same factual issues that had already been decided in the IAAF arbitration. And thus the New York Convention barred courts from hearing those claims. In technical terms, the court lacked "subject-matter jurisdiction" to hear those claims.

Slaney sued the United States Olympic Committee (USOC), along with the IAAF, apparently because the USOC is the athletic association in the United States that enforced the suspension imposed by the IAAF. Her state law claims against the USOC were barred, Judge Flaum held, because the Amateur Athletic Act gives the USOC the exclusive authority to determine the eligibility of American athletes. And for that reason, the Amateur Athletic Act preempted Slaney's state law claims against it.

Finally, Slaney also had alleged RICO claims against the USOC. Though RICO claims would not have been preempted, Judge Flaum held that the facts she alleged simply did not state a claim under the RICO act. Thus he concluded that those claims were properly dismissed as well.

Slaney was represented by James E. Coleman Jr. in Durham NC. The IAAF was represented by Eugene D. Gulland of Covington & Burling in Washington DC, and by William C. Barnard of Sommer & Barnard in Indianapolis. The USOC was represented by R.D. Zink of Henderson Daily Withrow & Devoe in Indianapolis, and by Richard R. Young and Brent E. Rychener of Holme Roberts & Owen in Colorado Springs.

Slaney v. International Amateur Athletic Federation, 244 F.3d 580, 2001 U.S.App.LEXIS 4923 (7th Cir. 2001) [ELR 23:4:13]

Court of Appeals enjoins enforcement of Indianapolis ordinance restricting children's access to violent coin-operated video games

An Indianapolis ordinance that prohibits children from playing or watching (without their parents' permission) coin-operated video games that are "harmful to minors" because of their "graphic violence" is likely to be unconstitutional, the Seventh Circuit Court of Appeals has held. And therefore, the appellate court has instructed the trial court to enter a preliminary injunction barring enforcement of the ordinance.

The case was filed by the American Amusement Machine Association, a trade association for those in the video game business. In response to the Association's motion for a preliminary injunction, federal District Judge David Hamilton agreed that video games are speech. But he also ruled that the

Indianapolis ordinance was "carefully tailored" to deal with problems that could result from exposing children to violent games, and he found that it was not unduly vague. For these reasons, he denied the Association's motion. (ELR 22:10:26)

On appeal, the Association found a more receptive audience. In an opinion by Judge Richard Posner, the Seventh Circuit has held that "The ordinance curtails freedom of expression significantly and, on this record, without any offsetting justification, 'compelling' or otherwise."

Judge Posner's opinion eloquently compares the violent games involved in this case - including "The House of the Dead" and "Ultimate Mortal Kombat 3" - to violent literature like the Odyssey, The Divine Comedy, War and Peace, Frankenstein and Dracula. Though the judge acknowledged that the games are "not distinguished literature," he noted that they too may "become cultural icons."

Judge Posner's decision does not inevitably mean that the ordinance, or some revised version of it, could never pass constitutional muster. "It is conceivable though unlikely," he said, "that in a plenary trial the City can establish the legality of the ordinance" - apparently by offering evidence of a "compelling" justification for it.

Moreover, he added, "If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be) a more narrowly drawn ordinance might survive a constitutional challenge."

In the meantime, however, Judge Posner concluded that the Association showed "a strong likelihood of ultimate victory should the City persist with the case. . . ." And that is why he ordered the lower court to enter a preliminary injunction.

The Association was represented by David L. Kelleher of Arent Fox Kintner Plotkin & Kahn in Washington D.C., and by Jackie M. Bennett Jr. of McTurnan & Turner in Indianapolis. The City of Indianapolis was represented by A. Scott Chinn of the City Counsel's Division in Indianapolis, and by Matthew R. Gutwein of Baker & Daniels in Indianapolis.

American Amusement Machine Association v. Kendrick, 244 F.3d 572, 2001 U.S.App.LEXIS 4371 (7th Cir. 2001) [ELR 23:4:13]

Federal court refuses to dismiss songwriter's copyright infringement suit against BBC complaining about authorized use of song in television documentary filmed in U.S. but broadcast only in Northern Ireland

Irish-American songwriter Christopher Byrne has won the right to pursue his copyright infringement lawsuit against the British Broadcasting Corporation in federal court in New York City. Byrne's lawsuit complains of the BBC's unauthorized use of a recording of his song "Fenians" in the soundtrack of a BBC documentary that was filmed in the United States but was broadcast only in Northern Ireland. Judge Sidney Stein has denied the BBC's motion to dismiss the lawsuit.

The BBC moved to dismiss Byrne's suit on two grounds. It argued first that it had not infringed Byrne's copyright, as a matter of U.S. copyright law. And it argued second that the case should be dismissed under the doctrine of "forum non conveniens," on the grounds that Byrne could have filed his suit in the United Kingdom, and should have.

Part of the BBC documentary was filmed in the studios of New York City radio station WBAI, which uses a recording of Byrne's song "Fenians" as the theme music for one of its programs. During that film shoot, the BBC crew intentionally recorded "Fenians" as it was being broadcast by WBAI. And when the documentary was later edited for television broadcast, the segment featuring "Fenians" was included.

Judge Stein rejected the BBC's argument that no infringement occurred until the Northern Ireland broadcast - an act that would be covered by British rather than U.S. copyright law. "An unauthorized copying of a copyrighted work constitutes a completed act of infringement," the judge explained, "even when the copy is made for the purpose of transmission or broadcast abroad."

The judge also rejected the BBC's argument that because it used "Fenians" in a documentary, that use was a fair use under U.S. law. Because of the way in which the song was used in the documentary, even the question of whether it was used for news purposes was a disputed issue of fact that could not be resolved in response to the BBC's motion. Moreover, the other fair use factors favored Byrne rather than the BBC.

Finally, Judge Stein ruled that the BBC failed to show that New York was too inconvenient to be the proper forum. The BBC had argued that "all roads lead to Britannia," while Byrne responded that "there's no place like home." After a careful analysis of the facts supporting each of these creatively stated positions, the judge concluded that "Home is where Byrne is entitled to stay. . . ."

Byrne was represented by Russell A. Smith of New York City. The BBC was represented by Marcia B. Paul of Kay Collyer & Boose of New York City.

Byrne v. British Broadcasting Corp., 132 F.Supp.2d 229, 2001 U.S.Dist.LEXIS 1668 (S.D.N.Y. 2001) [ELR 23:4:14]

Federal court denies request of children's cosmetics company for preliminary injunction that would have barred Disney Store from selling "Tinker Bell" products

"Tinkerbell" cosmetics and "Tinker Bell" clothes are like cousins with feuding parents. Each traces its origins to a key character in the 1911 play "Peter Pan."

Almost fifty years ago, the play's owner licensed a cosmetics maker to use the name "Tinkerbell" in connection with children's cosmetics. At about the same time, the play's owner licensed Disney to produce an animated movie version. Ever since Disney's movie was released in 1953, Disney also has made and sold clothes and related products bearing "Tinker Bell's" name and image.

The cosmetics company registered its claim to a trademark in the word "Tinkerbell." And Disney registered its claim to a copyright in the image of its animated version of the Tinker Bell character.

Disney and the cosmetics maker coexisted in peace for decades. But after the cosmetics maker changed ownership, its current owner sued The Disney Store for trademark infringement in federal court in Pennsylvania. It then sought a preliminary injunction that would have barred the store from continuing to sell products using the "Tinker Bell" name or Disney's own image of the character.

Judge Thomas Vanaskie has denied the cosmetic company's motion for a preliminary injunction, on two grounds.

First, the judge found that the company's predecessors knew for many years of Disney's use of "Tinker Bell" in connection with Disney's own products, and never objected. Indeed, those predecessors even sold their cosmetics to Disney for resale at Disneyland. For this reason, the cosmetics company was unable to show, as it had to, that a preliminary injunction was necessary to prevent irreparable injury.

Second, Judge Vanaskie concluded that the cosmetics company had not shown it was likely to prevail on the merits of its case. The judge found that there was no evidence that consumers were confused about the source of the "Tinker Bell" merchandise they purchased at The Disney Store.

The judge acknowledged that Disney's use of the words "Tinker Bell" without the Disney image "would appear to fall on the side of infringement," but he added that the company's use of those words "with the Disney image and the word Disney would appear to fall on the side of non-infringement." Since the cosmetics company sought an injunction that would have barred Disney's use of both the words "Tinker Bell" and

Disney's image, the judge didn't have to make a definitive ruling on that issue. So these thoughts were expressed in a footnote, designed perhaps to suggest to the parties a possible compromise they could reach on their own.

The cosmetics company was represented by James H. Heller of Cozen & O'Connor in Philadelphia. The Disney Store was represented by Michael P. Perry of O'Malley & Harris in Scranton.

New Dana Perfumes Corp. v. The Disney Store, Inc., 131 F.Supp.2d 616, 2001 U.S.Dist.LEXIS 1363 (M.D.Pa. 2001)[ELR 23:4:15]

"You Have Mail" and "IM" are generic phrases, appellate court agrees; but AOL's trademark registration certificate for "Buddy List" creates disputed issue of fact requiring trial in company's infringement claim against AT&T

Company names can of course be trademarks, and no one is likely to deny that "AOL" is one. Other things can be trademarks too, and AOL has claimed that three phrases it uses in its role as an Internet Service Provider are just that. The phrases in question are "You Have Mail," "IM" and "Buddy List." Indeed, AOL sought and obtained a trademark registration certificate from the U.S. Patent & Trademark Office for "Buddy List" (though not for the other two phrases).

AOL's most formal assertion of these trademark claims was made in an infringement suit it filed against AT&T in federal court in AOL's home state of

Virginia. AOL's lawsuit was triggered by AT&T's use of these phrases in connection with its AT&T WorldNet Internet service.

At first, AOL's case was not successful. Judge Claude Hilton granted AT&T's motion for summary judgment, on the particularly painful (to AOL) grounds that all three phrases are generic, and thus are not entitled to trademark protection at all. (ELR 21:10:12)

On appeal, AOL has salvaged something, though not all that it had hoped. In an opinion by Judge Paul Niemeyer, the Fourth Circuit Court of Appeals has agreed that "You Have Mail" and "IM" are generic.

But Judge Niemeyer has ruled that AOL's registration certificate for "Buddy List" constituted evidence of the Trademark Office's opinion that "Buddy List" is a protectible trademark. Thus, despite AT&T's considerable evidence that the words "buddy list" have long been used by others in a generic fashion, the judge held that AOL's successful registration of its trademark claim to that phrase entitles it to a trial on the question of whether "Buddy List" is a valid trademark that AT&T infringed.

The appellate court therefore reversed the summary judgment AT&T had won on that issue, and remanded it to the lower court.

AOL was represented by Maureen Ellen Mahoney of Latham & Watkins in Washington, D.C. AT&T was presented by Laura A. Kaster of AT&T in Basking Ridge, New Jersey.

America Online, Inc. v. AT&T Corp., 243 F.3d 812, 2001 U.S.App.LEXIS 2866 (4th Cir. 2001) [ELR 23:4:15]

Federal Court of Appeals orders reconsideration of trial court's decision that costumes did not infringe "Barney" copyright and trademark

The company that owns the copyright and trademark to "Barney" has won a new round in its infringement lawsuit against a costume rental shop in Charlotte, North Carolina.

"Barney" of course is the colorful dinosaur that stars in the PBS children's program "Barney and Friends." The character's copyright and trademark are owned by the Lyons Partnership which licenses Barney's image for use on toys, books and clothing, but not for costumes. Lyons decided not to license costumes because of the risk that those who wear Barney costumes might behave in an "un-Barney-like manner" and thereby tarnish Barney's wholesome reputation.

Morris Costumes used to rent three costumes that were similar in appearance to "Barney": a purple dinosaur, a purple hippopotamus and a purple dragon. They were in fact sufficiently similar that children thought they were "Barney." And for that reason, Lyons sued Morris for copyright and trademark infringement in federal court in North Carolina.

While the trial judge agreed that Morris' dinosaur and hippo did infringe Barney's copyright and trademark, he nevertheless ruled that Lyons' claims as to those two costumes were barred by the statute of limitations and laches.

The trial judge also concluded that Morris' dragon didn't infringe at all. Insofar as the Lyons' copyright claim was concerned, the trial judge ruled that even if children might find that costume to be substantially similar to Barney, adults would not, and it was adults who rented the costume, not children. The judge also disregarded certain evidence of actual confusion, on the grounds it was hearsay, and thus concluded there was no likelihood of confusion to support Lyons' trademark claim.

Lyons appealed, successfully.

In an opinion by Judge Paul Niemeyer, the Fourth Circuit Court of Appeals has held that Lyons' claims as to the dinosaur and hippo costumes were not barred by the statute of limitations or laches. Although Morris' earliest infringements of Lyons' copyright and trademark were barred, Lyons complained only about those costume rentals that had occurred within the limitations periods. Those rentals constituted independent infringements that were not barred, Judge Niemeyer held. He also ruled that the state law doctrine of laches does not cut off federal statutory claims before the statutes of limitation run on them. Thus, Lyons' claims with respect to Morris' dinosaur and hippo costumes have been remanded to the trial judge who has been directed to enter an injunction in Lyons' favor and to consider Lyons' request for statutory damages.

Judge Niemeyer also reversed the dismissal of Lyons' copyright and trademark claims with respect to Morris' dragon costume. He ruled that since the costume was rented for the amusement of children, the trial judge should have determined whether it was substantially similar to Barney from "the perspectives of those children."

Finally, Judge Niemeyer held that the trial judge should not have disregarded testimony by an elementary school principal that when she wore the dragon costume, her students thought it was Barney, nor should the trial judge have disregarded newspaper articles that mistakenly described the dragon as Barney. This evidence was not hearsay proof that the dragon and Barney were the same, Judge Niemeyer held. Instead, it was offered to show that observers believed they were the same, and as such, was "highly probative" evidence of actual confusion.

As a result, Lyons' dragon claims have been remanded to the trial judge for reconsideration as well.

Lyons was represented by Mack Sperling of Brooks Pierce McLendon Humphrey & Leonard in Greensboro. Morris Costumes was represented by Jay Scot Bilas of Moore & Van Allen in Charlotte.

Lyons Partnership v. Morris Costumes, Inc., 243 F.3d 789, 2001 U.S.App.LEXIS 3985 (4th Cir. 2001) [ELR 23:4:16]

Lawsuit for record royalty accounting and related state law claims filed by estate of "Dukes of Dixieland" founder against record companies and others is not preempted by Copyright Act, so federal court remands case to state court in New Orleans

There's a battle pending over royalties still being earned from the sale recordings made thirty to fifty years ago by the "Dukes of Dixieland." On one side of that battle is the estate of the late Frank Asunto who co-founded the jazz band with his brother Fred back in 1946. On the other side of the battle is John Shoup as well as several record companies that distribute "Dukes of Dixieland" records.

Apparently, the record companies are paying the disputed royalties to Shoup, and have been for quite a while. In a lawsuit filed in state court in New Orleans, Asunto's estate claims that those royalties should have been paid to it rather than Shoup, and the estate sought an accounting. Additional claims were alleged as well, asserting the breach of contractual and fiduciary duties, conversion of royalties, unjust enrichment and declaratory and injunctive relief.

To the defendants, the estate's case looked like a copyright infringement suit; so they removed the case to federal court. The estate, however, insisted that it was not complaining of infringement, so it made a motion to remand the case to state court.

Federal Judge Stanwood Duval has agreed with the estate and has remanded the case.

In an opinion that carefully analyzes each of the estate's claims one at a time, the judge determined that none of them asserts rights or seeks remedies equivalent to those available under the Copyright Act. Instead, Judge Duval concluded that the estate's lawsuit seeks royalties allegedly due pursuant to contracts. And even its claims for conversion and unjust enrichment - which often are preempted - are not preempted in this case, because those claims allege the conversion of contract royalties, and unjust enrichment because of the receipt of contract royalties, not intangible rights.

Asunto's estate was represented by John S. Keller of New Orleans. Shoup was represented by Stephen G. Bullock of Stone Pigman Walther Wittmann & Hutchinson in New Orleans. And the record companies were represented by Eugene R. Preaus of Preaus Roddy & Krebs of New Orleans.

Asunto v. Shoup, 132 F.Supp.2d 445, 2001 U.S.Dist.LEXIS 15597 (E.D.La. 2001) [ELR 23:4:17]

"X-Men" action figures are "dolls" rather than "toys," and thus importer must pay higher import duties, Court of International Trade decides

The question of whether certain "X-Men" action figures - those known as "Steel Mutants" and "Silver Samurai" - are "dolls" or "toys" is one that only an international trade law expert could understand, let alone answer. To the rest of us, dolls are just one type of toy. But the Harmonized Tariff Schedule makes a distinction between dolls and toys; and it imposes a 12% tariff on dolls but only a 6.8% tariff on toys.

The difference in tariff rate can matter to an importer. It did to importer Toy Biz, Inc. - a company that imported a lot of "X-Men" action figures back in 1993 and 1994. When the U.S. Customs Service imposed duty at 12% on its imports, Toy Biz went to the United State Court of International Trade, seeking a ruling that "X-Men" are really "toys," and thus were really dutiable at the lower 6.8% rate.

Earlier in the case, Judge Delissa Ridgway denied cross-motions for summary judgment filed by Toy Biz and the Government. At that time, she ruled that there were disputed facts concerning one basis for making a distinction between toys and dolls: whether the action figures at issue had readily apparent features that would clearly be non-human to the casual observer (ELR 22:12:16).

Undaunted - but apparently not anxious to go to trial - both parties returned to Judge Ridgway with yet another reason why those "X-Men" who are "Steel Mutants" and "Silver Samurai" are or are not toys. According to Toy Biz, these figures are modern equivalents of "[t]in soldiers and the like" which the Harmonized Tariff Schedule indicates are not dolls and are toys. The Government of course argued the opposite. And the judge has agreed with the Government.

Relying on a similar case in which the Government defeated Hasbro Toys' argument that "G.I. Joe" figures were toys instead of dolls (ELR 11:10:13), Judge Ridgway determined that "Steel Mutants and Silver Samurai . . . bear little resemblance to . . . '[t]in soldiers and the like'. . . ."

For that reason, the judge granted the Government's motion for a summary judgment declaring that they are not "toys."

Toy Biz was represented by Sherry L. Singer and Indie K. Singh of Singer and Singh in Valley Stream N.Y. The Government was represented by Stuart E. Schiffer, Acting Assistant Attorney General, U.S. Department of Justice.

Toy Biz, Inc. v. United States, 132 F.Supp.2d 17, 2001 U.S.C.I.T.LEXIS 5 (C.I.T. 2001) [ELR 23:4:17]

General Release signed by former owner of New England Patriots when he sold team bars antitrust suit against NFL and teams that existed when Release was signed, but did not bar suit against Jacksonville Jaguars because it did not exist when Release was signed, appellate court rules

Victor Kiam passed away not long ago. But before he did, he won a ruling that revived his claims that the NFL and its members violated federal antitrust law by conspiring to prevent him from moving the New England Patriots to Jacksonville, Florida, back in 1991.

Many people remember Kiam as the owner of Remington Products, because of television commercials he did for the company's electric shaver. Professional football fans, and those who live in New England, may also remember that he owned the NFL's New England Patriots from 1988 to 1992.

Those were bad years, financially, for the Patriots. When Boston refused to build him a new stadium, Kiam talked with a group in Jacksonville, Florida, about selling the team to them. Apparently, the NFL discouraged the Jacksonville group from buying the Patriots, so the group broke off their discussions.

After the Jacksonville group withdrew, Kiam sold the team to someone else who was willing to keep it in New England. In order to get the NFL's approval for that sale, Kiam had to sign a General Release, releasing the NFL - as well as its members, affiliates and successors - from all claims, including antitrust claims.

The following year, in 1993, the NFL awarded the Jacksonville group an expansion team, which became the Jacksonville Jaguars. Kiam then filed his antitrust lawsuit in federal court in New York City, alleging that the NFL and its members had conspired to prevent him from selling the Patriots to the Jacksonville group.

The NFL and its members responded to Kiam's suit by arguing that it was barred by the release he had signed; and Judge Milton Pollack agreed (ELR 21:8:18)

On appeal, Kiam has salvaged a part of his case. The Second Circuit Court of Appeals affirmed the dismissal of Kiam's suit against the League and those teams that were members in 1992 when Kiam signed the General Release.

However, in an opinion by Judge Robert Sack, the appellate court reversed the dismissal of Kiam's claims against the Jacksonville Jaguars, because that team didn't become a member of the NFL until after Kiam signed the General Release. And Judge Sack has concluded that the terms of the release simply did not cover teams that later joined the League.

Moreover, Judge Sack also concluded that there are disputed facts about whether the owners of the Jaguars participated in the alleged conspiracy before they were awarded their expansion franchise; and thus Kiam is entitled to a trial on that issue.

"While we understand that this leaves the NFL dog of this litigation quite dead but the [Jaguars] tail still wagging," the judge concluded, "the result is a necessary outgrowth of the fact that at this point, only the validity and operation of the Release have been fully litigated."

Kiam was represented by Steven R. Kuney of Williams & Connolly in Washington, D.C. The NFL and its members were represented by Gregg H. Levy of

Covington & Burling in Washington, D.C. And the Jaguars were represented by Steven A. Werber of Foley & Lardner in Jacksonville and Allen G. Reiter of Cooperman Levitt Winikoff Lester & Newman in New York City.

VKK Corp. v. National Football League, 244 F.3d 114, 2001 U.S.App.LEXIS 3885 (2nd Cir. 2001) [ELR 23:4:18]

Disparities between girls' softball and boys' baseball programs at Florida high schools in Brevard County violate Title IX, federal court decides

High schools in Brevard County, Florida, have programs for girls' softball and boys' baseball; but the two programs are not entirely alike.

The boys have batting cages; the girls do not. The boys' fields have scoreboards, lights and warm-up areas; the girls' fields have none of these. The dimensions of the boys' fields are correct for baseball, while the dimensions of the fields the girls must use are not correct for softball.

For these reasons and more, a class-action lawsuit was filed in federal court in Orlando by the father of high school softball player Kayla Landow, on behalf of all girls who play softball at Brevard County's high schools. The case alleged that these disparities violate Title IX.

At the conclusion of a three-day trial, Judge Anne Conway found that these disparities do exist, and that they do violate Title IX. As a result, the judge has ordered the Brevard County School Board to develop a plan that elevates the girls' softball program to the level of the boys' baseball program. Landow too was authorized to prepare a plan, in case the School Board fails to produce one that both sides are able to agree upon.

Landow was represented by Lisa Kuhlman Tietig and Mark Tietig of Tietig & Tietig in Merritt Island. The Brevard County School Board was represented by Jeffrey Graham Slater of Hilyard Bogan Palmer & Lockeby in Orlando.

Landow v. School Board of Brevard County, 132 F.Supp.2d 958, 2000 U.S.Dist.LEXIS 20713 (M.D.Fla. 2000) [ELR 23:4:18]

Previously Reported:

Federal District Judge William Conner has signed a new Consent Decree - technically known as the "Second Amended Final Judgment" - that was agreed to by ASCAP and the United States Department of Justice last year (ELR 22:4:6). Following comments from the public about the original version of that Consent Decree, its exact language was revised, but just slightly. United States of America v. American Society of Composers, Authors and Publishers, Civ. Action No. 41-1395 (WCC), available at http://www.ascap.com/ascap.pdf .

The California Supreme Court has declined to hear Francis Ford Coppola's appeal in Coppola v. Warner Bros., the case in which the California Court of Appeal reversed a $20 million judgment Coppola had won against Warner Bros. The Court of Appeal ruled that a letter sent by Warner Bros. to Columbia Pictures, asserting rights in Coppola's "Pinocchio" project, was legally privileged (ELR 22:11:4).

The Fourth Circuit Court of Appeals issued a "corrected" opinion in Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350, 2001 U.S.App.LEXIS 34656 (4th Cir. 2001), affirming (as had its earlier opinion) a judgment that the Ravens' logo infringes the copyright to a design created by an amateur artist, despite the Ravens' testimony that it never received the artist's submission (ELR 22:10:16). The United States Supreme Court thereafter denied the Ravens' petition for certiorari. Baltimore Ravens, Inc. v. Bouchat, 121 S.Ct. 2000, 2001 U.S.LEXIS 3863 (2001).

The Supreme Court also has denied a petition for certiorari in Forbes v. Eagleson, 121 S.Ct. 2551, 2001 U.S.LEXIS 4725 (2001), in which the Third Circuit Court of Appeals affirmed a lower court ruling that

RICO claims asserted by hockey players against the NHL and the former executive director of the NHL Players Association are barred by statute of limitations (ELR 22:10:19).

In response to a motion for reconsideration, federal District Judge Shira Scheindlin has reaffirmed her decision to dismiss a lawsuit against Windswept Pacific brought by the successors of songwriter Bo Gentry who claimed that they, rather than Windswept, own the renewal copyright to "Mony, Mony." (ELR 22:11:21) Judge Scheindlin did however delete a footnote from her earlier decision, because she agreed that it was "overbroad" when it stated that a 1989 agreement was cancelled by a 1998 document. (In fact, the 1989 agreement dealt with 21 songs while the 1998 document dealt only with eight.) Ackoff-Ortega v. Windswept Pacific Entertainment, 130 F.Supp.2d 440, 2000 U.S.Dist.LEXIS 17825 (S.D.N.Y. 2000)

George Wendt and John Ratzenberger have settled their right of publicity lawsuit against Host International. The settlement was reached after the Ninth Circuit Court of Appeals ruled that the two actors were entitled to a trial on their claims that robotic figures displayed in airport bars operated by Host depicted them in their roles as "Norm" and "Cliff" in the television series "Cheers" (ELR 20:1:7), and after the Supreme Court denied Host's petition for certiorari (ELR 22:8:26).

The decision of federal Magistrate Judge Andrew Peck, awarding the National Football League $2.6 million in damages in its copyright infringement action against PrimeTime 24 on account of the satellite company's retransmission of NFL television broadcasts to PrimeTime subscribers in Canada, has been published. National Football League v. PrimeTime 24,

131 F.Supp.2d 458, 2001 U.S.Dist.LEXIS 974 (S.D.N.Y. 2001) (ELR 23:1:19)
[ELR 23:4:19]

DEPARTMENTS

In the Law Reviews:

Loyola of Los Angeles Entertainment Law Review has published Volume 21, Numbers 2 and 3 with the following articles:

Getting Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses by Matthew G. Matzkin, 21/2 Loyola of Los Angeles Entertainment Law Review (2001)

Rebels With a Cause: Artists' Struggles to Escape a Place Where Everybody Owns Your Name by Scott L. Whiteleather, 21/2 Loyola of Los Angeles Entertainment Law Review (2001)

Playing the Hollywood Name Game in Cybercourt: The Battle Over Domain Names in the Age of Celebrity-Squatting by Leah Phillips Falzone, 21/2 Loyola of Los Angeles Entertainment Law Review (2001)

International Law of Mystery: Holding Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution by Scott Sterling, 21/2 Loyola of Los Angeles Entertainment Law Review (2001)

Symposium: Selected Issues in Labor Relations in the Motion Picture and Television Industries: Foreward by

Howard Fabrick, 21/3 Loyola of Los Angeles Entertainment Law Review (2001)

Motion Picture Production: To Run or Stay Made in the U.S.A. by Pamela Conley Ulich and Lance Simmens, 21/3 Loyola of Los Angeles Entertainment Law Review (2001)

Between a Rock and a Hard Place: Writers and Actors Navigate Hollywood's Rough Roads to Employment During Labor Strikes by Adam Levin and Jenny Schneider Li, 21/3 Loyola of Los Angeles Entertainment Law Review (2001)

Talent Agents as Producers: A Historical Perspective of Screen Actors Guild Regulation and the Rising Conflict with Managers by Koh Siok Tian Wilson, 21/3 Loyola of Los Angeles Entertainment Law Review (2001)

Peer Group/Labor Organization Review of the Admission of Extraordinary and Accompanying Aliens to Work in the Entertainment Industry: A Plea for Precedent by Laurence S. Zakson, 21/3 Loyola of Los Angeles Entertainment Law Review (2001)

Record Distributors' Minimum Advertised Price Provisions: Tripping Antitrust During Pursuit of Revenue, Control, and Survival in the Openly Competitive Digital Era by H. Damian Elahi, 21/3 Loyola of Los Angeles Entertainment Law Review (2001)

A Constitutional Critique of Carnivore, Federal Law Enforcement's Newest Electronic Surveillance Strategy by Graham B. Smith, 21/3 Loyola of Los Angeles Entertainment Law Review (2001)

Exploitative Publishers, Untrustworthy Systems, and the Dream of a Digital Revolution for Artists, 114 Harvard Law Review 2438 (2001)

Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions by R. Anthony Reese, 55 University of Miami Law Review 237 (2001)

Recent Developments in Trademark Law: Cybersquatters Run for Cover, While Copycats Breathe a Sigh of Relief by William G. Barber, Louis T. Pirkey, and Mark T. Garrett, 9 Texas Intellectual Property Law Journal 231 (2001) (published by University of Texas School of Law)

Copyright Misuse or a Right to Compete? A Critique of Alcatel USA v. DGI Technologies by Theodore Dorenkamp, 9 Texas Intellectual Property Law Journal 269 (2001) (published by University of Texas School of Law)

Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts has published Volume 24, Number 1 with the following articles:

Copyright Use and Excuse on the Internet by Jane C. Ginsburg, 24 Columbia-Volunteer Lawyers for the Arts Journal of Law and the Arts 1 (2002)

Digital Intellectual Property: Controversial and International Aspects by Henry M. Gladney, 24 Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts 47 (2001)

Hotel Checking: You Can Check Out Any Time You Want, But Can You Ever Leave? The Patenting of Business Models by Thomas R. Makin, 24 Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts 93 (2001)

Values Conflict in the Digital Environment: Librarians Versus Copyright Holders by Laura N. Gasaway, 24 Columbia-Volunteer Lawyers for the Arts Journal of Law & the Arts 115 (2001)

The Journal of Legal Aspects of Sport, published by the National Sports Law Institute, Marquette University School of Law, www.ithaca.edu/sslaspa/pubs.htm, has issued Volume 11, Number 1 with the following articles:

Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance by Sara A. Elliott and Daniel S. Mason, 11 Journal of Legal Aspects of Sport 1 (2001) (for address, see above)

Legal Precedents and Strategies Shaping Home Schooled Students' Participation in Public School Sports by Kathryn Gardner and Allison J. McFarland, 11 Journal of Legal Aspects of Sport 25 (2001) (for address, see above)

Automated External Defibrillators in Sport and Recreation Settings: An Analysis of Immunity Provisions in State Legislation by Daniel P. Connaughton & John O. Spengler, 11 Journal of Legal Aspects of Sport 51 (2001) (for address, see above)

Is Management at Risk? by Roger W. Simmons, 11 Journal of Legal Aspects of Sport 69 (2001) (for address, see above)

Contracts 101: Basics and Applications by Lori K. Miller, P.G. Comfort & G. Clayton Stoldt, 11 Journal of Legal Aspects of Sport 79 (2001) (for address, see above)

Valparaiso University Law Review has published Volume 35, Number 2 as a Symposium on Dispute Resolution in Sports with the following articles:

Arbitrating Sports Disputes: A World View by Michael S. Straubel, 35 Valparaiso University Law Review (2001)

Arbitration of Rights and Obligations in the International Sports Arena by James A.R. Nafziger, 35 Valparaiso University Law Review (2001)

The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes by Richard H. McLaren, 35 Valparaiso University Law Review (2001)

Olympic Team Arbitrations: The Case of Olympic Wrestler Matt Lindland by Steven J. Thompson, 35 Valparaiso University Law Review (2001)

Resolution of Disputes in Intercollegiate Athletics by Gary R. Roberts, 35 Valparaiso University Law Review (2001)2

Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator, and the Courts by Jeffrey A. Mishkin, 35 Valparaiso University Law Review (2001)

A Level Playing Field? The NCAA's Freshman Eligibility Standards Violate Title VI, but the Problems Can Be Solved by Douglas Bryant, 32 Texas Tech Law Review 305 (2001)

Protection Off of the Playing Field: Student Athletes Should Be Considered University Employees for Purposes of Workers' Compensation by Jason Gurdas, 29 Hofstra Law Review 907 (2001)

The Realities of the MP3 Madness: Are Record Companies Simply Crying Wolf? By Karen M. Lee, 27

Rutgers Computer & Technology Law Journal 131 (2001)

Gargoyles in Gotham: A Sculpture Incorporated into an Architectural Work Should Retain Independent Copyright Protection by Jay Orlandi, 29 Southwestern University Law Review 617 (2000)

The Second Circuit Denies Music Publishers the Benefits of the Derivative Works Exception: Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc. by Rob Sanders, 29 Southwestern University Law Review 655 (2000)2
[ELR 23:4:20]