LEGAL AFFAIRS

Royalties from Abroad
by Lionel S. Sobel

Billions of dollars in copyright royalties flow across national borders every year, to their rightful recipients - many of whom are Americans - without litigation or even the threat of it. This fact wouldn't be apparent from the kinds of developments usually reported in the Entertainment Law Reporter, because most of those developments are decisions in lawsuits, an ever increasing number of which are the result of international disputes. International copyright cases raise choice of law and jurisdictional issues that are significant and fascinating. But the cross-border flow of billions of dollars in royalties, without dispute, is truly remarkable.

To explain how so much money flows so smoothly from one country to another, it is helpful to distinguish between two types of royalties: (1) those that are paid as a result of individually negotiated voluntary licenses; and (2) those that are paid as a result of collectively administered or compulsory licenses. For reasons you will soon see, most of this article is devoted to collectively administered or compulsory licenses.

Individually negotiated voluntary licenses

Individually negotiated licenses would be used to authorize such things as:
* the foreign-language translation and publication abroad of a book written by an American author
* the performance of U.S.-authored play in London

* the theatrical exhibition abroad of a U.S.-produced movie
* television broadcasts in other countries of a U.S. program, and
* cable and satellite transmissions in other countries of original (as distinguished from retransmitted) programming, such as the programming carried on CNN, HBO and MTV.

These are just examples. Licenses to use other types of works in other ways are individually negotiated as well. What all of these types of works have in common is that the copyright laws of virtually all countries give copyright owners the right to license the use of these types of works (or not) as they see fit. Licenses to use these types of works, in other words, are voluntary. And when licenses for their use are granted, they are granted as a result of individually negotiated, two-party licenses between the owner of the work's copyright and the company that wants to use it.

The terms of individually negotiated licenses authorizing the use of American copyrighted works abroad are almost identical to domestic license agreements. In other words, a license authorizing the performance in London or Milan of an American stage play would be almost identical to a license authorizing its performance in San Diego. Likewise, a license authorizing the performance in Los Angeles of a British or Italian play would be almost identical to a license authorizing its performance in Oxford or Florence.

International licenses may have special provisions dealing with such issues as:

* the approval of translations and other adaptations of the work, in order to "localize" it for the licensee's expected audience
* ownership of the copyright to the translated version

* choice of law, personal jurisdiction and service of process, should litigation become necessary
* whether the licensee will be required to post a letter of credit to secure its payments to the copyright owner, and
* currency conversion.

Special provisions like these may make international license agreements somewhat longer than purely domestic licenses. On the other hand, they may not. Cultural norms in the licensee's country may have a greater influence on the length of a license agreement than the fact that it's international. Japanese contracts, for example, are typically much shorter than American contracts; and for that reason, a license from an American copyright owner authorizing the use of its work in Japan may be shorter than a license from that same copyright owner authorizing the use of its work in New York.

Relations between copyright owners in one country and their licensees in another usually are about as cordial (or not) as relations between copyright owners and licensees in the same country. Where, however, a copyright owner is in one country and a licensee in another - and the license is voluntary and individually negotiated - the process of negotiating and documenting the license will be a significant one. The way in which international law enables the smooth flow of copyright royalties across national borders is more dramatically illustrated by the international operation of collectively administered or compulsory licenses.

Collectively administered or compulsory licenses

Examples of collectively administered or compulsory licenses include licenses for:

* nondramatic public performances abroad of American musical compositions
* the manufacture and sale of recordings of American musical compositions in other countries, and
* cable and satellite retransmissions abroad of American movies and television programs that are broadcast on conventional (over-the-air) television.

Again, these are just examples. Licenses to use other types of works in other ways are collectively administered or are handled by compulsory license too. What these types of works have in common is that the licensing practices or copyright laws of many countries, including the United States, use collective administration or compulsory licensing to authorize these uses of these works.

"Collective administration" is the term used to describe the issuance of licenses for certain types of uses of many separate works, and the collection of royalties from licensees, done by a single organization on behalf of many separate copyright owners. In the United States especially, there are sub-categories of collective administration that differ from one another slightly (though in ways that may be significant to those involved). But for present purposes, these distinctions may be disregarded.

Classic examples of collective administration in the United States are the licenses issued by ASCAP, BMI and SESAC to broadcasters and concert venues authorizing them to perform musical compositions nondramatically. (Dramatic musical performances - that is, performances during a musical stage play - are not licensed collectively; they are licensed individually.) These collectively administered licenses are referred to as "blanket licenses," because they authorize licensees to use, for a single fee, any or all of the songs represented by the licensing organization.

The licensee is not required to identify in advance which songs will be performed. Nor is the licensee charged more if it chooses to perform popular songs, or less if it chooses to perform songs that are not well known.

In the United States, the law does not require songwriters and music publishers to use ASCAP, BMI or SESAC to issue public performances licenses. Legally, songwriters and music publishers may, if they wish, issue their own public performance licenses directly to broadcasters, concert venues and others. As a practical matter, however, songwriters and music publishers could not possibly issue their own licenses. There simply are too many music users to keep track of; there would be too much paper work to do; and the costs of doing so would exceed the license fees that could be charged or collected. For these practical reasons, songwriters and music publishers do appoint

ASCAP, BMI or SESAC to issue licenses and collect royalties on their behalves, even though American law does not require it.

"Compulsory licenses," also referred to as "statutory licenses," are those that are required by law - hence the names "compulsory" and "statutory." Copyright statutes around the world typically give copyright owners the "exclusive" right to do, or authorize others to do, certain things with their works. The word "exclusive" is misleading, however, because those same statutes typically contain other provisions that authorize certain types of uses of certain works, whether or not copyright owners like it. Of course, once certain uses are authorized - that is, licensed - by statute, the statute must provide a mechanism for establishing the license fee, as well as the procedure for collecting licensee fees from those that take advantage of this compulsory license, and for allocating and distributing to copyright owners the license fees that are collected.

In many (though not all) cases, collective rights organizations (like ASCAP, BMI and SESAC) participate in the process by which compulsory license fees are set; and in many (though not all) cases, compulsory license fees are paid or distributed to collective rights organizations for them to allocate among the copyright owners they represent.

The types of works and uses that are subject to compulsory licensing are determined by the copyright statutes of each country. The types of works and uses that are collectively administered are determined by the local practices of each country. Thus, to explain the international operation of collectively administered or compulsory licenses, it is necessary to consider them one type of use at a time, one country at a time.

Nondramatic pubic performances

Royalties for nondramatic public performances (including broadcasts) of musical compositions are collected by performing rights organizations (often called "PROs" for short) in the countries where those performances take place. ASCAP, BMI and SESAC are the PROs that collect for performances in the U.S. Other PROs collect for performances in their own countries - SOCAN in Canada, SACEM in France, GEMA in Germany, JASRAC in Japan, and PRS in the U.K. (These are only examples; there are at least 85 separate PROs in the world.)

ASCAP, BMI and SESAC have entered into agreements with their counterparts around the world, pursuant to which:

* other PROs collect royalties in their countries on behalf of American songwriters and music publishers

whose songs have been performed abroad, which royalties are then paid to ASCAP, BMI and SESAC for distribution to those entitled to them in the U.S.; and

* ASCAP, BMI and SESAC collect royalties in the U.S. for foreign songwriters and music publishers whose songs have been performed in the U.S., which royalties ASCAP, BMI and SESAC then pay to PROs in other countries for distribution to those entitled to them.

From the point of view of an individual songwriter or music publisher, the system is virtually seamless. All that is required is membership (or affiliation) with a local PRO; and if performances occur abroad, royalties from abroad will be received eventually.

Songwriters and publishers may have to satisfy some administrative formalities. If, for example, a songwriter composes a song that is in the soundtrack of a movie or television program that is broadcast in another country, cue-sheets must be submitted to that country's PRO so the song is properly credited to the songwriter and music publisher entitled to royalties on account of that broadcast. Likewise, if singer-songwriters go on tour in another country, they may have to submit "tour itineraries" and "set-lists" to that country's PRO so their songs can receive credit, and they can be paid royalties, for their performances of the songs they've written. But the same or similar administrative formalities would have to be complied with in order for them to receive credit for performances in their own countries, so little or no additional burdens are required of songwriters and publishers to collect their performance royalties internationally. That burden has been assumed for them by the PROs of the world, by means of a remarkably efficient network of international agreements for the reciprocal collective administration of music copyrights.

Manufacture and sale of music recordings

The copyright laws of all countries require those who record, manufacture and sell music recordings to obtain licenses from the owners of the copyrights to the songs on those recordings (that is, from music publishers or songwriters). This is so, because the law gives copyright owners the right to reproduce and distribute their works. Recording songs and manufacturing records results in the "reproduction" of the songs on the record; and the sale of recordings results in the "distribution" of those songs.

Though in the language of copyright law, record companies need "reproduction" and "distribution" licenses, those in the music business refer to these licenses as "mechanical licenses." (The reason is historic. Player piano rolls were the first "recordings." At the time, piano rolls were considered to be "mechanical" parts of pianos. Hence: "mechanical licenses.")

In the United States, many music publishers (or songwriters) issue mechanical licenses directly to record companies that request them. More publishers, however, have appointed The Harry Fox Agency to handle mechanical licensing on their behalves. The Harry Fox Agency acts, literally, as the agent for its music publishing clients for this purpose. Publishers have a choice between doing it themselves using their own staff employees, or having The Harry Fox Agency do it for them, in return for a fee.

United States copyright law contains a compulsory mechanical license that authorizes record companies to make new recordings of previously released songs, in return for the payment of a royalty of 8 cents per song for each recording sold. (That's the royalty now (ELR 23:7:11). The rate is adjusted periodically.) The compulsory mechanical license is a license of last resort, however, for most record companies, because most record companies try to make better deals for themselves through voluntary negotiations directly with music publishers.

Other countries handle mechanical licensing somewhat differently than does the U.S. In other countries, all mechanical licenses are issued - by local practice or law - by "mechanical rights societies." In some countries the mechanical rights society is the same organization that serves as that country's performing rights organization. GEMA for instance is both the PRO and mechanical rights society for Germany; and JASRAC is both the PRO and mechanical rights society for Japan. Mechanical and performing rights are legally distinct, however, and many countries have two separate organizations - one for each of these rights.

Moreover, in other countries, the mechanical license royalty is calculated differently than it is in the U.S. (It's often a percentage of the wholesale price of the recording, divided equally among all the songs on the recording, regardless of how many or how few there are.) Also, in other countries, record companies do not seek better deals through direct negotiations with music publishers. They don't, because all mechanical licenses are issued by mechanical rights societies; publishers in those countries do not issue mechanical licenses themselves.

If a song by an American songwriter is recorded abroad, The Harry Fox Agency will collect the royalties that are due from the mechanical rights society in that country, on behalf of the U.S. publisher of that song.

The Harry Fox Agency will then send the collected royalty to the publisher, and the publisher in turn will pay the songwriter, in accordance with the contract between the publisher and the songwriter. To collect foreign mechanicals this way, the U.S. publisher must affiliate with The Harry Fox Agency - must, in other words, appoint the Fox Agency its agent for making those collections - and the publisher must notify the Fox Agency which of its songs have been recorded, manufactured and sold abroad.

The Harry Fox Agency has "affiliation" agreements with some two dozen mechanical rights societies in other countries. Those agreements also authorize The Harry Fox Agency to issue mechanical licenses to record companies in the U.S. for songs written by songwriters from those countries.

Things are a bit more complicated for U.S. music publishers that don't use The Harry Fox Agency to collect foreign mechanical royalties, and for the collection of foreign mechanical royalties from countries whose mechanical rights societies are not affiliated with The Harry Fox Agency. In those cases, U.S. publishers must enter into sub-publishing agreements with music publishers in other countries; and foreign music publishers must enter into sub-publishing agreements with U.S. publishers. Sub-publishing companies authorize music publishers to publish in their own countries songs that originated and were first published in other countries. In this fashion, sub-publishers collect mechanical royalties from the societies in their own countries, and then send those royalties (less their commissions) to the publishers in other countries with which they have entered into sub-publishing contracts.

Regardless of which technique is used - The Harry Fox Agency as intermediary, or sub-publishing agreements with foreign music publishers - American music publishers and songwriters are able to receive mechanical royalties from foreign record companies, without having to negotiate individual licenses, and without litigation. The same is true in reverse: songwriters and music publishers in other countries are able to receive mechanical royalties from U.S. record companies, without having to negotiate or litigate.

Cable and satellite retransmissions of broadcasts

The copyright laws of all countries now require cable systems and satellite television companies to pay royalties when they retransmit to their own subscribers the signals of over-the-air broadcasts. These royalties are owed to the owners of the copyrights to the retransmitted programming. When cable and satellite companies transmit original programming (like CNN, HBO and MTV), they must pay royalties too; but that type of programming is licensed by voluntary direct negotiations with copyright owners (as noted near the beginning of this article). When cable and satellite companies retransmit over-the-air broadcasts, those retransmissions are licensed by statute or collective administration, somewhat differently in each country.

Europe

AGICOA (the Association for the International Collective Management of Audiovisual Works) is an organization whose members are associations of movie and TV program producers. U.S. producers are represented (within AGICOA) by MPAA (for the "majors"), AFMA (for the "independents") and the American Public Television Producers Association.

AFMA - the organization once known as the American Film Marketing Association - is a trade association of independent motion picture and television program producers and distributors. Though it collects foreign royalties on behalf of its members, it does not require producers and distributors to be members in order to take advantage of its international royalty collection service. Any producer or distributor entitled to foreign royalties may appoint AFMA its agent for royalty collection purposes; and, in return for a fee, AFMA will happily do the work necessary to collect and then distribute those royalties.

AGICOA negotiates license fees with cable and satellite companies in those European countries whose laws do not contain compulsory or statutory broadcast retransmission license provisions. AGICOA also collects retransmission royalties from cable and satellite companies; and it distributes those royalties to its association members, which then distribute them to the producers those associations represent.

To receive retransmission royalties, programs that are broadcast in Europe must be registered with AGICOA, a process that can be done on behalf of U.S. producers by the associations to which they belong.

Canada

Cable and satellite companies in Canada pay retransmission royalties to several "copyright collective societies" representing movie and TV producers, sports leagues (that own copyrights to sports broadcasts), and music publishers and songwriters. To receive royalties, those entitled to them must affiliate with (or form) a copyright collective society. The society proposes a "tariff," which may be challenged by cable and satellite companies in proceedings before the Copyright Board of Canada. That Board "certifies" the tariff to be paid to each society. And the societies collect the tariffs and distribute them to those it represents.

American copyright owners are represented in Canada by several such societies:

* Border Broadcasters, Inc. (TV stations, for local programming)
* Canadian Retransmission Right Association (ABC, CBS, NBC)
* Copyright Collective of Canada (MPAA, AFMA)
* FWS Joints Sports Claimants (NFL, NBA, NHL) ("FWS" stands for "Fall, Winter, Spring," because the big American Summer sport, baseball, is separately represented by:)
* Major League Baseball Collective of Canada (Major League Baseball), and
* SOCAN (ASCAP, BMI)

United States

Cable and satellite companies in the U.S. pay retransmission royalties as well, at rates established through proceedings administered by the U.S. Copyright Office. The royalties are paid to the Copyright Office, which then divides them among the owners of the copyrights to the retransmitted programs, in proportions determined by other proceedings administered by the Copyright Office.

When the signals of Canadian and Mexican television stations are retransmitted by cable and satellite companies in the U.S., the owners of the copyrights to those retransmitted programs are entitled to a share of the U.S. retransmission royalties. To get their shares, those Canadian and Mexican copyright owners participate in U.S. Copyright Office proceedings, side-by-side with American copyright owners.

Other royalties

Music performance royalties, mechanical royalties, and broadcast retransmission royalties are the most significant royalties paid as a result of collective administration or compulsory licensing, measured by the amount of money involved. There are, however, additional types of royalties, some of which are not required under U.S. law, but are under the laws of other countries. Though these royalties are not required by the international copyright treaties to which the U.S. adheres, some countries pay these royalties to American copyright owners anyway - even though the U.S. does not reciprocate (because U.S. law does not require these royalties to be paid to anyone). Two such royalties are particularly significant.

Private copying levies

Private copying levies (also known as blank tape and copier levies) are imposed by the laws of Austria, Belgium, Denmark, France, Germany, Netherlands, Spain and Switzerland. These levies are added to the price of blank tapes and copiers, and are then distributed to those whose works are likely to have been privately copied to blank media. American works are among those copied in the countries that impose these levies; and the Americans' share of these levies is collected on their behalf by the MPAA and AFMA (on behalf of movie and television producers) and ASCAP, BMI and SESAC (on behalf of music publishers and songwriters). (A narrow form of this levy exists in U.S.

law, in the Audio Home Recording Act of 1992, about which more is said below.)

Video rental and lending levies

Video rental and lending levies are imposed by the laws of Germany, the Netherlands and Switzerland. The levy is collected by retail video stores from customers who rent or borrow videos, and it is eventually distributed to those whose videos were rented or lent. American videos are among those rented and lent in those countries. And the Americans' share is collected on their behalf by the MPAA and AFMA from those organizations within Germany, the Netherlands and Switzerland that collect them from retail video stores there.

American dissatisfaction

Though this system for collecting and distributing royalties across national borders works well, it is not entirely problem free, at least from the point of view of American copyright owners. Here is why some Americans are dissatisfied.

Royalties not paid to Americans

Some royalties are not paid to Americans even though they are paid to others. For example, royalties paid by European, Australian and Japanese radio stations on account of their broadcasts of music recordings by performers who are nationals of those countries are not paid for recordings by American performers released by American record companies. Similarly, royalties are paid to authors living in the European Economic Area on account of the loan of their books by libraries in the U.K. and Germany; but those royalties are not paid to authors living in the U.S., even when their books are lent by U.K. and German libraries.

There is of course a legal reason that these royalties are not paid to Americans, even though they are paid to others. The copyright treaties to which the United States adheres - such as the Berne Convention, the TRIPs Agreement, and the WIPO Copyright Treaty - do not require adhering countries to grant recording performance or library lending rights, and the U.S. does not (except for very narrow digital performance rights). The Rome Convention does require adhering countries to pay royalties for broadcasts of recordings by nationals of adhering countries; but the United States has never adhered to the Rome Convention, so American radio stations don't pay royalties to record companies or performers of any nationality - not even to Americans - for broadcasting their recordings.

Royalties are paid, but not to "copyright owners"

Compulsory license royalties are not always paid to "copyright owners." The country where the royalty originates determines who is entitled to receive it. And in some countries, royalties are divided by law among authors, performers and producers - as defined by the laws of those countries - rather than being paid to copyright owners. In the United States entertainment industry, most works are created as "works made for hire," so that under U.S. law, production companies usually are the "authors" as well as the "copyright owners" of their works. Not so, elsewhere.

In countries where private copying and video rental royalties are divided by law among producers, authors and performers, U.S. production companies collect the producers' share, and - by agreement with the DGA and the WGA - the directors' and writers' shares are split with production companies: two-thirds to producers, and one-third split between directors and writers. (No one yet collects the performers' share for actors, however.)

Of course, the concept of directing a portion of compulsory license royalties, by statute, to authors and performers, is no longer alien to American copyright owners. This very thing was done by the U.S. Congress in the Audio Home Recording Act of 1992 which statutorily allocates, by percentage, blank digital media and recorder royalties among featured recording artists, background vocalists, background musicians, record companies, songwriters and music publishers. The Act does not simply divide these royalties between record companies and music publishers, even though they are the copyright owners (Copyright Act §1006). Congress did so again in the Digital Performance Right in Sound Recordings Act of 1995 which statutorily allocates, by percentage, digital public performance royalties among featured recording artists, backup vocalists, backup musicians, and recording companies. The Act does not permit record companies (which are the copyright owners) to get all these royalties (Copyright Act §114(g)(2)). As a result, when American copyright owners complain that other countries direct royalties away from copyright owners, that complaint is simply the international part of a broader complaint about something the U.S. does too.

Foreign collecting organizations sometimes retain royalties

Royalties that might otherwise have been paid to Americans are sometimes retained by foreign collecting societies, for at least three reasons.

First, performing rights organizations sometimes have difficulty identifying songs that have been publicly performed in their countries. The public performance royalties earned by unidentified songs may be retained by PROs in a so-called "black box." These "black box" moneys are distributed eventually, but only to local music publishers, thus depriving American songwriters and publishers of their share.

Second, a portion of some collective and compulsory license royalties are diverted away from those who would otherwise receive them, and are used for local social and cultural purposes. In France, 25% of private copying royalties are used for French cultural purposes; and in Spain, 20% of private copying royalties are used for training and promoting young

Spanish performers. French and Spanish recipients of these royalties get less than they otherwise would; the diversions are not just aimed at Americans. On the other hand, these diversions do benefit French and Spanish nationals, while they do not benefit Americans.

Third, a portion of some royalties are retained by local collecting organizations to fund health insurance, retirement programs, loans, grants and awards, and programs to promote live local performances. The royalties used for these purposes are retained from all that are collected - not merely from royalties collected for the use of American works. But again, these programs benefit only those who are members of the local collecting organizations; they do not benefit Americans.

Conclusion

Despite the complaints of Americans, the cross-border collection and distribution of royalties described in this article demonstrate that "international entertainment law" is a body of law that actually works. What's more, given the distances involved, and the differences in language, culture and business practices among nations, it works remarkably well.

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[ELR 23:10:4]

INTERNATIONAL DEVELOPMENTS

Settlement between European Union and United States of WTO Fairness in Music Licensing case may be back on track (and may never have fallen apart at all)

Last month, these pages reported that the settlement between the European Union and the United States of the WTO Fairness in Music Licensing case "appears to have fallen apart" (ELR 23:9:6). Now, the settlement appears to be back on track. What's more, it may never have fallen apart at all - despite documents in the public record suggesting that it did.

The settlement was announced by the EU in a press release last December (ELR 23:8:6). The next month, however, the EU informed the WTO that "no mutually acceptable arrangement has yet been made" with the U.S., and the EU requested authorization to impose tariffs of as much as $1.1 million a year on imported American "copyright goods." That triggered an immediate request for arbitration from the United States which objected to the size of the proposed sanction and which claimed that certain "principles and procedures" had "not been followed." (ELR 23:9:6) These filings were the ones that made it appear the settlement had fallen apart.

However, just four days after the United States' demand for arbitration, a further development occurred, suggesting that the settlement is not dead after all, and that the public record merely reflects the diplomacy that is necessary to keep it alive. This is what happened.

On January 22, 2002, the U.S. sent the WTO a "status report" in which it assured the WTO that "the European Communities and the United States have been engaged in productive discussions with a view to resolving the dispute," and "Those discussions are continuing."

The WTO nevertheless appointed three arbitrators, in response to the United States' request.

Just one week after that, the EC and the U.S. sent the arbitrators a joint communication saying, "The EC and the US would like to inform you that they are engaged in constructive discussions with a view to finding a solution to this dispute. Therefore, the EC and the US would respectfully request the Arbitrator to suspend the arbitration proceeding." The arbitrator therefore suspended the arbitration.

That is where the case stands as this issue of the Entertainment Law Reporter goes to press.

Editor's note: To satisfy the United States' obligations under the settlement, Congress must appropriate, for payment to the E.C., what is now $3.3

million ($1.1 million a year for three years). Eventually, Congress must repeal the Fairness in Music Licensing Act too. Representative James Sensenbrenner - a key player in the enactment of the Fairness in Music Licensing Act, as well as in Congress' inability to revoke it (ELR 23:6:5) - is not a member of the House Appropriations Committee, so appropriating the needed $3.3 million in settlement funds may be possible. On the other hand, since repeal of the Act will have to be blessed by the Judiciary Committee, which Representative Sensenbrenner now Chairs, that's unlikely to happen until he retires, is defeated for re-election, or Democrats retake control of the House.

Status Report by the United States, WT/DS160/18 (WTO 22 January 2002); *Recourse by the United States to Article 22.6 of the DSU*, WT/DS160/21 (WTO 19

February 2002); *Recourse by the United States to Article 22.6 of the DSU*, WT/DS160/22 (WTO 1 March 2002); all available online at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm [ELR 23:10:10]

WIPO Phonograms and Performances Treaty to take effect May 20, 2002, with ratification by thirtieth nation

The second of two copyright treaties adopted by the World Intellectual Property Organization in 1996 will soon take effect, as a result of its ratification by a thirtieth nation. The Phonograms and Performances Treaty was ratified by Honduras on February 20th, and thus the Treaty will take effect May 20, 2002.

The other treaty adopted in 1996 - the WIPO Copyright Treaty - took effect March 6th, after its ratification by Gabon last December (ELR 23:7:13).

The United States adhered to both WIPO treaties, after making the few changes to its law that were necessary to do so. Those changes were accomplished in 1998 in the Digital Millennium Copyright Act (ELR 20:6:4).

By its own terms, the Phonograms and Performances Treaty was to "enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO." Honduras was the thirtieth. Other nations among the 30 that ratified the Treaty - in addition to the United States - are: Albania, Argentina, Belarus, Bulgaria, Burkina Faso, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Ecuador, El Salvador, Gabon, Georgia, Hungary, Latvia, Lithuania, Mali, Mexico, Panama, Paraguay, Republic of Moldova, Romania, Saint Lucia, Senegal, Slovakia, Slovenia, and the Ukraine.

Though the countries the European Union are not among those that have adhered yet, they should be depositing their instruments of ratification soon. The recently-adopted EU Copyright Directive requires EU members to amend their laws to satisfy the Treaty's requirements; and the Directive gives EU members only until the summer of 2002 to implement those changes (ELR 23:2:6).

WIPO Press Release PR/2002/302 (Feb. 21, 2002), available at www.wipo.int/pressroom/en/releases/2002/p302.htm [ELR 23:10:10]

WASHINGTON MONITOR

Copyright Royalty Arbitration Panel recommends statutory license fees for Internet transmissions of music recordings

A Copyright Royalty Arbitration Panel has recommended statutory license fee rates for Internet transmissions of music recordings. The Panel's recommendations are the product of a proceeding that lasted months, during which 75 witnesses offered testimony that took 41 days of hearings and generated 15,000 pages of transcript and thousands of pages of exhibits, plus a thousand pages of post-hearing briefs and two additional days of legal arguments.

The fees that are the subject of this proceeding are those payable to record companies (and, under certain circumstances, to recording artists, including non-featured musicians and vocalists) as a result of the Digital Performance Right in Sound Recordings Act of 1995 (ELR 17:6:3). That Act was very complicated: some digital performances are exempt and thus do not require any license at all; other digital performances require negotiated licenses that must be obtained directly from record companies; and still other performances are eligible for statutory licenses. The license fees recommended by the Panel are for statutory licenses only.

Panel members Eric Van Loon, Jeffrey Gulin and Curtis Von Kann, issued a 135-page Report that describes the evidence they heard and explains how they arrived at the rates they recommended. Nevertheless, no one was satisfied with the result (at least not publicly). Both sides - the webcasters and the record companies - have appealed to the Librarian of Congress, as permitted by the Copyright Act.

The Panel recommended several different rates.

Internet retransmissions of over-the-air AM and FM radio broadcasts are the least expensive.

* The rate for webcasters (which are web-only "radio" stations) and commercial broadcasters (that retransmit their over-the-air broadcasts on the web) is 0.07 cents for each performance per listener (that is, 70 cents per 1,000 listeners for each performance of a recorded song).

* The rate for non-commercial broadcasters (that aren't affiliated with NPR) is 0.02 cents per performance per listener (or 20 cents per 1,000 listeners for each song). (NPR reached its own settlement with the RIAA before the Panel made its recommendations.)

Transmissions that begin on the Internet - that is, transmissions that do not begin as AM or FM broadcasts - are more expensive.

* The rate for webcasters and commercial broadcasters (that operate websites with programming that isn't retransmitted from the air) is 0.14 cents per performance per listener ($1.40 per 1,000 listeners per song).
* The rate for non-commercial broadcasters (unaffiliated with NPR) is 0.02 cents per performance per listener for the first two channels of programming, and 0.14 cents for any additional channels.

These transmission fees are public performance fees, and if webcasts could be done directly from CDs, these fees would be all that webcasters had to pay. Webcasts, however, can't be done directly from CDs using existing technology. Rather, recordings first have to be copied to computers known as "webservers" before they can be webcast. This copying is not a performance. It is instead a reproduction, and a separate license is necessary for that, a license known as an "ephemeral recording license." The Panel recommended that the ephemeral recording license fee for all Internet transmitters be 9% of the performance fees payable by each.

Finally, the Panel recommended a minimum license fee of $500 per year.

The licenses covered by these fees do not include those that must be obtained from songwriters or music publishers. Separate public performance licenses must be obtained from them by negotiations with ASCAP, BMI and SESAC. (There is no statutory license that covers webcasting of musical compositions.)

Webcasters and broadcasters have appealed, because they say the Panel's recommended rates are much too high. A radio station that retransmits on the web its over-the-air broadcasts containing 15 songs per hour to an audience that averages 25,000 listeners (round-the-clock) would have to pay record companies and recording artists statutory license fees of about $2.5 million a year. A website operated as a hobby that transmits 15 songs per hour to an audience that averages 10 listeners (round-the-clock) would have to pay statutory license fees of about $2,000 a year.

By law, the Librarian must decide the appeals, by accepting or rejecting the Panel's Report, by this coming May 21st. If the Librarian rejects the Report, or some of its recommendations, he will have another 30 days to set the rates.

Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9, Library of Congress, Copyright Office (Feb. 20, 2002), available at www.loc.gov/copyright/carp/webcasting_rates.html [ELR 23:10:] [ELR 23:10:12]

FCC Enforcement Bureau decides, after reconsideration, that edited version of Eminem's "The Real Slim Shady" did not violate federal indecency laws, so Bureau rescinds Notice of Apparent Liability previously issued to Citadel Broadcasting

Repeated broadcasts of Eminem's recording of "The Real Slim Shady" by a radio station in Pueblo, Colorado, almost cost the station's owner, Citadel Broadcasting, $7,000. That's the amount the FCC Enforcement Bureau originally proposed as a sanction, in a Notice of Apparent Liability issued last year (ELR 23:2:8).

To its credit, Citadel realized in advance that the lyrics of "The Real Slim Shady" might be considered "indecent" by the FCC, so the station actually broadcast a "radio edit" version that omitted some of those lyrics through the use of a muting device or overdubbed sound effect. Nevertheless, the Enforcement Bureau decided, at first, that even the edited version was indecent.

FCC rules authorized Citadel to ask for reconsideration. It did and has been rewarded for the effort. After looking again at the lyrics actually broadcast, the Enforcement Bureau concluded that Citadel had not violated the law, and thus "no sanction is warranted."

Though the lyrics that had been objected to by a complaining listener did "refer to sexual activity," they were "not patently offensive, and thus not actionably indecent," the Bureau finally concluded after reconsidering the matter. The Bureau explained that "the sexual references contained in the song's 'radio edit' version are not expressed in terms sufficiently explicit or graphic enough to be found patently offensive." Instead, the references to sex were "oblique" and did "not have the effect of a 'verbal shock treatment.'"

Citadel was represented by Kathleen A. Kirby and Elizabeth E. Goldin in Washington D.C.

In the Matter of Citadel Broadcasting Company, Licensee of Station KKMG(FM), Memorandum Opinion and Order, FCC No. EB-00-IH-0228 (Jan. 8, 2002), available at www.fcc.gov/eb/Orders/2002/DA-02-23A1.html [ELR 23:10:13]

NEW LEGISLATION AND REGULATIONS

Hawaii enacts income tax exemptions and other tax benefits for owners, creators and investors in performing arts works

In a bold move to make Hawaii a mecca for the production of works in the performing arts, Lieutenant Governor Mazie Hirono has signed into law an amendment to the state's income tax. Among other things, this ground breaking legislation - known in Hawaii as Act 221 - exempts from Hawaii state income taxation all royalties, and other income, derived from intellectual property rights in qualified works in the performing arts.

The income tax exclusion applies to many different type of products that are protected by copyright, including recorded music in digital format such as CDs and MP3s, television programming, motion pictures and other types of entertainment products that are perceived through the operation of computer. This last category would encompass virtually all performing arts products distributed over the Internet.

The income tax exclusion benefits of Act 221 are not restricted to companies that directly hold title to intellectual property rights, such as copyrights but, rather, the benefits of the law extend to the authors of those works, without regard to the application of the work-for hire doctrine, even if the authors have transferred the copyrights to their works to others so they can be commercially exploited.

In addition to giving artists, and the companies they work for, a free pass on State income taxes, Act 221 also provides significant investment tax credits, up to two million dollars, to taxpayers who invest in qualified companies that produce such performing arts products. Stock options granted to the employees of qualified companies may also be excluded from income for Hawaii state tax purposes.

No other state in the country has specifically targeted the entertainment industries for growth by providing such significant tax benefits. The purpose of the law is to encourage the growth of high technology and the entertainment industries in the State of Hawaii, especially the segment of the market that produces digital entertainment products, such as digital animation, computer games, and CDs.

The performing arts legislation is part of a larger legislative package that uses tax incentives to promote not only the entertainment industries, but also the development of computer software, biotechnology, sensor and optic technologies, the ocean sciences, astronomy and non-fossil fuel energy-related technology.

Individuals and companies interested in taking advantage of these tax incentives can apply to the Department of Taxation to obtain a "comfort letter" ruling. Comfort letters can be particularly helpful when putting together a business plan and will assist in raising the confidence level of investors that the proposed business enterprise is qualified and therefore eligible to receive the favorable tax treatment accorded by Act 221.

Pending in the State Legislature this session is an additional Bill that would exempt from Hawaii state income tax, all amounts received by performers in connection with live performances. The progress of this initiative - designated as HB 808, HD 1 and SB 3061 - may be tracked by visiting the Hawaii State Legislative Affairs website at <www.capitol.hawaii.gov>.

State of Hawaii Act 221, 2001 Haw. Sess. L. Act of July 1, 2001, §§235-7.3, 235-9.5, 235-110.9, 237-29.75 (amending Haw.Rev.Stat. ch. 235, 237 (2001)

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[ELR 23:10:14]

IN THE NEWS

California Supreme Court declares state's "Son of Sam" law unconstitutional, in case triggered by Columbia Picture's acquisition of movie rights to article about kidnapping of Frank Sinatra, Jr.

When Columbia Pictures acquired the movie rights to a New Times magazine article entitled "Snatching Sinatra," the studio set in motion a legal challenge to the Constitutionality of California's "Son of Sam" law. It was, apparently, a hard case. After proceedings in the lower courts that upheld the statute's constitutionality, the California Supreme Court agreed to hear the case, and needed two and half years to decide it. When it finally ruled, the Court held that California's Son of Sam statute is unconstitutional, because it infringes free speech rights under the First Amendment and the California Constitution.

The article at the heart of the case was based on an interview conducted by reporter Peter Gilstrap with Barry Keenan, who is one of the men who kidnapped Frank Sinatra, Jr., in 1963. Keenan was convicted and imprisoned for his part in the Sinatra kidnapping. The article was written with a possible movie rights sale in mind. Indeed, New Times, Gilstrap and Keenan specifically agreed to share any movie rights money the article might earn. And that is why Columbia was prepared to pay Keenan when the studio acquired the rights to the article.

When Sinatra got wind of the Columbia Pictures deal, he sued the studio, along with Keenan, Gilstrap and New Times, under California's "Son of Sam" statute, California Civil Code section 2225. Moreover, Sinatra obtained a preliminary injunction requiring

Columbia to withhold payment to Keenan, pending the outcome of the case. Keenan's motions to dissolve the injunction and dismiss the case were denied. And those rulings were upheld by the California Court of Appeal (ELR 21:5:9).

The California statute - like "Son of Sam" statutes enacted by other states and the federal government - is designed to prevent criminals from profiting from their crimes. It "imposes an involuntary trust, in favor of damaged and uncompensated crime victims as 'beneficiar[ies],' on a convicted felon's 'proceeds' from expressive 'materials' (books, films, magazine and newspaper articles, video and sound recordings, radio and television appearances, and live presentations) that 'include or are based on' the 'story' of a felony for which the felon was convicted, except where the materials mention the felony only in 'passing . . . , as in a footnote or bibliography.'"

In 1991, in Simon & Schuster v. N.Y. State Crime Victims Board, the United States Supreme Court held that New York's "Son of Sam" statute unconstitutionally interfered with First Amendment rights (ELR 13:8:3). When the California Court of Appeal later evaluated California's statute in Frank Sinatra's case, the court found that the New York statute was different than California's in several critical respects. And on that basis, the California court upheld the Constitutionality of the California statute.

The California Supreme Court acknowledged the differences between California's Son of Sam law and New York's. But it found those differences to be legally insignificant, or at least not significant enough. In an opinion by Justice Marvin Baxter, joined by all other Justices of the Court except Justice Janice Brown who wrote a concurring opinion of her own, the Court concluded that its "analysis of Simon & Schuster . . . renders [the California statute] invalid as well."

Judge Baxter explained that "Both the New York and California laws impose content-based financial penalties on protected speech. Thus they must, at a minimum, satisfy strict constitutional scrutiny. Both laws seek to serve compelling interests in preventing criminals from exploiting their crimes for profit, and in compensating crime victims from the profits of crime. Yet both laws are overinclusive for those purposes, because they confiscate all income from all expressive materials, whatever their general themes or subjects, that include significant discussions of their creators' past crimes."

The statute is overinclusive, the Court reasoned, because it "penalizes the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, [the statute] does not confine itself to such income. Instead, it confiscates all a convicted felon's proceeds from speech or expression on any theme or subject which includes the story of the felony, except by mere passing mention. By this financial disincentive, [the California statute], like its New York counterpart, discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds."

Keenan was represented by Stephen F. Rohde of Rohde & Victoroff in Los Angeles. Frank Sinatra, Jr., was represented by Richard B. Specter and Mark M. Monachino of Corbett & Steelman in Irvine.

Editor's Note: Though Columbia was not enjoined from producing a movie based on "Snatching Sinatra," in fact it never did. In the wake of the

Supreme Court's decision holding the statute unconstitutional, it has been reported that Columbia passed on the project, and it is now being shopped to other studios (Hollywood Reporter 2/27/02). In the meantime, it also has been reported that a separate and unrelated movie about the same events - entitled "Stealing Sinatra" - is being produced in Vancouver for broadcast on Showtime.

Keenan v. Superior Court, Cal.S.Ct. No. S080284 (Cal., Feb. 21, 2002), available at www.courtinfo.ca.gov/cgi-bin/opinions.cgi [ELR 23:10:15]

Appellate court affirms denial of Random House's request 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 a brief Per Curiam decision by Judges Jon Newman, Amalya Kearse and Jed Rakoff, the Second Circuit Court of Appeals has affirmed the denial of Random House's motion for a preliminary injunction in the publisher's lawsuit against Rosetta Books (ELR 23:4:10). The injunction Random House sought, if granted, would have prohibited Rosetta Books from publishing digital editions - commonly referred to as "ebooks" - of novels by William Styron, Kurt Vonnegut and Robert B. Parker.

The three authors have granted Random House exclusive licenses to publish their works "in book form." They then granted Rosetta Books the right to publish digital editions.

The Court of Appeals acknowledged that "there is some appeal to [Random House's] argument that an 'ebook' . . . is simply a 'form' of a book, and therefore within the coverage of [those] licenses."

On the other hand, the appellate court added, "the law of New York, which determines the scope of Random House's contracts, has arguably adopted a restrictive view of the kinds of 'new uses' to which an exclusive license may apply when the contracting parties do not expressly provide for coverage of such future forms." Moreover, "determining whether the licenses here in issue extend to ebooks depends on fact-finding regarding . . . the 'evolving' technical processes and uses of an ebook, and the reasonable expectations of the contracting parties 'cognizant of the customs, practices, usages and terminology as generally understood in the . . .trade or business' at the time of contracting."

For these reasons, " . . . we cannot say the district court abused its discretion in the preliminary way it resolved these mixed questions of law and fact," the appellate court concluded.

In addition, ". . . the balance of hardships tips . . . in [Rosetta Books'] favor. For while Random House expresses fears about harm to its goodwill if Rosetta is allowed to proceed with its sale of ebooks, Rosetta, whose entire business is based on the sale of ebooks, raises a reasonable concern that the proposed preliminary injunction will put it out of business or at least eliminate its business as to all authors who have executed similar contracts. As the district court found, such legitimate concerns outweigh any potential hardships to Random House, which, if it ultimately prevails on the merits, can recover money damages for any lost sales."

Random House was represented by R. Bruce Rich of Weil Gotshal & Manges in New York City. Rosetta Books was represented by Roger L. Zissu of Fross Zelnick Lehrman & Zissu in New York City.

Random House, Inc. v. Rosetta Books LLC, Docket No. Docket No. 01-7912 (2nd Cir., March 8, 2002), available at http://laws.findlaw.com/2nd/017912.html [ELR 23:10:16]

RECENT CASES

California appellate court upholds multi-million dollar legal malpractice judgment won by Michael Viner and Deborah Raffin as a result of their lawyer's negligence in connection with sale of their stock in Dove Audio

In a precedent setting decision, a California Court of Appeal has affirmed a legal malpractice judgment won by Michael Viner and his wife Deborah Raffin Viner against their former law firm, Williams & Connolly, and firm partner Charles A. Sweet. As entered by the trial court, the judgment was a stunning $13.3 million. In an opinion by Justice Earl Johnson, the appellate court has upheld almost $8.1 million of it.

The Viners' lawsuit grew out of the 1997 sale of their stock in Dove Audio, Inc., to Media Equities

International. Williams & Connolly represented them in that transaction. The deal imposed continuing obligations on the Viners and Dove (which was renamed NewStar Media) even after it closed; and disputes between them arose concerning those obligations. According to the Viners, their disputes with Dove - or at least the unsatisfactory outcome of those disputes - were the result of Williams & Connolly's negligence; and the jury apparently agreed.

During the malpractice trial, the Viners offered evidence that seven terms of their agreement were the result of their law firm's negligence. But they did not show that if their law firm had not been negligent, Media Equities would have agreed to more favorable terms.

In a litigation malpractice case against a trial lawyer, a former client is required to prove that but for the lawyer's negligence, the outcome of the litigation would have been more favorable. But Justice Johnson agreed with the Viners that the "case within a case" method of proof required in litigation malpractice cases is "not appropriate" in "transactional malpractice" actions. Instead, Justice Johnson held that transactional malpractice cases should be governed by ordinary negligence and causation principles. Moreover, the Justice ruled that it is not necessary for former clients to prove that their attorneys' malpractice is the sole cause of their injuries.

The appellate court also ruled that, with two exceptions, the amount awarded by the jury was supported by the evidence. The court's evaluation of the evidence was done in an unpublished portion of its decisions. But the amounts upheld were: $5,611,050 on account of a Non-Solicitation Clause in the Viners' agreement; $1,243,972 on account of a Non-Competition Clause; $462,284 on account of an attorneys fees issue; $400,000 on account of a audio book producer credit issue; $127,666 on account of an unpaid stock dividends issue; $125,000 on account of an indemnification issue; and $115,760 on account of a payment obligation issue.

The Viners were represented by Patricia L. Glaser and Peter C. Sheridan of Christensen Miller Fink Jacobs Glaser Weil & Shapiro in Los Angeles. Williams & Connolly and Charles A. Sweet were represented by Dennis C. Brown of Munger Tolles & Olson in Los Angeles, and by Charles F. Kester of Kester & Isenberg in Woodland Hills.

Viner v. Sweet, 112 Cal.Rptr.2d 426, 2001 Cal.App.LEXIS 767 (Cal.App. 2001) [ELR 23:10:17]

Washington Redskins' former owner entitled to liquidated damages of $30 million from investor group that agreed to buy club for $800 million but then withdrew request for necessary NFL approval

The Washington Redskins, along with its stadium and training facility, were owned for years by JKC Holding, a company that was in turn owned by Jack Kent Cooke and his son John Cooke. When Jack Kent Cooke died in 1997, the club had to be sold, and an investor group known as Washington Sports Ventures agreed to buy it, for $800 million.

The sale agreement contained a clause that entitled JKC to $30 million in liquidated damages from Washington Sports if the agreement were terminated under certain circumstances. Another clause required both parties to use their best efforts to get NFL approval for the sale, as required by League rules.

Washington Sports applied for NFL approval, but then withdrew its bid, apparently at the request of the League and in response to the League's promise to reimburse Washington Sports the $30 million it would thereby owe JKC. This plain statement bleeds all of the drama out of what happened, because the parties had very different and conflicting explanations for why the NFL asked Washington Sports to withdraw and why it agreed to do so.

Washington Sports' set of explanations would have relieved it of its contractual obligation to pay liquidated damages. JKC's would not. In the lawsuit that developed, the trial court agreed with JKC's explanations, and thus awarded it $30 million in damages.

Washington Sports appealed, on two grounds. First it reargued the point that JKC, not it, had breached the agreement by failing to support the NFL's approval of the transfer. Second, it argued that the $30 million in liquidated damages was an unenforceable penalty.

The Fourth Circuit Court of Appeals rejected both of these arguments.

In an opinion by Judge Irene M. Keeley, the appellate court ruled there was no evidence to support Washington Sports' assertion that the NFL had asked it to withdraw because the League wanted John Cooke to be able to buy the team, rather than Washington Sports. Instead, said Judge Keeley, the evidence suggested that the NFL was concerned about the way Washington Sports was going to finance the purchase and about the background of one of its partners, and those concerns were not caused by John Cooke or JKC.

Finally, Judge Keeley held that under the circumstances, the liquidated damages clause was enforceable, because the damages that would flow from Washington Sports' failure to complete the purchase were difficult to determine when the agreement was entered into, and the $30 million agreed on was "not plainly disproportionate to the injury."

As things turned out, JKC wasn't damaged at all (apart from transaction costs), because after the Washington Sports deal fell apart, the Redskins were sold to another group, headed by one of the investors in Washington Sports - though not the one that had caused the NFL concern. John Cooke never did become a new owner. But all of this turned out to be irrelevant to the outcome, except to confirm that the NFL didn't urge Washington Sports to withdraw simply so John Cooke could buy the team.

JKC Holdings was represented by Paul J. Mode, Jr., of Wilmer Cutler & Pickering in Washington D.C. Washington Sports Ventures was represented by David Boies of Boies Schiller & Flexner in Armonk N.Y.

JKC Holding Company v. Washington Sports Ventures, 264 F.3d 459, 2001 U.S.App.LEXIS 19818 (4th Cir. 2001) [ELR 23:10:17]

Federal court in Virginia has jurisdiction to hear CNN's claim to domain name "cnnews.com" registered with Verisign in Virginia by Chinese company that uses it to operate Chinese language website aimed solely at residents of China

CNN will be able to pursue its claim to the domain name "cnnews.com" in a federal court in Virginia, even though that domain was registered by a Chinese company having no contacts whatsoever with the United States that uses the domain to operate a Chinese language website aimed solely at residents of

China - most of whom, the Chinese company asserts, have never heard of CNN.

What makes this possible is that the Chinese company, Maya Online Broadband Network, registered "cnnews.com" with a registry in Virginia now owned by Verisign. The Anticybersquatting Consumer Protection Act (ELR 21:7:4) gives jurisdiction to hear "in rem" lawsuits concerning ownership of domain names to federal courts in the states where the names have been registered, regardless of where the registrants are located.

Maya is serious about wanting to retain ownership of "cnnews.com." The letters "cn" are an accepted abbreviation for China. Domain names registered in China even end with those letters. So apparently, Maya interprets the disputed domain name to mean "China News."

Maya responded to CNN's "in rem" lawsuit - a lawsuit against the name, not against Maya - with a motion to dismiss on "due process" grounds. Judge T.S. Ellis has rejected that argument, however. The judge has ruled that in an "in rem" domain name lawsuit, "there is no requirement that the allegedly infringing registrant have minimum contacts with the forum; it is enough, as here, that the registry is located in the forum."

Judge Ellis also ruled that although Maya's alleged bad faith may be relevant to the ultimate outcome of the case on its merits, the court's jurisdiction to hear the case does not depend on the company's bad faith.

CNN is represented by Janis R. Orfe in Fairfax. Maya is represented by Paul Edward Dietze of Pennie & Edmonds in Washington D.C.

Cable New Network v. Cnnews.com, 162 F.Supp.2d 484, 2001 U.S.Dist.LEXIS 14693 (E.D.Va. 2001) [ELR 23:10:18]

Copyright infringement suit against German sub-licensees of "Grease" is dismissed by federal court in New York for lack of personal jurisdiction, but court denies German licensee's motion to dismiss

A copyright infringement lawsuit complaining about the continued staging of the musical "Grease" in Germany will proceed in a federal court in New York City, though not against all of those who were originally named as defendants. Judge Leonard Sand has dismissed two German companies from the case - Grease Promotion GmbH and Brenner Holding GmbH

- on the grounds that he did not have personal jurisdiction over them.

Ironically, one of the German companies dismissed from the case, Grease Promotion GmbH, is the actual producer of the allegedly infringing German performances of "Grease." The reason that it and Brenner Holding were dismissed from the case is that neither of them had sufficient contacts with New York to satisfy that state's long-arm statute. Though both companies were sublicensees of the German rights in the musical, that's all they were - sublicensees. Neither of them had any direct contractual relations with the owners of the copyright to "Grease," author Jim Jacobs and the Estate of co-author Warren Casey.

Jacobs and Casey's Estate had licensed yet another German company, Felix Bloch Erben Verlag fur Buhne Film und Funk KG, to produce "Grease" in Germany. Felix Bloch had sub-licensed its rights to

Brenner Holding, which in turn sublicensed Grease Promotion. The ultimate dispute in the case concerns whether performances of "Grease" in Germany continued after Felix Bloch's license was terminated. If so, Jacobs and Casey's Estate apparently assert that Felix Bloch is legally responsible, along with Grease Promotion and Brenner Holding.

Since Felix Bloch had a direct contractual relationship with Jacobs and Casey's Estate, it didn't deny that the New York court has personal jurisdiction over it. Felix Block did, however, seek dismissal on "forum non conveniens" grounds, arguing that it would be more convenient if the case were re-filed in Germany. Judge Sand ultimately concluded that transferring the case to Germany would simply shift the burden of inconvenience from Felix Block to Jacobs and Casey's Estate. So the judge denied Felix Bloch's motion.

Jacobs and Casey's Estate were represented by Howard J. Schwartz of Porzio Bromberg & Newman in Morristown, N.J. Felix Bloch was represented by David M. Satnick of Loeb & Loeb in New York City. Grease Promotion and Brenner Holding were represented by Gregory F. Hauser of Alston & Bird in New York City.

Jacobs v. Felix Bloch Erben Verlag Fur Buhne Film, 160 F.Supp.2d 722, 2001 U.S.Dist.LEXIS 13882 (S.D.N.Y. 2001) [ELR 23:10:19]

Surfers entitled to trial in right of publicity and Lanham Act lawsuit against Abercrombie & Fitch, because of unauthorized use of photo in catalog, federal Court of Appeals rules in decision that rejects retailer's First Amendment, preemption and fair use defenses

Abercrombie & Fitch will have to defend itself at trial, after all, in a right of publicity and Lanham Act lawsuit filed against it by seven competitive surfers, whose photograph was used in a catalog without their consent. The trial will be the result of a ruling by the Ninth Circuit Court of Appeals that reversed the earlier dismissal of their case.

Federal District Judge Manuel Real had earlier granted Abercrombie & Fitch's motion for summary judgment, on the grounds that the surfers' claims were barred by the First Amendment, were preempted by the

Copyright Act, and were precluded by the Lanham Act's "fair use" defense. But in an opinion by Judge Procter Hug, the Court of Appeals reversed and remanded the case for trial.

Judge Hug ruled that the First Amendment does not bar the surfers' California right of publicity claims. In so ruling, Judge Hug had to distinguish the Ninth Circuit's recent decision in Dustin Hoffman's seemingly similar case against L.A. Magazine in which a different panel of the Court of Appeals reversed, on First Amendment grounds, a $3 million judgment the actor had won against the magazine on account of its unauthorized publication of a photo of him from the movie "Tootsie" (ELR 23:4:10).

Judge Hug also rejected Abercrombie & Fitch's argument that since it had obtained a copyright license from the photographer who shot the surfing competition photo used in the catalog, the surfers' right of publicity claims were preempted by the Copyright Act. On this issue, Judge Hug was able to draw substantial support from Nimmer on Copyright, Tom McCarthy's Rights of Publicity and Privacy and several judicial precedents.

Though five of the complaining surfers are residents of Hawaii, Judge Hug held that California right of publicity law should be applied, reversing Judge Real's ruling that Hawaiian law governs their claims.

Finally, Judge Hug also rejected Abercrombie & Fitch's "fair use" defense to the surfers' Lanham Act claims.

Judge Hug did uphold the dismissal of a claim for defamation. In addition to a photo of the surfers, the catalog contained photos of "naked and scantily clothed models" that caused the surfers "shame and embarrassment." They didn't provide evidence, however, that "an average person" would think less of them because their photo was included in a catalog that contained photos of naked and scantily clothed models; nor did the surfers offer evidence they had suffered any special damage. As a result, their defamation claim was properly dismissed, Judge Hug acknowledged.

The surfers were represented by Brent H. Blakely in Manhattan Beach. Abercrombie & Fitch was represented by Joel McCabe Smith and David Aronoff of Leopold Petrich & Smith in Los Angeles.

Downing v. Abercrombie & Fitch, 265 F.3d 994, 2001 U.S.App.LEXIS 20377 (9th Cir. 2001)[ELR 23:10:19]

Trial required to determine whether "March Madness" is protectible trademark, and to determine whether "marchmadness.com" was registered in bad faith

Claims and cross-claims concerning "March Madness" will have to go to trial. They can't be resolved by summary judgment, federal District Judge Jerry Buchmeyer has held.

The competitors in this trademark and domain name dispute are the March Madness Athletic Association - a company formed by the NCAA and the Illinois High School Association to manage the "March Madness" phrase - and Netfire, Inc., a company that purchased the "marchmadness.com" domain name from the man who originally registered it without the consent of the March Madness Athletic Association.

March Madness Athletic Association sued Netfire for trademark infringement and dilution and for cybersquatting. Apparently believing that an aggressive offense is the best defense, Netfire responded with a counterclaim and with a motion for summary judgment declaring that the Association does not have a protectible mark in the phrase "March Madness." The Association replied with a summary judgment motion of its own, asking the court to rule that its "March Madness" mark is protected.

Judge Buchmeyer has denied both summary judgment motions. He held that disputed fact issues still exist concerning whether "March Madness" has become generic as Netfire claims, or is protected as the Association claims.

The judge also denied Netfire's motion for summary judgment on the Association's cybersquatting claim. Though Netfire contended that it acquired and is using the "marchmadness.com" domain name in good faith - believing it to be generic - Judge Buchmeyer found enough evidence to raise an issue about whether that was so. Some evidence suggested Netfire had acted in bad faith, and if so, the Association would be entitled to prevail, not Netfire.

One small aspect of the case was disposed of on summary judgment. When the dispute between the parties first broke out, the Illinois High School Association asked Network Solutions to put "marchmadness.com" on hold, and it did. Netfire counterclaimed against the High School Association for conversion, for doing so. But Judge Buchmeyer held that this does not amount to "conversion" under Texas state law. So the judge dismissed that claim.

March Madness Athletic Association was represented by Theodore Stevenson III of Hughes & Luce in Dallas. Netfire was represented by R. Brent

Cooper of Cooper & Scully in Dallas. The NCAA was represented by Jeffrey C. Mateer of Mateer & Shaffer in Dallas.

March Madness Athletic Association v. Netfire, Inc., 162 F.Supp.2d 560, 2001 U.S.Dist.LEXIS 12426 (N.D.Tex. 2001)[ELR 23:10:20]

Court of Appeals vacates nationwide injunction granted to CBS, ABC, NBC and Fox in copyright infringement suit against Echostar, though appellate court upholds constitutionality of Satellite Home Viewer Act

The Satellite Home Viewer and Improvement Acts created statutory licenses that permit satellite TV companies to retransmit television broadcasts to satellite subscribers, under certain circumstances. The networks - as the owners of the copyrights to a great deal of television programming - would prefer that their signals not be retransmitted at all; so the networks take pains to be certain that satellite companies retransmit those signals only when the statutory circumstances are satisfied. Alas, the statutory circumstances are very complicated; most of them are based on broadcast engineering standards, the exact meaning of which is not very clear. As a result, the Satellite Acts have spawned a lot of litigation.

One of these cases has been filed against Echostar Communications by CBS, ABC, NBC, Fox and their affiliate associations. They allege that Echostar is retransmitting their network signals to many Echostar subscribers who are not entitled to receive those signals, because they don't satisfy the statutory circumstances. A federal District Court in Florida agreed that this was likely to be so, and it granted the networks a preliminary injunction.

On appeal, however, the Eleventh Circuit has vacated that injunction. In an opinion by Chief Judge Lanier Anderson, the appellate court held that the District Court had "abused its discretion" in granting a nationwide injunction, based on the evidence the networks had submitted. Often, "abuse of discretion" suggests slipshod work, but in this case, it did not. Rather, the Satellite Acts contain burden shifting and re-shifting provisions; and the appellate court ruled that given the evidence before it, the District Court's application of those rules was "flawed."

On the other hand, the appellate court agreed that the Satellite Acts do not violate Echostar's First Amendment rights - just as the District Court (and others) had held.

One further issue was of special interest to some satellite subscribers, as well as to Echostar. One provision of the Satellite Acts permits some satellite subscribers to continue receiving satellite retransmissions if they received them before a certain date, under circumstances where other subscribers would not be permitted to receive them. One issue in the networks' case against Echostar was whether subscribers who benefit from this "grandfathering" clause get to keep its benefits if, after the critical date, they switch to a new satellite company from the company that had been providing them with retransmissions before the critical date. The District Court thought not, based on suggestions to that effect in the Acts' legislative history. But Judge Anderson held that the grandfather clause is not ambiguous, so legislative history should not have been considered; and as clearly written, those subscribers get to transfer their right to receive satellite signals to new satellite companies, even if they switch after the critical date.

The networks were represented by Natacha D. Steimer of Wilmer Cutler & Pickering in Washington D.C. Echostar was represented by Mark A. Nadeau of Squire Sanders & Dempsey in Phoenix.

CBS Broadcasting, Inc. v. Echostar Communications, 265 F.3d 1193, 2001 U.S.App.LEXIS 20502 (11th Cir. 2001)[ELR 23:10:20]

Voyeur Dorm does not violate Tampa City Code provision prohibiting adult entertainment establishments in residential neighborhoods, because entertainment it provides may be viewed only on the web, federal Court of Appeals holds

Content providers bemoan the fact that the public is unwilling to pay for entertainment on the Internet, as a general rule. Adult entertainment seems to be an exception, however. Indeed, lots of folks were willing to pay Voyeur Dorm, L.C., $39.95 a month to subscribe to "voyeurdorm.com" - a website that provides 24-hour a day coverage of the activities of the women who live in a house in Tampa, Florida. Voyeur Dorm grossed more than $3 million in less than 2 years.

As might be expected, the City of Tampa had a problem with this. A Tampa City Code provision prohibits "adult entertainment establishments" in residential neighborhoods. As far as the City was concerned, the house in which Voyeur Dorm's women resided was just such an establishment, because some of their daily activities were performed sans clothing. A federal District Court agreed, and dismissed Voyeur Dorm's declaratory relief lawsuit in response to the City's motion for summary judgment.

On appeal, however, Voyeur Dorm has done better. In a short decision by Judge Joel Dubina, the Eleventh Circuit Court of Appeals has held that Voyeur Dorm does not fit the Tampa City Code's definition of an "adult entertainment establishment," because the public cannot be entertained at the house in Tampa. The only way the public may view the entertainment provided by Voyeur Dorm is on the web. And the appellate court held that the Code does not apply to a residence that does not offer entertainment to the public on its premises.

Though Tampa petitioned the United States Supreme Court to review the case, the Supreme Court declined.

Voyeur Dorm was represented by Luke Charles Lirot in Tampa. The City was represented by Jerry M. Gewirtz in Tampa.

Voyeur Dorm, L.C. v. City of Tampa, 265 F.3d 1232, 2001 U.S.App.LEXIS 20726 (11th Cir. 2001), cert. denied, 2002 U.S.LEXIS 1187 (2002)[ELR 23:10:21]

Owner of Miami Dolphins and Florida Marlins stadium wins dismissal of Americans with Disabilities Act case

The owner of Proplayer Stadium - home to the NFL's Miami Dolphins and Major League Baseball's

Florida Marlins - has won the dismissal of a lawsuit filed against it by Edward Resnick, a wheelchair-bound patron who complained that the Stadium's operation and design violate the Americans with Disabilities Act.

Resnick was turned away from a Miami Dolphins game in 1999, because tickets for all of the wheelchair accessible spaces had already been sold to others. Resnick's lawsuit alleged that he was unable to buy a ticket for that game, because Proplayer Stadium doesn't have enough wheelchair accessible spaces. The game he wanted to attend, however, was entirely sold out, for able-bodied as well as disabled fans. And federal District Judge Michael Moore ruled that the ADA "does not require a facility to afford a disabled guest a greater opportunity to purchase seats than his able-bodied counterpart."

Resnick did attend a Florida Marlins game in 2000, and he complained that certain features of the

Stadium were not accessible to the disabled. But he admitted that he had never personally attempted to use most of those features. Judge Moore ruled that Resnick had standing to complain only about features he personally had attempted to use but couldn't. So the judge dismissed Resnick's claims concerning those features he hadn't attempted to use.

Finally, with respect to the two features Resnick had attempted to use - the Stadium's wheelchair areas and the restroom - Judge Moore found that Resnick had not shown they could be readily modified in the way Resnick's expert proposed.

Resnick was represented by Stephen Michael Cody in Miami. The owner of the Stadium was represented by Carol Celeiro Lumpkin of Akerman Senterfitt & Eidson in Miami.

Access Now, Inc. v. South Florida Stadium Corp., 161 F.Supp.2d 1357, 2001 U.S.Dist.LEXIS 14917 (S.D.Fla. 2001)[ELR 23:10:22]

Kentucky Supreme Court vacates injunction against NCAA in eligibility case

The NCAA has won a significant victory before the Kentucky Supreme Court, by just one vote, in a lawsuit filed against it by the University of Louisville and Nigerian student Muhammed Lasege. The University had declared Lasege ineligible to play basketball, because he had previously signed professional basketball contracts, but it petitioned the NCAA to reinstate Lasege's eligibility because of his ignorance of NCAA regulations and other mitigating factors.

When the NCAA refused to do so, the University and Lasege sued and quickly won a two-part temporary injunction. The trial court declared Lasege eligible to play, and it prohibited the NCAA from imposing sanctions against the University even if it eventually lost the case.

In an opinion by Justice James Keller, writing on behalf of a 4 to 3 majority, the Kentucky Supreme Court vacated both parts of the injunction. In doing so, it overruled a 1977 appellate court decision the trial court had relied on in issuing its injunction.

Justice Keller concluded that the trial court had been "clearly erroneous" when it concluded that Lasege would probably succeed on the merits, and when it failed to consider the costs to the NCAA and others in balancing the equities. Justice Keller also concluded that the law permits the NCAA to impose penalties on members that allow athletes to play pursuant to court orders if those orders are later reversed or vacated.

National Collegiate Athlete Association v. Lasege, 53 S.W.3d 77, 2001 Ky.LEXIS 118 (Ky. 2001)[ELR 23:10:22]

Previously Reported:

Sonny Bono Act to be reviewed by U.S. Supreme Court. The United States Supreme Court has agreed to review Eldred v. Ashcroft (ELR 23:1:12), in which the federal Court of Appeals for the D.C. Circuit upheld the Constitutionality of the Sonny Bono Term Extension Act (the 1998 law that extended the term of copyright for an additional 20 years (ELR 20:6:8)). Briefs in the case (and other materials) are available at http://eon.law.harvard.edu/openlaw/eldredvashcroft. Eldred v. Ashcroft, 2002 WL 232898 (S.Ct. 2002), available at www.supremecourtus.gov/orders/01ordersofthecourt.html (02/19/02 Order List).

U.S. Supreme Court denies cert. The United States Supreme Court has denied petitions for review in: Saderup v. Comedy III Productions, 122 S.Ct. 806 (2002), in which the California Supreme Court held that artist Gary Saderup infringed Three Stooges' rights of publicity by reproducing their likenesses on lithographs and T-shirts, and that he did not have a First Amendment right to do so (ELR 22:12:5); Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Association, 122 S.Ct. 920 (2002), in which the Court of Appeals for the D.C. Circuit held that the FCC's Equal Opportunity Employment rule (ELR 22:1:10) is still unconstitutional, despite recent revisions (ELR 23:1:16); and in Taco Bell Corp. v. Wrench, 122 S.Ct. 921 (2002), in which the Sixth Circuit Court of Appeals reinstated an idea submission lawsuit filed by the creators of the "Psycho Chihuahua" cartoon character, in an opinion that held that the creators' implied contract claim against Taco Bell was not preempted by the Copyright Act, and that Michigan law does not require ideas to be novel in order to be protectible (ELR 23:7:15).

California Supreme Court to review DVD trade secrets case. The California Supreme Court has agreed to review a state Court of Appeals ruling in DVD Copy Control Association v. Bunner (ELR 23:7:4). The Court of Appeal reversed a preliminary injunction that had been granted, in a trade secrets case, against a website that was distributing DeCSS software, ruling that the injunction violated the First Amendment. The Supreme Court's order is available at http://appellatecases.courtinfo.ca.gov/search/mainCaseScreen.cfm?dist=0&doc_id=178921&rc=1.

Injunction vs. Minnesota Twins upheld. The Minnesota Supreme Court has denied the Minnesota Twins' petition for review in Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, in which the Minnesota Court of Appeals affirmed a temporary injunction requiring the Twins to play the 2002 season in Minneapolis Metrodome, and barring Major League Baseball from interfering with Twins doing so, despite Major League Baseball's plans to downsize by buying and eliminating club (ELR 23:9:10). The Minnesota Supreme Court's order is available at http://www.msfc.com/commissionnews_detail.cfm?releaseID=51.

"Beardstown Ladies" case settles. Buena Vista Books has settled the case in which a California Court of Appeal held that the First Amendment does not protect the publisher from possible liability for misleading advertising of "Beardstown Ladies" investment guide books and tapes. (The rate-of-return statements on the book and tape covers were said to be false.) The settlement still must be approved by a California trial court judge. Keimer v. Buena Vista Books, Inc. (ELR 21:9:13). In a factually identical but unrelated case in New York, a state court judge held that the First Amendment does protect the publisher from liability for erroneous rate-of-return statements on the book's cover (ELR 22:3:14). The New York judge made no effort to distinguish the earlier California decision; the New York judge simply said that he found "otherwise" and that he "differs" with the approach taken by the California appellate court.

Rehearing sought in photo linking case. Ditto.com has asked the Ninth Circuit Court of Appeals to reconsider its ruling that the company - which operates an online search engine for images - may be held liable for copyright infringement, because inline linking and framing of full-size digital photo images is not a fair use (ELR 23:9:10). Among other things, Ditto.com asserts that the appellate court simply misunderstood the facts, because, Ditto.com argues, although it once did using "framing" techniques on its website, it stopped doing so after only a few months. It replaced framing with a link that opens two new browser windows: one to the homepage of the originating website, and another to the image itself from the originating site. (Since the court's decision, Ditto.com provides only a link to the homepage of the originating site.) Ditto.com's petition for rehearing is available at www.perkinscoie.com/resource/genlit/DittoRehearingPetition.pdf.

Rehearing denied in "MC Teach" case. A petition for rehearing has been denied in the "MC Teach" case, Gardner v. Nike (ELR 23:9:11), in which a three-judge panel of the Ninth Circuit Court of Appeals held that exclusive copyright licensees may not sublicense or assign their rights without the copyright owners' consent.
[ELR 23:10:23]

DEPARTMENTS

In the Law Reviews:

Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, Dead and the Imaginary by Joseph J. Beard, 16/3 Berkeley Technology Law Journal 1165 (2001)

Gone with the Wind Done Gone: "Re-Writing" and Fair Use, 115 Harvard Law Review 1193 (2002)

The UCLA Entertainment Law Review has published Volume 9, Number 1 with the following articles:

Broadcasting Industry Ethics, the First Amendment and Televised Violence by John Alan Cohan, 9 UCLA Entertainment Law Review 1 (2001)

The Statutory Overriding of Controlled Composition Clauses by Mario F. Gonzalez, 9 UCLA Entertainment Law Review 29 (2001)

Putting the Brakes on the Right of Publicity by Schuyler M. Moore, 9 UCLA Entertainment Law Review 45 (2001)

The Right of Publicity: Preventing the Exploitation of a Celebrity's Identity or Promoting the Exploitation of the First Amendment? by Joshua Waller, 9 UCLA Entertainment Law Review 59 (2001)

The Law and Popular Culture: Introduction by Professor Michael Asimow, 9 UCLA Entertainment Law Review 87 (2001)

Attorney Advertising and the Use of Dramatization in Television Advertisements by Daniel Callender, 9 UCLA Entertainment Law Review 89 (2001)

Trial and Errors: Comedy's Quest for the Truth by Rajani Gupta, 9 UCLA Entertainment Law Review 113 (2001)

Drugs in Cinema: Separating the Myths from Reality by Paul Iannicelli, 9 UCLA Entertainment Law Review 139 (2001)

Entertainment and Sports Lawyer, published by the American Bar Association Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive,

Chicago, IL 60611-4497, has issued Volume 19, Numbers 2-3, with the following articles:

Are the Cats Out of the Bag? Lesson from the Makeup Designer's Case by Jeffrey M. Dine, 19 Entertainment and Sports Lawyer 1 (2001) (for address, see above)

Copyright Co-ownership in Cyberspace: The Digital Merger of Content and Technology in Digital Rights Management and E-commerce by Corey Field, 19 Entertainment and Sports Lawyer 3 (2001) (for address, see above)

"The Song's Got No Title Just Words and a Tune:" Protection of Song Titles Under the Lanham Act by Allen B. Grodsky and Eric M. George, 19 Entertainment and Sports Lawyer 9 (2001) (for address, see above)

Editorial: Record Industry/Napster by Richard J. Greenstone, 19 Entertainment and Sports Lawyer 13 (2001) (for address, see above)

Book Review: Taxation of the Entertainment Industry 2001 by Schuyler M. Moore reviewed by Robert G. Pimm, 19 Entertainment and Sports Lawyer 22 (2001) (for address, see above)

Loyola of Los Angeles Entertainment Law Review has published Volume 22, Number 1 with the following articles:

Current Developments of Public Performance Rights for Sound Recordings Transmitted Online: You Push Play, But Who Gets Paid? by Joshua P. Binder, 22 Loyola of Los Angeles Entertainment Law Review (2001)

Post-Napster: Peer-To-Peer File Sharing Systems: Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan by Hisanari Harry Tanaka, 22 Loyola of Los Angeles Entertainment Law Review (2001)

Can't Get No Satisfaction: How Abkco v. Lavere Bowed to Pressure from the Music Industry by Benjamin Gemperle, 22 Loyola of Los Angeles Entertainment Law Review (2001)

Trademark Confronts Free Speech on the Information Superhighway: "Cybergripers" Face a Constitutional Collision by Rebecca S. Sorgen, 22 Loyola of Los Angeles Entertainment Law Review (2001)

Fordham Intellectual Property, Media & Entertainment Law Journal has published Volume 12, Number 1 with the following articles:

Prior Restraints and Intellectual Property: The Clash Between Intellectual Property and the First Amendment from an Economic Perspective by Andrew Beckerman-Rodau, 12 Fordham Intellectual Property, Media & Entertainment Law Journal (2001)

Understanding the Market for Celebrity: An Economic Analysis of the Right of Publicity by Vincent M. de Grandpre, 12 Fordham Intellectual Property, Media & Entertainment Law Journal (2001)

The NBA Strategy of Broadcast Television Exposure: A Legal Application by John A. Fortunato, 12 Fordham

Intellectual Property, Media & Entertainment Law Journal (2001)

The Digital Millennium Copyright Act: Preserving the Traditional Copyright Balance by Christine Jeanneret, 12 Fordham Intellectual Property, Media & Entertainment Law Journal (2001)

If Per Se Is Dying, Why Not in TV Tying? A Case for Adopting the Rule of Reason Standard in Television Block-Booking Arrangements by Nicole LaBletta, 12 Fordham Intellectual Property, Media & Entertainment Law Journal (2001)

The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More by David Balaban, 12 Fordham Intellectual Property, Media & Entertainment Law Journal (2001)

Virginia Sports and Entertainment Law Journal has published Volume 1, Issue 1 with the following articles:

The Influence of Sports Law on American Jurisprudence by Daniel E. Lazaroff, 1 Virginia Sports and Entertainment Law Journal 1 (2001)

Simplifying Sports Liability Law Through a Shared Responsibility Chapter by Terence J. Centner, 1 Virginia Sports and Entertainment Law Journal 54 (2001)

A Drive to Justice: The Supreme Court's Decision in PGA Tour, Inc. v. Martin by Brian D. Shannon, 1 Virginia Sports and Entertainment Law Journal 74 (2001)

Oral Contracts in the Entertainment Industry by Gary M. McLaughlin, 1 Virginia Sports and Entertainment Law Journal 101 (2001)

DePaul-LCA Journal of Art and Entertainment Law has published Volume 11, Number 2 with the following articles:

Copyright Fair Use and Private Ordering: Are Copyright Holders and the Copyright Law Fanatical for Fansites? by Jessica Elliott, 11 DePaul-LCA Journal of Art and Entertainment Law 329 (2001)

Copyright and Contracts: The Subject Matter Jurisdiction of Federal Courts Under 28 U.S.C. § 1338(A) by Daniel E. Wanat, 11 DePaul-LCA Journal of Art and Entertainment Law 361 (2001)

Congress Trips Over International Law: WTO Finds Unfairness in Music Licensing Act by Mary LaFrance, 11 DePaul-LCA Journal of Art and Entertainment Law 397 (2001)

Analysis of Mark v. Moser: Determining the Duty of Care Between Sports Co-Participants in Light of the Indiana Comparative Fault Statute by Robert Carroll, 11 DePaul-LCA Journal of Art and Entertainment Law 425 (2001)

The Intent of the Law in Waivers: For the Persona or the "Other" Entity? by Gabrielle Stormo, 11 DePaul-LCA Journal of Art and Entertainment Law 457 (2001)

ALS Scan, Inc. v. Remarq Communities, Inc.: Notice and ISPs' Liability for Third Party Copyright

Infringement by Laura Rybka, 11 DePaul-LCA Journal of Art and Entertainment Law 479 (2001)

Independent Film and Television Production Incentive Act: Congress Attempts to Prevent Runaways by Courtney Siders, 11 DePaul-LCA Journal of Art and Entertainment Law 495 (2001)

The Rocky Road of the U.S. Accession to the Madrid Protocol: Could This Be the Year? by Maria Guerra, 11 DePaul-LCA Journal of Art and Entertainment Law 525 (2001)

U.S. v. Henriques by Pete Albanis, 11 DePaul-LCA Journal of Art and Entertainment Law 563 (2001)

Morrill v. Smashing Pumpkins by Sonia Gonzalez, 11 DePaul-LCA Journal of Art and Entertainment Law 571 (2001)

America Online, Inc. v. AT&T Corp. by Michael Fiorentino, 11 DePaul-LCA Journal of Art and Entertainment Law 581 (2001)

Marquette Sports Law Review has published Volume 12, Number 1 as a Symposium: Sports Law: A Law Faculty's Individual and Collective Perspectives with the following articles:

Foreword by Matthew J. Mitten, 12 Marquette Sports Law Review (2001)

Reflections from a Fan: Searching for More Common Ground in Sociology and Law by Daniel C. McDonald, S.J., 12 Marquette Sports Law Review (2001)

Reorganization of the Professional Sports Franchise by Ralph C. Ansivino, 12 Marquette Sports Law Review (2001)

The Americans with Disabilities Act and the Aging Athlete after Casey Martin by Alison M. Barnes, 12 Marquette Sports Law Review (2001)

Reflections on the Accident at Miller Park and the Prosecution of Work-Related Fatalities in Wisconsin by Edward A. Fallone, 12 Marquette Sports Law Review (2001)

College Coaching Contracts Revisited: A Practical Perspective by Martin J. Greenberg, 12 Marquette Sports Law Review (2001)

Arbitration of Olympic Eligibility Disputes: Fair Play and the Right to Be Heard by Jay E. Grenig, 12 Marquette Sports Law Review (2001)

Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum by J. Gordon Hylton, 12 Marquette Sports Law Review (2001)

Religious Freedom and the Interscholastic Athlete by Scott C. Idleman, 12 Marquette Sports Law Review (2001)

Golf and Torts: An Interesting Twosome by John J. Kircher, 12 Marquette Sports Law Review (2001)

Statewide School Athletic Associations and Constitutional Liability: Brentwood Academy v. Tennessee Secondary School Athletic Association by Alan R. Madry, 12 Marquette Sports Law Review (2001)

Privacy in Sports: Recent Developments in the Federal Courts by Michael K. McChrystal, 12 Marquette Sports Law Review (2001)

The Professional Athlete: Issues in Child Support by Judith G. McMullen, 12 Marquette Sports Law Review (2001)

Blue-Collar Crimes/White-Collar Criminals: Sentencing Elite Athletes Who Commit Violent Crimes by Michael M. O'Hear, 12 Marquette Sports Law Review (2001)

Athletes in Trouble with the Law: Journalistic Accounts for the Resentful Fan by David Ray Papke, 12 Marquette Sports Law Review (2001)

Baseball Diplomacy by Andrea Kupfer Schneider, 12 Marquette Sports Law Review (2001)

Fraser v. MLS, L.L.C.: Is There a Sham Exception to the Copperweld Single Entity Immunity? by Michael P. Waxman, 12 Marquette Sports Law Review (2001)

Sports Heroes, Sexual Assault and the Unnamed Victim by Shirley A. Wiegand, 12 Marquette Sports Law Review (2001)

Introducing the Court of Arbitration for Sport: The Ad Hoc Division in the Olympic Games by Richard H. McLaren, 12 Marquette Sports Law Review (2001)

Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information by Laurence B. Alexander, 20 Yale Law & Policy Review 97 (2002)

RIAA v. Napster: The Struggle to Protect Copyrights in the Digital Age by Russell P. Beets, 18 Georgia State Law Review (2001)

The V-Chip: A Little Thing But a Big Deal by Lisa D. Cornacchia, 25 Seton Hall Legislative Journal (2001)

The Right of Publicity in Illinois: Evolution, a New Right of Publicity Statute, and Federal Preemption in the Seventh Circuit: Where Should the Law Go From Here? by Paul M. McCormick, 25 Seton Hall Legislative Journal (2001)

Copyright Issues in Online Courses: Ownership, Authorship and Conflict by Roberta Rosenthal Kwall, 18 Santa Clara Computer and High Technology Law Journal (2001)

Judicial Review of ICANN Domain Name Dispute Decisions by David E. Sorkin, 18 Santa Clara Computer and High Technology Law Journal (2001)

Comedy III Productions, Inc. v. Gary Saderup, Inc.: Finding a Balance Between the Right of Publicity and the First Amendment Right of Freedom of Speech by Jennifer L. Koehler, 18 Santa Clara Computer and High Technology Law Journal (2001)

Eldred v. Reno: An Example of the Law of Unintended Consequences by L. Ray Patterson, 8 Journal of Intellectual Property Law 223 (2001) (published by University of Georgia School of Law, Athens, Georgia 30602-6012)

A New Technology Question of Olympic Proportions: Should NBC's License to Broadcast the Games Include Internet Broadcasting Rights? by Brandi Barnes Kellis, 8 Journal of Intellectual Property Law (2001) (for address, see above)

The Digital Millennium Copyright Act and the First Amendment: Can They Co-exist? by Rachel Simpson Shockley, 8 Journal of Intellectual Property Law 275 (2001) (for address, see above)

Trademark Metatagging: Lanham Act Liability or Pareto Optimality? by Jonathan A. Weininger, 23 Whittier Law Reivew (2001)

Is a Famous Trademark in Your Town Enough to Prohibit Use Across America? by Yvette Moreno, 23 Whittier Law Review (2001)

Death of a Trademark: Genericide in the Digital Age by Sung In, 21 The Review of Litigation 159 (2002) (published by University of Texas at Austin, School of Law Publications, 727 E. 27th Street, Austin, TX 78705-3299)

International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought? by Graeme B. Dinwoodie, 64 The American Journal of Comparitive Law 429 (2001) (published by University of California School of Law, Berkeley, California 94702-7200)

Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics by Christopher Paul Reuscher, 35 Akron Law Review (2001)

(c)Copyright God: Enforcement of Copyright in the Bible and Religious Works by Roger Syn, 14 Regent University Law Review (2001-2002)

Why Football is Securitizing for the Future by Stuart Brinkworth, 21 International Financial Law Review 13 (2001) (www.iflr.com)

Some Comments on Rulemaking at the World Intellectual Property Organization by Edward Kwakwa, 12 Duke Journal of Comparative and International Law 179 (2002)

Intellectual Property in Bankruptcy Court: The Search for a More Coherent Stanadard in Dealing with a Debtor's Right to Assume and Assign Technology Licenses by David R. Kuney, 9 American Bankruptcy Institute Law Review 593 (2001) (published by St. Johns University School of Law, Fromkes Hall, 8000 Utopia Parkway, Jamaica, NY 11439, (718) 990-6751)

"Offer of Judgment" as an Intellectual Property Litigation Tactic by Marc Lieberstein and Anthony Lovensheimer, 14 Intellectual Property & Technology Law Journal 5 (2002) (published by Aspen Law & Business,1185 Avenue of the Americas, 37th floor, New York, NY 10036)

Trademark and Domain Name License Agreement, 14 Intellectual Property & Technology Law Journal 15 (2002) (for address, see above)

The ICANN Domain-Name Dispute Resolution System as a Model for Resolving Other Intellectual Property Disputes on the Internet by Andrew Christie, 5 The Journal of World Intellectual Property 105 (2002) (published by Werner Publications, PO Box 5134, 1211 Geneva 11, Switzerland, www.wernerpubl.com)

The Entertainment Law Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 13, Issues 2 and 3 with the following articles:

Shocking News by Dinah Spence, 13 Entertainment Law Review 27 (2002) (for web address, see above)

A Creature of Statute: Copyright Law and Legal Formalism by Matthew Rimmer, 13 Entertainment Law Review 31 (2002) (for web address, see above)

Contracts for the Settlement of Intellectual Property Disputes and the Restraints of Trade Doctrine: The WWF Case by Ilanah Simon, 13 Entertainment Law Review 39 (2002) (for web address, see above)

Directors Beware by Euan Lawson, 13 Entertainment Law Review 42 (2002) (for web address, see above)

Framed: The Risks of Sampling Film Images by Peter Waters and Lauren Eade, 13 Entertainment Law Review 43 (2002) (for web address, see above)

Thank God It's British Trade Mark (Opposition before the U.K. Trade Marks Registry) by Chris McLeod, 13 Entertainment Law Review 44 (2002) (for web address, see above)

GenericallyUnfair.de-German Domain Name Disputes by Rohan Massey, 13 Entertainment Law Review 46 (2002) (for web address, see above)

Book Review: Electronic Publishing Agreement: Precedents with Commentary and Disk by Ingrid Winternitz, 13 Entertainment Law Review 47 (2002) (for web address, see above)

The Universal Jurisdiction of the French Courts in Civil and Criminal Cases: The Road to Digital Purgatory? by Jean Philippe Hugot and Nicholas Dalton, 13 Entertainment Law Review 49 (2002) (for web address, see above)

European Contract Law by Arnold Vahrenwald, 13 Entertainment Law Review 56 (2002)

Mobile Business: The Legal Implications of Business on the Move by Paul Renney and Jonathan Blair, 13 Entertainment Law Review 62 (2002) (for web address, see above)

Injunction Suggests It's Not All Smiley for NeuLevel by Rupesh Chandrani, 13 Entertainment Law Review 66 (2002) (for web address, see above)

Regulation of U.K. Theatrical Collective Investment Schemes (An Overview of the "New" Regulatory Regime) by D. Michael Rose, 13 Entertainment Law Review 68 (2002) (for web address, see above)

Human Rights Versus Copyright: The Paddy Ashdown Case by Louis Joseph, 13 Entertainment Law Review 72 (2002) (for web address, see above)

The European Intellectual Property Review (www.sweetandmaxwell.co.uk) has published Volume 24, Issue 2 with the following articles:

The Technologisation of Copyright: Implications for Privacy and Related Interests by Lee A. Bygrave, 24 European Intellectual Property Review 51 (2002) (for web address, see above)

The Copyright in the Information Society Directive: An Overview by Michael Hart, 24 European Intellectual Property Review 58 (2002) (for web address, see above)

The DMCA and the E-Commerce Directive by Victoria McEvedy, 24 European Intellectual Property Review 65 (2002) (for web address, see above)

Securing Webcast Content in the European Union: Copyright, Technical Protection and Problems of Jurisdiction on the Internet by Alex Morrison and Lorna E. Gillies, 24 European Intellectual Property Review 74 (2002) (for web address, see above)

The High Court of Australia Revisits "Misuse of Market Power" by Megan Richardson, 24 European

Intellectual Property Review 81 (2002) (for web address, see above)

The End of Exclusivity?: Abuse of Intellectual Property Rights in the E.U. by Christopher Strothers, 24 European Intellectual Property Review 86 (2002) (for web address, see above)

Trade Mark Exhaustion: The Final Chapter? by Naomi Gross, 24 European Intellectual Property Review 93 (2002) (for web address, see above)

New Zealand Moral Rights Law: Did Something Get Lost in Translation? by Ian Eagles, 8 New Zealand Business Law Quarterly 26 (2002) (http://www.brookers.co.nz/catalogue/title.asp?p=719)

Trade Marks On-Line: The WIPO and Paris Union Joint Recommendation on the Protection of Marks on the Internet by Graeme W Austin, 8 New Zealand Business Law Quarterly 92 (2002) (for web address, see above)
[ELR 23:10:24]