

IN THE NEWS

Napster case continues: Court of Appeals affirms modified preliminary injunction and shut down order; District Court allows Napster to conduct discovery on record companies' copyright ownership and alleged copyright misuse

Though in the world of peer-to-peer file transferring, Napster has been eclipsed by the likes of KaZaA and Morpheus, the Napster case itself rolls on, producing almost simultaneous rulings at the district and appellate court levels. The latest round of decisions gave both the record companies and Napster something to cheer about, and something to bemoan as well.

In March, the Ninth Circuit Court of Appeals affirmed District Judge Marilyn Patel's modified preliminary injunction against Napster, as well as her

order that Napster shut down its service until it could implement a new file filtering system that will enable it to block infringing files even if they are renamed to disguise their actual contents.

In February, Judge Patel stayed her ruling on the record companies' motion for summary judgment, and allowed Napster to conduct discovery in connection with two of its defenses: the argument that the record companies may not own the copyrights to all of the recordings whose copyrights have been infringed; and the argument that the record companies have misused their copyrights by entering into their own digital delivery ventures known as MusicNet and pressplay

The Ninth Circuit's decision is the product of a continuing dispute about the preliminary injunction first issued by Judge Patel against Napster in July 2000 (ELR 22:3:4). That injunction was largely upheld by the Ninth Circuit in February 2001, though it was

remanded with instructions that its terms be narrowed somewhat (ELR 22:9:5). Judge Patel did narrow the injunction (ELR 22:10:11) - too much to satisfy the record companies but not enough to satisfy Napster. Both appealed.

In the meantime, Napster adopted a new technology that allows it to identify files by their content, rather than by their names which users had begun changing to disguise their contents. But while Napster was trying to implement its new technology, it continued to operate using its old and ineffective filtering system. This prompted Judge Patel to order Napster to shut down completely until its new effective filtering system was working. Napster appealed that order as well.

Judge Patel's modified injunction required Napster to remove any user file from the Napster music index if Napster had reasonable knowledge that the file

contains copyrighted works. In return, the record companies must give Napster notice of specific infringing files. They must provide the name of the performing artist, the title of the work, a certification of ownership, and the names of one or more files that have been available on the Napster file index containing the protected copyrighted work. Napster then must continually search the index and block all files which contain that particular noticed work.

In a short opinion by Judge Robert Beezer, the Ninth Circuit rejected both sides' objections to the modified injunction, saying that it correctly reflects the appellate court's earlier decision and the law of vicarious and contributory infringement. Judge Beezer also held that the shut down order was not an abuse of Judge Patel's discretion.

While the injunction was being litigated in the Ninth Circuit, the record companies made a motion for

summary judgment before Judge Patel, asking her to rule that Napster had willfully infringed their copyrights as a matter of law. Napster countered by asking the judge to stay her decision until it could conduct discovery that it hopes will give it a valid defense or two to the record companies' claims.

Though the record companies have alleged that they own the copyrights to the recordings transferred using the Napster service, Napster questions whether that is really so, particularly with respect to those recordings whose copyrights were registered by the record companies as their "authors" under the "work made for hire" doctrine. Some recording artists have claimed that their recordings were not works made for hire.

Judge Patel acknowledged that "authorship is only one possible avenue through which [the record companies] can establish ownership. If [they] can

demonstrate that they own the works by assignment, they will prevail on the issue of ownership and may demonstrate that additional discovery is either unwarranted or futile." On the other hand, the judge recognized that the record companies would have to produce documents to establish their copyright ownership under either theory; and she appointed Neil Boorstyn as a Special Master to review and evaluate those documents.

More significantly, Napster also argued that the record companies have abused their copyrights by forming two companies to license digital transfers: pressplay, a joint venture between Sony and Universal; and MusicNet, a joint venture among EMI, BMG, Warner and RealNetworks.

Judge Patel was troubled by these joint ventures. "[E]ven a naif" she said, "must realize that in forming and operating a joint venture, [the record companies']

representatives must necessarily meet and discuss pricing and licensing, raising the specter of possible antitrust violations. These joint ventures bear the indicia of entities designed to allow [the record companies] to use their copyrights and extensive market power to dominate the market for digital music distribution. Even on the undeveloped record before the court, these joint ventures look bad, sound bad and smell bad."

What's more, the license offered to Napster by MusicNet provided that if Napster entered into an individual license with any of its three record companies, or any other record company including those that MusicNet does not represent, MusicNet may terminate Napster's license or charge higher license fees. This "effectively grants MusicNet control over which content Napster licenses," Judge Patel observed.

For these reasons, the judge found that the MusicNet "agreement is troubling on its face," but she added that "too many questions remain unanswered for the court to effectively rule on the issue." As a result, she allowed Napster to conduct discovery on the copyright misuse issue too.

The record companies do not, of course, acknowledge that anything they have done amounts to copyright misuse. Moreover, they may have taken some comfort in one more thing Judge Patel said in her ruling. She emphasized that copyright misuse "does not invalidate a copyright, but precludes its enforcement during the period of misuse. If [the record companies] are engaged in misuse, they cannot bring suit based on their rights until the misuse ends. The doctrine does not prevent [them] from ultimately recovering for acts of infringement that occur during the period of misuse. The issue focuses on when [they] can bring or pursue

an action for infringement, not for which acts of infringement they can recover."

On the other hand, if Napster unearths evidence during discovery that enables it to persuade Judge Patel that the record companies have been guilty of misuse, they will not be able to pursue their case against Napster - and perhaps not against other digital music distributors either, like KaZaA and Morpheous- until they end that misuse.

A&M Records, Inc. v. Napster, Inc., USCA No. 01-15998 (9th Cir., Mar. 25, 2002), available at <http://www.ca9.uscourts.gov/ca9/newopinions.nsf>;

A&M Records, Inc. v. Napster, Inc., USDC Case No. MDL 00-1369 MHP, C 99-5183 MHP (N.D.Cal., Feb. 2002), available at <http://www.cand.uscourts.gov> [ELR 23:11:4]

United States Supreme Court declares federal statute banning "virtual child pornography" unconstitutional, citing "Romeo & Juliet," "Traffic" and "American Beauty" as movies whose themes the statute prohibits

"Romeo & Juliet" has been made into at least 40 movies. Last year, "Traffic" was nominated for an Academy Award as Best Picture. And the year before that, "American Beauty" won the Academy Award for Best Picture. These very different movies have one thing in common: all portray sexual activity by teenagers, in ways that may have violated the Child Pornography Prevention Act of 1996.

The Child Pornography Prevention Act is a federal statute that bans sexually explicit images, sometimes called "virtual child pornography," that appear to depict minors but were produced using

youthful-looking adults or computer-imaging technology.

In a decision by Justice Anthony Kennedy, the United States Supreme Court has held that the Act is unconstitutional, because it is overbroad.

Though the First Amendment appears to prohibit all government bans on speech, it doesn't. As the Supreme Court has interpreted it, the First Amendment permits laws that prohibit obscenity, and it permits laws that prohibit non-obscene child pornography that depicts actual children.

The Child Pornography Prevention Act went a step further, however, by prohibiting non-obscene child pornography that does not depict actual children. Justice Kennedy cited "Romeo & Juliet," "Traffic" and "American Beauty" as works that "explore themes within the wide sweep of the statute's prohibitions." As a result, the Act was not helped by the Supreme Court's

earlier decisions upholding the constitutionality of obscenity and child pornography laws.

The Government argued that it has become very difficult to prosecute those who produce pornography using real children, because pornography can be produced using computer images, and experts may not be able to tell whether pictures were made using computer images or real children. The Court was not persuaded that this rationale justified the Act. "This argument, in essence, is that protected speech may be banned as a means to ban unprotected speech," Justice Kennedy noted. But, he explained, "This analysis turns the First Amendment upside down."

Ashcroft v. Free Speech Coalition, USSC No. 00-795 (Apr. 16, 2002), available at www.supremecourtus.gov/opinions/01slipopinion.html [ELR 23:11:5]

INTERNATIONAL DEVELOPMENTS

Reader's Edition of James Joyce's Ulysses infringed novel's copyright, because it includes protected material first published after Joyce's death; if it had included only material published during Joyce's lifetime, Reader's Edition could have been published legally, though reasonable royalty would have been payable because UK restored copyright to that material as required by EC Directive

James Joyce's Ulysses is "famously complex." Almost 80 years after its first publication, and sixty years after Joyce's death, the novel's complexity was at the heart of a copyright infringement case involving complex issues of its own.

With apologies to literature majors for whom the complexities of Ulysses were the subject of long study,

here is a stripped down version of the facts of this case. The accused work was the Reader's Edition of Ulysses, edited by Danis Rose and published by Macmillan in 1997. It consists, for the most part, of a version of Ulysses that was first published in 1922. Rose, however, edited the 1922 version by incorporating some material from another version of Ulysses known as the "Rosenbach manuscript" that wasn't published until 1975.

The Reader's Edition was published without the consent of the trustees of the James Joyce estate, and as a result, the trustees sued Macmillan and Rose for copyright infringement in the UK. The case became complex, because under British copyright law, the 1922 version of Ulysses went into the public domain in 1991, 50 years after Joyce's death in 1941. However, in 1993, the European Commission adopted a Directive that required all EU members to extend the duration of

copyright to the life of the author plus 70 years. The UK did so in 1996; and at the same time, it restored the already expired copyrights of works - like *Ulysses* - whose authors had been dead more than 50 but less than 70 years.

As a result, by the time the Reader's Edition was published in 1997, the copyright to the 1922 version of *Ulysses* had been restored, and it won't expire until 2011 (70 years after Joyce's death). What's more, the copyright to the "Rosenbach manuscript" has never expired, because it wasn't published until after Joyce's death; and its copyright won't expire until 2025 - 50 years after its 1975 publication.

Rose began work on the Reader's Edition in 1992, after the 1922 version of *Ulysses* went into the public domain and before the EC Directive was adopted. But much of Rose's work was done after the Directive was adopted in 1993. Macmillan of course,

and presumably Rose too, knew that Ulysses would become protected by copyright once again, as a result of UK implementation of that Directive. But they didn't proceed in blind disregard for the rights of Joyce's trustees. That is, they thought they could legally publish the Reader's Edition without the trustees' consent, even after Ulysses' copyright had been restored, for either of two reasons.

First, when the UK restored the copyrights of works whose copyrights had expired, the UK adopted "Regulation 23" which provides: "It is not an infringement of revived copyright in a work . . . to do anything . . . in pursuance of arrangements made before . . . 1995 at a time when copyright did not subsist in the work. . . ." According to Macmillan and Rose, publication of the Reader's Edition in 1997 was done pursuant to "arrangements" made before 1995, and thus

was "not an infringement" of Ulysses' "revived copyright."

Second, when the UK restored copyrights of works whose copyrights had expired, the UK also adopted "Regulation 24" which created a statutory license permitting the use of works whose copyrights had been revived, "subject only to the payment of such reasonable royalty . . . as may be agreed or determined . . . by the Copyright Tribunal." According to Macmillan and Rose, if publication of the Reader's Edition was not permitted by Regulation 23, its publication was permitted by Regulation 24, subject only to their obligation to pay a reasonable royalty.

Insofar as their use of material from the "Rosenbach manuscript" was concerned, Macmillan and Rose argued that the manuscript itself was created by Joyce before the 1922 version of Ulysses was published; and even though the manuscript contained

material not contained in the 1922 version, publication of Ulysses in 1922 effectively published material in the manuscript too, so its republication in the Reader's Edition was covered by Regulation 23 or Regulation 24 as well.

Joyce's trustees didn't agree with any of these contentions. Moreover, the trustees asserted that quite apart from copyright, publication of the Reader's Edition also constituted "passing off," because the Reader's Edition did not adequately disclose the ways in which it differs from any version actually written or authorized by Joyce while he was alive.

Mr. Justice Lloyd, of the Chancery Division of the UK High Court of Justice, needed 85 paragraphs of close analysis to resolve this dispute. But in the end, he resolved it largely, though not entirely, in favor of the trustees.

He found that publication of the Reader's Edition was not authorized by Regulation 23, because no agreement for its publication had been entered into between Rose and Macmillan before 1995, and the work Rose did on the book before 1995 did not amount to "arrangements."

Justice Lloyd did find that Regulation 24 would have authorized the publication of the Reader's Edition - subject to the payment of reasonable royalties - if it had consisted entirely of material that appeared in the 1922 version whose copyright had expired and then been revived. However, the Reader's Edition did not consist solely of material from the 1922 version; it also contained material from the "Rosenbach manuscript." And Justice Lloyd ruled that material in the "Rosenbach manuscript" that was not in the 1922 version was not published when the 1922 version was published; so the copyright to that material from the

"Rosenbach manuscript" never expired and is not subject to Regulation 24. That is, the Reader's Edition does infringe the copyright to the "Rosenbach manuscript." And Macmillan's willingness to pay "reasonable royalties" under Regulation 24 does not help.

The only complete victory Macmillan and Rose took from the case was Justice Lloyd's ruling in their favor on the trustee's "passing off" claim. The justice held that there is no way to define a "class" of goods that includes all authorized editions of Ulysses but excludes the Reader's Edition.

The Joyce trustees were represented by John Baldwin Q.C. and Fiona Clark, instructed by Bird & Bird. Macmillan and Rose were represented by Guy Burkill, instructed by Denton Wilde Sapte.

Sweeney v. Macmillan Publishers Limited, Case No. CH 1997 S 3257 (UK High Court of Justice, Chancery Div., Nov. 22, 2001), available at www.courtservice.gov.uk [ELR 23:11:6]

RECENT CASES

Bruce Springsteen's victory in copyright case in British court, that confirmed his ownership of copyrights to early songs and recordings, bars company that claimed ownership of those copyrights from re-litigating its ownership claim in United States; so Springsteen wins copyright case in U.S. too

Bruce Springsteen has won a copyright infringement case here in the United States that was

almost identical to another case he won in the United Kingdom, a couple of years ago. Both cases involved the ownership of the copyrights to songs he wrote, and recordings he made, back in the early 1970s before he became a star.

The chain of title to those songs and recordings was not as perfect (or preserved) as it might have been. That permitted Pony Express Records and JEC Music to claim that they had acquired the copyrights to Springsteen's early songs and recordings from their original owners, even though Springsteen himself already had done so.

Pony Express and JEC licensed Masquerade Music, a British company, to make and sell CDs of Springsteen's early recordings in the U.K., which is what prompted the lawsuit won by Springsteen in that country. The Chancery Court ruled that Springsteen is now the owner of the copyrights to the songs and

recordings at issue in that case, rather than Masquerade's licensors; and the British Court of Appeals affirmed (ELR 23:1:9). Thus, when Pony Express and JEC attempted to re-litigate that issue in an infringement suit they filed against Springsteen here in the U.S., Springsteen argued they were precluded from doing so by the British judgment.

Federal District Judge Harold Ackerman has agreed. Judge Ackerman noted that the Full Faith and Credit clause of the Constitution did not require him to recognize the British judgment, because that Clause only applies to judgments of U.S. state courts; nor does any federal law or treaty require the recognition of British judgments in the U.S. On the other hand, the doctrine of "comity" often does require the recognition of foreign judgments by U.S. courts, and does in this case, Judge Ackerman ruled.

Pony Express and JEC argued that they had not been parties to the British case, and thus the doctrine of comity should not preclude their claims in the U.S. However, even though they weren't parties, they did know of the case, and had in fact submitted evidence in support of their licensee, Masquerade. Moreover, they had a legal right to participate in that case, Judge Ackerman concluded, and simply chose not to. For this reason, the fact that they were not actual parties to the British case did not prevent Judge Ackerman from applying the comity doctrine.

The question of whether Springsteen owned the copyrights at issue in the British case, or Masquerade's licensors, Pony Express and JEC, owned those copyrights, was in part an issue of fact and in part an issue of British copyright law. Though British law was somewhat different than U.S. law at the time Springsteen acquired the copyrights from their original

owners, British law was then stricter than U.S. law and more difficult for Springsteen to satisfy. The facts found by the British court nevertheless enabled Springsteen to satisfy the British standard, and those facts certainly enabled him to satisfy the then more lenient U.S. standard. Judge Ackerman therefore held that the British judgment in favor of Springsteen barred Pony Express and JEC from re-litigating their ownership claim in the U.S. The judge dismissed Pony Express' and JEC's infringement claims against Springsteen, and the judge granted judgment in favor of Springsteen on his copyright infringement counterclaims against them.

Pony Express and JEC were represented by Frank J. Cozzarelli of Cozzarelli & Mautone in Belleville, N.J. Springsteen was represented by Stephen M. Greenberg of Stern & Greenberg in Roseland, N.J.

Pony Express Records, Inc. v. Springsteen, 163 F.Supp.2d 465, 2001 U.S.Dist.LEXIS 17654 (D.N.J. 2001) [ELR 23:11:8]

Dreamworks wins dismissal of suit alleging "The Peacemaker" was copied from works about former Green Beret Keith Idema

Dreamworks and several co-defendants - including Steven Spielberg and Random House - have defeated a lawsuit filed against them in federal court by former Green Beret Keith Idema and three others who wrote a novel, articles, a treatment and a screenplay dramatizing Idema's life and career. The lawsuit alleged that Dreamworks' movie "The Peacemaker," which starred Nicole Kidman, infringed the copyrights to

those written works, and violated other rights of Idema and his co-plaintiffs under state law.

Judge Audrey Collins has dismissed the copyright infringement claims, because she found that "The Peacemaker" was not substantially similar to the novel and other written works about Idema's life. The judge explained why this was so in a 70-page decision that describes the various works in remarkable detail, including a chapter-by-chapter synopsis of the novel and a scene-by-scene synopsis of the movie. While this portion of the decision will be of interest to anyone who saw the movie, Judge Collins' analysis will be of interest to plagiarism lawyers and other judges because it illustrates, quite well, important principles of copyright law.

The plots of the movie and the allegedly infringed novel shared two "notable" similarities. One was a similarity between a border-crossing scene in the

novel (and the other written works) and a checkpoint scene in the movie. The other was a similarity between a "similar mistake" made in both, namely, the suggestion that a nuclear warhead carried in a backpack could destroy ten city blocks.

Judge Collins ruled that these similarities "would not be nearly enough" to make the novel and the movie "substantially similar," even if they were protected expression. Moreover, and equally important, they were not protected expression at all, for at least four reasons.

First, in works about the idea of smuggling, the border-crossing scene merged with the story idea or was a standard scenes a faire element. Second, the border-crossing scene was based on "real events," to which Idema and his co-plaintiffs cannot claim exclusive rights, even if Dreamworks and its co-defendants learned of those events only by reading the novel. Third, it was not clear that the warhead in the

movie was the same size as the one in the novel, but even if it were, the warhead in the novel was reported as an actual "fact" which "any author is explicitly allowed to mine (even [from] copyrighted) sources. . . ."

Finally, Judge Collins found that Idema's character, as depicted in the novel and other writings, is not protected, because copyright law gives him "no exclusive right to [the] 'facts' of his life." In any event, the judge added, Idema and the movie's character Devoe were not "substantially similar," because to the extent they were similar, it was "only with respect to traits that are so generalized and/or cliché as to be nearly scenes a faire of the military/action genre. . . ." Judge Collins dismissed most the plaintiff's state law claims with prejudice, because several of them were preempted by federal copyright law and others failed to state valid claims as a matter of state law. She

dismissed two state law claims without prejudice, because they were not preempted and might be capable of being amended to allege valid state law claims.

Idema represented himself. His co-plaintiffs were represented by David Olan in Los Angeles. Dreamworks and its co-defendants were represented by Terence J. Clark of Squire Sanders & Dempsey in Los Angeles, by Stephen Contopulos of Sidley Austin Brown & Wood in Los Angeles, and by Louis Petrich of Leopold Petrich & Smith in Los Angeles.

Idema v. Dreamworks, Inc., 162 F.Supp.2d 1129, 2001 U.S. Dist. LEXIS 14810 (C.D. Cal. 2001) [ELR 23:11:8]

Oral personal management contract between rap artist RZA and DME Management is not barred by California statute of frauds, nor is it too indefinite to be enforced

Popular rap artist RZA may have to pay commissions to his former manager, as a result of rulings made by a federal judge in New York City. David Ehrlich, who lives in California and does business as DME Management, once managed RZA, who now lives in New York, pursuant to an oral agreement negotiated and entered into in California.

The reason that it matters where Ehrlich and RZA live, and where they entered into their agreement, is that Ehrlich's lawsuit claims commissions based on RZA's earnings more than a year after the management agreement began.

Under California's statute of frauds, the agreement is enforceable, because either party could have terminated it within one year, even though it may require RZA to pay commissions for more than a year on deals done by Ehrlich before the agreement was terminated. New York's statute of frauds, on the other hand, would have invalidated the management agreement, because it requires agreements to be in writing if either party has any rights after a year, as Ehrlich alleges he does.

Judge Raymond Dearie decided that California, rather than New York, law applies to the management agreement, because the agreement was entered into and performed by Ehrlich in California. As a result, enforcement of the agreement is not barred by California's statute of frauds (even though it would have been barred by New York's statute of frauds).

Judge Dearie also ruled that the oral agreement is not too indefinite to be enforced. Earlier California cases had held that the role of a personal manager is sufficiently well known in California that Ehrlich's oral agreement to serve as RZA's personal manager was definite enough to be enforceable.

For these reasons, the judge has denied RZA's motion to dismiss Ehrlich's lawsuit.

Ehrlich was represented by Michael J. Gerstein in New York City. RZA was represented by Nicole Page of Scarola & Reavis in New York City.

Ehrlich v. Diggs, 169 F.Supp.2d 124, 2001 U.S. Dist. LEXIS 17665 (E.D.N.Y. 2001) [ELR 23:11:9]

Dismissal of right of publicity and other claims by heirs of Temptations against producers of NBC mini-series is affirmed on appeal

Docudramas do not violate the rights of publicity of those who are portrayed - even if the portrayal is fictionalized - the Sixth Circuit Court of Appeals has held, in a case that complained about an NBC mini-series that dramatized the story of the Temptations. The production was based on a book by Otis Williams who was one of the original Temptations. But the producers did not get releases from the daughter or other heirs of David Ruffin, another member of the group.

Early in the case, federal District Judge John Feikens denied, on First Amendment grounds, a motion by Ruffin's daughter seeking a preliminary injunction that would have barred the telecast entirely (ELR 20:10:7). Later, Judge Feikens granted a defense

motion dismissing all of the heirs' claims (ELR 22:1:12). In an opinion by Judge Joseph Hood, the Sixth Circuit has affirmed the dismissal of those claims, for the very reasons cited by Judge Feikens.

The Court of Appeals has ruled that the use of the heirs' "fictionalized likenesses in a work protected by the First Amendment . . . did not give rise to a claim for relief under the [heirs'] rights of publicity. . . ." Advertising for the mini-series didn't violate the heirs' rights of publicity either, Judge Hood concluded. Claims for "unjust enrichment" simply duplicated the heirs' rights of publicity claims, so those were properly dismissed as well.

A defamation claim by Ruffin's widow was dismissed, because she had died, and the law of Mississippi, where she was domiciled, does not permit defamation claims to survive a plaintiff's death, even if those claims were filed before death. On appeal, it was

argued that the widow died in Alabama, so that Alabama law should have been applied to her defamation claim rather than Mississippi law. Judge Hood determined that the defamation claim had been properly dismissed under Mississippi law, but that even if Alabama law applied, the result would have been the same, because injuries to reputation do not survive death in that state either.

Finally, Judge Hood held that the heirs' infliction of emotional distress claims were properly dismissed too. They were, the judge explained, because even "assuming each of the inaccuracies described in [the heirs'] complaints . . . is inaccurate in the manner described by [them], defendants' actions in producing the story . . . about the Temptations cannot be considered so extreme in degree as to go beyond all bounds of decency."

The heirs were represented Gregory J. Reed in Detroit. The mini-series' producers were represented by Herschel P. Fink of Honigman Miller Schwartz & Cohn in Detroit. NBC was represented by Gregory M. Kopacz of Dykema Gossett in Bloomfield Hills.

Ruffin-Steinback v. dePasse, 267 F.3d 457, 2001 U.S.App.LEXIS 21085 (6th Cir. 2001) [ELR 23:11:10]

eBay is immune from copyright liability for users' sale of pirated "Manson" videos, because cease-and-desist letters sent by producer of allegedly infringed video did not comply with notice requirements of Digital Millennium Copyright Act

Federal District Judge Robert Kelleher has dismissed a copyright infringement suit filed against

eBay by the producer of the video documentary "Manson," because the cease-and-desist letters the producer sent to eBay did not comply with the notice requirements of the Digital Millennium Copyright Act. According to producer Robert Hendrickson, pirated copies of "Manson" were being auctioned on eBay's site; and for all anyone knows, that may have been true.

The DMCA imposes copyright liability on internet service providers that permit their facilities to be used by infringers, despite knowledge of that use. But the DMCA also provides service providers immunity from liability, unless they have actual or constructive knowledge of the infringement or receive a written notice containing specific elements required by the Act itself.

Hendrickson sent eBay aggressive cease-and-desist letters, but those letters did not contain the elements required by the DMCA. They didn't, for

example, identify the "Manson" copies that Hendrickson claimed were pirated, even though each item available on eBay has a unique eBay number. Nor did he declare under penalty of perjury that the facts asserted in his letters were true.

To its credit, eBay notified Hendrickson, more than once, that he should submit a proper infringement notice; it even told him exactly what information the notice should contain. Hendrickson, however, stubbornly refused to do so. Instead, when eBay sought dismissal of his lawsuit, Hendrickson argued that his letters and follow-up phone conversations with eBay were good enough to substantially satisfy the DMCA's requirements, and in any event gave eBay actual knowledge that its users were infringing his copyright.

Judge Kelleher rejected both of these arguments. The judge acknowledged that not all notices to eBay need to contain eBay's identification numbers. "For

example," Judge Kelleher said, "if a movie studio advised eBay that all listings offering to sell a new movie (e.g., 'Planet X') that has not yet been released in VHS or DVD format are unlawful, eBay could easily search its website using the title 'Planet X' and identify the offensive listings." In Hendrickson's case, however, "Manson" had been released in VHS, and thus some copies offered for sale on eBay may have been legitimate. Though Hendrickson said that he orally gave eBay the names of the sellers of infringing copies eventually, that wasn't good enough, because the DMCA requires notices to be in writing and under oath.

Moreover, Judge Kelleher concluded that Hendrickson's cease-and-desist letters did not give eBay knowledge of its infringing users, because the DMCA itself provides that knowledge should not be based on defective notices.

Hendrickson represented himself. eBay was represented by Jeffrey E. Scott and Raymond B. Kim in Santa Monica.

Hendrickson v. eBay, Inc., 165 F.Supp.2d 1082, 2001 U.S. Dist. LEXIS 14420 (C.D. Cal. 2001) [ELR 23:11:10]

Isaac Hayes' transfer of "all contract rights" to royalties from pre-1978 songs gave transferees the right to continue receiving those royalties after songs' copyrights were renewed

Several songs written by Isaac Hayes between 1968 and 1974 continue to earn royalties today, though Hayes himself hasn't collected those royalties since 1978. He hasn't, because he went bankrupt in 1978,

after borrowing \$1.5 million from Planters Bank. When he borrowed that money, he gave the bank security interests in all of his contract rights to receive royalties, so when he went bankrupt, the Bank foreclosed on Hayes' contract rights and then sold and assigned them to predecessors of Carlin America, Inc. and other music publishers.

Carlin and the other publishers were receiving those royalties when the copyrights to the songs themselves were renewed. But when those copyrights were renewed, Hayes claimed that he was entitled to the songs' royalties during their renewal terms, rather than the publishers that had acquired his royalty rights. Hayes made this claim in a lawsuit in federal court in New York City; but he hasn't been successful.

Judge Louis Stanton has held that financing statements signed by Hayes when he borrowed from Planters Bank transferred Hayes' rights to royalties

during his songs' copyright renewal terms (in addition to their original terms), because they gave the Bank "all contract rights" to royalties, including those "hereafter arising. . . ."

As a result, Carlin and the other publishers were entitled to continue collecting royalties from Hayes' songs during their renewal terms, because Carlin and the other publishers had acquired those rights from predecessors who had acquired them from the Bank.

Hayes was represented by Jane G. Stevens and Christopher T. Bavitz in New York City. Carlin and the other publishers were represented by Robert C. Osterberg of Abelman Frayne & Schwab in New York City.

Hayes v. Carlin America, Inc., 168 F.Supp.2d 154, 2001 U.S. Dist. LEXIS 16984 (S.D.N.Y. 2001) [ELR 23:11:11]

California appellate court affirms dismissal of Oakland Raiders' lawsuit complaining about NFL's operation of European football league

The Oakland Raiders have sued the NFL, its clubs, its commissioner and others, because - the Raiders say - the League's leadership has abused its powers and damaged the Raiders in the process. Among many other things, the Raiders object to the NFL's operation of "NFL Europe," a league that plays American style football in Europe.

As a result of a series of motions for summary adjudication, virtually all of the defendants in the case won dismissal of the Raiders' claims against them. Judgment was then entered in their favor, bringing the Raiders' case against them to a complete end, except for the Raiders' inevitable appeal.

Now, the appeal has been resolved as well. In an opinion by Justice Eugene Premo, the California Court of Appeal has affirmed the dismissal of the Raiders' lawsuit, on two grounds, neither of which is unique to sports law.

Justice Premo decided first that the NFL's operation of NFL Europe does not "plainly contravene" NFL bylaws, and thus, by virtue of the "abstention doctrine," courts should not intervene into the internal affairs of the League, because it is a "private voluntary association."

Despite the abstention doctrine, California courts may intervene into the affairs of private voluntary associations if the complaining member is able to show that it would have been "futile" for it to demand that the association itself take action. In this case, though, the Raiders failed to show - though it attempted to - that it would have been futile for it to make such a demand.

The Raiders were represented by Jeffrey Birren in Alameda. The NFL was represented by Dale E. Barnes of McCutchen Doyle Brown & Enersen in San Francisco.

Oakland Raiders v. National Football League, 113 Cal.Rptr.2d 255, 2001 Cal.App.LEXIS 1174 (Cal.App. 2001) [ELR 23:11:11]

In response to petition for rehearing, Court of Appeals reinstates some claims by Latrell Sprewell against Golden State Warriors and NBA, in suit triggered by termination of his contract by the Warriors and his suspension by NBA

Basketball fans, and many others, will remember that Latrell Sprewell once played for the Golden State

Warriors, and that his tenure with the team came to an abrupt end in 1997 after he choked, punched and threatened to kill P.J. Carlesimo who was then the Warriors' head coach. As a result of that incident, the Warriors suspended him for ten days and then terminated his contract, and the NBA suspended him for a year.

Sprewell responded by filing a grievance, as the NBA collective bargaining agreement allowed him to do. In due course, the arbitrator issued a decision that largely - but not entirely - favored the player. Sprewell therefore pursued the case to federal court, where he sought an order vacating the arbitrator's decision, on several grounds. Sprewell was not however successful in court, at least not at first. District Judge Vaughn Walker dismissed Sprewell's lawsuit, and sanctioned his attorneys for filing a "baseless" amended complaint.

And the Ninth Circuit Court of Appeals affirmed that ruling, in all respects (ELR 22:11:19).

Never one to quit, on or apparently off the court, Sprewell filed a petition for rehearing with the Ninth Circuit. Though such petitions are rarely granted, Sprewell's was. Upon reconsideration, the Ninth Circuit has held that the player's claims under California state law are not preempted by federal labor law (as the court had earlier ruled) insofar as they are based on the Warriors' and NBA's alleged instigation of a media campaign designed to portray Sprewell "in a false and negative light." The appellate court therefore remanded these claims to the District Court for further consideration.

Moreover, because part of Sprewell's case now survives, the appellate court also remanded for further consideration the question of whether sanctions should have been imposed on his lawyers.

Sprewell was represented by Peter F. Utrecht in San Francisco. His lawyers were represented by Richard R. Dale in Mill Valley. The Warriors and NBA were represented by Jeffrey A. Mishkin of Skadden Arps Slate Meagher & Flom in New York City.

Sprewell v. Golden State Warriors, 266 F.3d 979, 2001 U.S.App.LEXIS 20434 (9th Cir. 2001), petition for rehearing and rehearing en banc denied, 275 F.3d 1187, 2001 U.S.App.LEXIS 28424 (9th Cir. 2001) [ELR 23:11:12]

Chicago Tribune's use of "The Joy of Six" on memorabilia to celebrate Chicago Bulls' sixth NBA championship did not infringe "the joy of six" trademark, appellate court affirms

When the Chicago Bulls won their sixth NBA championship in 1998, the Chicago Tribune trumpeted their victory with a front-page headline reading "The Joy of Six." Then, as it had done on earlier "historic occasions," the Tribune reproduced the entire page on t-shirts, posters and other memorabilia - "Joy of Six" headline and all.

This seemingly innocent act got the Tribune sued by a lady named Diana Packman. She had earlier registered "the joy of six" as a trademark, under state and federal law, for entertainment services related to football and basketball games. According to her

lawsuit, the Tribune's use of the phrase infringed her trademark.

Packman did not enjoy success with her suit. It was dismissed by federal District Judge Charles Kocoras. And, in an opinion by Judge Kenneth Ripple, the Seventh Circuit Court of Appeals has affirmed.

Judge Ripple concluded that Packman failed to show there was any likelihood of confusion between the services she offers and the merchandise sold by the Tribune. And he concluded that the Tribune had used "The Joy of Six" phrase in a descriptive, non-trademark fashion, and thus its use was a non-infringing fair use.

Packman was represented by Reginald J. Hill in Chicago. The Tribune was represented by James A. Klenk of Sonnenschein Nath & Rosenthal in Chicago.

Packman v. Chicago Tribune Co., 267 F.3d 628, 2001 U.S.App.LEXIS 21047 (7th Cir. 2001) [ELR 23:11:12]

NCAA may be subject to Title IX ban on sex discrimination because of its relationship with national youth sports program that receives federal financial assistance, appeals court rules in case filed by graduate student who was ineligible to play volleyball

Renee Smith may get to trial yet, in her Title IX lawsuit against the NCAA. Her case has been pending for six years. But so far the case has been bounced from District Court to Court of Appeals to the Supreme Court and back to the Court of Appeals - all over the issue of whether the NCAA is subject to Title IX at all. Now it looks as though the NCAA may be subject to Title IX, if certain facts are proved at trial, as a result of the Court of Appeals' second and most recent decision in the case.

Renee Smith was a graduate student at the University of Pittsburgh when she filed her lawsuit. She had played intercollegiate volleyball for two seasons while an undergraduate at St. Bonaventure University, and she wanted to continue doing so at the University of Pittsburgh. Pittsburgh applied to the NCAA for a waiver of the Postbaccalaureate Bylaw on Smith's behalf; but the NCAA denied Pittsburgh's request.

According to Smith, the NCAA administers the "Postbaccalaureate Bylaw" in a way that violates Title IX, because, she alleges, it grants more waivers to male than female postgraduate student-athletes. Title IX is the federal statute that bans sex discrimination by educational institutions that receive federal financial assistance. The NCAA's "Postbaccalaureate Bylaw" makes graduate students ineligible for intercollegiate sports, unless they play for the same schools where they earned their undergraduate degrees.

When Smith's case last appeared in these pages, the Supreme Court had just ruled that the NCAA is not subject to Title IX simply because it receives dues from colleges and universities that do receive federal financial aid (ELR 20:11:7). That ruling did not bring Smith's case to a complete end, however, because she also argued that Title IX applies to the NCAA for two other reasons: because it receives federal aid through the NCAA-administered National Youth Sports Program; and because the NCAA's members have given it authority to control their athletic programs. Since neither of those arguments had been addressed by the lower courts, the Supreme Court remanded the case to for further proceedings.

Now, the Third Circuit Court of Appeals has ruled that the NCAA does not exercise controlling authority over its members athletic programs of the kind that would have made the organization subject to

Title IX for that reason. However, in an opinion by Judge Richard Nygaard, the appellate court has held that Smith may be able to prove that the NCAA is subject to Title IX because of its relationship with the National Youth Sports Program - a program that receives federal financial assistance. Judge Theodore McKee concurred, in a lengthy opinion of his own. As a result, Smith's case has been remanded to the District Court for further proceedings.

Smith was represented by Virginia A. Seitz of Sidley & Austin in Washington D.C. The NCAA was represented by Carole S. Katz of Sweeney Metz Fox McGrann & Schermer in Pittsburgh and by John J. Kitchin of Swanson Midgley in Kansas City.

Smith v. National Collegiate Athletic Association, 266 F.3d 152, 2001 U.S.App.LEXIS 18910 (3rd Cir. 2001) [ELR 23:11:12]

Ohio court approves settlement of class action lawsuit by former season ticket holders of old Cleveland Browns

Season ticket holders of the old Cleveland Browns will receive \$50 each in settlement of their class action lawsuit against the team's owner, or they may donate that \$50 to a charitable fund created by the settlement for the purpose of supporting youth football and other youth activities in Northeast Ohio. The settlement has been approved by Ohio Court of Common Pleas Judge Kenneth Callahan, after none of the 11,000 class members voiced objection.

The lawsuit was triggered by the Browns' 1995 move to Baltimore where they became the Baltimore Ravens. The current Cleveland Browns are a new team, unrelated to the team that moved and got sued for doing so.

As a result of pre-settlement rulings, the case was "distilled" to the claim that the Browns' move deprived its season ticket holders of an implied right of first refusal to buy seats in the team's new stadium in Baltimore (ELR 21:9:20). The value of that right was in serious dispute. The class member's expert said it was worth \$6.45 million dollars, while the team's expert said it was worth nothing and certainly no more than \$1.2 million.

Settlement payments could total \$550,000, if all 11,000 class members seek their payouts. Judge Callahan approved the settlement with the observation that the parties, and he, "hope . . . that the creation of a significant charitable fund that benefits children will . . . alleviate the residual sense of injustice this chapter of local history has produced."

The class plaintiffs were represented by Joshua R. Cohen of Gary Naegelle & Theado in Cleveland.

The Browns were represented by Gerald A. Messerman of Messerman & Messerman in Cleveland and by Michael D. Colglazier of Hogan & Hartson in Baltimore.

Beder v. Cleveland Browns, Inc., 758 N.E.2d 307, 2001 OhioMisc.LEXIS 21 (Ohio Com.Pl. 2001) [ELR 23:11:13]

U.S. court to hear antitrust lawsuit by NHL Players' Association against Ontario Hockey League complaining that Canadian league's 20-year-old eligibility rule violates antitrust law

United States District Judge Victoria Roberts has refused to dismiss an antitrust lawsuit filed by the National Hockey League Players' Association against

the Ontario Hockey League and its teams, even though most of the defendants are Canadians.

At issue in the case is an eligibility rule that prohibits 20-year-old U.S. college players from playing in the Ontario Hockey League. The rule - known as the "Van Ryn Rule" - has a colorful history, resulting, it has been alleged, from Mike Van Ryn's signing with the National Hockey League's St. Louis Blues for "significantly more" than he would have received from the NHL team that originally drafted him, the New Jersey Devils, after playing for an OHL team until New Jersey's draft rights expired.

The merits of the Van Ryn Rule have not yet been argued to Judge Roberts, because at the outset of the case, the Canadian defendants made a motion to dismiss on two grounds: forum non conveniens (inconvenient forum), and lack of personal jurisdiction. The judge has denied that motion.

She rejected the forum non conveniens argument, because she concluded that Canadian courts - where the Canadian defendants wanted the case to be heard - were not an adequate alternative. They were not, she explained, because Canadian antitrust law may not apply to the OHL at all, and in any event does not provide for the injunctive relief that the NHL Players' Association seeks.

Judge Roberts rejected the lack of personal jurisdiction argument, because the OHL has a team in Michigan and because the OHL has a "highly interactive website" from which it advertises and sells tickets and merchandise. As a result, the judge concluded, the OHL and its teams do business in Michigan.

The NHL Players' Association was represented by William A. Sankbeil of Kerr Russell in Detroit. The

OHL and its co-defendants were represented by Stephen Wasinger of Wasinger Kickham in Royal Oak.

National Hockey League Players' Association v. Plymouth Whalers Hockey Club, 166 F.Supp.2d 1155, 2001 U.S.Dist.LEXIS 20540 (E.D.Mich. 2001) [ELR 23:11:13]

Michigan appellate court reverses million dollar judgment against Detroit Tigers awarded to spectator injured by flying bat fragment; screening satisfied Tigers' limited duty to protect spectators, court rules

The Detroit Tigers have escaped a million dollars in liability to Alyssia Benejam, a young spectator who

was injured when a broken bat fragment flew around the stadium's protective netting and crushed her fingers.

A jury awarded Benejam \$917,000 in noneconomic damages, \$56,700 in lost earning capacity, and \$35,000 in medical expenses, after a Michigan state trial judge rejected the Tigers' arguments that they could not be held liable, as a matter of law.

However, in an opinion by Judge Richard Bandstra, the Michigan Court of Appeals has reversed that judgment. Judge Bandstra agreed with earlier decisions in other states that the owners of baseball stadia have only a "limited duty" to spectators. That duty is to provide screened seats behind home plate and to provide protective screening for as many additional seats as are necessary to meet ordinary demand.

Tiger Stadium satisfies that standard, and thus the team was not liable for Benejam's injuries, unfortunate though they were.

Benejam was represented by James O. Elliott in Bloomfield Hills. The Tigers were represented by Barbara H. Erard of Dickinson Wright in Detroit.

Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 2001 Mich.App.LEXIS 146 (Mich.App. 2001) [ELR 23:11:14]

Mannequin head not protected by copyright, after all, federal court rules in 11-year-old case

After 11 years of litigation, Judge Frank Easterbrook has dismissed a lawsuit filed by Pivot Point International against Charlene Products - a

lawsuit that complained that the copyright to a Pivot Point mannequin head named "Mara" was infringed by Charlene Products' similar mannequin head named "Liza."

Judge Easterbrook ruled that Pivot Point's head is not eligible for copyright protection, because it does not contain sculptural features that can be identified separately, and are capable of existing independently, from "Mara's" utilitarian function. This was significant, because copyright law protects works of sculpture, but not their utilitarian functions. Thus, if a work's sculptural features can't be separately identified and can't exist independently from its utilitarian functions, the work isn't protectible.

Though Judge Easterbrook is a judge of the Seventh Circuit Court of Appeals, he brought this case to an end (unless there's an appeal) while sitting by designation as a judge of the Northern District of

Illinois. He was in fact the fifth district judge assigned to the case. One of the remarkable things about his decision is that eight years earlier, one of those other judges had ruled that "Mara's" sculptural features may be capable of being identified separately and existing independently from its utilitarian function (ELR 15:7:26). Judge Easterbrook didn't hesitate to set aside that ruling, in part because that ruling had set aside a yet earlier ruling that "Mara" was not eligible for copyright protection.

In other words, after 11 years in the District Court, the case is back where it was after Charlene Products' first summary judgment motion: done.

Pivot Point was represented by Robert Edward Browne of Altheimer & Gray in Chicago. Charlene Products was represented by Thomas John Ring of Wildman Harold Allen & Dixon in Chicago.

Pivot Point International, Inc. v. Charlene Products, Inc., 170 F.Supp.2d 828, 2001 U.S.Dist.LEXIS 16347 (N.D.Ill. 2001) [ELR 23:11:14]

Courts reject argument by Polaris Amphitheater that city ordinance, adopted in response to complaints about noise from music concerts, is unconstitutional prior restraint

Bands that perform popular music in concerts at the Polaris Amphitheater may no longer be able to play as loudly as they like. The Amphitheater is located near Westerville, Ohio, and that city has adopted an ordinance that limits the decibel level of sounds produced by electronic amplifying equipment during evening and nighttime hours. Among other remedies, the ordinance authorizes Westerville to seek an

injunction against anyone who has violated it and is likely to do so again.

The ordinance was adopted in response to citizen complaints about "noise" from concerts at the Amphitheater. That, no doubt, is what led the Amphitheater to seek a judgment declaring the ordinance to be an unconstitutional prior restraint. But federal District Judge James Graham disappointed the Amphitheater by granting judgment for the city. And that judgment has been affirmed on appeal.

In a short decision for the Sixth Circuit Court of Appeals, Judge Nathaniel Jones has held that the ordinance does not run afoul of the First Amendment, for two reasons: because it "is entirely content-neutral, regulating only the time, place, and manner in which artists may engage in expressive activity at the Polaris Amphitheater"; and because the ordinance is "narrowly drawn to regulate decibels at certain hours, [and] does

not burden the content of protected speech, or permit unfettered official discretion."

Polaris Amphitheater was represented by Benson A. Wolman of Wolman Genshaft & Gellman in Columbus. Westerville was represented by Steven F. Pflaum of McDermott Will & Emory in Chicago.

Polaris Amphitheater Concerts v. City of Westerville, 267 F.3d 503, 2001 U.S.App.LEXIS 21372 (6th Cir. 2001) [ELR 23:11:15]

Sellers of unauthorized cable TV descramblers are subject to penalties under section 553 of Communications Act but not heavier penalties under section 605, federal Court of Appeals decides

The sale of unauthorized cable TV descramblers is prohibited by the federal Communications Act, in two separate sections - section 553 and section 605. For most people, it doesn't matter which section applies. All that matters is that it's illegal to sell so-called black box decoders.

However, the question of which section applies did matter to Cable City Corporation, because it sold illegal decoders to customers in New Jersey and got sued by TKR Cable Company for doing so. Section 605 authorizes courts to award much greater damages than are authorized by section 553. Relying on section 605, federal District Judge Garrett Brown awarded TKR

\$160,000 in statutory damages, while section 553 would have authorized no more than \$50,000 in damages.

The difference between \$50,000 and \$160,000 seemed worth an appeal; Cable City took one; and it has been rewarded for that effort. In an opinion by Judge Julio Fuentes, the Third Circuit Court of Appeals has held that section 605 only applies to the unauthorized interception of over-the-air television signals, not to the interception of cable signals; and thus section 553, which does apply to the interception of cable signals, is the only section under which damages should have been awarded against Cable City. The case has therefore been remanded to the District Court so damages may be reassessed, at the lower rate authorized by section 553.

Though the issue may seem arcane, and those who raise it unworthy of judicial deference, the

Supreme Court itself may yet take up the question of whether section 605 may be used to penalize the illegal sale of cable TV decoders. In an earlier unrelated case, the Second Circuit Court of Appeals held that section 605 does apply to the interception of cable signals (ELR 18:5:19) - a conclusion with which Judge Fuentes expressly "disagree[d]." Only the Supreme Court is able to resolve this conflict among the Circuits, unless Congress decides to do so by amending the Communications Act.

TKR Cable Company was represented by Patrick J. Sullivan of Lefkowitz Louis and Sullivan in Jericho, N.Y. Cable City Corporation was represented by Eugene P. Franchino in Flemington, N.J.

TKR Cable Co. v. Cable City Corp., 267 F.3d 196, 2001 U.S.App.LEXIS 21237 (3rd Cir. 2001) [ELR 23:11:15]

Previously Reported:

Supreme Court denies cert. The United States Supreme Court has denied petitions for certiorari in: *Feltner v. Columbia Pictures Television*, 122 S.Ct. 1063, 2002 U.S.LEXIS 649 (2002), in which the Ninth Circuit Court of Appeals affirmed a \$31.7 million jury verdict in favor of Columbia Pictures in a copyright infringement case against the owner of TV stations that continued to broadcast programs after Columbia had terminated their licenses (ELR 23:4:11); and *City of Tampa v. Voyeur Dorm*, 122 S.Ct. 1172, 2002 U.S.LEXIS 1187 (2002), in which the Eleventh Circuit Court of Appeals ruled that Voyeur Dorm does not violate a Tampa City Code provision that prohibits adult entertainment establishments in residential neighborhoods, because the entertainment Voyeur

Dorm provides may be viewed only on the web (ELR 23:10:21).

"In the News" Decisions published. Decisions that were previously reported in the "In the News" section of the Entertainment Law Reporter have been published: Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 2001 U.S.App.LEXIS 21690 (11th Cir. 2001) (ELR 23:6:10); Yahoo!, Inc. v. La Ligue Contre Le Rascisme, 169 F.Supp.2d 1181, 2001 U.S.Dist.LEXIS 18378 (N.D.Cal. 2001) (ELR 23:7:6); and DVD Copy Control Association v. Bunner, 113 Cal.Rptr.2d 338, 2001 Cal.App.LEXIS 1179 (Cal.App. 2001) (ELR 23:7:4, 23:10:23).

Rolling Stone victory in defamation case affirmed. The Ninth Circuit Court of Appeals has affirmed the dismissal of a defamation lawsuit filed

against Rolling Stone Magazine by D.A.R.E. America (ELR 22:6:19). In a short ruling by Judge Pamela Rymer, the appellate court judges said that they "agree with and adopt the well reasoned opinion of the district court . . ." on most issues. D.A.R.E. America v. Rolling Stone Magazine, 270 F.3d 793, 2001 U.S.App.LEXIS 22852 (9th Cir. 2001).

Court refuses to reopen art collectors' suit against dealer gallery. Federal District Judge Miriam Cedarbaum has denied a motion by art collectors Claude and Rene Boule to reopen their lawsuit against an art dealer and gallery that had disparaged as "fakes" certain works in the Boules' collection attributed to Russian artist Lazar Khidekel. After the Boules were awarded only \$7,100 (ELR 23:5:14), they sought to reopen the case to introduce "newly discovered" evidence. Judge Cedarbaum declined to do so,

however, because the Boules had not shown that they could not have discovered the evidence before trial. *Boule v. Hutton*, 170 F.Supp.2d 441, 2001 U.S. Dist. LEXIS 18162 (S.D.N.Y. 2001).
[ELR 23:11:16]

DEPARTMENTS

Book Note:

Kohn on Music Licensing, Third Edition

by Al Kohn and Bob Kohn (Aspen Law & Business 2002)

Music publishers and songwriters make frequent appearances in the pages of the Entertainment Law Reporter, because their business is complicated, and complications provoke frequent litigation. At its heart,

however, music publishing isn't about lawsuits. It isn't even about "publishing" in the way the book and magazine businesses use the word "publishing." At its heart, the music publishing business is about licensing - about making deals that authorize the use of copyrighted musical compositions, and about documenting those deals with written contracts.

The reason the music publishing business is complicated is that: music is used in many different ways by many different types of users located in countries all around the world each of which has its own copyright law; many songs (unlike any computer programs) retain their commercial value for decades; copyright laws change frequently; and technology (having an impact on music use) changes even more frequently.

Fortunately for music publishers (and business-minded songwriters), there is a book to help them make

sense out of the complications they must live with. That book is Kohn on Music Licensing, the Third Edition of which has just been published by Aspen Law & Business. Written by Al Kohn, most recently V.P. of Music Licensing for Warner/Chappell Music, and his son Bob Kohn, the founder of Emusic.com (and more recently Laugh.com), Kohn on Music Licensing is the "bible" of the music publishing industry. (A disclosure: when Bob Kohn was a much younger man - not that he's old now, mind you), he was an Associate Editor of the Entertainment Law Reporter and he's still a member of its Editorial Advisory Board as well as an occasional contributor to its pages.)

Like its predecessors, this new Third Edition is a unique blend of textual discussion, analysis and advice, as well as a music publishing form book. Indeed, the book's forms - more than 60 of them - are not only printed (in an easy to read format) in the book, they

also are provided on an included CD-ROM (in rich text format, so they can easily be pulled into all types of word processors, and edited for use in actual deals).

In all, the Third Edition now runs to more than 1,600 pages (perfect bound, like a hardcover novel, so it lies flat on the desk while it's being read). This new edition updates everything that needed updating, but the most dramatic changes are in the chapter dealing with the licensing of music - compositions and recordings - for use on the Internet.

Since the prior edition was published, Congress has enacted two significant amendments to the Copyright Act: the Digital Performance Right in Sound Recordings Act and the Digital Millennium Copyright Act. And the Third Edition of Kohn on Music Licensing considers the music-licensing implications of both. The book goes beyond those Acts too, by addressing the distinctions between streaming and

downloading transmissions, interactive and non-interactive transmissions, cross-border digital phonorecord deliveries, and other recent developments. Topics that Entertainment Law Reporter subscribers have been reading about piecemeal in monthly installments are covered in a coherent, well-organized and intelligible fashion.

The Third Edition is \$165.00. For information about ordering a copy, go to www.KohnMusic.com.
[ELR 23:11:17]

In the Law Reviews:

Cardozo Arts & Entertainment Law Journal has published Volume 19, Number 3 with the following articles:

Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney, 19/3 Cardozo Arts & Entertainment Law Journal (2001)

Reconsidering the Federal Journalist's Privilege for Non-Confidential Information: Gonzales v. NBC by Anthony L. Fargo, 19/3 Cardozo Arts & Entertainment Law Journal (2001)

The Eighth Annual Hebert Tenzer Distinguished Lecture in Intellectual Property: E-Commerce, Business Method Patents, and the USPTO: An Old Debate for a New Economy by Q. Todd Dickinson, 19/3 Cardozo Arts & Entertainment Law Journal (2001)

Invading the "Homes" of the Homeless: Is Existing Right-of-Privacy/Publicity Legislation Adequate? by

Laurel Kallen, 19/3 Cardozo Arts & Entertainment Law Journal (2001)

Vertical Integration and Self-Dealing in the Television Industry: Should Profit Participants Be Owed a Fiduciary Duty? by Marc Simon, 19/3 Cardozo Arts & Entertainment Law Journal (2001)

Does Ethics Make Good Law? A Case Study by Jeff Storey, 19/3 Cardozo Arts & Entertainment Law Journal (2001)

Preserving the Collaborative Spirit of American Theater: The Need for a "Joint Authorship Default Rule" in Light of the Rent Decision's Unanswered Question by Paulette S. Fox, 19/3 Cardozo Arts & Entertainment Law Journal (2001)

Has the Computer Revolution Placed Our Children in Danger? A Closer Look at the Child Pornography Prevention Act of 1996 by Alison R. Gladowsky, 8 Cardozo Women's Law Journal (2001)

Columbia-Volunteer Journal of Law & the Arts has published Volume 24, Number 3 with the following articles:

Practical Limitations on Authors' Rights by John M. Kernochan, 24 Columbia-VLA Journal of Law & the Arts 263 (2001)

From Protections to Protection: Rethinking Italian Cultural Heritage Policy by Andrea Boggio, 24 Columbia-VLA Journal of Law & the Arts 269 (2001)

Inauthentic Works of Art: Why Bridgeman May Ultimately Be Irrelevant to Art Museums by Mitch Tuchman, 24 Columbia-VLA Journal of Law & the Arts 287 (2001)

New Directions for Copyright: The Property Rights of Stage Directors by Talia Yellin, 24 Columbia-VLA Journal of Law & the Arts 317 (2001)

Fordham Intellectual Property, Media & Entertainment Law Journal has published Volume XII, Number 2 as its Fifth Annual Symposium on Legal Issues in Professional Sports with the following articles:

The United States' and International Response to the Problem of Doping in Sports by Edward H. Jurith and Mark W. Beddoes, 12 Fordham Intellectual Property, Media & Entertainment Law Journal (2002)

Dispute Resolution at Games Time by Urvasi Naidoo and Neil Sarin, 12 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Labor Pains: Why Contraction Is Not the Solution to Major League Baseball's Competitive Balance Problems by Bryan Day, 12 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases by Alexander J. Drago, 12 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Sharing the Wealth: Don't Call Us. We'll Call You: Why Revenue Sharing Is a Permissive Subject and Therefore the Labor Exemption Does Not Apply by

Jessica Cohen, 12 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Start-Up Sports Leagues: Why These Leagues Are Entitled to Use the Ruinous Competition Defense to Justify Anticompetitive Restraints by Marc P. Schwartz, 12 Fordham Intellectual Property, Media & Entertainment Law Journal (2002)

Entertainment Law: Playing Catch-Up with New Technologies by Donald E. Biederman, March Los Angeles Lawyer 40 (2002)

What's Mine Might Be Yours: Why We Should Rethink the Default Rule for Copyright Co-Ownership in Joint Works by J. David Yarbrough, Jr., 76/2 Tulane Law Review (2001)

The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology by Raymond Shih Ray Ku, 69 The University of Chicago Law Review 263 (2002)

The Evolution and Revolution of Napster by Peter Jan Honigsberg, 36 University of San Francisco Law Review 473 (2002)

Authorship and Termination Rights in Sound Recordings by Mary LaFrance, 75 Southern California Law Review 375 (2002)

Trademarks and Keyword Banner Advertising by Gregory Shea, 75 Southern California Law Review 529 (2002)

That Which We Call a Domain By Any Other Name Would Smell as Sweet: The Overbroad Protection of Trademark Law As It Applies to Domain Names on the Internet, 53/2 South Carolina Law Review (2002)

The Regulation of New Media Broadcasting in Canada Post IcraveTV.com by Danistan Saverimuthu, 19/2 The John Marshall Journal of Computer & Information Law (2001)

Toward an American Moral Rights in Copyright by Ilhyung Lee, 58/3 Washington and Lee Law Review (2001)

Developments in U.S. Copyright Law 2000-2001: From Revising the Old South to Redefining the Digital Millennium by Alicia Morris Groos, 10 Texas Intellectual Property Law Journal 111 (2001)

Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content by Xavier Amadei, 35/1 Cornell International Law Journal (2002)

Towards a Solution for Dilution: Likelihood Instead of Actual Harm by Seth Aaron Rose, 62/6 Ohio State Law Journal (2001)

Smut on the Small Screen: The Future of Cable-Based Adult Entertainment Following *United States v. Playboy Entertainment Group* by Bradley A. Skafish, 54/2 Federal Communications Law Journal (2002) (published by Indiana University School of Law-Bloomington and the Federal Communications Bar Association)

When a Commercial Is Not a Commercial: Advertising of Violent Entertainment and the First Amendment by Joel Timmer, 7/2 Communication Law and Policy (2002) (published by Lawrence Erlbaum Associates, Mahwah, New Jersey)

Dimensions of Censorship: Reconceptualizing Public Willingness to Censor by Jennifer L. Lambe, 7/2 Communication Law and Policy (2002) (for address, see above)

Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment by Clay Calvert, 39 San Diego Law Review 1 (2002)

Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?, 39 San Diego Law Review 201 (2002)

Using Celebrities and Personalities as Spokespersons: Sample Agreement with Commentary by D. John Hendrickson and Jennifer V. Koester, Volume 22/3 The Licensing Journal 9 (2002) (published by Aspen Publishers, Inc.)

The Supreme Court Clarifies Electronic Rights for Freelancers and Publishers by Gregory A. Sebald and Robert A. Kalinsky, 22/4 The Licensing Journal 1 (2002) (published by Aspen Publishers, Inc.)

Valuing Intellectual Property Assets for Licensing Transactions by Mark Berkman, 22/4 The Licensing Journal 16 (2002) (published by Aspen Publishers, Inc.)

The Southwestern Journal of Law and Trade in the Americas, published by Southwestern University

School of Law, has issued Volume 8, Number 1 with the following articles:

Documentaries, Docudramas, and Dramatic License: Crossing the Legal Minefield by Roger L. Armstrong and Mark S. Lee, 8 Southwestern Journal of Law and Trade in the Americas (2002)

Retransmission of Television Broadcasts on the Internet by Dr. Sunny Handa, 8 Southwestern Journal of Law and Trade in the Americas (2002)

Antitrust Scrutiny of Intellectual Property Exploitation: It Just Don't Make No Kind of Sense by Daniel B. Ravicher and Shani C. Dilloff, 8 Southwestern Journal of Law and Trade in the Americas (2002)

Digital Dissemination of Cultural Information: Copyright, Publicity, and Licensing Issues in Cyberspace by Marilyn Phelan, 8 Southwestern Journal of Law and Trade in the Americas (2002)

How Encryption and National Security Will Affect the Future of Digital Film Distribution by Konrad Gatien, 8 Southwestern Journal of Law and Trade in the Americas (2002)

United States and Canadian Olympic Television Coverage: A Tale of Two Monopolists by Queenie Ng, 8 Southwestern Journal of Law and Trade in the Americas (2002)

Vertical Integration and Media Regulation in the New Economy, 19/1 Yale Journal of Regulation (2002)

Digital Music: Educational Issues by John Faust, 2 Brigham Young University Education and Law Journal 567 (2001)

Race to the Stars: A Federalism Argument for Leaving the Right of Publicity in the Hands of the States by Usha Rodrigues, 87/6 Virginia Law Review (2001)

*Playing with an Asterisk: Casey Martin Shoots a Hole-in-One at the United States Supreme Court: PGA Tour, Inc. v. Martin, by Gregory C. Graffman, 41/2 Washburn Law Journal (2002)

The Anticybersquatting Consumer Protection Act's In Rem Provision: Making American Trademark Law the Law of the Internet? by Steven J. Coran, 30 Hofstra Law Review 169 (2001)

Toward a Stricter Originality Standard for Copyright Law, 43 Boston College Law Review 193 (2001)

Review Essay: Law, Sports, and Popular Culture: The Marriage of a Relationship Scorned by Richard P. Cole, 23 Western New England Law Review 431 (2002)

When Almost Famous Just Isn't Famous Enough: Understanding Fame in the Federal Trademark Dilution Act as a Term of Art Requiring Minimal Distinctiveness by Daniel E. Mangis, 21 The Review of Litigation 455 (2002) (published by University of Texas, Austin, School of Law Publications, 727 East 27th Street, Austin, Texas 78705-3299)

Digital Copying and File Sharing on Trial by Sheila M. Heidmiller, 14 Intellectual Property & Technology Law Journal 1 (2002) (published by Aspen Law & Business)

Copyright Infringement and Peer-to-Peer Technology
by Niels Schaumann, 28 William Mitchell Law Review
(2002)

Revised Article 9 and Intellectual Property Asset
Financing by Raymond T. Nimmer, 53/2 Maine Law
Review (2001)

The Perfection and Priority Rules for Security Interests
in Copyrights, Patents, and Trademarks: The Current
Structural Dissonance and Proposed Legislative Cures
by Thomas M. Ward, 53/2 Maine Law Review (2001)

Talking About My Generation: Assumption of Risk and
the Rights of Injured Concert Fans in the Twenty-First
Century by Luke Ellis, 80 Texas Law Review 607
(2002)

Student Designed Home Web Pages: Does Title IX or the First Amendment Apply? by Susan H. Kosse, 43/4 Arizona Law Review (2001)

The European Intellectual Property Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 24, Issues 3 and 4 with the following articles:

GEMA and IFPI by Josephine Liholm, 24/3 European Intellectual Property Review 112 (2002) (for web address, see above)

The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments by Martin Kretschmer, 24/3

European Intellectual Property Review 126 (2002) (for web address, see above)

Codification of Contract Rules for Copyright Owners-The Recent Amendment of the German Copyright Act by Martin Schippan, 24/4 European Intellectual Property Review 171 (2002) (for web address, see above)

International Hague Convention on Jurisdiction and Foreign Judgments: A Way Forward for I.P.? by Annette Kur, 24/4 European Intellectual Property Review 175 (2002) (for web address, see above)

Linking and Framing: A Comparative Law Approach by Ignacio Javier Garrote, 24/4 European Intellectual Property Review 184 (2002) (for web address, see above)

The WIPO Treaties 1996: Ready to Come into Force by Jorg Reinbothe and Silke von Lewinski, 24/4 European Intellectual Property Review 199 (2002) (for web address, see above)

The Influence of the European Convention on Human Rights on Intellectual Property Rights by Timothy Pinto, 24/4 European Intellectual Property Review 209 (2002) (for web address, see above)
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