BUSINESS AFFAIRS

A Revolutionary Old-Fashion Approach to Valuation of Entertainment Companies

by Schuyler Moore

Well one thing's for sure - the current accounting rules are worthless as barometers of stock valuation, particularly for entertainment companies. The accounting rules are simply aimed at other goals and should not be asked to do double duty. Financial analysts worship at the alter of earnings per share and debt/equity ratios, yet these concepts have no relevance in determining how much cash a shareholder actually receives - now or in the future - which is the ultimate determinant of valuation. This point has been painfully brought home by the nose-dive in the stock price of

AOL Time Warner and Vivendi Universal, not to mention the climactic bankruptcy of Adelphia. Let's look at the reasons why the accounting rules don't work for stock valuation:

- * For starters, the accounting rules are somewhat schizophrenic in their goals: One goal is to accurately portray the current financial condition of a company. However, another goal is to match related income and expenses, referred to as the "matching principle," and this goal is achieved by reporting income and expenses in years other than when cash is received or paid, in an effort to match the expenses with the related income. These two goals are completely contradictory, but the contradiction is never admitted.
- * The accounting rules can be gamed, in part because of their schizophrenic nature. The rules are often vague and ambiguous, which permits them to be circumvented and manipulated. If structured correctly

and within limits, liabilities can be moved off balance sheet, income can be accelerated, and expenses can be deferred.

* The most fundamental problem of all is that companies hire their own "independent" auditors, and ever since time immemorial, he who pays the piper calls the tune. The recent spate of proposed legislation and SEC rules aimed at preventing accounting firms from rendering consulting services to their audit clients miss the mark. The problem is not that accounting firms profit from unrelated consulting services; the problem is that they profit from auditing, and they won't profit from auditing if companies don't hire them. The current problems will continue until companies do not get to choose their own auditors and some type of independent appointment method is used.

Although the accounting rules in general are rather malleable, they reach their zenith of

manipulability (is that a word?) in the entertainment industry. The main reason is that the accounting rules for intangible assets, such as copyrights and patents, give enormous discretion to management because these assets make up a relatively small portion of most companies' balance sheets. This is, of course, turned on its head for the entertainment industry. Here are some of the specific problems:

* Entertainment companies get to report all fixed payments under a license on the "availability date," which is the date the licensee can first exploit the licensed property, even if payments are not to be made until some time in the future. For example, if a license calls for ten annual installments of \$1 million, the full \$10 million (albeit reduced to present value) is reported up front. No other industry is permitted to do this.

* The cost of producing an intangible asset (such as a film) is not deducted when incurred, but is, instead,

amortized (i.e., deducted in annual increments) in amounts intended to match the company's estimate of future income from the asset for the first ten years. If the company estimates large amounts of future income, it is able to minimize the current deduction of costs. This, in turn, has two palliative effects; it increases current profits and increases assets reported on the balance sheet.

- * The entire entertainment industry is geared to create off-balance financing through negative pick-ups, sale-leaseback tax shelters, and other more exotic financing techniques all permissible under existing accounting rules. Even Enron could have learned a few tricks from the entertainment industry on this one.
- * When one company acquires another, a substantial portion of the purchase price can be capitalized to "goodwill" and carried on the books as an

asset more or less indefinitely with no amortization until there is some "impairment" of that goodwill.

These issues are discussed in more detail in my book The Biz; the Basic Business, Legal, and Financial Aspects of the Film Industry. The net result of all this is that financial statements for entertainment companies are not useful for purposes of determining how much actual cash shareholders can expect to receive - the ultimate determinant of value. You can't get there from here.

So what to do? Here is where my revolutionary old-fashion idea comes in. Years ago, companies were valued based on a reasonable multiple of dividends paid. Yes, dividends. For those not old enough to remember, dividends were annual payments of hard cash by a company to its shareholders. The concept was that cash is king, and that the value of any investment must be based on cash received from that investment. If

a company had a consistent track record of paying annual dividends to its shareholders, its shares were valued by multiplying the dividends paid per share by a multiple. Much as with the multiple currently applied to earnings per share (an accounting concept that has no relevance to dividends), the particular multiple applied to dividends reflected the public's perception as to the prospects for future growth of the dividend. Choosing a multiple is just an indirect way of choosing a desired annual return. For example, a multiple of 10 equates to an annual return of 10%, and a multiple of 20 equates to an annual return of 5%. Say that a company paid dividends of \$10 per share per year, and that investors wanted to receive a 15% return given the risks of investing in equity. The multiple for a 15% return is 6.7, so the stock would have a value of about \$67.

When dividends were no longer used as a gauge for valuation, companies simply stopped paying

dividends. Why bother? This gave the companies much more cash to pay their executives, buy jets, and make other similar sound financial investments. The theory was that by building up its assets, a company became much more valuable, and thus so must its shares. But just how much is stock worth in a company that does not pay dividends? Putting aside the artificiality of the stock market (which is becoming all too apparent), the answer is, not much. For example, if a company never paid another dividend, and the company continued indefinitely, just how much is a current share of stock in it worth? Try \$0.

If the public shifted back to valuing companies based on dividends paid, then companies would go back to paying dividends to their shareholders, instead of using the cash on executive compensation and jets. Hey, what a concept!

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[ELR 24:3:4]

WASHINGTON MONITOR

Librarian of Congress sets statutory license fees for Internet transmissions of music recordings

The Librarian of Congress has set the license fees payable by webcasters who are eligible to transmit music recordings under the statutory license created by sections 112 and 114 of the Copyright Act. The rate will be 0.07 cents per listener per recorded song, both for transmissions that originate on the Internet and for retransmissions of over-the-air AM or FM radio broadcasts, plus an additional 8.8% of that amount. The 0.07-cent fee is a public performance fee; and the additional 8.8% is an ephemeral license fee, payable because webcasters have to copy recordings to the hard drives of their web servers before they can be transmitted over the Internet.

These fees are less than those earlier recommended by a Copyright Arbitration Royalty Panel. Last February, a CARP recommended that webcasters who originate their transmissions pay 0.14 cents per listener per recorded song, while those that merely retransmit AM or FM broadcasts pay 0.07 cents per listener per recorded song; and it recommended that all webcasters pay an additional 9% ephemeral license fee (ELR 23:10:12). Neither the record companies nor webcasters satisfied with the were that appealed, and recommendation. Both recommendation of the Register of Copyrights, the Librarian rejected the CARP's recommendation last May (ELR 23:12:9). By law, the Librarian had 90 days to make a decision on what the fees should be, and his 0.07-cent plus 8.8% ruling is that decision.

The Librarian of Congress accepted the CARP's conclusion that an agreement between the RIAA and

Yahoo! represented the best evidence of what rates would have been negotiated in the marketplace between a willing buyer and a willing seller for a license to engage in webcasting of radio retransmissions and Internet-only transmissions. But the Librarian concluded that the CARP misinterpreted some aspects of the RIAA/Yahoo! agreement. One error was the CARP's conclusion that the RIAA and Yahoo! must have agreed that radio retransmissions have a tremendous positive promotional impact on sales of phonorecords that Internet-only transmissions do not have; and this promotional impact explained why the RIAA and Yahoo! set a higher rate for Internet-only transmissions

In fact, both the broadcasters (who benefited from the CARP's conclusion regarding promotional value) and the RIAA agreed that there was no evidence in the record to support the conclusion that the RIAA

and Yahoo! considered and made adjustments for promotional value for radio retransmissions. The Librarian therefore determined that the CARP's conclusion about promotional value was arbitrary and provided no basis for concluding that radio retransmissions provide a promotional value that Internet-only transmissions do not provide.

Since the CARP had recommended different rates for Internet-only transmissions and radio retransmissions because of the promotional value it found in radio retransmissions but not in Internet-only transmissions, the Librarian rejected the two-tiered royalty structure recommended by the CARP. In light of his rejection of the CARP's rationale for setting a rate for Internet-only transmissions that was twice as high as the rate for radio retransmissions, the Librarian concluded that there is no basis for making any distinction between the marketplace rate for Internet-

only transmissions and the marketplace rate for radio retransmissions.

Webcasters and broadcasters asked that the Librarian reject the CARP's approach and provide them with an option to pay a rate based on a percentage of their revenues, rather than a per-performance rate. However, the CARP concluded that a percentage of revenue approach was less desirable for a number of reasons. Those reasons included the CARP's conclusion. that a per-performance rate is directly tied to the right being licensed (i.e., the right of public performance). The CARP also observed that due to varying business models among webcasters, some of which offer features unrelated to music, identifying the relevant revenue base against which a percentage should be applied consistently would be complex and difficult. Finally, the CARP noted that because many webcasters are currently generating very little revenue, a

percentage of revenue rate would require copyright owners to allow extensive use of their property with little or no compensation. The Librarian found these conclusions reasonable and saw no reason to reject the CARP's per performance approach.

The Librarian established September 1, 2002, as the effective date of the rates. That does not mean that no royalties are due for webcasters' activities prior to September 1. Webcasters and others using the statutory licenses will have to pay royalties for all of their activities under the licenses since October 28, 1998. However, the September 1 effective date determines when the royalty payments will have to be made. Full payment of royalties for all pre-September 1 licensed activities must be made by October 20, 2002 (because the law provides that payments of arrears shall be made by the 20th day of the month following the month in which the royalty rate is set). Payment for the month of

September shall be due on or before November 14, 2002, and payments for subsequent months will be due the 45th day after the end of each month for which royalties are owed.

Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, Library of Congress, Copyright Office, 67 Federal Register-Number 130 (July 8, 2002), available at www.copyright.gov/carp/webcast_regs.html [ELR 24:3:6]

INTERNATIONAL DEVELOPMENTS

British race car driver Eddie Irvine wins lawsuit against sports talk radio station that used his photo in promotional brochure without his consent; British Chancery Court rules that "false endorsement" claims may be brought under "passing off" doctrine

Eddie Irvine had a great year in 1999. Driving cars made by Ferrari, he finished second on the international Formula 1 racing circuit, just narrowly missing the Drivers World Championship.

The year 2002 has been a good one for Irvine too, though in a different way. This year, he has won a precedent-setting lawsuit against Talksport Limited, the owner of one of the largest commercial radio stations in the United Kingdom. Justice Laddie of the Chancery

Division of the British High Court of Justice has ruled that Irvine's "false endorsement" claim against Talksport could be brought under British law's traditional "passing off" doctrine. This ruling sets new precedent, because until Justice Laddie so held, it was generally believed that British law does not recognize (what in the United States would be called) the "right of publicity."

As its name suggests, the format of Talksport's radio station is sports talk shows and sporting event coverage. In 1999, it converted to sports from more general news and talk, and it acquired the rights to broadcast that year's Formula 1 Grand Prix World Championship. To publicize this change to advertising agencies, Talksport sent brochures to ad agency personnel - brochures that featured Irvine's photo listening to a portable radio bearing Talksport's logo.

The photo was licensed from the photographer who owned its copyright. But the original photo showed Irvine talking on a cell phone, not listening to a radio. Talksport altered the photo to replace the phone with a radio. And Talksport did so, and used the altered photo in its brochure, without Irvine's consent. Irvine sued.

Since British law had not previously recognized a right of publicity, Talksport naturally argued that it should not be held liable for using Irvine's photo in the brochure. But after thoughtful analysis, Justice Laddie disagreed. He noted that manufacturers and retailers "recognize the realities of the marketplace" when they pay well known personalities to endorse their goods, and he held that "The law of passing off should do likewise."

To succeed in such a case, Justice Laddie held that a claimant has to prove two things: that the

claimant has a significant reputation or goodwill; and that the actions of the defendant "gave rise to a false message which would be understood by a not insignificant section of his market that his goods have been endorsed, recommended or are approved by the claimant."

In this case, the evidence satisfied Justice Laddie that Irvine did have a substantial reputation in 1999, when Talksport's brochure was sent to advertising agencies. And the evidence showed that the brochure did create a false message that would be understood by a not insignificant section of Talksport's market to mean that Irvine had endorsed, recommended or approved its radio station.

"Mr. Irvine has a property right in his goodwill which he can protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third party's goods or business,"

Justice Laddie concluded The Justice noted that this conclusion was based solely on Britain's traditional law of "passing off." At an early stage of the case, he had asked counsel for both parties to consider whether the U.K. Human Rights Act applied to false endorsements. (That Act was at the heart of the U.K. Court of Appeal's decision recognizing the privacy rights of Michael Douglas and Catherine Zeta Jones in their privacy suit against Hello! magazine (ELR 22:10:8).) But Justice Laddie determined that since Irvine's goodwill was protected by the law of "passing off," it was not necessary to rule on whether the Human Rights Act did so as well.

Editor's note: Though this is a precedent-setting decision in the United Kingdom, this decision does not yet create a British "right of publicity" as broad as the "right of publicity" recognized in the United States. In the U.S., the right of publicity includes not only false

advertising endorsements, but unauthorized merchandising as well. Justice Laddie emphasized, more than once, that Talksport had not sold merchandise bearing Irvine's name or likeness, and that this opinion does not address the question of whether British law yet prohibits the unlicensed manufacture and sale of merchandise bearing celebrity names and likenesses.

Irvine v. Talksport Limited, [2002] EWHC 367 (Ch), available at www.courtservice.gov.uk [ELR 24:3:8]

IN THE NEWS

Franklin Mint's victory in lawsuit filed against it by Princess Diana Estate, complaining of Mint's unlicensed sale of Princess Diana merchandise, is affirmed on appeal

A four-year legal war between the Estate of Princess Diana and the Franklin Mint has ended in defeat for the Estate and a complete victory for the Mint. The war was fought over the Estate's claim that the Mint's unlicensed sale of Princess Diana merchandise violated the Estate's right of publicity and trademark rights. Before it was over, the case produced three decisions by two federal District Court judges, two decisions by the Ninth Circuit Court of Appeals, and activity by the California legislature.

Franklin Mint's victory was announced in an opinion by Court of Appeals Judge Harry Pregerson which held that the Princess Diana Estate: had no right to recover under California's post-mortem right of publicity statute; had no right to recover under federal "false endorsement" law; and was properly ordered to pay the Mint \$2.3 million in attorneys' fees.

The Estate made its ultimately unsuccessful claims against the Mint, because following Princess Diana's tragic and untimely death in 1997, her Estate granted an exclusive license to use her name and likeness to a charitable Memorial Fund which in turn authorized their use on certain products and services in the United States, but not by Franklin Mint. Though the Mint was not one of the Fund's licensees, the Mint continued to sell merchandise bearing Princess Diana's name and likeness - a practice it actually had begun as long ago as 1981.

The Diana Estate and Memorial Fund sued Franklin Mint in federal court in California, asserting claims under the state's right of publicity statute and under federal trademark law. Early in the case, federal District Judge Richard Paez granted Franklin Mint's motion to dismiss the Estate's right of publicity claim on the grounds that British law, not California law, applies to the Estate's right of publicity claim, and British law doesn't recognize a right of publicity for the living let alone for the deceased. The only thing that prevented Franklin Mint from winning the case entirely right then was Judge Paez's conclusion that although the Estate had not shown it was likely to prevail on its trademark claims, disputed issues of fact concerning those claims prevented their immediate dismissal. (ELR 20:12:11)

Bruised but not defeated, the Estate aggressively pursued the case on two fronts. It took an interlocutory

appeal of Judge Paez's rulings to the Ninth Circuit Court of Appeals; and it went to the California legislature for an amendment to the California right of publicity statute which, if obtained, would have authorized the estates of non-California decedents to assert claims under that statute.

The Estate was not successful before the Court of Appeals. In an unpublished ruling, the Ninth Circuit affirmed Judge Paez's dismissal of the Estate's right of publicity claim.

On the other hand, the Estate was able to argue that it had been successful before the California legislature. The Astaire Celebrity Image Protection Act contained one provision that looked - on the surface - as though it amended the California right of publicity statute to make it applicable to acts (such as the sale of merchandise) that take place in California, even if the decedent (whose name or likeness was used without

authority) was domiciled elsewhere at the time of his or her death (ELR 21:6:18).

The Diana Estate filed a motion to reinstate its right of publicity claim, on the grounds that the Astaire Act had amended California law to permit it to sue Franklin Mint for violating the Estate's rights of publicity, at least for merchandise sales that took place after the amendment's January 1, 2000 effective date. But Judge Richard Paez was not persuaded. He held that the amendment is not a choice-of-law provision that gives the estates of non-resident decedents the right to assert violations of the statute. Instead, he concluded that it is a provision that limits the applicability of the California right of publicity statute solely to unauthorized uses of names and likenesses that take place in California.

The Court of Appeals agreed with this conclusion. Judge Pregerson noted that the amendment

made California's right of publicity statute applicable "to cases . . . aris[ing] from acts occurring directly in [California]," but it "does not state that California's post-mortem right of publicity statute applies to such cases regardless of the domicile of the owner of the right."

Moreover, the legislative history of the amendment showed that initially, the bill that eventually became the Astaire Act did contain exactly the language that the Diana Estate wanted - language that would have expressly authorized lawsuits by non-domiciliaries. Before that bill was enacted, however, that language was removed, intentionally. The bill's sponsor, California Senator John Burton, tried to get the language reinserted in the bill, but at a legislative committee hearing, he withdrew that attempt, saying that he might try to have it reinserted "later." When the

bill was enacted, it did not contain the language that Senator Burton - and the Diana Estate - wanted.

As a result, the statute that applied to the Estate's right of publicity claims was an entirely separate section of the California Civil Code that provides that "personal property" - which is what the right of publicity is - is governed by the law of the domicile of its owner; and since Princess Diana was domiciled in Great Britain, its law - which has no right of publicity - governed.

Franklin Mint's "false endorsement" claims fared no better. By the time Franklin Mint renewed its motion for summary judgment concerning those claims, Judge Paez had been elevated from the District Court to the Court of Appeals, so the case was reassigned to District Judge Florence-Marie Cooper. She granted Franklin Mint's motion and dismissed the Estate's remaining false endorsement claims.

That ruling too was affirmed on appeal. Judge Pregerson held that there was no likelihood that consumers would be confused about the Estate's endorsement of the Mint's products, because so many companies have been selling Diana merchandise since 1981 that her image does not identify the source of any of those products. Judge Pregerson also ruled that the Mint's use of Princess Diana's name in identifying its products was permitted by trademark law's fair use doctrine.

Finally, the Court of Appeals affirmed Judge Cooper's decision to award Franklin Mint \$2.3 million in legal fees.

The Princess Diana Estate was represented by Barbara A. Solomon of Fross Zelnick Lehrman & Zissu in New York City. The Franklin Mint was represented by

Robert A. Meyer and Daniel J. Friedman of Loeb & Loeb in Los Angeles.

Editor's note: At the time the Estate's right of publicity claim was first dismissed, it could be said that British law did not recognize a right of publicity something Judge Pregerson did say in his decision affirming that dismissal. That is no longer true, however. As reported in the "International Developments" department of this issue of the Entertainment Law Reporter, the Chancery Division of the U.K. High Court of Justice has now held that British "passing off" law does give celebrities "false endorsement" claims against those who use of celebrity names and likenesses without authorization (ELR 24:3:8). Nevertheless, that decision would not have affected the outcome of the Princess Diana case, for at least three reasons. First, the Chancery Division emphasized that its decision concerns "false

endorsement" claims only, not unauthorized merchandising, while the Princess Diana Estate's right of publicity claims were based on unauthorized merchandising. Moreover, the Chancery Division decision dealt only with the claims of living celebrities; it did not discuss the more difficult issue of whether deceased celebrities have false endorsement rights as well. Finally, the Princess Diana Estate was permitted to assert a false endorsement claim under U.S. law, even before such a claim was recognized in British law; the Estate simply failed to prove the facts necessary to win the claim.

Cairns v. Franklin Mint Co., Ninth Circuit Court of Appeals Case No. 00-56217, available at www.ca9.uscourts.gov/ca9/newopinions.nsf/14ECC72 A3D2BE1C988256BDC0080619B/\$file/0056217.pdf? openelement (9th Cir. 2002) [ELR 24:3:9]

RECENT CASES

AOL wins dismissal of copyright infringement suit filed by Harlan Ellison complaining of unauthorized posting of digital copies of his science fiction novels in newsgroup; court rules that AOL is protected by DMCA safe harbor provision

Author Harlan Ellison is in the vanguard, not just with his science fiction writing, but also with his response to online copyright infringement. Other science fiction writers are pleased to have their works scanned, digitized and made available on the Internet, even without their consent, or so it has been reported. Ellison is not, and he's done something about it.

When science fiction fan Stephen Robertson made Ellison's works available through the "alt.binaries.e-book" newsgroup, Ellison sued

Robertson, AOL and others for copyright infringement. Robertson quickly settled by agreeing to pay Ellison \$3,648.96. Other defendants settled as well, on unreported terms.

AOL, however, did not settle, perhaps because its role in the infringement was more attenuated than Robertson's, or perhaps because it had more at stake in the case, if not to Ellison himself then to others who may follow Ellison's lead. AOL's role was limited to hosting the newsgroup Robertson used to make infringing copies of Ellison's works available to others.

In response to cross-motions for summary judgment, federal District Judge Florence-Marie Cooper has held that AOL is protected by one of the "safe harbor" provisions of the Digital Millennium Copyright Act. She therefore granted AOL's motion.

Judge Cooper's carefully analyzed opinion will be consulted about several issues. She determined, for example, that AOL's activities did not make it a direct or vicarious infringer of Ellison's copyrights. On the other hand, she ruled that AOL may have contributed to Robertson's direct infringements, and thus absent some defense, might have been held liable to Ellison.

The heart of the ruling explains why AOL is protected from liability by one affirmative defense. The DMCA provides Internet service providers with a number of "safe harbors." These safe harbors contain a number of conditions that ISPs must satisfy to claim their protection. (One of the reasons Napster was not protected by a safe harbor was that it didn't satisfy all of the necessary conditions.)

In Ellison's case, Judge Cooper determined that AOL satisfied all of the criteria to satisfy the safe harbor for "Transitory digital network communications." In brief, that safe harbor protects Internet service providers against copyright liability for

money damages, if all they do is transmit infringing material on the behest of others, and copies of the material are not stored by the provider "for a longer period than is reasonably necessary for the transmission."

Ellison argued that AOL does not qualify for this safe harbor, because it stores newsgroup materials for 14 days. However, Judge Cooper noted that the legislative history of the section indicates that it was intended to codify the result in Religious Technology Center v. Netcom (ELR 18:7:22), a case in which the service provider stored newsgroup postings for 11 days. The judge decided that the three-day difference between that case and this one was "insufficient to distinguish the two."

Ellison was represented by Glen L. Kulik of Gottesman & Mouton in Sherman Oaks. AOL was

represented by Daniel Scott Schecter of Latham & Watkins in Los Angeles.

Ellison v. Robertson, 189 F.Supp.2d 1051, 2002 U.S.Dist.LEXIS 4166 (C.D.Cal. 2002)[ELR 24:3:11]

Video Pipeline is enjoined from creating or streaming Internet trailers for homevideos of Disney and Miramax movies, because unauthorized trailers infringe movies' copyrights

Video Pipeline creates and distributes movie trailers to retail video stores. Indeed, for many years, it did so with the consent of Buena Vista Home Entertainment, using trailer materials supplied by Buena Vista itself. Before the Internet became a retail marketplace, all of Video Pipeline's trailers were

videotapes distributed to homevideo stores for promotional exhibition on television monitors located within those stores.

Once the Internet became a marketplace, many retailers began selling and renting homevideos from websites - not by downloading them as digital files, but simply by allowing customers to shop and order online for subsequent deliveries by mail, FedEx, UPS or the like. Video Pipeline is technically savvy, and in response to these types of Internet sales, it did something that must have seemed entirely logical to it. It began using the trailer materials Buena Vista had supplied to make digital trailers for Internet streaming.

Using Video Pipeline's service, Internet video retailers could give customers the ability to view 2-minute trailers, simply by clicking on "preview" buttons on the retailers' websites. Doing so would seamlessly transport customers to Video Pipeline's own

server, from which requested trailers would be streamed; and Video Pipeline would charge retailers fees based on the number of streams their customers requested.

Though Video Pipeline handled the technology of all of this just fine, it did not get a license from Buena Vista Home Entertainment or Miramax to do any of it. Indeed, when Buena Vista objected - and asked for the return of the trailer materials it had earlier provided to the company - Video Pipeline began creating digital trailers from copies of videos its store clients had purchased.

Video Pipeline also sued Buena Vista and Miramax, seeking a judicial declaration that its actions are legal. Buena Vista and Miramax responded by filing counterclaims alleging that Video Pipeline's actions constituted copyright infringement, and seeking

a preliminary injunction. Federal District Judge Jerome Simandle has granted the injunction they requested.

Judge Simandle has ruled that Video Pipeline's digital trailers are derivative works, and that transmitting them over the Internet constituted public performances and displays. Since these things were done without authorization, they infringed Buena Vista's and Miramax's copyrights - at least as an initial matter. Video Pipeline did have some affirmative defenses, but Judge Simandle rejected them.

Video Pipeline argued that since the First Sale Doctrine gives retailers the right to resell videos, it also must give them the right to advertise and promote them, without requiring the copyright owners' consent. Judge Simandle responded that the First Sale Doctrine benefits the retailers who actually purchased videos, not Video Pipeline; and in any event, the First Sale

Doctrine would not authorize retailers to perform or display videos over the Internet.

The judge also rejected Video Pipeline's fair use defense. And he held that a preliminary injunction would not violate Video Pipeline's First Amendment free speech rights.

Video Pipeline was represented by Gary D. Fry of Pelino & Lentz in Philadelphia. Buena Vista and Miramax were represented by Gary A. Rosen of Akin Gump Strauss Hauer & Feld in Philadelphia.

Video Pipeline v. Buena Vista Home Entertainment, 192 F.Supp.2d 321, 2002 U.S.Dist.LEXIS 5400 (D.N.J. 2002)[ELR 24:3:11]

Movie and video game companies win dismissal of tort lawsuit filed against them by widow and children of teacher killed at Columbine High School

In the wake of the tragic killings at Columbine High School, families of the victims have tried to make sense out of what seems senseless. Dylan Klebold and Eric Harris - the students who committed the terrible crime - were fans of the movie "The Basketball Diaries" and of violent video games. And that, the victims' families have said, is the explanation for what happened. The family of at least one of the victims has alleged that the killings were caused by those who made the movie and the games.

These allegations were made in negligence and products liability lawsuit filed by the widow and stepchildren of William David Sanders, the Columbine High School teacher who was killed during the 1999

rampage. Though their complaint was well thought out, federal District Judge Lewis Thornton Babcock has dismissed it "for failure to state a claim upon which relief may be granted."

In a methodical and well-analyzed opinion, Judge Thornton concluded that the movie and video game companies owed no duty to Sanders' widow and children because it was not foreseeable that Klebold and Harris' violent actions were "the likely consequence of exposure to video games or movies," and because "there is social utility in expressive and imaginative forms of entertainment even if they contain violence."

Moreover, the judge held that even if the movie and video game companies did owe Sanders' widow and children a duty, "Harris' and Klebold's intentional violent acts were the superseding cause of Mr. Sanders' death," and "no reasonable jury could find that [the

companies'] conduct resulted in Mr. Sanders' death in 'the natural and probable sequence of events."

For these reasons, Judge Babcock granted the companies' motion to dismiss the negligence claim against them.

Judge Babcock also dismissed the family's products liability claim. He did so, because he ruled that the "intangible thoughts, ideas, and expressive content" in "The Basketball Diaries" and video games "are not 'products' as contemplated by the strict liability doctrine."

What's more, the judge added, even if the claims were valid as a matter of tort law, both would run afoul of the First Amendment.

Sanders' widow and children were represented by John W. DeCamp of DeCamp Legal Services in Lincoln, Nebraska. The movie and video game companies were represented by Gerald Owen Sweeney

Jr. of Lord Bissell & Brook in Chicago and several others.

Editor's note: This is the second case in which "The Basketball Diaries" and video games were alleged to have sparked an on-campus student shooting that resulted in deaths. It was alleged as well in a case filed by the parents of three girls who were shot to death in Kentucky. That case too was dismissed by the trial judge (ELR 22:4:11), on grounds similar to those relied on by Judge Babcock in the Columbine case.

Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1264, 2002 U.S.Dist.LEXIS 3997 (D.Colo. 2002)[ELR 24:3:12]

Author of book "The Golden Age of Television" was "co-author" of book's photographs, appellate court rules in decision affirming dismissal of photographer's infringement lawsuit

Author Phillip Collins has defeated a copyright infringement lawsuit filed against him by photographer Garry Mark Brod - a lawsuit that resulted from their seemingly successful collaboration on the book The Golden Age of Television.

Brod sued Collins and the book's publisher after The Golden Age of Television was published in 1997, alleging that Brod's photographs had been used in the book without his consent. In fact, Brod had shot the book's photos, in 1991 or so, in response to Collins' proposal that Brod do so for the then-planned book.

More to the point - insofar as Brod's infringement claim was concerned - the two men

traveled together to the site of the photo shoot, where Collins selected the subjects for the photos, collaborated with Brod on the photos' composition by selecting and positioning the subjects and props and by suggesting camera angles and changes before Brod triggered the camera's shutter. For these reasons, the Court of Appeals affirmed a District Court ruling that Collins' contributions to the photos were "sufficiently original and expressive to constitute a copyrightable contribution, even though [Collins himself] did not physically trigger the shutter."

Moreover, the appellate court ruled that Brod "manifested his intent that he and Collins would be coauthors by collaborating with Collins, deferring to Collins' judgment regarding the positioning of the subject televisions and the camera angles . . . ," and in other ways.

For these reasons, the appellate court affirmed the District Court's conclusion that Collins was a coauthor of the photographs, and as such could not have infringed their copyrights, even though, in the book itself, Collins had given Brod sole copyright credit for the photographs.

Brod v. General Publishing Group, Inc., 32 Fed.Appx. 231, 2002 U.S.App.LEXIS 2544 (9th Cir. 2002)[ELR 24:3:13]

Appellate court rules that federal judge did not abuse discretion by sanctioning plaintiff's lawyer in frivolous suit against Mattel alleging that "Cool Blue Barbie" infringed copyright to USC cheerleader doll "Claudine"; but case is remanded for reconsideration of legal basis for sanction and its amount

Every once in a while, a copyright infringement suit gets filed that is baseless almost on its face. One such case was filed against Mattel, Inc., on behalf of a fellow named Harry R. Christian who alleged that Mattel's "Cool Blue Barbie" infringed his copyright to a USC cheerleader doll named "Claudine." The suit was frivolous because Christian's doll "Claudine" was created in 1996, five years after the creation of Mattel's "Cool Blue Barbie." Moreover, Mattel's "Cool Blue Barbie" had a copyright notice on her head that clearly

indicated her 1991 publication date - something Christian and his lawyer should have seen and investigated before the lawsuit was filed.

Christian was represented by lawyer James B. Hicks, and it was Hicks who signed the complaint and other pleadings in the lawsuit.

Though the case should never have been filed in the first place, Hicks refused to dismiss it, even after Mattel offered him evidence that its "Cool Blue Barbie" could not possibly have been copied from his client's "Claudine" doll. In fact, further proceedings in the case cost Mattel more than a half million dollars in attorneys' fees, before it was finally dismissed by federal District Judge Nora Manella, in response to Mattel's motion for summary judgment.

Though there was no appeal from the dismissal of the case, that was not the end of it. That was not the end, because Mattel successfully sought sanctions

against lawyer Hicks. Judge Manella imposed sanctions of \$501,565, finding that Hicks should have discovered - before filing the suit - that Mattel's doll could not have infringed the copyright to "Claudine" because Mattel's doll was created first, as the copyright notice on Mattel's doll indicated. Judge Manella also found that "Hicks had behaved 'boorishly' during discovery," and that significant sanctions were necessary because Hicks had a history of misconduct in earlier cases too.

Hicks appealed from the sanction order, with some - but only some - success. In an opinion by Judge Margaret McKeown, the Court of Appeals has held that Judge Manella did not abuse her discretion in sanctioning Hicks. Indeed, it said that she had "a firm basis for awarding sanctions" against him.

The appellate court did, however, vacate the sanction order, for this reason. The sanctions were awarded under Rule 11 - a rule that authorizes

sanctions solely for misconduct regarding signed pleadings. Judge Manella's order did not make it plain whether she had sanctioned Hicks solely for signing frivolous pleadings, or whether she sanctioned him for other conduct as well.

Mattel argued that in addition to Rule 11, District Judges have "inherent authority" to sanction lawyers for behavior apart from signing frivolous pleadings. The appellate court agreed that that was so, but pointed out that such sanctions require "an explicit finding" that the lawyer had engaged in "bad faith" conduct - something Judge Manella had not done in this case.

Thus, the appellate court remanded the case for further proceedings, including an evaluation of whether all half-million dollars worth of services rendered by Mattel's lawyers were related to Hicks' sanctionable conduct.

Hicks was represented by Kent L. Richland and Jessica M. Weisel of Greines Martin Stein & Richland in Beverly Hills. Mattel was represented by Adrian Mary Pruetz of Quinn Emanuel Urquhart Oliver & Hedges in Los Angeles.

Christian v. Mattel, Inc., 286 F.3d 1118, 2002 U.S.App.LEXIS 6849 (9th Cir. 2002)[ELR 24:3:13]

Child Online Protection Act's reliance on "community standards" does not, by itself, make Act unconstitutional, Supreme Court decides; but case remanded to Court of Appeals for consideration of other constitutional issues

Congress is having trouble protecting children from harmful matter on the Internet, in a Constitutional

fashion. Its first legislative effort to do so - the Communications Decency Act of 1996 - "ran afoul of the First Amendment" because it was unconstitutionally vague, the Supreme Court held in Reno v. American Civil Liberties Union (ELR 19:2:7).

Congress attempted to clarify its intentions with the Child Online Protection Act. In a nutshell, that Act - commonly referred to as "COPA" - defined material harmful to minors by incorporating the Supreme Court's long-standing three-part obscenity test, thus making "contemporary community standards" a determining factor in the assessment of whether any particular material is illegally harmful.

That standard didn't pass muster either, at least at first. A federal Court of Appeals held that COPA's use of "community standards" made the Act unconstitutionally overbroad (ELR 22:6:24). But a 5-to-4 majority of the Supreme Court disagreed. In an

opinion by Justice Clarence Thomas, it has held that COPA's use of "contemporary community standards" to determine what is harmful to minors does not, by itself, make the Act unconstitutional.

On the other hand, COPA may be unconstitutional for other reasons. The ACLU and others who have challenged COPA's constitutionality argued that COPA also is unconstitutional because it is vague and does not satisfy the "strict scrutiny" standard applied to restrictions on speech. Since the Court of Appeals had not ruled on those arguments, the Supreme Court remanded the case to the Court of Appeals for it to do so. These arguments raise "difficult issues," Justice Thomas explained, and "prudence" dictated that the Court of Appeals should consider them "first."

The Government was represented by Theodore B. Olson. The ACLU was represented by Ann E. Beeson.

Ashcroft v. American Civil Liberties Union, 122 S.Ct. 1700, 2002 U.S.LEXIS 3421 (2002)[ELR 24:3:14]

Los Angeles ordinance prohibiting operation of adult book store and adult video arcade in same building may be constitutional, Supreme Court rules

A Los Angeles City ordinance that prohibits the operation of an adult bookstore and an adult video arcade in the same building may be constitutional after all - but just barely, judging by the opinions of the Supreme Court justices who have so held.

Some background: In 1977, the City conducted a study that concluded that concentrations of adult entertainment businesses are associated with higher

crime rates in neighboring communities. For that reason, the City enacted an ordinance that prohibited adult businesses from operating within a thousand feet of one another. The wording of that ordinance, however, created a "loophole" that permitted more than one adult business to operate within a single building. So the City amended the ordinance to close that "loophole."

Alameda Books, Inc., operated a bookstore and video arcade in a single building in violation of the ordinance. It therefore sued the City in federal court, seeking a judicial declaration that the ordinance was unconstitutional. At first, Alameda got exactly what it wanted. A District Court granted Alameda's motion for summary judgment; and the Court of Appeals affirmed (ELR 22:8:26). The appellate court held that although the City had a substantial interest in reducing crime, the 1977 study on which it relied said nothing about the

effect on crime of selling books and exhibiting videos in a single building.

Persistence, however, paid off for Los Angeles. In an opinion by Justice Sandra Day O'Connor, four justices of the Supreme Court held that it was reasonable for the City to conclude, from the findings of its 1977 study, that reducing the number of adult businesses in an area could reduce crime, whether they operated in separate buildings or in the same building.

Justice Anthony Kennedy concurred. He concluded that Los Angeles could exercise its zoning authority to limit the number of adult businesses that could operate in a single building. Though Justice Kennedy's reason was different from Justice O'Connor's, his vote gave Los Angeles the fifth vote it needed to win reversal of the summary judgment won by Alameda.

Los Angeles was represented by Michael L. Klekner in Los Angeles. Alameda Books was represented by John H. Weston in Los Angeles.

City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728, 2002 U.S.LEXIS 3424 (2002), motion to modify denied, 122 S.Ct. 2585, 2002 U.S.LEXIS 4458 (2002)[ELR 24:3:14]

Federal court strikes - under California anti-SLAPP lawsuit - defamation complaint against Los Angeles Times filed by former Counter Intelligence Corps agent who was subject of biography "Test of Courage"

A defamation complaint filed by Michel Thomas against the Los Angeles Times has been stricken by

federal District Judge Audrey Collins. Thomas' biography, Test of Courage, was published by Free Press/Simon & Schuster. The book says that Thomas used to be an agent of the U.S. Counter Intelligence Corps, a member of the French Resistance, and a concentration camp survivor.

As long ago as 1983, an article in the Los Angeles Times profiled Thomas and reported that he was a Counter Intelligence Corps agent and Holocaust survivor. But following the publication of his biography in 2000, another Times article titled "Larger than Life" raised questions about Thomas' background. It did so, Judge Collins explained, "by setting forth [Thomas'] version of events along with those of other witnesses and historical records."

The "Larger than Life" article was what triggered Thomas' defamation lawsuit. California has a statute that permits courts to dismiss complaints based on acts

that further free speech. It is called an "anti-SLAPP" statute ("SLAPP" stands for "Strategic Lawsuit Against Public Participation"). The Times relied on that statute in its successful effort to dispose of the case.

To prevent the dismissal of his complaint, Thomas would have had to establish that he probably would prevail in the case; but he couldn't do that.

Judge Collins found that Thomas is a public figure, and thus would have to prove that the offending article was published with actual malice. "At most," the judge explained, "a reasonable juror would find that [the Times] intended to raise questions about Thomas' story." Moreover, the article "is constitutionally protected" the judge held, "because it merely states 'opinion[s] on matters of public concern that do not constitute or imply a provable factual assertion." California's anti-SLAPP statute makes an award of attorneys' fees mandatory if a motion to strike is

granted, as it was in this case. So Judge Collins authorized the Times to make a motion for fees.

Thomas was represented by Anthony Glassman of Glassman Browning & Saltsman in Beverly Hills. The Times was represented by Kelli Sager of Davis Wright Tremaine in Los Angeles.

Thomas v. Los Angeles Times Communications, LLC, 189 F.Supp.2d 1005, 2002 U.S.Dist.LEXIS 3579 (C.D.Cal. 2002)[ELR 24:3:15]

Defamation lawsuit against "The New Yorker" filed by woman who claims to be Marilyn Monroe's daughter is dismissed, because offending article did not defame her

Federal District Judge Samuel King has dismissed a lawsuit alleging defamation and related claims filed by a woman named Nancy Miracle against The New Yorker. At issue in the case were statements made in an article titled "Fakes: Who Forged the J.F.K.-Marilyn Monroe Papers?" published in the magazine's November 3, 1997 issue. The article is not about Miracle, but it does mention her in passing, because Miracle claims to be Marilyn Monroe's daughter.

The article was about a fellow named Lex Cusack who was convicted for creating and selling forged documents falsely attributed to President

Kennedy. The article quotes Cusack as saying that he found the documents as a result of a meeting with Miracle. In the course of describing that meeting, Cusack described Miracle as "disheveled" and "in her early forties." Cusack said that Miracle "laid out a tangled claim to the Monroe estate," and that he concluded she "was nuts."

These and other statements are what prompted Miracle to sue The New Yorker. In response to the magazine's motion for summary judgment, Judge King concluded that none of the offending statements was defamatory.

The article's assertion that Miracle was "disheveled" was non-actionable opinion. The statement that she was "in her early forties" - while inaccurate, because she was just 39 when she met Cusack - was not defamatory. And the statements that she had asserted "a tangled claim" and "was nuts" were

statements of Cusack's subjective evaluations and opinion.

Related claims for emotional distress and interference with contractual and business relations were dismissed as well.

Miracle was represented by Gary Victor Dubin in Honolulu. The New Yorker was represented by James J. Bickerton of Bickerton Saunders & Dang in Honolulu and by Kevin W. Goering of Coudert Brothers in New York City.

Miracle v. New Yorker Magazine, 190 F.Supp.2d 1192 (D.Hawaii 2001)[ELR 24:3:15]

CBS broadcast of "48 Hours" segment about lotto winners did not defame or invade privacy of one winner's ex-wife and stepdaughter, appellate court affirms

To Mitzi Green's eyes, CBS defamed her and invaded her daughter's privacy when it broadcast a segment about lotto winners as part of its "48 Hours" news magazine program. Neither Green nor her daughter was a lotto winner. But Green's ex-husband was. And in the course of profiling the ex-husband, things were said about Green and her daughter.

In their defamation and privacy lawsuit against the network, Green alleged that "48 Hours" implied that she was a liar and a gold digger, and that the segment invaded the daughter's privacy by tying her name to an alleged sexual assault.

Federal District Judge Robert Maloney dismissed the Greens' case, in response to CBS' motion for summary judgment. And that ruling has been affirmed by the Court of Appeals.

In an opinion by Judge Emilio Garza, the appellate court has held that Green failed to show that statements made about her during the broadcast were false or defamatory, because the facts reported were substantially true. Judge Garza also held that the broadcast did not disclose any private facts about Green's daughter, because the sexual abuse allegation had been discussed in open court during the Greens' divorce proceedings, and Green herself had disclosed the information to several people.

The Greens were represented by Sandra Bowers Self in Abilene and Sheryl G. Erasmus in Austin. CBS was represented by Thomas S. Leatherbury of Vinson & Elkins in Dallas.

Green v. CBS Inc., 286 F.3d 281, 2002 U.S.App.LEXIS 5966 (5th Cir. 2002)[ELR 24:3:16]

Savannah radio station is enjoined from using "KISS" to identify or promote itself, in infringement suit filed by owner of competing station that owns "KIIS" and "KISS FM" trademarks

A kiss is just a kiss (or so said composer Herman Hupfeld in "As Time Goes By . . ."). But "KIIS" and "KISS FM" are trademarks. Citicasters Licenses, Inc., said so in a trademark infringement suit, in which it has been quite successful so far.

Citicasters is the company that owns radio station KIIS-FM in Los Angeles and some 40 other stations around the country, including WAEV-97 FM

in Savannah, Georgia. It has owned a federally registered trademark for "KIIS" since 1989, and a federally registered mark for "KISS FM" since May 1998.

Two things make all this interesting. Citicasters uses the mark "97 KISS FM" to identify and promote its Savannah station, and has since December 2001. Cumulus Media, Inc., owns a competing station in Savannah, WSIS-104 FM, which Cumulus began identifying and promoting as "KISS 104" in October 1998. The two companies' simultaneous use of "KISS" in Savannah prompted each to sue the other for trademark infringement, in a case in which each sought a preliminary injunction against the other.

Federal District Judge Dudley Bowen has granted Citicasters' motion for a preliminary injunction, and has denied Cumulus' motion.

Judge Bowen found there is a likelihood of confusion between Citicasters' mark "KIIS" and Cumulus' use of "KISS 104." He also found there is a likelihood of confusion between Citicasters' "97 KISS FM" and Cumulus' "KISS 104."

Cumulus of course argued that in Savannah, it used "KISS 104" before Citicasters used "97 KISS FM." That was true, but Citicasters' federal registrations gave it priority throughout the nation, except in specific areas where Cumulus used "KISS" before Citicasters did. Cumulus used "KISS" in Myrtle Beach before Citicasters registered "KISS FM." But the Myrtle Beach market does not encompass Savannah. So Citicasters' May 1998 registration of "KISS FM" gave it seniority in Savannah over Cumulus' October 1998 use of "KISS 104" there, Judge Bowen held.

Citicasters was represented by R. Perry Sentell III of Kilpatrick Stockton in Augusta and Jonathan C.

Balfus of Heenan Blaikie in Beverly Hills. Cumulus was represented by David E. Hudson of Hull Towill Norman Barret & Sallet in Augusta and James W. Dabney of Pennie & Edmonds in New York City.

Citicasters Licenses, Inc. v. Cumulus Media, Inc., 189 F.Supp.2d 1372, 2002 U.S.Dist.LEXIS 3497 (S.D.Ga. 2002)[ELR 24:3:16]

Statute of limitations bars suit by songwriter Philip Baptiste to rescind 1959 publishing contract for "Sea of Love"

Procedural issues surrounding the question of who wrote the song "Sea of Love" have been bouncing around the U.S. court system for years. From the release of the song's first recording in 1959, authorship

of "Sea of Love" has been credited to Philip Baptiste and George Khoury. Now, however, Baptiste alleges that he alone wrote the song - an allegation Baptiste first made, publicly, in 1995, in a lawsuit he filed against Khoury.

Baptiste's dispute with Khoury and the song's current publisher has appeared in these pages four times, most recently because of an order by a federal District Court in New York sending the publisher's declaratory relief lawsuit to Louisiana where Baptiste lives (ELR 18:3:10, 21:6:24, 22:1:18, 23:6:25).

In 1998, Baptiste decided that he might be able to prevail if he filed a separate lawsuit against the song's original publisher, Eddie Shuler doing business as Kamar Publishing Company, seeking rescission of the 1959 publishing contract altogether, on the grounds that it was the result of fraud. That lawsuit was dismissed, however, by a Louisiana state court, on the

grounds that it was barred by the statute of limitations. (In Louisiana legal parlance, the trial judge granted Shuler's "exception of prescription.")

That ruling has now been affirmed by the Louisiana Court of Appeal, in a short opinion by Judge Marc Amy.

At issue in the appeal was an arcane provision of Louisiana law that distinguishes between suits for complete and partial rescission on the grounds of fraud. A suit for complete rescission would not be subject to the statute of frauds, while a suit for partial rescission would be. Judge Amy affirmed the trial judge's conclusion that Baptiste was really seeking rescission only of the portion of the publishing contract that made Khoury a co-author of "Sea of Love," rather than a complete rescission of the contract. And that is why the suit was filed too late.

Philip Baptiste was represented by Daniel Emile Stretcher of Marcantel Marcantel Wall & Pfeiffer in Jennings. Shuler was represented by Robert Michael McHale in Lake Charles.

Baptiste v. Shuler, 809 So.2d 1210, 2002 La.App.LEXIS 627 (La.App. 2002)[ELR 24:3:17]

Indiana Supreme Court reverses contempt finding against Indiana High School Athletic Association, even though Association's "Restitution Rule" prevented school from permitting student to participate in varsity basketball as ordered by trial court

The Indiana Supreme Court has reversed a ruling holding the Indiana High School Athletic Association

in contempt of court. The Association was held in contempt as a result of its role in an eligibility case brought by Jessah Martin, a high school student who wanted to play women's varsity basketball after transferring from Bellmont to Bishop Luers High School for her senior year.

Martin was declared ineligible to play basketball at Bishop Luers because of the Association's transfer rule. But a trial court ruled that Martin was likely to prove that she was eligible under the Association's own "hardship exemption." As a result, the trial court issued a preliminary injunction barring the Association from doing anything to enforce its decision that Martin was not eligible. The injunction was affirmed on appeal (ELR 22:8:22).

Nevertheless, Bishop Luers refused to allow Martin to play anyway, because the Association failed to waive its "Restitution Rule." That rule requires

schools to forfeit any game in which an ineligible student plays, even if the student plays pursuant to a court order if the order is later reversed. The trial court deemed the Association's refusal to waive its "Restitution Rule" to be a violation of the preliminary injunction; and that ruling was affirmed on appeal too (ELR 23:217).

But in an opinion by Justice Frank Sullivan, a 3-to-2 majority of the Indiana Supreme Court reversed the contempt finding, for two reasons. First, the preliminary injunction did not specifically bar the Association from enforcing its "Restitution Rule." Second, in earlier cases, the Indiana Supreme Court had upheld the validity of the "Restitution Rule," even when used against schools that had permitted ineligible students to play only under later-reversed court orders (ELR 20:5:21).

The Indiana High School Athletic Association was represented by Robert M. Baker III of Johnson Smith Pence & Heath in Indianapolis. Martin was represented by Edward L. Murphy Jr. and Stephanie R. Crawford of Miller Carson Boxberger & Murphy in Fort Wayne.

Indiana High School Athletic Association v. Martin, 765 N.E.2d 1238, 2002 Ind.LEXIS 293 (Ind. 2002)[ELR 24:3:17]

Trial required to determine damages Franklin Sports must pay to owner of Roger Clemens Instructional Baseball patent on account of Franklin's sale of infringing baseball

Baseball games last nine innings. Baseball patent cases may also, if the case filed by Michael McGinley against Franklin Sports is any guide.

McGinley's owns a patent to the Roger Clemens Instructional Baseball - a patent that was infringed, courts found, by an instructional baseball sold by Franklin. That infringement finding took a few (judicial) innings by itself (ELR 22:4:22, 23:9:23).

Eventually, however, the case was sent to the courtroom of federal District Judge John Lungstrum for a damage assessment. Franklin then made a motion for partial summary judgment. It asked Judge Lungstrum to rule that McGinley's damages should be limited to a

reasonable royalty, and should not include the profits McGinley alleges he lost as a result of Franklin's infringing baseball.

There is indeed a principle of patent law that does limit a patent owner's damages to a reasonable royalty, under certain circumstances. That principle, stated from Franklin's point of view, would entitle McGinley to lost profits only if he could prove four things - one of which, Franklin argued, McGinley could not prove in this case.

Judge Lungstrum agreed with Franklin on the law, but he denied its motion nonetheless, because the judge ruled that a jury trial is necessary to decide disputed facts concerning the one element Franklin claimed McGinley would be unable to prove.

The disputed issue is whether a non-infringing substitute exists, that would be acceptable to consumers, for McGinley's Rogers Clemens baseball. If

one does exist, McGinley recovery will be limited to a reasonable royalty; if a non-infringing acceptable substitute does not exist, he will be entitled to recover lost profits.

McGinley was represented by Karen D. Renwick of Walters Bender Strohbehn & Vaughan in Kansas City. Franklin Sports was represented by Thomas A. Sheehan of Shook Hardy & Bacon in Kansas City.

McGinley v. Franklin Sports, Inc., 192 F.Supp.2d 1214, 2002 U.S.Dist.LEXIS 5248 (D.Kan. 2002)[ELR 24:3:18]

Previously Reported:

Decisions reported "In the News" now published. Decisions that were previously reported in the "In the

News" section of the Entertainment Law Reporter have been published: In re Napster, Inc. Copyright Litigation, 191 F.Supp.2d 1087, 2002 U.S.Dist.LEXIS 2963 (N.D.Cal. 2002) (ELR 23:11:5); Grammer v. Artists Agency, 287 F.3d 886, 2002 U.S.App.LEXIS 7723 (9th Cir. 2002) (ELR 23:12:7).

Supreme Court denies cert petitions. The United States Supreme Court has denied petitions for certiorari in: Echostar Communications Corp. v. CBS Broadcasting, 122 S.Ct. 1964, 2002 U.S.LEXIS 3621 (2002), in which the Court of Appeals upheld the constitutionality of the statutory license provisions of the Satellite Home Viewer and Improvement Acts, though it vacated an injunction that had been granted to the networks in their copyright infringement suit against Echostar (ELR 23:10:20); and Satellite Broadcasting and Communications Ass'n v. Federal Communications Commission, 122 S.Ct. 2588, 2002

U.S.LEXIS 4476 (2002), in which the Court of Appeals upheld the constitutionality of the "Carry One, Carry All" provision of the Satellite Home Viewer Improvement Act - the provision that requires satellite TV companies to deliver local stations as well as network affiliates (ELR 23:8:4).

[ELR 24:3:18]

DEPARTMENTS

In the Law Reviews:

Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary by David Nimmer, 23 Cardozo Law Review 909 (2002)

Comedy III v. Saderup by Gil Peles, 17 Berkeley Technology Law Journal 549 (2002)

Entertainment Law by Jon M. Garon, 76 Tulane Law Review 559 (2002)

The Merits of Ownership: or, How I Learned to Stop Worrying and Love Intellectual Property: Review Essay of Lawrence Lessig, The Future of Ideas, and Siva Vaidhyanathan, Copyrights and Copywrongs, by Shubha Ghosh, 15 Harvard Journal of Law and Technology 453 (2002)

Entertainment and Sports Lawyer, published by the American Bar Association's Forum on the Entertainment and Sports Industries, 750 N. Lake Shore Drive, Chicago, IL 60611-4497, has issued Volume 19, Number 4 with the following articles:

Does the Digital Millennium Copyright Act Impede Scientific Expression? by Tieffa Harper, 19 Entertainment and Sports Lawyer 1 (2002) (for address, see above)

Old Friends: ASCAP and DOJ Reach a New Consent Decree by Michael A. Einhorn, 19 Entertainment and Sports Lawyer 7 (2002) (for address, see above)

The Supreme Court Decides the Case, But Not the Arguments: What Is the Impact of PGA Tour v. Casey Martin? by John T. Wolohan, 19 Entertainment and Sports Lawyer 11 (2002) (for address, see above)

The Uncommon Origins of "The Common Law Origins of the Infield Fly Rule" by Robert M. Jarvis and Phyllis

Coleman, 19 Entertainment and Sports Lawyer 17 (2002) (for address, see above)

Book Review: Insurance Coverage of Intellectual Property Assets by David A. Gauntlett reviewed by Bob Pimm, 19 Entertainment and Sports Lawyer 22 (2002) (for address, see above)

The UCLA Entertainment Law Review has published Volume 9, Issue 2 with the following articles:

The Justification and Scope of the Copyright Misuse Doctrine and Its Independence of the Antitrust Laws by Ilan Charnelle, 9 UCLA Entertainment Law Review (2002)

Straightening Out Copyright Preemption by Schuyler Moore, 9 UCLA Entertainment Law Review (2002)

The Intersection of Film Finance and Revised Article 9: A Mystery by Pauline Stevens, 9 UCLA Entertainment Law Review (2002)

Finding the Unobstructed Window for Internet Film Viewing by Alexis Garcia, 9 UCLA Entertainment Law Review (2002)

Boxing Basinger: Oral Contracts and the Manager's Privilege on the Ropes in Hollywood by Michael T. Giordano, 9 UCLA Entertainment Law Review (2002)

Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent with the First Amendment? by Tara Kole, 9 UCLA Entertainment Law Review (2002)

Digital Sampling: A Cultural Perspective by Henry Self, 9 UCLA Entertainment Law Review (2002)

Objective Limitations or, How the Vigorous Application of "Strong Form" Idea/Expression Dichotomy Theory in Copyright Preliminary Injunction Hearings Might Just Save the First Amendment by Michael W. Shiver Jr., 9 UCLA Entertainment Law Review (2002)

Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws by Brent T. Yonehara, 9 UCLA Entertainment Law Review (2002)

The Vanderbilt Journal of Entertainment Law and Practice has published Volume 4, Number 2 with a

Symposium: Emerging Issues in Sports Law including the following articles:

Symposium Transcript: Emerging Issues in Sports Law by Steve Underwood and Christoper Whitson, 4 Vanderbilt Journal of Entertainment Law and Practice 120 (2002)

From Subway Stations to the Information Superhighway: Compliance Strategies for Musicians to Avoid the Worldwide Entanglement of Privacy Laws by Yvenne M. King, 4 Vanderbilt Journal of Entertainment Law and Practice 129 (2002)

The Electronic Jungle: The Applications of Intellectual Property Law to Distance Education by Jon Garon, 4 Vanderbilt Journal of Entertainment Law and Practice 146 (2002)

Book Publishing in the Age of the e-Book by Nancy B. Vermylen, 4 Vanderbilt Journal of Entertainment Law and Practice 190 (2002)

Crossing the (Blue) Line: Is the Criminal Justice System the Best Institution to Deal with Violence in Hockey? By John Timmer, 4 Vanderbilt Journal of Entertainment Law and Practice 205 (2002)

The Recording Industry, Minimum Advertised Pricing Policies and Non-Price Vertical Restraints of Trade by Courtney McCormick, 4 Vanderbilt Journal of Entertainment Law and Practice 220 (2002)

The Government Tunes in to Tune Out the Marketing of Violent Entertainment to Kids: The Media Violence Labeling Act, the Media Marketing Accountability Act

and the First Amendment by Shannon McCoy, 4 Vanderbilt Journal of Entertainment Law and Practice 237 (2002)

Comm/Ent, Hastings Communications and Entertainment Law Journal, has published Volume 23, Numbers 3 and 4 and Volume 24, Number 1 with the following articles:

Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped by Clay Calvert, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 507 (2001)

Trade Secrets, the First Amendment and the Challenges of the Internet Age by David Greene, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 537 (2001)

Turning Gray into Green: Some Comments on Napster by Shubha Ghosh, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 563 (2001)

The First Amendment as a Check on Copyright Rights by Alan E. Garfield, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 587 (2001)

Using Technology to Circumvent the Law: The DMCA's Push to Privatize Copyright by Matt Jackson, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 607 (2001)

Legislative Prohibitions on the Enforcement of Post-Employment Covenants Not To Compete in the

Broadcasting Industry by Alice J. Baker, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 647 (2001)

The Future of the Concurrent Use of Trademarks Doctrine in the Information Age by David S. Barrett, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 687 (2001)

Reconstructing First Amendment Doctrine: the 1990s [R]Evolution of the Central Hudson and O'Brien Tests by Susan Dente Ross, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 723 (2001)

Pricing Network Elements Under the Telecommunications Act of 1996: Back to the Future by Salvatore Massa, Mark E. Meitzen, and Steve G.

Parsons, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 751 (2001)

The Webcasting Music Revolution Is Ready to Begin, As Soon As We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself by Kimberly L. Craft, 24 Comm/Ent, Hastings Communications and Entertainment Law Journal 1 (2001)

Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design by Samantha L. Hetherington, 24 Comm/Ent, Hastings Communications and Entertainment Law Journal 43 (2001)

The Supreme Court and Trade Dress-A Short Comment by William P. Kratzke, 24 Comm/Ent, Hastings

Communications and Entertainment Law Journal 73 (2001)

Year of the Living Dead: California Breathes New Life into Celebrity Publicity Rights by Rhett H. Laurens, 24 Comm/Ent, Hastings Communications and Entertainment Law Journal 109 (2001)

Vote-Swapping Over the Internet: Free Speech or Voter Corruption? by Jesse Sisgold, 24 Comm/Ent, Hastings Communications and Entertainment Law Journal 149 (2001)

Cardozo Arts and Entertainment Law Journal has published Volume 20, Number 2 as a Symposium on Copyright Law as Communications Policy: Convergence of Paradigms and Cultures:

The Distant Drumbeat: Why the Law Still Matters in the Information Era by Marci A. Hamilton, 20 Cardozo Arts & Entertainment Law Journal (2002)

Digital TV, Copy Control, and Public Policy by Jonathan Weinberg, 20 Cardozo Arts & Entertainment Law Journal (2002)

Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act by Jonathan Band and Matthew Schruers, 20 Cardozo Arts & Entertainment Law Journal (2002)

Internet Television and Copyright Licensing: Balancing Cents and Sensibility by Michael A. Einhorn, 20 Cardozo Arts & Entertainment Law Journal (2002)

War Stories by Jessica Litman, 20 Cardozo Arts & Entertainment Law Journal (2002)

One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability by Matt Jackson, 20 Cardozo Arts & Entertainment Law Journal (2002)

Replaying the Betamax Case for the New Digital VCRs: Introducing TiVo to Fair Use by Matthew W. Bower, 20 Cardozo Arts & Entertainment Law Journal (2002)

The Deep Pocket Dilemma: Setting the Parameters of Talk Show Liability by Jason S. Schlessel, 20 Cardozo Arts & Entertainment Law Journal (2002)

Copyright Law-Fair Use Doctrine-Eleventh Circuit Allows Publication of Novel Parodying Gone with the

Wind-Suntrust Bank v. Houghton Mifflin Co., 115 Harvard Law Review 2364 (2002)

Fordham Intellectual Property, Media and Entertainment Law Journal has published Volume 12, Numbers 3 and 4 with the following articles:

Symposium: Global Intellectual Property Rights: Boundaries of Access and Enforcement, 12/3 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

India: A Cautionary Tale on the Critical Importance of Intellectual Property Protection by Susan Finston, 12/4 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New by David J. Gervais, 12/4 Fordham Intellectual Property, Media & Entertainment Law Journal (2002)

Well-Known and Famous Trademarks in Israel: TRIPS from Manhattan to the Dawn of a New Millennium! by Amir H. Khoury, 12/4 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Dancing to the Beat of a Different Drummer: Global Harmonization-and the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings by John R. Kettle III, 12/4 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

The Proposed New WIPO Treaty for Increased Protection for Audiovisual Performers: Its Provisions and Its Domestic and International Implications by Adler Bernard, 12/4 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Forever on the Installment Plan? An Examination of the Constitutional History of the Copyright Clause and Whether the Copyright Term Extension Act of 1998 Squares with the Founders' Intent by Kevin D. Galbraith, 12/4 Fordham Intellectual Property, Media & Entertainment Law Journal (2002)

ICANNSucks.biz (and Why You Can't Say That): How Fair Use of Trademarks in Domain Names is Being Restrained by Adam Goldstein, 12/4 Fordham Intellectual Property, Media & Entertainment Law Journal (2002)

Like a Sieve: The Child Internet Protection Act and Ineffective Filters in Libraries by Adam Goldstein, 12/4 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work? by Natalie C. Suhl, 12/4 Fordham Intellectual Property, Media and Entertainment Law Journal (2002)

Intellectual Property Law in the Context of Competition Law: 'Consent' in Relation to Curbs of Parallel Trade in Europe by Valentine Korah, 25 Fordham International Law Journal 972 (2002)

Parallel Imports, the Intraband/Interband Competition Paradigm, and the Hidden Gap Between Intellectual

Property Law and Antitrust by Eleanor M. Fox, 25 Fordham International Law Journal 982 (2002)

Virginia Sports and Entertainment Law Journal has published Volume 1, Number 2 with the following articles:

Public Finance of Sports Stadia: Controversial But Permissible...Time for Federal Income Tax Relief for State and Local Taxpayers by Mildred Wigfall Robinson, 1 Virginia Sports and Entertainment Law Journal 135 (2002)

Recent Incitement Claims Against Publishers and Filmmakers: Restraints on First Amendment Rights or Proper Limits on Violent Speech? by Vivien Toomey Montz, 1 Virginia Sports and Entertainment Law Journal 171 (2002)

A Cart That Accommodates: Using Case Law to Understand the ADA, Sports and Casey Martin by Paul M. Anderson, 1 Virginia Sports and Entertainment Law Journal 211 (2002)

Symposium: Braves or Cowards? Use of Native American Images and Symbols as Sports Nicknames, 1 Virginia Sports and Entertainment Law Journal 257 (2002)

Legal Approaches to the Use of Native American Logos and Symbols in Sports by Scott R. Rosner, 1 Virginia Sports and Entertainment Law Journal 258 (2002)

American Indian Nicknames and Mascots for Team Sports: Law, Policy, and Attitude by Roger Clegg, 1

Virginia Sports and Entertainment Law Journal 274 (2002)

The Tears of Strangers Are Only Water: The Refusal of America to Understand the Mascot Issue by Christine Rose, 1 Virginia Sports and Entertainment Law Journal 283 (2002)

Fighting Sue: The Unsavory War Against Indian Symbols by John J. Miller, 1 Virginia Sports and Entertainment Law Journal 291 (2002)

Illegal Defense: The Law and Eocnomics of Banning High School Players from the NBA Draft by Michael A. McCann, 1 Virginia Sports and Entertainment Law Journal 295 (2002)

The Future of Music by Jenny Toomey, 10 Texas Intellectual Property Law Journal (2002)

Napster Opens Pandora's Box: Examining How File-Sharing Services Threaten the Enforcement of Copyright on the Internet by Matthew Green, 63 Ohio State Law Journal (2002)

Sound Recordings, Works for Hire, and the Termination of Transfers Time Bomb by David Nimmer and Peter S. Menell, 49 Journal of the Copyright Society of the USA 387 (2001) (352 Seventh Avenue Ste 307, New York, NY 10001)

Traffic Jam on the Music Highway: Is It a Reproduction or a Performance? by Michael A. Einhorn and Lewis Kurlantzick, 49 Journal of the

Copyright Society of the USA 417 (2001) (for address, see above)

Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary by Joseph J. Beard, 49 Journal of the Copyright Society of the USA 441 (2001) (for address, see above)

Second Interdisciplinary Conference on the Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property: Looking Ahead and Shaping the Future: Provoking Change in Copyright Law by Kenneth D. Crews, 49 Journal of the Copyright Society of the USA 549 (2001) (for address, see above)

TRIPS Dispute Settlement and the Sources of (International) Copyright Law by Ruth Okediji, 49 Journal of the Copyright Society of the USA 585 (2001) (for address, see above)

Everything You Ever Wanted to Know About the Copyright Act Before 1909, But Couldn't Be Bothered to Look Up by David Rabinowitz, 49 Journal of the Copyright Society of the USA 649 (2001) (for address, see above)

Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers et al by Andrea Rush, David Stratas and Stephen Zolf, 49 Journal of the Copyright Society of the USA 663 (2001) (for address, see above)

When is Fair Use Fair? A Comparison of E.U. and U.S. Intellectual Property Law by Eric Allen Engle, 15 The Transnational Lawyer 187 (2002) (published by University of the Pacific, McGeorge Law School)

Symposium: Beyond Napster-The Future of the Digital Commons, introduction by Elizabeth Rindskopf Parker, 15 The Transnational Lawyer 257 (2002) (published by University of the Pacific, McGeorge Law School)

The Napster Case: The Whole World is Listening by Grace J. Bergen, 15 The Transnational Lawyer 259 (2002) (published by University of the Pacific, McGeorge Law School)

The Future of Online Music: Labels and Artists by Scott Hervey, 15 The Transnational Lawyer 279 (2002)

(published by University of the Pacific, McGeorge Law School)

The Intersection of Intellectual Property and Antitrust Law: In re Independent Service Organizations Antitrust Litigation by Matthew G. Jacobs and Michael S. Mireles, 15 The Transnational Lawyer 293 (2002) (published by University of the Pacific, McGeorge Law School)

Publishing in the Digital Age by Scott W. Pink, 15 The Transnational Lawyer 305 (2002) (published by University of the Pacific, McGeorge Law School)

Beyond Napster-Is It Just Music? Or Are Judicial Resolutions Ineffective in Digital Commerce? by Jed Scully, 15 The Transnational Lawyer 313 (2002)

(published by University of the Pacific, McGeorge Law School)

Infringement.com: RIAA v. Napster and the War Against Online Music Piracy by Timothy James Ryan, 44 Arizona Law Review (2002)

Music on the Internet: Is Technology Moving Faster Than Copyright Law? by Kimberly Kerry, 42 Santa Clara Law Review 967 (2002)

The American Federation of Musicians: An Unearned Encore for Featherbedding by Mindy Schwartz, 47 The Wayne Law Review 1339 (2002)

The AOL-Time Warner Merger: An Analysis of the Broadband Internet Access Market by Aaron M. Wigod, 6 The Journal of Small and Emerging Business

Law (2002) (published by Northwestern School of Law of Lewis & Clark College)

The Wind Done Gone: Transforming Tara into a Plantation Parody by Jeffrey D. Grossett, 52 Case Western Reserve Law Review (2002)

First Amendment Limits on Copyright by C. Edwin Baker, 55 Vanderbilt Law Review 891 (2002)

The Digital Millennium Copyright Act and the European Copyright Directive: Legislative Attempts to Control Digital Music Distribution by Sharonda Williams, Loyola University New Orleans School of Law Intellectual Property and High Technology Journal (2002)

Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution by Richard D. Rose, 42 IDEA, the Journal of Law and Technology 313 (2002) (published by the PTC Research Foundation, 2 White Street, Concord, NH 03303)

Understanding the Impact of the Digital Millennium Copyright Act on the Open Source Model of Software Development by Theodore C. McCullough, 6 Marquette Intellectual Property Law Review (2002)

"Originality" After the Dead Sea Scrolls Decision: Implications for the American Law of Copyright by Urszula Tempska, 6 Marquette Intellectual Property Review (2002)

Will Mickey Mouse Get a New Lease on Life? Constitutional Questions on the Extension of the Copyright Term by Jeanne Hamburg and William Nix, 22 The Licensing Journal 7 (2002) (published by Aspen Publishers)

Antitrust Issues in Licensing Transactions by Stafford Matthews, 22 The Licensing Journal 9 (2002) (published by Aspen Publishers)

Substantial Notice Under the Digital Millennium Copyright Act by Pearson Liddell, Jr. and William D. Eshee, Jr., 8 Texas Wesleyan Law Review (2002)

Intellectual Property, Antitrust, and the Economics of Aftermarkets by Jill Boylston Herndon, 47 The Antitrust Bulletin 309 (2002) (published by Federal

Legal Publications, 157 Chambers Street, New York, NY 10007)

Copyright as Entry Policy: The Case of Digital Distribution by Randal C. Picker, 47 The Antitrust Bulletin 423 (2002) (for address, see above)

Online Music: Antitrust and Copyright Perspectives by Jeffrey L. Harrison, 47 The Antitrust Bulletin 465 (2002) (for address, see above)

Perfecting Security Interests in Unregistered Copyrights: Preemption of the Federal Copyright Act and How Filing In Accordance with Article 9 Leads to the Creation of a Bankruptcy "Force Play," 10 American Bankruptcy Institute Law Review 463 (2002) (published by the American Bankruptcy Institute, 44 Canal Center Plaza, Ste 404, Alexandria, VA 22314)

Global Solutions to Prevent Copyright Infringement of Music Over the Internet: The Need to Supplement the WIPO Internet Treaties with Self-Imposed Mandates, 12 Indiana International and Comparative Law Review (2001)

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)

Major League Baseball Players Association v. Garvey: Revisiting the Standard for Arbitral Review by Jaime Dodge Brynes and Alison Berkowitz Prout, 7 Harvard Negotiation Law Review (2002)

Open Competition in League Sports by Stephen F. Ross and Stefan Szymanski, 2002, Number 3 Wisconsin Law Review (2002)

Down for the Count: The Muhammad Ali Boxing Reform Act and Its Shortcomings by Cristina E. Groschel, 26 Nova Law Review (2002)

The Journal of Sport Law, published by Seton Hall University School of Law, has issued Volume 12, Number 1 with the following articles:

The Sign Said, "Beware of Duffers"-The Liability of Golf Course Operators for Failing to Post Warning Signs by Michael Flynn, 12 The Journal of Sport Law, Seton Hall University School of Law (2002)

Legal and Ethical Aspects of Sports-Related Concussions: The Merril Hoge Story by Alexander N. Hecht, 12 The Journal of Sport Law, Seton Hall University School of Law (2002)

Walking Through the New Jersey Equine Activity Statute: A Look at Judicial Statutory Interpretation in Jurisdictions with Similar Limited Liability Laws by Loren Speziale, 12 The Journal of Sport Law, Seton Hall University School of Law (2002)

Negligence in the Protection of Third Parties During Youth Sports Programs-The Duty of an Actor to Control the Conduct of Another So as to Protect a Third Person from Attack Will Arise Only If There Is a Special Relationship Between the Actor and That Other Party Whose Conduct Requires Restraint-Hills v. Bridgeview Little League Association by Daniela

D'Amico, 12 The Journal of Sport Law, Seton Hall University School of Law (2002)

Courts' Scope of Review of Arbitration Decisions-Supreme Court Overturns the Ninth Circuit's Rejection of the Arbitration Panel's Decision That Found No Collusion Activities by the Baseball Owners-Major League Baseball Players Association v. Steve Garvey, 12 The Journal of Sport Law, Seton Hall University School of Law (2002)

Economic Duress and Anti-Competitive Practices-Coercive Tactics Utilized by the National Football League to Prevent Franchise Relocation-V.K.K. Coporation v. National Football League by Robert J. Ritacco, 12 The Journal of Sport Law, Seton Hall University School of Law (2002)

Sports Law Arbitration by CAS: Is It the Same as International Arbitration? by Richard H. McLaren, 29 Pepperdine Law Review (2002)

The Journal of College and University Law, published by the National Association of College and University Attorneys and the Notre Dame Law School, has issued a Symposium on Intercollegiate Athletics with the following articles:

Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues by John Gaal, Michael S. Glazier and Thomas S. Evans, 28 The Journal of College and University Law (2002) (for publisher, see above)

At the Busy Intersections: Title VI and NCAA Eligibility Standards by David P. Bruton, 28 The Journal of College and University Law (2002) (for publisher, see above)

An Update on Recent Decisions Rendered by the NCAA Infractions Appeals Committee: Further Guidance for NCAA Member Institutions by Richard R. Hilliard, Angel F. Shelton and Kevin E. Pearson, 28 The Journal of College and University Law (2002) (for publisher, see above)

From the Stadium Parking Lot to the Information Superhighway: How to Protect Your Trademarks from Infringement by Scott Bearby and Bruce Siegal, 28 The Journal of College and University Law (2002) (for publisher, see above)

Free Speech in Private Universities: The Marketplace of Ideas vs. The Market: An Examination of Keady v. Nike by Maureen Threaplton, 28 The Journal of College and University Law (2002) (for publisher, see above)

Self-Regulation and League Rules Under the Sherman Act by Mark C. Anderson, 30 Capital University Law Review (2002)

Institutional Liability for Hazing in Interscholastic Sports by Scott R. Rosner and R. Brian Crow, 39 Houston Law Review (2002)

PGA Tour, Inc. v. Martin: Leveling the Playing Field for Disabled Athletes under the Americans with Disabilities Act by Foy Meyer III, 76 Tulane Law Review (2002)

When the Only Way to Equal Is to Acknowledge Difference: PGA Tour, Inc. v. Martin by Martha Lee Walters and Suzanne Bradley Chanti, 40 Brandeis Law Journal of the University of Louisville 727 (2002)

Untangling the "Publisher" Versus "Information Content Provider" Paradox of 47 U.S.C. section 230: Toward a Rational Application of the Communications Decency Act in Defamation Suits Against Internet Service Providers by Bryan J. Davis, 32 New Mexico Law Review (2002)

Use "the Filter You Were Born With": The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries by Richard J. Peltz, 77 Washington Law Review (2002)

The First Amendment and Problems of Political Viability: The Case of Internet Pornography by Mark C. Alexander, 25 Harvard Journal of Law and Public Policy 977 (2002)

A Matter of Arithmetic: Using Supply and Deman To Determine the Constitutionality of Adult Entertainment Zoning Ordinances by Ashley C. Phillips, 51 Emory Law Journal 319 (2002)

Use of Expert Testimony in Copyright Infringement Cases by Vernon W. Johnson, III, 14 Intellectual Property and Technology Law Journal 8 (2002) (published by Aspen Law & Business, edited by Weil, Gotshal & Manges)

Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply by Odelia Braun, 32 Golden Gate University 325 (2002)

Resolving the Dilemma of the Televised Fair Trial: Social Facilitation and the Intuitive Effects of Television by Blake D. Morant, 8 The Virginia Journal of Social Policy and the Law (2001)

Endangered Research: The Proliferation of E-books and Their Potential Threat to the Fair Use Clause by Jason Cohen, 9 Journal of Intellectual Property Law 163 (2001) (published by University of Georgia School of Law, Athens, Georgia 30602-6012)

The Classical Recording Industry: Survival Techniques in a Shrinking Market by Clyde Philip Rolston and C. Anthony Di Benedetto, 32 The Journal of Arts

Management, Law and Society 25 (2002) (www.heldref.org)

Is There a Market for Copies? by Francoise Benhamou and Victor Ginsburgh, 32 The Journal of Arts Management, Law and Society 37 (2002) (for web address, see above)

Justice Between Authors by Dawn C. Nunziato, 9 Journal of Intellectual Property Law (2002) (published by University of Georgia School of Law, Athens, Georgia 30602-6012)

Copyrights from a Child's Perspective by Monica Vining, 9 Journal of Intellectual Property Law (2002) (published University of Georgia School of Law, Athens, Georgia 30601-6012)

You Cannot Hide Behind Religion in Copyright Law: The Ninth Circuit Correctly Rejected a Religious Extension to the Fair Use Defense in Worldwide Church of God v. Philadelphia Church of God, Inc., Creighton Law Review 1107 (2002)

Drawing Swords After Feist: Efforts to Legislate the Database Pirate by Victoria Smith Ekstrand, 7 Communication Law and Policy (2002) (published by Lawrence Erlbaum Associates, Publishers, Mahwah, New Jersey)

The Missing Goya: Section 11 of the Theft Act 1968 by Humphrey Wine, 6 Art Antiquity and Law 301 (2001) (www.ial.uk.com/publications/AAL.htm)

Protection of Cultural Property in Austria by Anita Gach and Hubert D. Szemethy, 6 Art Antiquity and Law 309 (2001) (for website, see above)

The Museum Courier and the Distribution of Liability for Loans in Transit by Rosalie Cass, 6 Art Antiquity and Law 325 (2001) (for website, see above)

Review of the Treasure Act by Elaine M. Paintin, 6 Art Antiquity and Law 345 (2001) (for website, see above)

Chapman Law Review has published Volume 5, Number 1 as a Gaming Law Symposium with the following articles:

Sports Gambling in the Cyberspace Era by Anthony N. Cabot and Robert D. Faiss, 5 Chapman Law Review (2002)

There Are No Pequots on the Plains: Assessing the Success of Indian Gaming by Kathryn R. L. Rand, 5 Chapman Law Review (2002)

Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States by Joseph Kelly, 5 Chapman Law Review (2002)

Appendix: An International Survey of Gambling Debt Enforcement Law, 5 Chapman Law Review (2002)

Gambling for the Good, Trading for the Future: The Legality of Markets in Science Claims by Tom W. Bell, 5 Chapman Law Review (2002)

The Regulation of Commercial Gaming by Cory Aronovitz, Esq., 5 Chapman Law Review (2002)

Internet Gaming Regulation: The Kahnawake Experience by Frank Catania, 5 Chapman Law Review (2002)

Appendix: Kahnawake Gaming Commission Regulations Concerning Interactive Gaming, 5 Chapman Law Review (2002)

Internet Gaming Tax Regulation: Can Old Laws Learn New Tricks? By Daniel H. Lantzer, 5 Chapman Law Review (2002)

Internet Gambling, Electronic Cash & Money Laundering: The Unintended Consequences of a

Monetary Control Scheme by Mark D. Schopper, 5 Chapman Law Review (2002)

Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics by Julie A. Baird, 17 Berkeley Women's Law Journal 31 (2002)

Title III of the ADA Allows a Qualified Disabled Entrant to Use a Motorized Cart on the Professional Golf Tour: PGA Tour, Inc. v. Martin by David A. Monaghan, 40 Duquesne Law Review (2002)

A Good Catch: A Transfer System for Cricket?, 9 Sports Law Administration and Practice 1 (2002) (published by Informa Law, www.informalaw.com)

Image Rights, 9 Sports Law Administration and Practice 11 (2002) (for website, see above)

Personality and Patrimony: Comparative Perspectives on the Right to One's Image by Eric H. Reiter, 76 Tulane Law Review (2002)

Dusting Off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Association, 35 Creighton Law Review 913 (2002)

Back to the Future: Intellectual Property and the Rediscovery of Property Rights-and Wrongs by June Carbone, 46 Saint Louis University Law Journal 629 (2002)

Extra! Can't Read All About It: Articles Disappear After High Court Rules Freelance Writers Taken Out of Context in New York Times Co. v. Tasini by Douglas P. Bickham, 29 Western State University Law Review 85 (2001)

Fore! American Golf Corporation v. Superior Court: The Continued Uneven Application of California's Flawed Doctrine of Assumption of Risk by Nicholas J. Cochran, 29 Western State University Law Review 125 (2001)

The Journal of Mass Media Ethics, www.jmme.byu.edu, published by Lawrence Erlbaum Associates, 10 Industrial Avenue, Mahwah, NJ 07430-2262, has published Volume 17, Number 1 with the following articles:

Times v. Sullivan: Landmark or Land Mine on the Road to Ethical Journalism? by John C. Watson, 17 Journal of Mass Media Ethics 3 (2002) (for address, see above)

Privacy Invasion by the News Media: Three Ethical Models by Candace Cummins Gauthier, 17 Journal of Mass Media Ethics 20 (2002) (for address, see above)

Responsibility and Ethics in the Canadian Media: Some Basic Concerns by Raphael Cohen-Almagor, 17 Journal of Mass Media Ethics 35 (2002) (for address, see above)

Journalism Sources as Trade Secrets: Whose Source Is It Anyway by Clay Calvert and Robert D. Richards, 23 Whittier Law Review (2002)

The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of New York Times v. Sullivan by Kristian D. Whitten, 32 Cumberland Law Review (2001-2002)

Domain Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP by Stephen J. Ware, 6 The Journal of Small and Emerging Business Law (2002) (published by Northwestern School of Law of Lewis & Clark College)

ICANN Domain Name Dispute Resolution, the Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law by Richard E. Speidel, 6 The Journal of Small and Emerging Business Law (2002) (published by Northwestern School of Law of Lewis & Clark College)

Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process by Elizabeth G. Thornburg, 6 The Journal of Small and Emerging Business Law (2002) (published by Northwestern School of Law of Lewis & Clark College)

Protection of Trademark Owners: The Ultimate System of Regulating Search Engine Results by James A. Rossi, 42 Santa Clara Law Review 295 (2002)

The UDRP-A Model for Dispute Resolution in E-Commerce? by Edward C. Anderson and Timothy S. Cole, 6 The Journal of Small and Emerging Business Law (2002) (published by Northwestern School of Law of Lewis & Clark College)

Charles Dickens' Bleak House: Mr. Tulkinghorn As a Successful Literary Lawyer by Maureen E. Markey, 14 St. Thomas Law Review (2002)

The Price of Passion: The Banishment of English Hooligans from Football Matches in Violation of Fundamental Freedoms by Geoff Beckham, 25 Hastings International and Comparative Law Review (20010

Stadium Funding in Massachusetts: Has the Commonwealth Found the Balance in Private v. Public Spending? by Brian Adams, 51 Catholic University Law Review (2002)

PGA Tour, Inc. v. Martin: A Hole in One for Casey Martin and the ADA by Melissa Ann Resslar, 33 Loyola University Chicago Law Journal (2002)

Comment: Intellectual Property Right and Economic Development by Keith Maskus, by Robert E. Evenson, 33 Case Western Reserve Journal of International Law 187 (2001)

Argentina's Emerging Standard of Intellectual Property Protection: A Case Study of the Underlying Conflicts Between Developing Countries, TRIPS Standards, and the United States by Kimberly A. Czub, 33 Case Western Reserve Journal of International Law (2001)

Complete Ban on Virtual Child Porn Violates the First Amendment, 19 The Computer & Internet Lawyer 27 (2002) (published by Aspen Law & Business)

Wilson v. Layne: Bans Press with Police in the Home, But Leaves Media Ride-Alongs Intact by Kathy A. Brown, 102 West Virginia Law Review 891 (2000)

Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve by Wendy A. Adams, 10 International Journal of Law and Information Technology 71 (2002) (www.ijlit.oupjournals.org)

Copyright Infringement in the Internet Era: The Challenge of MP3s by Alex Colangelo, 39 Alberta Law Review (2002)

Infringement of Copyright and Trade Marks in Electronic Commerce: A Kuwaiti and Comparative Approach by Mahmoud A. Al-kandari, 17 Arab Law

Quarterly 3 (2002) (http://elj.warwick.ac.uk/juk/journals/alq.html)

Recovering Stolen Art-Australian, English and US Law on Limitations of Action by Andrew Kenyon & Simon Mackenzie, 30 The University of Western Australia 233 (2002) (www.law.ecel.uwa.edu.au/lreview/)

Getting "Personal" in the UK: To What Extent Does the Law Offer Celebrities Protection? by Sarah Whalley Coombes and Elizabeth May, 119 Copyright World 16 (2002) (www.ipworldonline.com)

Ulysses' Legal Odyssey by Jacqueline Irvine, 119 Copyright World 19 (2002) (www.ipworldonline.com)

Commissioned Designs: Who Owns Them? by Simon Clark, 120 Copyright World 16 (2002) (www.ipworldonline.com)

Copyright in Brazil by Henry K. Sherrill, 120 Copyright World 20 (2002) (www.ipworldonline.com)

Reform of Copyright by Bob and Benedict Dugan, April The New Zealand Law Journal 120 (2002) (published by LexisNexis NZ)

The European Intellectual Property Review, www.sweetandmaxwell.co.uk, has published Volume 24, Issues 6 and 7 with the following articles:

New Amendments to the Copyright Law of the People's Republic of China by Thomas Hays and Zhang Yun, 24

The European Intellectual Property Review 301 (2002) (for web address, see above)

Looking into the Revision of the Trade Mark and Copyright Laws from Perspective of China's Accession to WTO by Zheng Chengsi, 24 The European Intellectual Property Review 313 (2002) (for web address, see above)

Intellectual Property in the Information Age and Secured Finance Practice by Jacqueline Lipton, 24/7 European Intellectual Property Review 358 (2002) for web address, see above)

Copyright in Cyberspace-Experience of China by Hong Xue, 8 Computer and Telecommunications Law Review 113 (2002) (www.sweetandmaxwell.co.uk)

The Entertainment Law Review, www.sweetandmaxwell.co.uk, has published Volume 13, Issue 5 with the following articles:

The Irrelevance of Truth and Falsity in the New Law of Defamation by Jonathan Coad, 13 Entertainment Law Review 95 (2002) (for website, see above)

A Shabby State of Affairs-Disclosure of Sexual Facts against the Individual's Consent, Striking the Balance, Pre-publication, between Articles 8 (Privacy) and 10 (Freedom of Expression)-a Claimant's Perspective by Simon Smith, 13 Entertainment Law Review 101 (2002) (for website, see above)

Personality Endorsement-New Brands Hatch? by Kristie Sloper and Brian Cordery, 13 Entertainment Law Review 106 (2002) (for website, see above)

Homer Simpson Strikes Again by Owen Morgan, 13 Entertainment Law Review 108 (2002) (for website, see above)

Content and Copyright in the Digital Age; Impact on Contract by Adam Simpson, 12 Journal of Law and Information Science, published by the University of Tasmania 70 (2001)

Canadian Skirmishes in the Copyright Wars Lead to a Split Decision by Steven B. Garland and Dennis S.K. Leung, 121 Copyright World 18 (2002) (www.ipworldonline.com)
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