IN THE NEWS

Entertainment industry loses copyright infringement case against Grokster and Morpheus, though claims against Kazaa are still pending; federal judge rules that Grokster and Morpheus are not vicariously or contributorily liable because they, unlike Napster, cannot control what users do with their peer-to-peer software

The entertainment industry has suffered a serious setback in its ongoing battle against online digital piracy. Federal District Judge Stephen Wilson has held that Grokster and Morpheus - companies that distribute peer-to-peer networking software - are not liable for copyright infringements committed by users of their software.

Judge Wilson made this ruling in a case filed by movie and record companies, and a companion case filed by songwriters and music publishers, against three peer-to-peer companies: Grokster, Morpheus and Kazaa. The entertainment industry's claims against Kazaa were not addressed in the judge's decision and are still pending.

Grokster and Morpheus did not dispute that "at least some" of those who use their software commit "direct copyright infringement" by downloading movies and music recordings. On the other hand, the entertainment industry did not contend that Grokster or Morpheus themselves committed "direct" infringement. Instead, the industry argued that Grokster and Morpheus were liable for vicarious and contributory infringement. This same argument was successful for the industry in the "Napster" case (ELR 22:3:4, 22:9:5, 22:10:11, 23:11:4).

Though Grokster and Morpheus, like Napster, facilitate peer-to-peer networking - by which users exchange digital files directly with one another, without routing those files through a central server - Napster did something that Grokster and Morpheus do not. Napster hosted, on its own central server, an index of files available on computers connected to Napster's network. For that reason, Napster was involved in its users' infringing activities even after users installed Napster's software on their own computers. What's more, Napster had the means to prevent further infringements, by deleting the names of infringing files from its index.

Grokster and Morpheus, by contrast, do not host indexes on their servers. Grokster's software enables users - usually many at a time - to host indexes. Morpheus' software enables users to find files they want, apparently without creating a central index anywhere.

Judge Wilson concluded that these technical distinctions between the way in which Napster worked and the ways in which Grokster and Morpheus work, required a significant difference in the legal outcome.

To be liable for contributory infringement, Grokster and Morpheus would have to have knowledge their software was being used to infringe "at a time when [they] . . . can . . . do something about it." Although they knew their software was being used to infringe, Judge Wilson concluded that they couldn't do anything about it, because once their software is distributed, Grokster and Morpheus no longer have any control over what users do with it.

Moreover, the judge concluded that the two companies could not be held liable simply for distributing their software, even though they knew it could be used to infringe, because their software also can and is being used for non-infringing purposes too. "Grokster and StreamCast [the company that now owns

Morpheus] are not significantly different from companies that sell home video recorders or copy machines, both of which can be and are used to infringe copyrights," the judge reasoned.

To be liable for vicarious infringement, Grokster and Morpheus would have to benefit financially from their users' infringements and have the ability to supervise that conduct. Judge Wilson found that Grokster and Morpheus do benefit financially, because they receive substantial revenue from the sale of advertising that is seen by users of their software. On the other hand, the judge found that the two companies do not have the ability to supervise their users' infringing conduct, because they do not know or control what files their users upload or download.

Judge Wilson rejected the entertainment industry's argument that the software could be modified to screen out the titles of infringing works, just as the software already includes optional screens to block obscene file names. Whether or not this could be done as a matter of technology, the judge concluded that Grokster and Morpheus did not have the obligation to do so, because they do not have the ability to supervise their users' infringing conduct. "The doctrine of vicarious infringement does not contemplate liability based upon the fact that a product could be made such that it is less susceptible to unlawful use, where no control over the user of the product exists," he explained.

Judge Wilson concluded by emphasizing that he "is not blind to the possibility that [Grokster and Morpheus] may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefiting financially from the illicit draw of their wares." For that reason, he suggested, ". . . additional legislative guidance may be well-counseled." For the present, however, he granted Grokster's and Morpheus' motions for summary judgment.

The company that operates Kazaa - Sharman Networks - was not a party to the motions granted by Judge Wilson; and the industry's case against it is still pending. Sharman is organized under the laws of the island-nation of Vanuatu and is operated out of Australia. It has no offices in the United States, and thus it filed a motion to dismiss on the grounds that the court did not have personal jurisdiction over it. In an earlier ruling, Judge Wilson rejected that argument. The judge held that Sharman has sufficient contacts with California to give his court jurisdiction. Given those contacts, Judge Wilson said, "It is hard to imagine . . . that Sharman would not unreasonably anticipate being hailed into court in California."

Though Grokster and Morpheus have escaped without liability, it is not apparent that Sharman will too. Sharman uses the same technology and network as Grokster does. But in a footnote in his Grokster/Morpheus decision, Judge Wilson noted that while Grokster does not operate any of the computers that host indexes on that network, "it appears" that Sharman does operate some of the index-hosting computers itself. If that proves to be so, it may be that Sharman's Kazaa will be found to be more like Napster than like Grokster and Morpheus; and thus Sharman may be held liable.

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., USDC Case No. CV 01-08541 (C.D.Cal. 2003), available at http://www.cacd.uscourts.gov/CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/b0f0403ea8d6075e88256d13005c0fdd/$FILE/CV01-08541SVW.pdf

(Grokster/Morpheus decision); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., USDC Case No. CV 01-08541 (C.D.Cal. 2003), available at http://www.cacd.uscourts.gov/CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/e19d0bcc761118ad88256cb700708a1f/$FILE/CV01-08541SVW.pdf (Sharman decision) [ELR 24:11:4]

Federal court orders Verizon to comply with second RIAA subpoena requesting identity of subscriber who is downloading songs; court upholds constitutionality of subpoena provision of DMCA

Verizon has been ordered, again, to comply with an RIAA subpoena seeking the name of a Verizon customer the RIAA believes is downloading infringing recordings from the Internet. This is the second such order federal District Judge John Bates has issued against Verizon, this year.

Judge Bates' first order was issued in January, in response to the RIAA's motion to enforce a subpoena it had served on Verizon in July 2002. The subpoena was issued pursuant section 512(h) of the Copyright Act - a previously-obscure provision added to the law by the Digital Millennium Copyright Act.

Verizon resisted that subpoena on the grounds that the company was not hosting a website or storing files for the subscriber whose identity the subpoena sought. The subscriber used Verizon only to get access to the Internet, and all of the recordings the subscriber downloaded were stored on his or her own computer. In his January decision, the judge held that section 512(h) applies to companies that merely provide Internet access (in addition to those that host infringing websites or store infringing files). (ELR 24:9:10)

Judge Bates' January decision dealt solely with issues of statutory construction. Verizon did not raise, so the judge did not address, the separate question of whether section 512(h) is constitutional. In February 2003, while Verizon's post-ruling request for a stay was being argued, the RIAA served a second subpoena on Verizon. The company responded to this subpoena with a motion to quash, arguing that section 512(h) is unconstitutional, for two reasons.

Verizon argued first that Congress exceeded its constitutional power by enacting section 512(h), because the section authorizes clerks of federal courts to issue subpoenas at the request of copyright owners, even if those copyright owners have not filed infringement lawsuits against anyone. Article III of the Constitution gives federal courts authority only in connection with actual "cases and controversies." And Verizon argued that there was no actual case or controversy pending before the court when the clerk gave the RIAA a subpoena under section 512(h).

Judge Bates found this argument "intriguing" but "not persuasive." The judge explained that as long ago as 1810, the Supreme Court held that Congress may direct federal court clerks to perform specified acts, without making them acts of the courts themselves. What's more, Congress has enacted several laws that authorize federal court clerks to issue subpoenas, even in the absence of pending cases or controversies. As a result, Judge Bates concluded that Verizon's argument that section 512(h) is unconstitutional under Article III "must fail."

Verizon also argued that section 512(h) unconstitutionally deprives its subscribers of their First Amendment rights. Judge Bates acknowledged that the First Amendment does protect anonymous expression on the Internet. "But," he added, "when the Supreme

Court has held that the First Amendment protects anonymity, it has typically done so in cases involving core First Amendment expression," such as political speech. "The DMCA, however, does not directly impact core political speech . . . ," the judge noted. Rather, it deals with copyright infringement - a form of expression entitled to just "minimal" free speech protection. Moreover, the judge added, "Verizon's customers should have little expectation of privacy (or anonymity) in infringing copyrights."

Judge Bates held that section 512(h) provides sufficient procedural safeguards to protect the rights of Internet users, and it doesn't seek to restrain the underlying "expression" which is the "sharing" of copyrighted material.

The judge also rejected Verizon's argument that section 512(h) is unconstitutionally overbroad. "Whatever marginal impact the DMCA subpoena authority may have on the expressive or anonymity rights of Internet users . . . is vastly outweighed by the extent of copyright infringement over the Internet by peer-to-peer file sharing . . . ," he said. "Hence, the DMCA fosters speech by helping artists, musicians, and authors protect their creative works, in turn encouraging further expression."

The RIAA was represented by Donald B. Verilli, Jr., of Jenner & Block in Washington D.C., and by Jonathan Whitehead of the RIAA. Verizon was represented by Eric Holder of Covington & Burling in Washington D.C.

Recording Industry Association of America v. Verizon Internet Services, Civil Action 03-MS-0040 (JDB) (D.D.C. 2003), available at http://www.dcd.uscourts.gov/03-ms-0040.pdf [ELR 24:11:5]

Jury awards TVT Records $132 million verdict in case against Def Jam Records over recordings by Ja Rule

Island Def Jam Music has been hit with a jury verdict of $132 million in a case filed against it by Ja Rule's first record company, a small company known as TVT Records. According to news reports, the jury awarded TVT some $24 million in actual damages plus an additional $108 million in punitive damages.

Ja Rule and his record producer Irv Gotti are signed exclusively to Def Jam. But earlier in his career, back when he was a member of the rap group Cash Murda Click, Ja Rule had a contract with TVT. The group, also known as CMC, recorded some tracks for TVT but never finished an album.

After Ja Rule and Gotti signed with Def Jam, they agreed to finish an album for TVT. Moreover, TVT alleged that it reached an agreement with Def Jam that would have allowed Ja Rule and Gotti to do so. TVT also alleged that Def Jam then broke that agreement by telling Ja Rule and Gotti that if they recorded additional tracks for TVT, they would be violating their exclusive agreements with Def Jam.

Earlier in the case, Federal District Judge Victor Marrero issued a preliminary injunction barring Def Jam from including tracks previously recorded for TVT in Ja Rule's latest album, "The Last Temptation." (ELR 24:10:9). When despite that injunction, the case didn't settle, a trial was held on the issue of whether Def Jam had agreed to allow Ja Rule and Gotti to record for TVT, and if so, whether Def Jam broke that agreement. The jury ruled in TVT's favor on those questions, thus setting the stage for the second phase of the trial dealing with damages.

Naturally, TVT was pleased with the jury's verdict. Def Jam has said that it will appeal. [ELR 24:11:6]

INTERNATIONAL DEVELOPMENTS

EC members must "uniformly" interpret Directive requiring "equitable" payments by radio stations to performers and record companies, but each member may determine the "most appropriate criteria" for calculating payments within its own territory, Court of Justice of European Communities decides in case between collecting society and broadcasters in Netherlands

Radio stations in the European Communities pay broadcast royalties to performers and record companies (unlike radio stations in the United States which do not). The national laws of EC members have required radio stations to pay these royalties for more than a decade, because of a Copyright Directive issued by the EC Commission in 1992.

The Directive does not, however, specify the amount of the royalty. Instead, Article 8(2) simply requires EC members to "ensure that . . . equitable remuneration is paid" to performers and record companies by stations that broadcast recordings. The Directive doesn't even define the concept of "equitable remuneration," so EC members were given no guidance on how they ought to calculate the amounts that radio stations should pay.

The Directive's lack of guidance appears not to have been a problem, at first. This may have been because radio stations were able to reach agreements with performers and record companies, without legal proceedings over what criteria should be used to determine the size of the broadcast royalty.

In the Netherlands, for example, radio stations paid broadcast royalties even before the EC Directive required them to. The amount they paid was determined by an agreement between associations representing broadcasters and an association representing record companies. For 1994, broadcasters paid a total of 700,000 Dutch Guilders (about $360,000 at today's exchange rates), pursuant to that agreement.

After the Directive was issued, a new association began representing performers and record companies. The new association is known as SENA, and it demanded a royalty that would have come to 7.5 million Guilders a year (about $3.9 million).

SENA's demand resulted in a rate setting proceeding before the Netherlands District Court which set an interim rate of 2 million Guilders. That decision was taken to the Regional Court of Appeals which determined that the "principal issue was how to determine the equitable remuneration" required by Dutch law, given that "neither that law nor [the EC] Directive . . . gives any specific indication at all as to how to calculate it." The Court of Appeals proposed a multi-factor test with which SENA did not agree, so SENA appealed to the Netherlands Supreme Court.

The Supreme Court stayed proceedings and referred the case to the Court of Justice of the European Communities, for answers to two questions: (1) whether the term "equitable remuneration," as used in the EC Directive, must be interpreted the same way by all EC members; and if so, (2) what criteria should be used to determine the amount.

The EC Court of Justice has issued what appears to be a "split" decision. It has ruled that "The concept of equitable remuneration . . . must be interpreted uniformly in all the Member States. . . ." On the other hand, it also ruled that "it is for each Member State to determine, in its own territory, the most appropriate criteria for assuring, within the limits imposed by . . . [the] Directive . . . adherence to that Community concept."

The Court of Justice's decision does not explain how, exactly, an EC member may apply its own criteria while still interpreting the concept of equitable remuneration "uniformly" with the way in which it is interpreted by other members, each of which is free to apply its own criteria. However, the Court of Justice did rule that the Directive "does not preclude" the use of the criteria proposed by the Netherlands Court of Appeals (and objected-to by SENA).

Those criteria, now blessed (in effect) by the Court of Justice, are: the number of hours of recordings broadcast, the size of the broadcasters' audience, the royalties paid to music publishers and songwriters, and the amounts paid by broadcasters in neighboring EC members. These factors should be used in way that yields a "proper balance" between the interests of performers and record companies in being paid, and the interests of broadcasters in being able to broadcast recordings "on terms that are reasonable."

Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omreop Stichting (NOS), Case C-245/00 (EC Court of Justice 2003), available at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000J0245 [ELR 24:11:7]

World Wrestling Federation and its licensee THQ will not be in contempt if THQ continues to sell computer games containing "WWF" initials, despite injunction won by World Wildlife Fund barring use of those initials by Federation or its licensees, British Court of Appeal rules

Computer game maker THQ has received the blessings of a British Court of Appeal for the company's continued sales of wrestling-themed games that contain the initials "WWF." The appellate court's ruling grows out of an earlier case in which the World Wildlife Fund won an injunction that bars the World Wrestling Federation "and its licensees" from using those initials (ELR 23:12:10).

Before the injunction was issued, the World Wrestling Federation - now known as World Wrestling Entertainment, as a result of the injunction - licensed

THQ to use the "WWF" initials in computer games. When the injunction became final, the Federation notified THQ that it had to stop using those initials, and THQ did, on its packaging and promotional materials for existing games, and in all of its new wrestling games.

However, THQ had already produced a dozen games in which the "WWF" initials are in the games themselves, and appear on users' computer screens while they play the games. The cost of reprogramming those existing games to remove the initials would be so great that it cannot be done, as a practical matter. The games continue to have significant value to THQ, so the company does not want to stop selling them completely.

THQ sought, but failed to get, "assurances" from the World Wildlife Fund that it would not seek to have THQ held in contempt if it continued to sell the games.

THQ responded by making an application to the court for an order confirming that it could continue to sell existing games. The court, however, denied THQ's application, saying that THQ could sue the Federation for any damages THQ suffered from its inability to sell those games.

THQ appealed, and - because of the lower court's suggestion that it could be liable for THQ's damages - the Federation intervened. On appeal, both have done much better.

In a decision by Lord Justice Peter Gibson, Lord Justice Carnwath and Mr. Justice Blackburne, the UK Court of Appeal has held that since THQ was not a party to the original case, its continued sale of existing games would not violate the injunction against the Federation, and the injunction's ban on use of the "WWF" initials by the Federation's "licensees" was simply meant to prohibit the Federation from avoiding the injunction by authorizing licensees to do what it could not.

The Court of Appeal also held that the Federation would not be in contempt, if THQ continued to sell existing games, for two reasons. First, the injunction makes the Federation responsible for its own actions, including the actions of its officers, employees and agents, but not for the actions of independent contractors such as THQ.

Second, to the extent the license agreement between the Federation and THQ gave the Federation the power to prevent THQ from using the "WWF" initials, the evidence showed that the Federation had done everything it could to do that. Indeed, the appellate court emphasized that the Federation had largely succeeded, because THQ had eliminated the initials from its packaging and promotion for existing games, and had stopped using the initials in new games.

For these reasons, the justices unanimously agreed to "allow" THQ's appeal.

THQ was represented by Simon Thorley QC and Thomas Mitcheson (instructed by Richards Butler). The World Wildlife Fund was represented by Christopher Morcom QC and Ashley Roughton (instructed by Edwin Coe). And the World Wrestling Federation was represented by Christopher Carr QC and Guy Hollingworth (instructed by S J Berwin).

World Wide Fund for Nature v. World Wrestling Federation, [2003] EWCA Civ 401, available at http://www.courtservice.gov.uk/judgmentsfiles/j1672/wwfn_v_wwfe.htm [ELR 24:11:8]

Internet café in United Kingdom settles case for £210,000 after British court ruled that café infringed copyrights by burning CDs of recordings downloaded by customers

A British company that owns the easyInternetcafe chain has agreed to pay £210,000, or about $335,000, to settle a copyright infringement lawsuit filed against it by Sony Music, Polydor and Virgin Records. The settlement was reached after Mr. Justice Peter Smith, of the Chancery Division of the High Court of Justice, held that easyInternetcafe infringed the record companies' copyrights by making CDs of recordings downloaded by its customers (ELR 24:9:6).

Mr. Justice Smith rejected easyInternetcafe's claim that it shouldn't be held liable because it didn't know what files its customers had downloaded. The justice also rejected easyInternetcafe's argument that Internet transmissions are like television transmissions, and that burning CDs for later listening is like recording television programs for later viewing.

The settlement amounted to £80,000 in damages and an additional £130,000 in legal costs. [ELR 24:11:8]

WASHINGTON MONITOR

FCC sanctions Infinity Broadcasting $27,500 on account of late-afternoon broadcast of indecent material describing sex practices on WKRK-FM's "Deminski & Doyle Show"

Infinity Broadcasting is the proud owner of radio station WKRK-FM in Detroit. As a result, Infinity is going to have to pay a $27,500 fine to the federal government, unless the company decides to appeal a "Notice of Apparent Forfeiture" it has just received from the Federal Communications Commission.

The fine - or more technically, the "forfeiture" - is the result of material broadcast on WKRK-FM's "Deminski & Doyle Show" from 4:30 to 5:00 p.m. in January 2002. According to the FCC, the material was "indecent." A federal statute and FCC regulation prohibit the utterance of indecent language on the radio, especially between 6:00 in the morning and 10:00 at night.

"Deminski & Doyle" is a listener call-in talk-show. The material that got Infinity in trouble involved on-air discussions between the show's hosts and nine separate callers, all of which included detailed descriptions of techniques for performing a variety of sexual acts. If anyone wonders whether these discussions actually were "indecent," the FCC's "Notice of Apparent Forfeiture" includes a transcript of the broadcast. Suffice it to say, Infinity did not dispute the indecency of the broadcast.

Instead, Infinity argued that no forfeiture should be imposed, because the law's definition of "indecency" is unconstitutional. The difficulty with this argument is that it has been made, and rejected, before. And the FCC rejected it once again, with just a single paragraph.

This is not the first time Infinity has run afoul of the law's ban on indecent broadcasts (ELR 15:6:26, 16:3:36, 17:7:19, 23:2:8). Perhaps for that reason, the amount of the forfeiture - $27,500 - was the statutory maximum for a single violation, and more than four times the $7,000 minimum. Though the FCC justified the amount simply by saying that the violation was "egregious," it also said that "additional serious violations by Infinity may well lead to the initiation of a [license] revocation proceeding."

Commissioner Michael Copps dissented from the FCC's ruling - not because he would have ruled for Infinity, but because he was "deeply disappointed" that the penalty was only $27,500, even though that is the maximum penalty permitted for each violation.

Until now, the FCC has "traditionally" treated all indecent statements made during a single broadcast to constitute just a single violation of the ban on indecent "utterances." From now on, however, it won't. In this decision, the FCC announced that "in the future, we may treat situations like this as multiple, repeated violations with the accompanying increase in forfeitures."

In the Matter of Infinity Broadcasting Operations, Inc., Licensee of Stations WKRK-FM, Detroit, Michigan, Notice of Apparent Liability for Forfeiture, File No. EB-02-IH-0109, available at http://www.fcc.gov/eb/Orders/2003/FCC-03-7A1.html [ELR 24:11:9]

RECENT CASES

Recording contract signed by The Ronettes in 1963 transferred ownership of masters to their record company, so company was authorized to license use of recordings by movie and TV producers, New York Court of Appeals decides; $3 million judgment in Ronettes' favor is remanded for recalculation, because contract did not entitle Ronettes to royalties for movie/TV uses

Record producer Phil Spector discovered The Ronettes in 1963 and signed them to a two-page recording contract. Though short by today's standards, the contract was widely used at the time. And in due course, it resulted in several things. For most music fans, the most important result was several dozen memorable recordings, including The Ronettes' chart-topping "Be My Baby."

For music lawyers, the contract also resulted - almost four decades later - in a decision by the New York Court of Appeals on what rights record companies acquire when they acquire the "right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known."

In an opinion by Judge Victoria Graffeo, the Court of Appeals has held that this language gave Phil Spector's record company the right to license the use of The Ronettes' master recordings by movie and television producers, as well as the right to authorize the manufacture of audio recordings in "whatever future formats evolve from new technologies."

What's more, the Court of Appeals held that this was so, even though the 1963 contract did not entitle The Ronettes to royalties from licenses to movie and TV producers. Judge Graffeo acknowledged that the court's "conclusion . . . effectively prevents [The Ronettes] from sharing in the profits that [Spector and his record company] have received from . . . licensing [movie and TV producers]." But the judge added, "However sympathetic [The Ronettes'] plight, we cannot resolve the case on that ground under the guise of contract construction."

The Ronettes were prompted to file their lawsuit by the fact that their record company paid them a $15,000 advance when they signed their contract in 1963, and then never paid them anything again, despite the success of the recordings in the 1960s when they were first released, despite the fact that in later years their record company sold compilation albums featuring their performances and licensed the re-release of their recordings by other companies, and despite the fact that "Be My Baby" was licensed in 1987 for use in the movie "Dirty Dancing."

The Ronettes were successful in the early stages of their case. A trial court ruled that their record company did not have the right to license the use of their recordings by movie and TV producers or by other record companies. This was so, the Appellate Division affirmed, because The Ronettes' 1963 contract did not specifically transfer those rights to their record company. As a result, the Appellate Division upheld a $3 million judgment awarded to The Ronettes - an amount that consisted, in part, of "the music recording industry's standard 50% royalty rate for income derived from synchronization and third-party licensing."

Judge Graffeo's decision for the Court of

Appeals "modified" that ruling (in a manner that actually reversed it, though Judge Graffeo's decision says it "affirmed" the Appellate Division's ruling "as so modified"). It "modified" the Appellate Division's decision by holding that The Ronettes' 1963 contract broadly transferred all rights in their master recordings - not simply the right to make "phonograph records and/or tape recordings" - because the contract also granted the right to make "other similar devices," which included the "right to reproduce the performances by any current or future technological methods."

Judge Graffeo specifically rejected The Ronettes' argument that the royalty schedule restricted the scope of their record company's rights. "The section of the agreement provides compensation rights to [The Ronettes]," the judge said, "it does not inhibit [their record company's] ability to use the master recordings."

Because the $3 million judgment The Ronettes had won included 50% of the amount their record company had received from licenses to movie and TV producers, the Court of Appeals sent the case back to the trial court "to recalculate [The Ronettes'] damages," so they are limited to royalties due from the sale of audio recordings only, not from movie and TV uses of their masters.

The Ronettes were represented by Ira G. Greenberg and Idelle R. Abrams of Edwards & Angell in New York City, and by Alexander Peltz of Pelz & Walker. Phil Spector and his record company were represented by Andrew H. Bart and David C. Rose of Pryor Cashman Sherman & Flynn in New York City.

Greenfield v. Philles Records, Inc., 750 N.Y.S.2d 565, 780 N.E.2d 166, 98 N.Y.2d 562, 2002 N.Y.LEXIS 3146 (N.Y. 2002) [ELR 24:11:10]

Gunther-Wahl Productions wins new trial in case against Mattel, because jury should have been instructed to consider that Mattel requested Gunther-Wahl's submission of ideas for TV series and related toys in deciding whether there was an implied-in-fact contract

A jury returned a verdict against Gunther-Wahl Productions in the company's lawsuit against Mattel, but the case isn't over yet. A California Court of Appeal has reversed the judgment, because the instructions given to the jury were wrong.

It remains to be seen whether different instructions will help Gunther-Wahl win at trial the next time. But regardless of the ultimate outcome, the company has made a place for itself in the annals of entertainment law history, for this reason: the jury instructions disapproved by the Court of Appeal were virtually identical to instructions that have been given in implied contract cases for decades, and expressly approved in earlier appellate court decisions. So this decision is either new law, or an important clarification of existing law.

Gunther-Wahl is an animation company. In 1992, it developed ideas for an animated television series that featured characters that could be made into toys, including characters the company called "Flutter Faeries." At a toy industry convention in 1993, company executive Michael Wahl told Mattel executive Debra Gallinni that he was developing properties he wanted to show her. Gallinni to him to "set up a meeting through my secretary," and Wahl did.

The meeting was held. Mattel expressed interest at first. It even asked if there was animation of the "Flutter Fairies," and Wahl sent Mattel a reel. Eventually, however, Mattel "pass[ed]" on the property, and that was that - until 1995.

In 1995, Mattel released a line of dolls that, according to Gunther-Wahl, have characteristics similar to the "Flutter Fairies." As a result, Gunther-Wahl responded with a breach of implied-in-fact contract lawsuit.

At trial, the jury was given two key instructions:

1. It was told that in order to return a verdict in favor of Gunther-Wahl, the jury had to find that Gunther-Wahl "clearly conditioned [its]disclosure on Mattel's agreement to pay Gunther-Wahl . . . if it used the 'Flutter Faeries' concept. . . ."

2. It was instructed that "A request for a submission or the absence of a request for a submission is a factor that may be considered in deciding whether there is an implied-in-fact contract."

The first of these instructions comes from the California Supreme Court's 1956 decision in the leading case of Desny v. Wilder and from more recent Court of Appeal decisions in such cases as Mann v. Columbia Pictures (ELR 3:14:1). The second instruction was a revised version of an instruction Gunther-Wahl requested for this case in particular; it has never before been used (at least not in a case that resulted in a published decision).

In an opinion by Justice Candace Cooper, the Court of Appeal held that these instructions were wrong, and the error was prejudicial.

The first instruction was wrong, Justice Cooper reasoned, because the jury could have interpreted it to mean that Mattel would be liable only if it expressly agreed, orally or in writing, to pay Gunther-Wahl for its ideas - something "the law does not require for an implied contract."

The second instruction was wrong, Justice Cooper held, because it said that a request for submission "may" be considered in deciding whether there is an implied contract. Gunther-Wahl had asked for an instruction that said that such a "request . . . implies a promise to pay. . . ." Justice Cooper didn't go so far as to hold that a request, by itself, automatically implies such a promise. But he did hold that a request for submission "must" be considered in deciding whether there was an implied-in-fact contract.

Since the jury was instructed that it "may" - rather than "must" - consider Mattel's request, the Court of Appeal reversed the judgment against Gunther-Wahl.

Gunther-Wahl was represented by Stuart B. Esner of Esner & Chang, and by Nate G. Kraut, in Los Angeles. Mattel was represented by Lawrence Y. Iser of Greenberg Glusker Fields Claman Machtinger & Kinsella, and by Michael K. Collins, in Los Angeles.

Editor's note: On its face, it looks as though this decision is at odds with the California Supreme Court's decision in Desny v. Wilder and earlier Court of Appeal decisions in cases like Mann v. Columbia Pictures. It may not be, however. Those two cases, along with many others, involved unsolicited submissions, sometimes referred to as "over the transom" or "blurt-out" submissions. In cases like those, it is necessary for those making unsolicited submissions to indicate they intend to be paid, and they must do so in a way and at a time that permits their submissions to be rejected before they are read or heard. When, however, submissions are expressly requested, and especially where appointments are made for idea "pitch meetings," it would be unusual (if not unheard of) for submitters to begin by declaring they intend to be paid. It also would be unusual for those who affirmatively request submissions to suppose that those they have asked to pitch ideas are willing to let them be used for free. The significant issue in requested-submission cases is whether the idea used by the defendant was the one submitted by the plaintiff, or instead was one created by the defendant itself or received from another source. Since the jury ruled there was no contract at all, it didn't reach the question of whether the ideas Mattel used came from someone other than Gunther-Wahl. That issue will be hotly litigated if there is a retrial in Gunther-Wahl's lawsuit, because even Justice Cooper acknowledged that "there was substantial evidence that Mattel did not borrow or steal [Gunther-Wahl's] ideas but came up with the challenged portions . . . [including] the name 'Flutter Fairies' . . . through its own design efforts and/or the efforts of others paid by Mattel."

Gunther-Wahl Productions, Inc. v. Mattel, Inc., 128 Cal.Rptr.2d 50, 2002 Cal.App.LEXIS 5097 (Cal.App.

2002), review denied, 2003 Cal.LEXIS 1144 (Cal. 2003) [ELR 24:11:11]

Mariah Carey's "Thank God I Found You" does not infringe copyright to "One of Those Love Songs," because they are not substantially similar, federal District Court rules

In 1999, Mariah Carey released an album titled "Rainbow," one of whose cuts was the song "Thank God I Found You." Carey wrote the song with James Harris III and Terry Lewis. But songwriters Seth Swirsky and Warryn Campbell claim the song's chorus was copied from a song they had written called "One of Those Love Songs."

Claims of this kind are common in the music business. But this claim was different than many.

Swirsky and Campbell are not songwriter "wannabees." Their songs have been professionally published and recorded. Indeed, "One of Those Love Songs" was recorded by the group Xscape on its album "Traces of My Lipstick" in 1998, in plenty of time for Carey, Harris and Lewis to have heard it before they wrote "Thank God I Found You."

What's more, Professor Robert Walser - Chair of the Musicology Department at UCLA - was of the opinion that parts of the two songs are substantially similar. Professor Walser acknowledged that the songs' lyrics and verse melodies are "clearly and significantly" different. But he said that their choruses are substantially similar. And this was significant, the Professor said, because "the chorus is usually the most important part of a popular song."

Swirsky and Campbell's claims, and Professor Walser's opinions, were offered in a copyright infringement lawsuit filed by Swirsky and Campbell in federal court in Los Angeles. The claim, however, has not been successful. Judge Christina Snyder has granted a motion for summary judgment filed by Carey and her co-defendants.

In a decision reflecting a sophisticated knowledge of music theory, Judge Snyder has concluded that the two songs' choruses are not, in fact, substantially similar, for two reasons.

First, Professor Walser's analysis of the songs' melodies considered only a "subset" of the notes that are in the two songs, and did "not adequately explain . . . why that subset of notes is more important, or more appropriately analyzed, than the other notes present in the songs." What's more, the songs have different rhythmic patterns, and in some respects were "very different," as Professor Walser himself acknowledged in his deposition.

Second, some similarities were simply "stock" musical phrases, and as such are not protected by copyright. Among other things, the judge found that one part of Swirsky and Campbell's song is closer to "For He's a Jolly Good Fellow" than it is to Carey's "Thank God I Found You." Judge Snyder also rejected certain claimed similarities of key, harmony, tempo and genre, on the grounds that those elements of a song are not protectible.

Swirsky and Campbell were represented by Jonathan D. Freund of Freund & Brackey in Beverly Hills. Carey and her co-defendants were represented by Robert M. Dudnick of Paul Hastings Janofsky & Walker in Los Angeles and Hayes F. Michel of Proskauer Rose in Los Angeles.

Swirsky v. Carey, 226 F.Supp.2d 1224, 2002 U.S.Dist.LEXIS 20399 (C.D.Cal. 2002) [ELR

24:11:12]

Copyright infringement suit filed by Bridgeport Music and Westbound Records against No Limit Films is dismissed, because Bridgeport's co-owners licensed use of song in movie "I Got the Hook Up," and portion sampled from Westbound's recording was de minimis

No Limit Films has defeated, without a trial, a copyright infringement lawsuit filed against it by Bridgeport Music and Westbound Records. The lawsuit complained that a song in the soundtrack of No Limit's 1998 movie "I Got the Hook Up" infringed copyrights owned by Bridgeport and Westbound. But Federal District Judge Higgins ruled otherwise, and granted No Limit's motion for summary judgment.

The music at issue in the case is a recording of

"100 Miles and Runnin.'" No Limit did acquire a synchronization license from at least one of the co-owners of the song's copyright. But it didn't acquire a synch license from Bridgeport Music, which became a co-owner of the song's copyright several months after No Limit acquired its license.

Bridgeport became a co-owner of "100 Miles" because it contains samples from another song whose copyright Bridgeport owns, "Get Off Your Ass and Jam." That is, the owners of the copyright to "100 Miles" transferred part of that song's copyright to Bridgeport to compensate Bridgeport for "100 Miles'" use of samples from "Get Off Your Ass."

In its lawsuit against No Limit Films, Bridgeport argued that the synch license No Limit got from Bridgeport's co-owners covered only the interests of those co-owners, and not the interest of Bridgeport. Judge Higgins rejected this argument, for two reasons.

First, the judge ruled that "a co-owner may grant a non-exclusive license for use of a copyright without having to obtain the permission of its co-owners." Second, in the document by which Bridgeport became a co-owner of "100 Miles," Bridgeport specifically granted to its co-owners and their licensees the right to use the sampled portions of "Get Off Your Ass." No Limit Films was a licensee of "100 Miles'" co-owners, and thus that document authorized No Limit to use the sampled portions of "Get Off Your Ass."

Westbound Records owns the copyright to the recording of "Get Off Your Ass" which was sampled by the recording of "100 Miles" used by No Limit Films in its movie. Westbound never signed anything, apparently, that could amount to a sampling license of its recording - at least not one that benefited No Limit.

Nevertheless, Judge Higgins concluded that Westbound's copyright was not infringed by No Limit's use of portions of the recording of "100 Miles" that consisted of sampled segments from "Get Off Your Ass." The judge came to this conclusion because he determined that "no reasonable jury . . . would recognize the source of the sample without having been told of its source. This fact, coupled with the minimal quantitative copying and the lack of qualitative similarity between the works, warrants dismissal of Westbound's claims . . ." on the grounds that No Limit's copying was "de minimis."

Bridgeport Music and Westbound Records were represented by D'Lesli M. Davis of King & Ballow in Nashville. No Limit Films was represented by Robert L. Sullivan of Loeb & Loeb in Nashville.

Bridgeport Music, Inc. v. Dimension Films, 230 F.Supp.2d 830, 2002 U.S.Dist.LEXIS 21705 (M.D.Tenn. 2002) [ELR 24:11:12]

RePlayTV owners stated valid "fair use" declaratory relief claim against movie and TV producers, which in separately-filed suit allege that RePlayTV is liable for contributory and vicarious infringement; owners' suit and producers' suit are consolidated

RePlayTV is like a Betamax on steroids. RePlayTV is a digital recorder that makes copies of television broadcasts that may be reproduced perfectly. RePlayTV allows commercials to be skipped, easily. And RePlayTV owners may send programs they have recorded to other RePlayTV owners, over the Internet.

For these reasons, some 28 movie and TV production companies filed a lawsuit against RePlayTV, alleging that unnamed RePlayTV owners are using the device to infringement movie and program copyrights, and that RePlayTV is therefore liable for "contributory and vicarious" copyright infringement. If litigated to a conclusion, the case will decide whether there are any outer limits to the Supreme Court's 1984 decision in the "Betamax case" which held that VCR makers were not liable for contributory or vicarious infringement, because it is a fair use for VCR owners to tape TV programs for later time-shifted viewing (ELR 5:9:10).

Though no RePlayTV owners were named as defendants in the producers' lawsuit against RePlayTV - not even as "Does" - five owners decided to assert claims of their own against the producers. They did, they alleged, because the producers' lawsuit made them apprehensive that if the producers won their lawsuit against RePlayTV, the producers would then sue RePlayTV owners.

The RePlayTV owners did not intervene in the producers' lawsuit. Instead, the owners filed a lawsuit of their own, seeking a declaratory judgment that their use of their RePlayTVs is a "fair use" and thus not a copyright infringement. The producers responded to the owners' declaratory relief lawsuit with a motion to dismiss, on the grounds that their complaint did not allege an actual "case or controversy." Both the Constitution and the Declaratory Judgment Act give federal courts the authority to hear only actual cases or controversies. So if the producers were right, the owners' lawsuit would have to be dismissed - not on its merits, but because the court didn't have the power to hear it.

Though the "case or controversy" issue arises regularly, it had never before arisen in the context of a contributory and vicarious copyright infringement suit. Judge Florence-Marie Cooper was therefore called upon to decide the producers' motion on a clean slate. And she decided it against them. That is, Judge Cooper decided that the RePlayTV owners' complaint does allege an actual "case or controversy," and for that reason, she refused to dismiss it.

What's more, Judge Cooper also granted the owners' motion to consolidate their case with the case in which the producers have sued RePlayTV.

The RePlayTV owners were represented by Ira P. Rothken. The 28 producers were represented by O'Melveny & Myers, Wilmer Cutler & Pickering, White O'Conner Curry & Avanzado, Proskauer Rose, and McDermott Will & Emery. RePlayTV was represented by Fenwick & West.

Newmark v. Turner Broadcasting Network, 226 F.Supp.2d 1215, 2002 U.S.Dist.LEXIS 19123 (C.D.Cal. 2002) [ELR 24:11:13]

Two members of the Isley Brothers validly transferred interests in songs to publisher April Music, and released claims for royalties from T-Neck Records, federal appellate court affirms

Marvin Isley and Christopher Jasper are two members of the Isley Brothers. They joined the group after it had been in existence for more than a decade, and they co-wrote and recorded the group's songs thereafter. The group's songs were published by Bovina Music, and their recordings were released by T-Neck Records, both of which are companies that were formed and owned by the three original Isley Brothers, not by Isley or Jasper.

In due course, Bovina entered into an administration agreement with April Music, and T-

Neck entered into a distribution agreement with CBS Records. And somewhere along the line, Isley and Jasper stopped receiving royalties, or at least all of the royalties they thought were due them.

Isley and Jasper made this contention in a lawsuit in federal court in New York City which appears to have been filed originally against April and CBS. Bovina and T-Neck intervened, however, so by the time the case was finished, those companies' names were on briefs. And when it was finished, Isley and Jasper lost and Bovina and T-Neck won, both in the District Court and the Court of Appeals.

The grounds for the ultimate outcome may be interesting to Isley Brothers' fans. Whether others in the music business will find those grounds instructive is another question.

In a short opinion for the Court of Appeals - much of which deals with whether the case raises any issues at all under the Copyright Act, which would be necessary for federal courts to have subject matter jurisdiction - Judge Jon O. Newman ruled against Isley and Jasper on two issues.

First, Isley and Jasper had signed an addendum to the Bovina-April administration agreement, by which Bovina assigned to April a 50% interest in the songs' copyrights, and the right to retain 50% of the income collected by April for mechanical, synchronization and print licenses. Though what they signed was merely an addendum to the administration agreement, the addendum indicated they "assented" to the agreement and "agreed to be bound" by its terms. Judge Newman held that the addendum satisfied the Copyright Act's requirement that assignments be in writing, and this "defeat[ed]" Isley and Jasper's "claims for song royalties."

Second, the three original Isley Brothers went bankrupt in the early 1980s, owing Isley and Jasper some money. Worse yet, the bankruptcy exposed Isley and Jasper to liability for debts incurred by the three bankrupt Brothers in connection with Isley Brothers business, because the Isley Brothers were a general partnership. In return for being released from liability for Isley Brothers debts totaling $4 million, Isley and Jasper settled their claims by accepting some money and by releasing "any and all claims" they may have had against T-Neck and Bovina. This meant they no longer had any claims for record royalties, Judge Newman concluded.

Isley was represented by Robert W. Ottinger of Jersey City. Jasper was represented by Margaret C. Jasper of South Salem. Bovina and T-Neck were represented by Leon Friedman of New York City.

Jasper v. Bovina Music, Inc., 314 F.3d 42, 2002

U.S.App.LEXIS 26432 (2nd Cir. 2002) [ELR 24:11:14]

Chuck Berry wins dismissal of band member Johnnie Johnson's lawsuit, because Johnson's copyright co-ownership and other claims were barred by statute of limitations despite his claimed lack of "mental competence"

Ordinarily, people take offense at assertions that they lack mental competence. But Johnnie Johnson, who once was a member of Chuck Berry's band, submitted a psychologist's report asserting just that, about Johnson himself, in a lawsuit he filed against Berry. The lawsuit was one in which Johnson claimed to be the co-author of some 50 songs - including "Roll Over Beethoven," "Nadine," and "Surfin' U.S.A." - that he recorded with Berry between 1955 and 1966.

Because Johnson didn't file his lawsuit until decades after he said he wrote the songs, the statute of limitations has been a central legal issue from its start. Early in the case, though, Judge Donald Stohr dismissed Johnson's infringement claims against Berry, not on statute of limitations grounds, but rather because co-authors may use works they co-author, even without the consent of other co-authors, without infringing their copyrights (ELR 23:12:14).

Now, Judge Stohr has dismissed the balance of Johnson's claims as well. Most of the judge's decision analyzes whether mental incapacity might toll the statute of limitations, and if so, whether Johnson was incapacitated in that way.

Judge Stohr noted that although Johnson had been an alcoholic, he nevertheless was able to live, work and travel, unassisted, for his entire career. The judge also noted that Johnson always understood that he was not receiving songwriter royalties or creative credits for the songs he claims he co-wrote.

For these reasons, the judge concluded that Johnson had not shown that he met any standard of legal incompetence. And thus Judge Stohl concluded that all of Johnson's remaining claims - for copyright co-ownership, breach of fiduciary duty, and misrepresentation - are barred by the statute of limitations.

Johnson was represented by Mitchell A. Margo of Curtis & Oetting in St. Louis and Scott J. Orr in Sacramento. Chuck Berry was represented by Martin M. Green of Green & Schaaf in St. Louis and Alvin A. Wolff Jr. in Brentwood (Missouri).

Johnson v. Berry, 228 F.Supp.2d 1071, 2002 U.S.Dist.LEXIS 21090 (E.D.Mo. 2002) [ELR 24:11:14]

Author of "Career Misconduct," a book critical of the Chicago Blackhawks' owner, wins appellate court ruling invalidating ordinance that barred him from selling book on sidewalk outside Blackhawks' home arena without a permit

Author Mark Weinberg will be able to sell his book Career Misconduct on the sidewalk outside the Chicago Blackhawks' home arena after all, even though he doesn't have a peddlers permit authorizing him to do so. A federal Court of Appeals has ruled that the City of Chicago ordinance that required him to have a permit is unconstitutional.

Career Misconduct is critical of the owner of the Chicago Blackhawks, and for that reason, Weinberg reasoned that there was no better place to sell his book than in front of the United Center, the arena in which the NHL team plays its home games. He did so without getting a permit from the city of Chicago, despite an ordinance that required peddlers of everything except newspapers to have such a permit, in order to sell things within 1000 feet of the arena's entrance.

When threatened with arrest for violating the ordinance, Weinberg stopped peddling his book from the sidewalk. But he sued the City, claiming its ordinance doesn't apply to book sellers, or if it did, it was unconstitutional.

Weinberg's lawsuit - like many Blackhawks' games - had its ups and downs. A federal District Court granted his request for a temporary restraining order. But in response to cross-motions for summary judgment, Magistrate Judge Arlander Keys ruled in favor of the City (ELR 24:1:12).

On appeal, however, Weinberg has finally prevailed. Writing for the Court of Appeals, Judge William Bower ruled that the ordinance was not a proper time, place and manner restriction, and that it was an impermissible prior restraint on Weinberg's free speech rights.

Weinberg was represented by Martin J. Oberman in Chicago. The city was represented by Marc J. Boxerman of the Office of Corporation Counsel in Chicago.

Weinberg v. City of Chicago, 310 F.3d 1029, 2002 U.S.App.LEXIS 23878 (7th Cir. 2002) [ELR 24:11:15]

University of New Haven did not violate anti-discrimination laws by requiring prior NCAA coaching experience of candidates for head football coaching job, federal District Court decides

James C. Jackson has coached minor league professional football, and has done so very successfully. He was honored as "coach of the year" several times, and has been inducted into the minor league football hall of fame. So when he learned that the University of New Haven was looking for a new head football coach, Jackson felt well qualified for the job, even though he didn't have NCAA coaching experience; and he applied.

The University of New Haven felt otherwise, however, about Jackson's experience. The University's postings for the job had said that "Successful collegiate coaching experience [is] required," and that "knowledge of NCAA rules and regulations is essential." Thus, when the time came to interview applicants, the University did not interview Jackson. Instead, it interviewed six other applicants, all of whom were Caucasian. Jackson is an African-American.

Jackson responded to the University's decision not to interview him by filing a lawsuit, alleging that the University's insistence on collegiate coaching experience violated federal statutes banning racial discrimination.

Jackson's lawsuit has not been successful. Federal District Judge Christopher Droney has granted the University's motion for summary judgment and has dismissed the case. In his ruling, Judge Droney noted that federal law allows employers to reject unqualified job applicants, and it gives employers "considerable latitude in selecting employment qualifications."

The judge concluded that "the prior college coaching experience requirement at issue here appears reasonable on its face." He reasoned that "There is an obvious and significant nexus between the [University's] need to select a head coach well-versed in NCAA regulations and the requirement that candidates have actual experience in college coaching."

Jackson also argued that though the college-experience qualification may have seemed "neutral," it in fact had a discriminatory impact on African-Americans, because they "have historically been under-represented in the ranks of NCAA coaches." Judge Droney rejected that argument too, however. The judge held that Jackson's evidence - consisting of statistics based on a sample of 14 applicants, and an article from Sports Business Journal - was inadequate to prove discriminatory impact.

Jackson was represented by Philip H. Schnabel in Hartford. The University was represented by Peter J. Lefeber of Wiggin & Dana in New Haven.

Jackson v. University of New Haven, 228 F.Supp.2d 156, 2002 U.S.Dist.LEXIS 21075 (D.Conn. 2002) [ELR 24:11:15]

Federal Court of Appeals reverses $2.4 million punitive damage award won by Heather Sue Mercer after jury found that Duke University discriminated against her on the basis of sex by cutting her from football team; appeals court rules that punitive damages are not available under Title IX

Duke University is breathing easier, now that a $2.4 million punitive damage judgment against it has been set aside by a federal Court of Appeals. The judgment was won by student Heather Sue Mercer who made news, and maybe history, when in 1995, the Duke football coach allowed her to try out for the team, successfully, as a place kicker. She didn't, however, actually play in any games that season, and the coach cut her from the team before the next season began.

In her lawsuit against Duke, Mercer contended that she had been cut from the team as a result of sex discrimination prohibited by Title IX. After pre-trial rulings dismissing and then reinstated her case (ELR 21:3:19, 21:9:22), a jury returned a verdict in Mercer's favor for $1 in compensatory damages and $2.4 million in punitive damages. Federal District Judge James Beaty refused to set aside the verdict and entered a judgment, in those amounts, in Mercer's favor (ELR 24:1:8).

Thereafter, Duke caught a lucky break. In an unrelated case, the United States Supreme Court held that punitive damages may not be awarded in cases brought under the American with Disabilities Act or the Rehabilitation Act. Duke argued that the reasoning behind the Supreme Court's decision in that case applied in Title IX cases too. And in a Per Curiam decision marked "not selected for publication in the Federal Reporter," the Court of Appeals agreed with Duke. It held that punitive damages may not be awarded in Title IX sex discrimination cases.

District Judge Beaty also had awarded Mercer substantial attorneys fees. Since the reversal of the punitive damage award left Mercer with a judgment for just $1 in compensatory damages, Duke argued that it should not have to pay her attorneys fees either. The appellate court ruled that a $1 award may justify an award of attorneys fees in a case like this one. So although the Court of Appeals did vacate the attorneys fees award, it remanded the case to Judge Beaty for him to consider whether fees should still be awarded.

Mercer was represented by Burton Craige of Paterson Harkavy & Lawrence in Raleigh. Duke University was represented by Stephen M. McNabb of Fulbright & Jaworski in Washington D.C.

Mercer v. Duke University, 50 Fed.Appx. 643, 2002 U.S.App.LEXIS 23610 (4th Cir. 2002) [ELR 24:11:16]

College baseball pitcher is entitled to trial in lawsuit against opposing school, college conferences and aluminum bat maker for head injury suffered by pitcher when hit by line drive

College baseball player Andrew Sanchez suffered a serious head injury in a 1999 game against the University of Southern California. Sanchez was a pitcher for California State University, Northridge. Using an aluminum bat, called an "Air Attack 2," a USC player hit a line drive that struck Sanchez in the temple.

The bat was manufactured by Hillerich & Bradsby Co., and according to Sanchez, the bat's design significantly increases the speed of a hit ball, and thus increases the risk that a pitcher will be hit and injured.

Sanchez sued the bat's maker, USC, the Pac 10 Conference and the NCAA, alleging that they were responsible for his injuries. A California trial court dismissed the case without a trial, ruling that Sanchez would not be able to prove that his injuries resulted from any increased risks the bat's design might pose to pitchers.

On appeal, however, Sanchez has won the right to a trial on his claims. Writing for the Court of Appeal, Justice Gary Hastings has held that Sanchez did offer "sufficient evidence to establish that use of this particular bat significantly increased the inherent risk that a pitcher would be hit by a line drive and that the unique design properties of this bat were the cause of his injuries."

Sanchez was represented by Alan R. Templeman of Lowthorp Richards McMillan Miller Conway & Templeman in Oxnard. Hillerich & Bradsby Co. was represented by Peter J. Zomber of La Follette Johnson De Haas Fesler Silberberg & Ames in Los Angeles.

USC and the Pac-10 were represented by Lawrence Borys of Wilson Kenna & Borys in Los Angeles. And the NCAA was represented by Frederick R. Juckniess of Miller Canfield Paddock & Stone in Los Angeles.

Sanchez v. Hillerich & Bradsby Co., 128 Cal.Rptr.2d 529, 2002 Cal.App.LEXIS 5186 (Cal.App. 2002) [ELR 24:11:16]

Stadium-style movie theaters that have wheelchair seating only front rows violate Americans with Disabilities Act, federal District Court in California rules in case filed by Justice Department against AMC

Stadium-style movie theaters are especially popular with the movie-going public, except those movie-goers who are confined to wheelchairs. Most stadium-style seating is on tiered risers that are inaccessible to wheelchairs. Wheelchairs need flat areas that can be reached from an auditorium's doors.

Many stadium-style theaters have been designed with flat areas only near the front rows, where lines of sight are not nearly as good as farther back and higher up. Wheelchair-bound patrons argue that the Americans with Disabilities Act prohibits movie theater owners from designing theaters in this way. They say the ADA requires theaters to be designed so they have lines of sight that are as good as those enjoyed by other patrons. The United States Department of Justice agrees and interprets the Government's ADA Accessibility Guidelines to require just that.

The Guidelines themselves provide some support for that argument, but they aren't as clear about it as are the disabled or the Justice Department. The Guidelines merely require theaters to provide "lines of sight comparable to those for members of the general public." But the Guidelines don't say those lines of sight have to be as good as the ones enjoyed by most of those in the theater.

Nevertheless, the Justice Department filed suit against AMC Entertainment in federal court in Los Angeles, alleging that many of its stadium-style theaters violate the Guidelines and the ADA itself, because they require wheelchair-bound patrons to sit in the front rows.

Judge Florence-Marie Cooper has agreed. In a lengthy opinion, the judge has ruled that "those AMC designs of stadium-style theaters that place wheelchair seating solely on the sloped-floor portion of the theater fail to provide "lines of sight comparable to those for members of the general public" and "therefore these designs violate [the Guidelines]."

This is not the first case in which the design of stadium-style theaters has been at issue. At least twice before, courts in other parts of the country have held that the Americans with Disabilities Act requires stadium-style movie theaters to offer "unobstructed views" to wheelchair-bound patrons, but does not require them to provide the same line-of-sight viewing angles enjoyed by most non-disabled patrons (ELR 22:4:22, 23:6:23). The Supreme Court denied a petition for certiorari in the earlier of those cases. But Judge Cooper noted that she did "not find [that case] to be persuasive."

The Justice Department was represented by Leon W. Weidman of the Office of the U.S. Attorney Civil Division in Los Angeles. AMC was represented by David C. Vogel of Lathrop & Gage in Kansas City.

United States v. AMC Entertainment, Inc., 232

F.Supp.2d 1092, 2002 U.S.Dist.LEXIS 22484 (C.D.Cal. 2002) [ELR 24:11:17]

Previously Reported:

The United States Supreme Court: has denied Mattel's petition for certiorari in Mattel, Inc. v. MCA Records, 123 S.Ct. 993, 2003 U.S.LEXIS 920 (2003) (ELR 24:6:10); and has denied Eric Eldred's petition for a rehearing in Eldred v. Ashcroft, 123 S.Ct. 1505, 2003 U.S.LEXIS 2133 (2003) (ELR 24:8:4). [ELR 24:11:17]

DEPARTMENTS

In the Law Reviews:

The Columbia Journal of Law & the Arts has published Volume 25, Number 4 with the following articles:

Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for On-Line Information Licensing Transactions by Jacques de Werra, 25 The Columbia Journal of Law & the Arts 239 (2003)

Some Reflections on Copyright Management Information and Moral Rights by Severine Dusollier, 25 The Columbia Journal of Law & the Arts 377 (2003)

Staffing the 21st Century Theater: Technological Evolution and Collective Bargaining by Carolyn Casselman, 25 The Columbia Journal of Law & the Arts 401 (2003)

The Villanova Sports & Entertainment Law Journal has published Volume 10, Issue 1 as a Symposium entitled 6-4-3 (Double Play)! Two Teams Out: Contraction in Baseball with the following articles:

Introduction by Gilbert Stein, 10 Villanova Sports & Entertainment Law Journal 1 (2003)

Major League Baseball Contraction and Antitrust Law by John T. Wolohan, 10 Villanova Sports & Entertainment Law Journal 5 (2003)

Squeeze Play: Analyzing Contraction in Professional

Sports by Scott Rosner, 10 Villanova Sports & Entertainment Law Journal 29 (2003)

The Effect of Baseball's Antitrust Exemption and Contraction on Its Minor League Baseball System: A Case Study of the Harrisburg Senators by Stanley M. Brand and Andrew J. Giorgione, 10 Villanova Sports & Entertainment Law Journal 49 (2003)

Insert Coins to Slay! Regulating Children's Access to Violent Arcade Games by Elizabeth A. Previte, 10 Villanova Sports & Entertainment Law Journal 69 (2003)

Parental Rage and Violence in Youth Sports: How Can We Prevent "Soccer Moms" and "Hockey Dads" from Interfering in Youth Sports and Causing Games to End in Fistfights Rather Than Handshakes? by Dianna K.

Fiore, 10 Villanova Sports & Entertainment Law Journal 103 (2003)

The Entertainment Value of a Trial: How Media Access to the Courtroom Is Changing the American Judicial Process by Jeffrey S. Johnson, 10 Villanova Sports & Entertainment Law Journal 131 (2003)

Not Like It Was in the Old Days: Is the Americans with Disabilities Act Changing the Face of Sports As We Know It? by Amy M. Kearney, 10 Villanova Sports & Entertainment Law Journal 153 (2003)

Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes by E. Tim Walker, 10 Villanova Sports & Entertainment Law Journal 181 (2003)

The University of Georgia School of Law Journal of Intellectual Property Law has published Volume 10, Number 1 with the following articles:

Copyright Term Extensions, the Public Domain and Intertextuality Intertwined by Ashley Packard, The University of Georgia School of Law Journal of Intellectual Property Law (2002)

The DMCA: A Modern Version of the Licensing Act of 1662 by L. Ray Patterson, 10 The University of Georgia School of Law Journal of Intellectual Property Law (2002)

An Experimental Approach to the Study of Social Norms: The Allocation of Intellectual Property Rights in the Workplace by Yuval Feldman, 10 The University of Georgia School of Law Journal of Intellectual

Property Law (2002)

Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works by John R. Autry, 10 The University of Georgia School of Law Journal of Intellectual Property Law (2002)

Just Let the Music Play: How Classic Bootlegging Can Buoy the Drowning Music Industry by Dawn R. Maynor, 10 The University of Georgia School of Law Journal of Intellectual Property Law (2002)

Does the Lanham Act Lose Meaning for Companies That Operate Exclusively Over the Internet? by Sheila D. Rizzo, 10 The University of Georgia School of Law Journal of Intellectual Property Law (2002)

DePaul University College of Law Journal of Art and

Entertainment Law has published Volume 12 with the following articles:

Fix and Tell: The Sotheby's/Christine's Antitrust Scandal and Proposed Changes to Illinois Art Auction Law, 12 DePaul University College of Law Journal of Art and Entertainment Law (2002)

Publicity Rights and Defamation of the Deceased: Resurrection or R.I.P.?, 12 DePaul University College of Law Journal of Art and Entertainment Law (2002)

Kasky v. Nike, Inc.: A Reconsideration of the Commercial Speech Doctrine, 12 DePaul University College of Law Journal of Art and Entertainment Law (2002)

Promatek Industries, Ltd. V. Equitrac Corporation:

Perpetuating the Metatag Fallacy, 12 DePaul University College of Law Journal of Art and Entertainment Law (2002)
Clear Channel v. Competition Act of 2002: Is There a Clear End in Sight?, 12 DePaul University College of Law Journal of Art and Entertainment Law (2002)

Mattel, Inc. v. MCA Records, Inc., 12 DePaul University College of Law Journal of Art and Entertainment Law (2002)

The Federal Communications Law Journal, published by Indiana University School of Law-Bloomington and the Federal Communications Bar Association, has issued Volume 55, Number 2 with the following articles:

The Legacy of the Federal Communications

Commission's Computer Inquiries by Robert Cannon, 55 Federal Communications Law Journal (2003) (for publisher, see above)

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[ELR 24:11:18]