BUSINESS AFFAIRS

Raising Film Financing by Betting the Box
by Schuyler M. Moore

This article suggests a model for film companies to (a) limit their risk on films and (b) raise film financing. But first, some background: Many film companies want to reduce their risk on films, particularly large budget ones. Reducing risk avoids the company going down for the count if the film flops, and it permits the company to spread precious cash over a wider number of films. Perhaps the most common way to achieve risk reduction at present is to enter into split-rights transactions, where two or more companies co-finance a film, with one taking domestic rights, and one or more taking foreign rights. Even when these deals involve a sharing of profits between the two territories, the net result is to give valuable distribution rights, and about half the profits, to competitors. This approach has become widespread, including for "Titanic," "Cast Away," "The Hours," "Tomb Raider," "XXX," and "Terminator 3." While this approach achieves the desired goal, it is somewhat like selling off the family jewels as a hedge against volatility in the diamond market. Film companies are in the business of owning and exploiting film rights, and if there were a logical way to reduce risk while keeping the rights, they would jump at it.

Historically, a great way to hedge risk while retaining film rights was to raise equity through public or private film funds, starting with Silverscreen for Disney in the 1980's. But these funds have long gone the way of the dinosaur. While it is common to blame the demise of these funds on the loss of the tax deduction for "passive losses" under the 1986 tax act, the passive loss rules generally do not apply to corporate investors; if the transactions made sense, there would still be a well-funded market for them. The true reason for the absence of these funds is that most funds felt victimized by opaque Hollywood accounting. Just watch investment bankers shudder when you offer them a share of a film's net profits. Eddie Murphy's great quip - calling a share of net profits "monkey points" - best summarizes the vast public perception of what it means to invest in films. It is for this reason that the U.S. equity market for film financing has dried up.

Yes, there are still some equity investors out there, but they are far and few between, ranging from random rich star-struck investors to German or U.K film funds. But because of Adam Smith's immutable law of supply and demand, these equity sources often ask for more than film companies are willing to pay. It behooves film companies to come up with a solution that vastly increases supply, bringing prices down, rather than muddling through looking for needles in haystacks. The strong film companies can, of course, raise debt financing, but aside from outright default, debt does not shift risk. What is needed is equity financing.

So here's a suggestion for an approach that might revitalize the U.S. equity market for films: End the accounting miasma, and tie the investors' return directly to a percentage of the gross domestic box office receipts to the theaters ("Domestic Box") for the film. This approach raises the curtain of negativity and doubt that surrounds Hollywood accounting and leaves a spotlight on the glamour and thrill of "owning a piece" of a film. Talk about transparent accounting - all the investor would have to do is open the trades. Accounting statements and audits would be history. The film company would pay the investors the specified percentage of Domestic Box, even though there is only an indirect link between Domestic Box and the film company's ultimate net profits. From the film company's perspective, this transaction hedges risk, which is exactly what it wants to do. To some extent, the transaction resembles a simple wager about the box office results of a film, and this is something everyone can understand to the point of being common coffee klatch chatter, so it would open the investment door to the general public. There is even an on-line service (BetWWTS.com) that allows the public to place bets on the Domestic Box of large films, and film companies should be tapping into this potential financing source. It could be done across a slate of films or film-by-film, with investors placing their bets on particular films of their choice. Once the market became efficient, investors could place their bets and invest up to perhaps the day before a film's release.

A simple example may best illustrate this suggestion: Assume that a studio wants to produce a $100 million film, but it wants to limit its risk to $50 million. One approach would be to sell off all foreign rights to one or more other film companies for $50 million, but it will lose foreign rights forever to competitors and with it about half the potential profits from the film. Instead, it raises $50 million of equity with a film fund that provides the investors with a payment equal to 50% of the Domestic Box. If the film flops and comes in with a Domestic Box of $10 million, the studio pays the investors $5 million, keeps the $45 million balance of the investment, and is happy. If the film has a Domestic Box of $100 million, the studio pays the investors a break-even payment of $50 million, and the studio is happy because it will keep worldwide rights and profits to a successful film. If the film scores big and has a Domestic Box of $200 million, the studio will pay the investors $100 million, and the studio is still happy because paying an extra $50 million to the investors is cheaper than losing all foreign rights and half the profits on this blockbuster forever to competitors, which was the alternative.

More good news all around is the accounting and tax treatment of the transaction. For accounting purposes, the investment will be treated either (a) as a reduction in the cost of the film, with any payment owed to the investor being added to the cost of the film when accrued or (b) as equity, thus lowering the film company's debt/equity ratio, which is an even better result than off-balance sheet financing, which has no impact on the company's debt/equity ratio. For tax purposes, the investment should be treated as a tax-free equity contribution. There is some risk of the transaction being treated as a taxable sale of a future income stream, but this result can be avoided by structuring the transaction as a partnership for tax purposes with the film company. Any loss should be deductible to the investors as an ordinary loss, although any profit should be taxable as ordinary income, not capital gain.

In all cases, the transaction will be treated as the offering of "securities" by the film company, so it must be careful to comply with the securities laws. This is the one significant hurdle to creating enough volume for an efficient market. In the beginning, the easiest approach is to use only "private offerings" to "accredited investors." If the market and size of the offering justifies it, the next step would be to do a registered offering, perhaps even with public trading. (Imagine having to add "Film Futures" to the Chicago Exchange.)

In order for these transactions to work, the investment must be refundable with interest if the film does not end up with the promised key cast and director or does not get a theatrical release on a minimum number of screens by a specified date. Because the film company will be required to make payments to the investors (whether due to the film not meeting the promised conditions or based on Domestic Box) regardless of actual net profits received by the film company, the company will have to either (a) have a strong enough balance sheet to make the investors happy or (b) hold the investment in escrow until the Domestic Box results are in, precluding the investment from being used to cash flow production. Even if the investment is escrowed, the investors still will be relying on the film company to pay any amounts owed to them in excess of the investment if the Domestic Box is high enough. These factors militate toward making this transaction easier for the studios (the rich get richer), but it is not beyond the reach of well-heeled independents.

Would it work? Bet on it.

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[ELR 24:12:4]

INTERNATIONAL DEVELOPMENTS

British court holds Hello! magazine liable for "breach of confidence" for publishing unauthorized photos of wedding of Michael Douglas and Catherine Zeta-Jones; damages and liability of paparazzo's California-based photo agency still to be determined

Michael Douglas and Catherine Zeta-Jones have won the liability phase of their lawsuit against Hello! magazine - a lawsuit they filed as soon as they learned that Hello! intended to publish unauthorized photographs taken by a paparazzo during the couple's wedding at the Plaza Hotel in New York City. The Chancery Division of the British High Court of Justice has held the British magazine liable for "breach of confidence."

Still to be decided are the amount of the damages Douglas and Zeta-Jones will be awarded, and whether the paparazzo's California-based photo agency will be held liable as well.

Douglas and Zeta-Jones had sold exclusive rights to their wedding photos to OK! magazine - a fierce competitor of Hello! - for £1 million ($1.6 million), so the lawsuit was filed in part to protect that "commercial" interest. Indeed, OK! joined the newly-married couple as a third claimant and also was victorious in the liability phase. OK! in fact may be awarded even greater damages than Douglas and Zeta-Jones.

But the case was not just about money. Douglas and Zeta-Jones had in fact rejected an even more lucrative offer from Hello! for £1.5 million ($2.4 million), in part because Hello! wanted to send its own photographers to the wedding. OK!, on the other hand, was satisfied to publish photos that were taken by the couple's own photographers and were selected for publication by Douglas and Zeta-Jones themselves.

On the day the case was filed in November 2000, Douglas, Zeta-Jones and OK! obtained (what in the United States would be called) a temporary restraining order, by telephone. That order was followed by an interlocutory injunction (the equivalent of a U.S. "preliminary injunction") after a hearing before a Division of the Queens Bench.

Hello! immediately took that injunction to the U.K. Court of Appeal, with mixed results. The Court of Appeal created British legal precedent by ruling that Douglas and Zeta-Jones have a "right of privacy" under British law; and that much of the Court of Appeal's decision hurt Hello! On the other hand, the Court of Appeal vacated the injunction, ruling that money damages would be an adequate remedy in this particular case, if the photos were published (ELR 22:10:8). This enabled Hello! to publish the photos after all, and it did, thus setting the stage for the just-concluded liability phase of the case.

The case was heard by Mr. Justice Lindsay. The trial took 20 courtroom days over a six-week period, and resulted in a written decision of almost 80 pages. Much of Justice Lindsay's decision is devoted to a detailed recitation of the facts - one that reads much like a New Yorker magazine article. For what might have been a simple invasion of privacy case, the facts were unusually dramatic. They included surprisingly elaborate precautions taken by Douglas and Zeta-Jones in an ultimately unsuccessful effort to prevent unauthorized photos of their wedding. The facts also included surprisingly devious steps taken by Hello!, after the lawsuit was filed, to mislead the courts about the role the magazine played in having paparazzi sneak into the wedding, in order to shoot the photos Hello! eventually published.

Justice Lindsay's legal conclusions were surprising too, for two reasons: first, because they were so conservative; and second, because despite Justice Lindsay's conclusion that "the case advanced by Hello! . . . was a false one," no consequences flowed from that. Instead, Justice Lindsay ruled in favor of Douglas, Zeta-Jones and OK! on their "breach of confidence" and "Data Protection Act" claims, rejecting their other claims, including those for invasion of privacy and for exemplary and aggravated damages.

Justice Lindsay found that the wedding was "a valuable trade asset, a commodity the value of which depended, in part at least, upon its content at first being kept secret and then on its being made public in ways controlled by Miss Zeta-Jones and Mr. Douglas for the benefit of them and of [OK!]" For this reason, the

Justice concluded, photos of the wedding were entitled to "confidentiality." Moreover, the paparazzo who took the unauthorized photos "knew (or at the very least ought to have known) that the Claimants reasonably expected the private character of the event and photographic representation of it to be protected."

Hello! knew too that OK! had an exclusive contract to publish wedding photos, and Hello! knew that "elaborate security procedures" had been taken "to protect the secrecy of the event." Nevertheless, Hello! "indicated to paparazzi in advance that [Hello!] would pay well for photographs and [Hello!] knew the reputation of the paparazzi for being able to intrude."

These and other factors satisfied "all the elements of a successful case in breach of confidence." But Hello! argued that it had a right of "freedom of expression," based on the U.K.'s implementation of the Human Rights Convention in 1998 in the U.K. Human

Rights Act. That Act does protect freedom of expression; but it also requires regard to be given to "any relevant privacy code." In the U.K., the Press Complaints Commission has adopted a code that requires respect for "private and family life," and prohibits journalists from obtaining "pictures through misrepresentation and subterfuge." In this case, Justice Lindsay found that the unauthorized wedding photos were "obtained by misrepresentation and subterfuge." As a result, Hello!'s right to freedom of expression was "overborne" by the rights of Douglas, Zeta-Jones and OK! "under the law of confidence," the Justice concluded.

Justice Lindsay did not base his ruling on the law of privacy. Given the Court of Appeal's earlier ruling in this case that British law now recognizes such a right, Justice Lindsay's decision not to rely on privacy law was surprising. But he ruled as he did, in part, because he concluded that Douglas, Zeta-Jones and OK! would not have been entitled to any greater recovery under privacy law than under breach of confidence law. Moreover, Justice Lindsay expressed the view that privacy law is "so broad" that "the subject is better left to Parliament."

Justice Lindsay's decision dealt only with liability, not damages. According to news reports, the amount of damages to be awarded will be decided in a trial to be held in July.

Also left for later proceedings is the question of whether the photo agency that represented the paparazzo who took the unauthorized photos also will be held liable. The photos were taken by British-born but California-based photographer Rupert Thorpe, whose photo agent was California-based Philip Ramey. Ramey - himself a paparazzo of note - was the one who dealt with Hello! in negotiating a $188,000 fee for the photos and in transmitting the photos by computer from the United States to Hello!'s London office. Though Thorpe was not named as a defendant, Ramey was.

At first, it appeared that Ramey would avoid potential liability, because he was served in the United States. A lower court set aside service on him, on the grounds that nothing Ramey did was done in Britain, and thus British courts did not have jurisdiction over him. The Court of Appeal, however, ruled otherwise. It held that the allegation against Ramey was that he "agreed to obtain photos by unlawful means with a view to their unlawful publication," and thus it was alleged that participated in "unlawful" activities that took place in Britain. These allegations, the Court of Appeal held, were sufficient to give British courts jurisdiction over Ramey. But that decision came too late to include Ramey in the already-scheduled trial against Hello!.

Douglas, Zeta-Jones and OK! were represented by M. Tugendhat Q.C. and D. Sherborne (instructed by Messrs Theodore Goddard). Hello! was represented by J. Price Q.C. and G. Fernando (instructed by Messrs Charles Russell). A co-defendant was represented by H.T.M. Mulcahy (Solicitor Advocate of Messrs Reed Smith). Philip Ramey was represented by John Jarvis QC and Jonathan Nash (instructed by Messrs Reed Smith).

Douglas v. Hello! Ltd., [2003] EWHC 786 (Ch), available at http://www.courtservice.gov.uk/judgmentsfiles/j1700/douglas_v_Hello!.htm (liability decision); Douglas v. Hello! Ltd., [2003] EWCA Civ 139, available at http://www.courtservice.gov.uk/judgmentsfiles/j1553/douglas_v_Hello!.htm (jurisdiction over Ramey decision)[ELR 24:12:6]

RECENT CASES

Television writers' age discrimination lawsuits against networks, production companies and talent agencies are dismissed

In the fall of the year 2000, more than two dozen television writers filed a massive lawsuit against fifty production companies, networks and talent agencies. All of the writers were 40 years of age or older, and their case alleged that they had been discriminated against on account of their age.

As originally filed in federal court in Los Angeles, the writers' complaint alleged claims under: two federal statutes - the Age Discrimination in Employment Act, and the Labor Management Relations

Act; two state statutes - the California Fair Employment and Housing Act, and the New York State Human Rights Law; and the common law.

Now, some two and a half years later, the case is no closer to being resolved than it was when first filed, because it has been dismissed, twice, by two different courts. However, both times, at least some of the writers' claims were dismissed without prejudice, so they may be amended and filed again, if the writers choose to do so.

The lead plaintiff in the first case was Emmy Award winning writer Tracy Keenan Wynn. He was joined at the outset by 27 other television writers, and later by 22 more. Their claims were similar but not identical. That is, all alleged that they had been discriminated against as television writers because of their age. But not all of them had sought employment from the same production companies; indeed, after a while, some stopped seeking employment at all as television writers. And some were represented by talent agencies, while others were not. In fact, some alleged that they were dropped by their agents and couldn't get other agencies to represent them, because of their age.

The defendants responded to the writers' lengthy complaint with a motion to dismiss and a related motion to "sever" both plaintiffs and defendants. The motion to dismiss argued that the writers' complaint - despite its length - did not allege facts asserting a violation of any of the statutes or common law doctrines relied on. The motion to sever argued that even if the complaint did allege valid claims, those claims could not be brought against all fifty defendants in a single lawsuit, and could not be brought by all of the writers against any defendant in a single case.

Federal District Judge Stephen Wilson agreed. In a 50-page decision, he granted the defendants' motion to sever both plaintiffs and defendants; he granted some of their motion to dismiss with prejudice; and he granted the rest of the motion to dismiss without prejudice.

By and large, Judge Wilson's decision is procedural and will be of greater interest to employment discrimination lawyers than entertainment lawyers. Much of the decision dealt with why the writers' claims had to be brought separately against those particular defendants who allegedly discriminated against each writer, rather than by all writers against all defendants in a single case.

One part of Judge Wilson's decision was substantive and of special importance to the entertainment industry. He ruled that talent agencies are not subject to the federal Age Discrimination in Employment Act, because they are not "employers."

Shortly after Judge Wilson dismissed the writers' original complaint, the writers voluntarily dismissed the case entirely (over the objections of the defendants), even though the judge's ruling had allowed them to amend and refile some of their claims. The writers hadn't given up on their case, however. Instead, they refiled it in the spring of 2002 in California state court in Los Angeles, as a series of 23 class action lawsuits, each against a single production company, network or talent agency. By this time, the number of writers involved in the case exceeded 160.

The state court cases alleged only claims under California law. Again, the defendants responded with a motion - a "demurrer," which is what California calls a motion to dismiss for failure to state a valid claim. The cases were assigned to Superior Court Judge Charles McCoy, Jr., and he has granted the defendants' motion. Again, some of the writers' claims were dismissed "with prejudice," so the defendants have won with respect to those. But Judge McCoy dismissed other claims "without prejudice" or "with leave to amend"; so those claims may still be amended and refiled again.

The essence of Judge McCoy's decision is that the writers may be able to plead valid claims under California's Fair Employment and Housing Act, though they hadn't done so in their original state court complaints. According to a website maintained by the writers' Steering Committee (www.writerscase.com), the "Steering Committee is currently evaluating how to proceed in light to Judge McCoy's rulings."

The writers were represented by Dolly M. Gee of Schwartz Steinsapir Dohrmann & Sommers in Los Angeles, and others. NBC was represented by James N. Adler of Irell & Manella in Los Angeles; and other defendants were represented by other firms.

Wynn v. National Broadcasting Co., 234 F.Supp.2d

1067, 2002 U.S.Dist.LEXIS 25893 (C.D.Cal. 2002); Alch v. Time Warner Entertainment, Case No. BC 268836 (Cal.Super.Ct. 2003), unpublished but available at www.writerscase.com/pdf/order.pdf [ELR 24:12:8]

Michigan appellate court reverses $29 million judgment against Jenny Jones Show in wrongful death action filed by estate of Scott Amedure who was shot to death by Jonathan Schmitz after Amedure revealed he had crush on Schmitz during taping of episode about same-sex crushes

The Jenny Jones Show did not owe a duty of care to Scott Amedure, the Michigan Court of Appeals has held. And therefore neither it nor its producer or syndicator should have been held liable to Amedure's estate, after he was shot to death by Jonathan Schmitz following the taping of a Jenny Jones Show episode during which Amedure revealed he had a secret crush on Schmitz.

Amedure's estate sued the Jenny Jones Show, its producer Telepictures, and its syndicator Warner Bros., alleging that they had "ambushed" Schmitz by failing to reveal to him that the show's topic was same-sex crushes. Amedure's estate asserted that the Show was liable for "misfeasance," because - the estate claimed - it was "reasonably foreseeable that . . . taping an episode on the topic of same-sex crushes . . . would cause Schmitz to murder Amedure."

The trial court agreed with the estate, and therefore denied the Show's pre-trial motion for summary judgment and its post-trial motion for judgment notwithstanding the verdict. The jury's verdict was that the Show and its co-defendants were liable to Amedur's estate for more than $29 million in damages.

In an opinion by Judge Richard Griffin, the appellate court reversed. Judge Griffin acknowledged that "creating and producing this episode of the show may be regarded by many as the epitome of bad taste and sensationalism. . . ." Nevertheless, the judge added, the Show and its co-defendants "had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving [their] studio and hundreds of miles away."

The appellate court therefore remanded the case to the trial court, with directions that judgment be entered in favor of the Show and its co-defendants. Judge William Murphy dissented.

Amedure's estate was represented by Geoffrey N. Fieger of Fieger Fieger Schwartz & Kenney in Southfield. The Warner Bros., the Jenny Jones Show, and Telepictures were represented by James P. Feeney of Feeney Kellett Wienner & Bush of Bloomfield Hills.

Graves v. Warner Bros., 656 N.W.2d 195, 2002 Mich.App.LEXIS 1461 (Mich.App. 2002)[ELR 24:12:9]

Court dismisses right of publicity and privacy suit filed by woman shown kissing drummer in "Bands on the Run" television program and ads

Diana Lynn Daly wasn't pleased with her 15 minutes of fame. It was brought to her by Viacom, in connection with the VH1 series "Bands on the Run." Daly, you see, was videotaped while kissing Dominic Weir, the drummer for the band Flickerstick. The tape was used in the program and in television ads for the show, and individual frames from the tape were used in magazine ads for the show and even on a giant billboard on Sunset Boulevard.

Daly didn't object so much to the disclosure that she had kissed Weir. Apparently she had publicly disclosed the kiss herself, all on her own. What she objected to was VH1's disclosure of the place where the kiss occurred, because it took place in a stall in the women's bathroom of a nightclub.

Daly's objections to the program and its advertising were expressed in a federal court lawsuit alleging a host of claims, including those for misappropriation of her right of publicity, invasion of privacy, infliction of emotional distress, fraud and unfair business practices. Her case, however, has not been successful. Judge Maxine Chesney has granted Viacom's motion to dismiss it.

Judge Chesney found that "Bands on the Run" is an "expressive work," and as such is protected by the First Amendment. This means, the judge ruled, that

Daly could not state a misappropriation claim based on the use of her likeness in the program or in advertisements for it.

Daly's privacy claim failed, because she herself had disclosed the kiss, so it was no longer private; and the judge held that publicly disclosed activity does not become private "merely by virtue of the location in which such activity occurs." What's more, the judge said, Daly could not show that "the disclosure of the fact that [Daly] kissed someone in a bathroom or any other seemingly unromantic locale is 'beyond the limits of decency' such that [Viacom] 'should have realized that it would be offensive to persons of ordinary sensibilities.'"

Since Daly's emotional distress and unfair business practices claims were based on the same facts as her publicity and privacy claims, those claims failed too. And Daly's fraud claim - based, apparently, on

Viacom's failure to disclose what it intended to do with the tape when it had her sign a release - failed, because she did not allege she suffered any "out-of-pocket" damages as a result of the fraud.

Daly was represented by R. Michael Lieberman in San Francisco. Viacom was represented by Thomas R. Burke of Davis Wright Tremaine in San Francisco and by Kelli L. Sager in that firm's Los Angeles office.

Daly v. Viacom, Inc., 238 F.Supp.2d 1118 (N.D.Cal. 2002)[ELR 24:12:9]

Court of Appeals rules that rate court erred in setting "fair royalty" payable by Music Choice to BMI, for music performances on cable and satellite channels, at rate that was less than half the rate proposed by BMI

BMI has won what looks like a significant victory in its on-going dealings with Music Choice over the royalty rate that Music Choice should pay for its public performances of music. Music Choice provides digital music channels to cable and satellite companies.

In an opinion by Judge Pierre Leval, a federal Court of Appeals has held that the "rate court" established by BMI's 1966 Consent Decree erred in setting the "fair royalty" payable by Music Choice. The royalty set by the rate court was less than half the rate proposed by BMI. And though the Court of Appeals specifically said that it "express[ed] no view what would be a proper rate," Judge Leval's reasoning suggests that the rate should be greater, perhaps twice the rate set by the rate court.

The essence of the parties' disagreement was whether the rate payable by Music Choice should be a percentage of the retail price paid by cable and satellite customers who receive Music Choice channels, or whether instead it should be a percentage of the wholesale price received by Music Choice from cable and satellite companies. The reason the dispute was cast in this particular fashion is a result of history.

In 1990, Music Choice obtained a "through-to-the-viewer" license from BMI. Because the license was "through-to-the-viewer," cable and satellite companies that carry Music Choice channels do not need to have their own BMI licenses for those channels. The rate agreed to in 1990 was about 2% of the retail amount paid by cable and satellite subscribers. It was done that way, because when Music Channel first went into business, its music channels were premium channels, for which subscribers paid an extra amount that could be calculated. Music Choice's main competitor, DMX, also had a BMI license requiring DMX to pay the same 2%-of-retail royalty.

Eventually, however, Music Choice and DMX channels were made available to subscribers by cable and satellite companies as part of their basic service packages. This made it impossible to determine exactly how much subscribers were paying for the music channels alone. As a result, in 1993, BMI granted a license to DMX that specified a royalty based on DMX's receipts from cable and satellite companies - that is, the wholesale price - rather than the retail price paid by cable and satellite subscribers who received DMX channels. However, in order to keep the actual royalty about the same as it had been before, DMX's rate was doubled to 4% of its receipts, on the assumption that cable and satellite companies charged their subscribers about double what those companies paid to DMX for its channels.

When Music Choice's BMI license expired in 1997, the two were unable to agree on a new rate, and BMI applied to the rate court to set a "reasonable license fee," as permitted in the BMI Consent Decree. Privately-negotiated transactions - such as the DMX-BMI license - often are used by rate courts to set "reasonable rates" under Consent Decrees. But the rate court declined to use the DMX rate as a guide, because it found that DMX had made its deal with BMI at a time when DMX was "strained financial[ly]" and "especially eager to arrive at a deal with BMI, even if disadvantageous. . . ."

What's more, the rate court determined that a rate based on the retail price paid by Music Channel listeners would improperly compensate BMI for features of the Music Channel service that were not supplied by BMI (or by the songwriters and music publishers it represents), such as the equipment used to transmit and deliver Music Channel's services to listeners' homes. As a result, the rate court decided that a fair royalty would be based on Music Choice's wholesale revenues, and that a fair percentage of those royalties would be 1.75%.

On appeal, Judge Leval concluded that the rate court had erred. He reasoned that the retail price paid by listeners is a fair measure of the value of the music. "The customer pays the retail price, because the customer wants the music, not because the customer wants to finance the laying of cable or the launching of satellites," he explained. Judge Leval acknowledged that delivery of music by cable and satellite involves costs for things other than music. This is why, he said,

". . . the appropriate royalty for the copyright owner will be only a small percentage of the fair market value of the music."

The Court of Appeals therefore vacated the rate court's judgment and remanded the case to it for further proceedings.

BMI was represented by Norman C. Kleinberg of Hughes Hubbard & Reed in New York City. Music Choice was represented by Bruce D. Sokler of Mintz Levin Cohn Ferris Glovsky and Popeo in Washington D.C.

United States (Application of Music Choice) v. Broadcast Music, Inc., 316 F.3d 189, 2003 U.S.App.LEXIS 531 (2nd Cir. 2003)[ELR 24:12:10]

Country music artist Toby Keith is granted nationwide injunction against unnamed sellers of bootleg merchandise

Country music artist Toby Keith has done what other performers before him failed to do. He has obtained a preliminary injunction barring unknown and thus unnamed defendants from selling bootleg t-shirts and other merchandise at Keith's live performances, nationwide.

The bootleg merchandise at issue in the case featured Keith's name, likeness, logo and tour information, just like the authentic merchandise sold by a company authorized by Keith to do so. Law enforcement officers in areas where Keith performs in concert told Keith and his authorized distributor that no effort would be made to arrest bootleggers or seize bootleg merchandise, unless Keith obtained a federal court injunction. As a result, Keith and his authorized merchandise company applied for such an injunction in federal court in Lexington, Kentucky.

Judge Karl Forester granted their motion for a preliminary injunction. He did so on the grounds that the sale of bootleg merchandise violates their rights under the Lanham Act. Though the result seems correct, even by intuition, two things about it are remarkable. First, the preliminary injunction bars even unnamed defendants from selling bootleg merchandise, just as soon as the injunction is served on them. Second, the preliminary injunction is effective nationwide.

In earlier cases, judges have refused requests by artists such as Led Zeppelin for nationwide injunctions against unnamed bootleggers (ELR 20:11:12). However, in Toby Keith's case, Judge Forester either distinguished those earlier cases or disagreed with their reasoning. Judge Forester ruled that the Lanham Act itself gives federal courts the authority to grant such injunctions. And he found that Keith had proved that his was a proper case in which to do so.

Moreover, Judge Forester also granted a permanent injunction against named and unnamed bootleggers, barring them from ever selling bootleg merchandise within a 25-mile radius of any Toby Keith performance in the Eastern District of Kentucky.

Keith and his authorized merchandise company were represented by Thomas W. Miller of Miller Griffin & Marks in Lexington.

SKS Merch, LLC v. Barry, 233 F.Supp.2d 841, 2002 U.S.Dist.LEXIS 23800 (E.D.Ky. 2002)[ELR 24:12:11]

Former member of The Beach Boys infringed "Beach Boys" trademark by using "Beach Boys" phrase while performing with others, federal appellate court affirms

Al Jardine was an original member of The Beach Boys, but he isn't any more. That's because The Beach Boys are no more; they haven't performed together since 1998 or so. But "The Beach Boys" trademark still exists, and is owned by Brother Records, Inc., a company formed by the band's members back in 1967 and now owned by Jardine, Mike Love, Brian Wilson and the estate of Carl Wilson.

As often happens when popular bands split up, former members want to continue to perform using the band's name; and so it was with The Beach Boys. Both Jardine and Mike Love wanted to tour, with other performers, using "The Beach Boys" trademark. Love got a license to do so from Brother Records. Jardine did not, or so Brother Records alleged.

Brother Records' allegation against Jardine was made in a federal trademark infringement lawsuit, provoked by Jardine's performances using the names "The Beach Boys Family and Friends," "The Beach Boys," and other similar combinations.

Jardine's primary defense was that his use of The Beach Boys trademark was not infringing, because it was a fair use. A federal District Court thought otherwise, and granted Brother Records' motion for summary judgment. And that ruling has been affirmed by the Court of Appeals.

Writing for the appellate court, Judge Wallace Tashima reasoned that Jardine's use of The Beach Boys was not a fair use, because he did not use that phrase descriptively to mean "boys who frequent a stretch of sand beside the sea." Also, Jardine could not successfully claim that his use of the phrase was a "nominative fair use," because he used The Beach Boys in a way that falsely "suggested sponsorship or endorsement" by Brother Records.

Jardine also argued that he had obtained a trademark license from Brother Records, though even he acknowledged the license would have expired at the end of 1999. Since Jardine apparently continued to use The Beach Boys trademark after 1999, the license would not have protected Jardine from all of Brother Records' infringement claims.

But Jardine sought to use the license offensively, arguing that during the time the license was in effect, Brother Records forced him to perform as "The Beach Boys Family and Friends," rather than as "The Beach Boys," and this caused him to earn less money on tour than he otherwise would have. For this, Jardine sought money damages on the theory that Brother Records breached the license agreement. But Judge Tashima affirmed the District Court's rejection of this argument, on the grounds that Jardine's damages for the alleged breach were "speculative" and thus could not be recovered.

Brother Records was represented by Phillip H. Stillman in Del Mar and Edwin McPherson of McPherson & Kalmansohn in Los Angeles. Jardine was represented by Jeffrey S. Benice in Irvine.

Brother Records, Inc. v. Jardine, 318 F.3d 900, 2003 U.S.App.LEXIS 1335 (9th Cir. 2003)[ELR 24:12:11]

United States federal court dismisses Dow Jones' lawsuit seeking declaratory and injunctive relief barring Harrods from pursuing defamation action against Dow Jones in Great Britain or elsewhere, complaining of humorous Wall Street Journal article published in response to Harrods' April Fool's day press release

Dow Jones & Company publishes the Wall Street Journal and other periodicals all around the world, and operates a website that has subscribers world-wide too. This is, no doubt, a source of great pride for the company. But it also means that Dow Jones gets sued for defamation all around the world; and that is a source of expense and concern.

Faithful readers of the Entertainment Law Reporter will recall that Dow Jones is now defending itself in a court in Australia, after that country's High

Court ruled that Australian courts have jurisdiction to hear a defamation lawsuit filed by an Australian resident, complaining about an article that appeared on Barron's Online, even though the article was written in the United States, by an American, and is available only from a server located in New Jersey (ELR 24:9:7).

In an entirely separate case, Dow Jones also has been sued in a British court in London, again for defamation, this time by Harrods, Limited, the owner of the world-famous department store. Two things are remarkable about the Harrods case: what prompted it in the first place; and what Dow Jones did - or attempted to do - in response to the suit.

The events that degenerated into a lawsuit began on March 31, 2002 when Harrods issued an April Fool's day press release, reporting that the company's chairman, Mohamed Al Fayed, would be announcing plans the next day "to 'Float' Harrods." The release was a joke. But the Wall Street Journal was fooled, and mistakenly reported that Fayed would be announcing that he was taking Harrods public.

A couple of days later, when the Journal realized the press release was an April Fool's day prank, it published a correction. And a few days after that, the Journal published a follow-up article that was headlined "The Enron of Britain?" That article cautioned readers that "If Harrods, the British luxury retailer, ever goes public, investors would be wise to question its every disclosure." The article then reported on Harrods' April Fool's day joke and questioned whether Harrods could "get in trouble for messing with the facts" by issuing a bogus press release.

According to Dow Jones, its article was intended to reflect "the Journal's own brand of wry, light-hearted humor." But Harrods was not amused. Instead, it threatened to, and eventually did, file a defamation lawsuit in London.

British defamation law is no laughing matter for publishers. In many ways - Dow Jones counted at least seven - British law favors plaintiffs in a manner the First Amendment would never tolerate. Indeed, American courts have so held, in cases in which they have refused to enforce British defamation judgments, for that very reason (ELR 14:2:13, 17:1:24, 20:1:18).

Dow Jones, however, did not want to incur the expense of defending itself in London, only to have to incur further costs in the United States if it lost in London and Harrods then attempted to collect a judgment in the U.S. (Dow Jones apparently has few assets in Britain, so Harrods may have to attempt any British judgment it may win by confirming that judgment in a U.S. court.)

Therefore, Dow Jones filed a lawsuit against Harrods in federal court in New York City, under the

Declaratory Judgment Act. It sought a declaratory judgment and an injunction that would have barred Harrods from pursuing a defamation lawsuit in Great Britain or anywhere else in the world. It was an imaginative and potentially effective tactic. But Judge Victor Marrero was not persuaded it was proper or wise. As a result, the judge granted Harrods' motion to dismiss.

Judge Marrero's analysis of the case was thorough: it runs 54 pages and contains 218 footnotes. In the end, however, his reasons are easily summarized. The Declaratory Judgment Act is available only to decide cases that present an "actual controversy"; and since Harrods' claims have not yet been decided, no "actual controversy" yet exists, the judge said.

Moreover, the judge doubted that a declaratory judgment in Dow Jones' favor, based on American constitutional law principles, would have any effect on a lawsuit filed by Harrods in Britain, because such a case would assert harm to a British company, done in Britain, and would be brought under British law.

Finally, Judge Marrero noted that even if he had jurisdiction under the Declaratory Judgment Act, the act permits - but does not require - him to hear the case; and he concluded that he would decline to hear the case, because of the importance of showing respect for courts of other nations and not issuing judgments that would interfere with their authority.

Judge Marrero did not ignore Dow Jones' First Amendment rights. In fact, he specifically stated that if a British court does issue a judgment that violates Dow Jones' First Amendment rights, the company will then have "a justiciably ripe occasion to challenge" that judgment, in a United States court, should Harrods attempt to enforce that judgment here. However, Dow Jones' attempt to protect its First Amendment rights before a judgment is entered against it in Britain is "premature," the judge concluded.

Dow Jones was represented by Jack M. Weiss of Gibson Dunn & Crutcher in New York City. (Harrods' counsel is not yet identified in the advance sheets or online.)

Dow Jones & Co. v. Harrods, Ltd., 237 F.Supp.2d 394, 2002 U.S.Dist.LEXIS 19516 (S.D.N.Y. 2002)[ELR 24:12:12]

Television contract between Minnesota Twins and Fox Sports Network gave Fox the right to televise Twins games during 2002 and 2003 seasons, and gave Twins the right to receive bonus payments from Fox, federal appellate court affirms

In 1998, the Minnesota Twins and Midwest Sports Channel entered into an agreement giving Midwest Sports the right to televise Twins games from 1998 through 2001. The agreement also gave Midwest Sports an option to extend the agreement through the 2003 season, if the Twins solved a then-pending problem concerning its use of the Metrodome in Minneapolis. And the agreement gave the Twins the right to receive bonus payments from Midwest Sports, again, if the Twins solved its Metrodome problem.

The lawyers who drafted the agreement should be pleased to know that four federal judges concluded that the agreement is "clear and unambiguous." On the other hand, the reason that judges had occasion to consider the agreement at all is that Fox Sports Network bought Midwest Sports and took over the Twins contract, and the agreement wasn't clear enough to prevent disagreement between the Twins and Fox over what their respective rights and obligations were.

The disagreement degenerated into a lawsuit between the Twins and Fox - one that included tort claims and counterclaims, as well as breach of contract allegations. Federal District Judge David Doty had no trouble with the case; he granted motions and cross-motions for summary judgment. And the Court of Appeals had no trouble either; in an opinion by Judge Gerald Heaney, it has affirmed all of Judge Doty's rulings.

On the contract issue, Judge Heaney agreed that when the Twins exercised an option to play in the

Metrodome for the 2001 season, that indicated the team had solved its Metrodome problem, sufficiently to trigger Fox's option to extend its television contract for the 2002 and 2003 seasons. At the time, the Twins were exploring the possibility of starting its own regional sports network; and perhaps for that reason, it may have wanted Fox's rights to come to an end after the 2001 season. But Judge Heaney ruled in Fox's favor.

Judge Heaney also ruled that when the Twins exercised an option to play in the Metrodome for the 2001 season, and then for the 2002 and 2003 seasons, the Twins solved their Metrodome problem sufficiently to trigger the Twins' right to receive bonus payments from Fox (payments that appear to have simply increased the licensing fee for those seasons). Fox argued that "solving" the Metrodome problem meant something different in the two clauses, so that Fox could extend the term of its television rights without having to make bonus payments. But Judge Heaney "decline[d] Fox's invitation" to define the term differently for different sections of agreement.

Fox also sued the Twins and their COO, Kevin Cattoor, for misappropriation of trade secrets. This claim was based on the fact that Cattoor was general manager of Midwest Sports before Fox bought it. But Judge Heaney ruled that Cattoor had not acquired any trade secrets, and certainly none that he used for the Twins' benefit, while at Midwest Sports.

The judge also ruled that Cattoor had not tortiously interfered with Fox's contracts with other Minnesota sports teams, by asking them to join the new sports network then being considered by the Twins. All of those teams stayed with Fox, and some even signed new Fox contracts.

Finally, Judge Heaney affirmed the dismissal of counterclaims by the Twins and Cattoor. They complained that a Fox press release was defamatory, and complained that Fox tried to persuade Minnesota teams to stay with Fox rather than join a new Twins-owned network. The judge found the press release was not defamatory, and he ruled that Fox had a right to persuade teams to stay with it.

Fox Sports Network was represented by Barbara P. Berens in Minneapolis. The Twins were represented by Roger J. Magnuson in Minneapolis.

Fox Sports Net North v. Minnesota Twins Partnership, 319 F.3d 329, 2003 U.S.App.LEXIS 2202 (8th Cir. 2003)[ELR 24:12:13]

Settlement payments received by NFL's Raiders from Oakland following city's failed attempt to prevent team from moving to LA were taxable, federal appellate court rules, but loan from LA Coliseum Commission was not taxable income to Raiders in year received, and further proceedings are necessary to determine when Raiders' debt to Irwindale was discharged and thus became taxable

When the NFL's Oakland Raiders decided to move to Los Angeles in the early 1980s, it touched off a firestorm of litigation, including a lawsuit over the taxation of three separate transactions that were associated with that decision. Now, decades later, the question of how two of those transactions should be taxed has finally been decided, though further proceedings will be necessary to determine the manner in which the third transaction should be taxed.

When the Raiders decided to move to Los Angeles, the City of Oakland filed an eminent domain lawsuit against the team, in an effort to keep the team. The lawsuit was temporarily successful - Oakland won a preliminary injunction that barred the move for two years - but ultimately it failed. The Raiders then made a claim against the city, asserting that the two years' delay had cost the team $26 million in damages to the value of its franchise. Eventually, that claim was settled, and Oakland paid the Raiders $4 million.

The Raiders took the position that the $4 million it received from Oakland was not taxable income, but instead was a nontaxable return of capital. The Internal Revenue Service disagreed, as did the Tax Court. In an opinion by Judge Wallace Tashima, the Court of Appeals has disagreed too. Judge Tashima reasoned that the Raiders' claim included a list of damages that included items that consisted of lost profits that would have been taxable if the team had received them from its operations. Since the settlement was meant to replace this lost income, it too was taxable.

Once the Raiders were legally able to move to Los Angeles, the team played its home games in the LA Memorial Coliseum, pursuant to a deal it had struck with the LA Coliseum Commission. Part of that deal required the Coliseum Commission to loan the Raiders $6.7 million that was to have been repaid from income from luxury suites the Raiders were to have constructed at the Coliseum. The luxury suites were never built; and litigation between the team and the Commission was eventually settled.

The IRS then took the position that the loan was taxable to the Raiders in the year it was made, because the Raiders' obligation to build the suites was "illusory" and thus the team controlled whether or not it would have to repay the loan. The Tax Court agreed, but the

Court of Appeals did not. Judge Tashima noted that the Raiders were required to make reasonable efforts to build the luxury suites, and thus its obligation to repay the loan was not illusory. As a result, the judge ruled that the loan was not taxable income to the Raiders for the year in which the team received the loan. In a footnote, however, Judge Tashima noted that eventually, the Raiders' obligation to repay the loan was extinguished; and it became taxable income in that year.

In 1987, by which time it looked as though the Raiders would not be staying in the LA Coliseum after all, the City of Irwindale struck a deal with the Raiders that required the team to build a stadium there. As part of that deal, Irwindale advanced the Raiders $10 million against what was to have been a $115 million loan, to be repaid from revenues of the to-be-constructed stadium. In 1988, however, the California legislature enacted legislation that prohibited Irwindale from issuing bonds to build a stadium for the Raiders, and no stadium was ever built in that city. Moreover, the Raiders were never required to repay the $10 million advance.

The IRS determined that the $10 million was taxable income to the Raiders in 1987 when the team received the money, or in 1988 when the no-bond legislation was passed, or in 1989 when an Irwindale negotiator said that it looked as though no stadium would be built there. The Tax Court decided that the loan became income in 1988. But the Court of Appeal held that the 1988 legislation did not make the deal impossible, because Irwindale could have financed construction of a stadium in other ways. As a result, Judge Tashima remanded the case to the Tax Court for further proceedings to determine in what year the deal actually died, for that is the year the Raiders' obligation to repay the loan was discharged and thus became taxable income.

The Raiders were represented by Jerome B. Falk, Jr., in San Francisco. The Commissioner of Internal Revenue was represented by Kenneth W. Rosenberg of the Tax Division of the Department of Justice in Washington D.C.

Milenbach v. Commissioner of Internal Revenue, 318 F.3d 924, 2003 U.S.App.LEXIS 2059 (9th Cir. 2003)[ELR 24:12:14]

Cincinnati Reds do not owe $6.5 million in unpaid rent for use of old Riverfront Stadium, Ohio appellate court rules in decision reversing judgment against team in lawsuit filed by taxpayer

The Cincinnati Reds do not owe $6.5 million in unpaid rent for its use of the old Riverfront Stadium, where it once played its home games, an Ohio Court of Appeals has held, in a procedurally unusual case. In fact, to many it was surprising the case was brought at all, because the Reds' landlords - the City of Cincinnati, and later Hamilton County - agreed with the Reds that the team owed no rent. The lawsuit was filed by a fellow named Steven W. Ritter, in his capacity as a Cincinnati taxpayer.

Ritter explained his motives (in a motion to the trial court) by saying, "We just want the Reds to pay their rent." The purpose of his case, Ritter said, was to challenge "the failure of government officials to collect $4.5 million owed to taxpayers."

To understand Ritter's position, it's necessary to know that Riverfront Stadium was a city-owned facility, and was leased by the city, back in 1967, to both the Reds and to the NFL's Cincinnati Bengals. The Reds' lease contained a provision by which the city agreed that it always would treat the Reds as favorably as it treated the Bengals. The city signed a new lease with the Bengals in 1994, in which the city gave the Bengals a better deal than the Reds then had. That at least is what the Reds asserted, though the city apparently disagreed.

As a consequence of this disagreement, the Reds began withholding rent. The city, however, did not immediately sue the Reds; and that is why Ritter, the taxpayer, claimed the team owed $4.5 million that government officials had refused to collect.

Rather than get involved in litigation with the Reds, the city assigned Riverfront Stadium - which by then was called Cinergy Field - to Hamilton County, along with the Reds' lease, thereby making the Reds' unpaid rent a problem for the county to solve. And the county did.

In 1998, Hamilton County entered into an agreement with the Reds pursuant to which the county agreed to waive the unpaid rent, in return for the Reds' agreement to do three things. The Reds agreed: (1) to waive its claim for damages under the clause of the old lease that entitled it to be treated as favorably as the Bengals; (2) to contribute $30 million to the construction of a new county-owned stadium; and (3) to become a tenant in the new stadium for 30 years. Both the county and the Reds were satisfied with this deal. But Ritter was not.

Ritter's case went to trial, and the trial court ruled in his favor. That is, the trial court ruled that the Reds owed the county what by then had become $6.5 million. And the trial court awarded Ritter more than $100,000 in attorney's fees and expenses. The Reds and Hamilton County appealed.

Ohio law does permit taxpayer lawsuits that assert claims on behalf of the government that the government itself has not enforced. That much was not in dispute on appeal. What was in dispute was whether the government could compromise its claims over the objections of a taxpayer, even while a taxpayer lawsuit was pending.

In an opinion by Judge Mark Painter, the Ohio Court of Appeals held that city and county governments in Ohio have the power to settle claims, and the Ohio taxpayer lawsuit statute does not permit taxpayers to control or interfere with that power. As a result, Judge Painter ruled, Ritter's lawsuit became moot as soon as the county and the Reds settled their dispute. And thus, the trial court should not have entered a judgment against the Reds. Moreover, since Ritter was not entitled to relief, once the case became moot, the trial court should not have awarded him attorney's fees and costs, Judge Painter concluded.

Ritter appealed to the Supreme Court of Ohio, but the Supreme Court denied review.

Ritter was represented by Ronald L. Burdge in Dayton. The Reds were represented by James E. Burke of Keating Muething & Klekamp in Cincinnati. Hamilton County was represented by Michael K. Allen, the Hamilton County Prosecuting Attorney.

City of Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C., 782 N.E.2d 1225, 2002 OhioApp.LEXIS 6913 (Ohio App. 2002)[ELR 24:12:14]

Boxing promoter Alfredo Marchio is granted preliminary injunction barring fighter Julian Letterlough from boxing professionally, unless ads and promotional materials for bouts identify Marchio as promoter or co-promoter

Professional boxer Julian Letterlough had a written contract with promoter Alfredo Marchio that gave Marchio the exclusive right to promote Letterlough's fights for three years. Marchio was successful in "building up Letterlough as a nationally ranked and reputable professional fighter. . . ." But for some reason, the two had a falling out, before their contract expired.

As a result, Marchio believed that Letterlough would hire a new promoter, in breach of their contract. So Marchio filed a breach of contract lawsuit against

Letterlough in federal court in Philadelphia. Shortly thereafter, Marchio made a motion for a preliminary injunction that, if granted, would have barred Letterlough from participating in any fight promoted by anyone other than Marchio.

Federal District Judge Baylson has granted Marchio a preliminary injunction, though it is not as broad as the one Marchio had sought. The judge noted that the injunction sought by Marchio "would effectively bar Letterlough from pursuing his chosen profession as his opportunities to fight could be curtailed virtually at Marchio's will."

On the other hand, Judge Baylson concluded that Marchio was entitled to some injunctive relief, because he had a written agreement with Letterlough, had done much to contribute to Letterlough's career, and would suffer irreparable harm if Letterlough were to box in fights promoted by someone else, without acknowledging Marchio.

As a result, Judge Baylson granted Marchio a limited preliminary injunction - one that bars Letterlough from boxing professionally unless ads and promotional materials for those bouts identify Marchio as their promoter or co-promoter. The judge's ruling makes it plain that Letterlough may hire someone else to actually promote his fights, and Letterlough does not have to use Marchio's services, so long as Letterlough receives the "promoter" or "co-promoter" credit required by the injunction.

Marchio was represented by George Bochetto of Bochetto & Lentz in Philadelphia. Letterlough was not represented.

Marchio v. Letterlough, 237 F.Supp.2d 580, 2003 U.S.Dist.LEXIS 25262 (E.D.Pa. 2003)[ELR 24:12:15]

PGA defeats antitrust claims by website company that was prohibited from selling real-time golf scores made available at tournament media centers

Professional golf is a leisurely sport, but there is a valuable market for real-time tournament scores. That market is serviced by the PGA Tour itself, which syndicates scores to newspapers and others and also makes real-time scores available on its own website.

Morris Communications Corporation competes with the PGA Tour in the business of providing real-time tournament scores. It sells tournament scores to CNN/SI and others, and also makes them available on Morris' own website.

For a while, the PGA and Morris got along with one another quite well. Morris received credentials to cover PGA tournaments, and those credentials gave

Morris access to the PGA media centers, where tournament scores were displayed in real time. Indeed, that is how Morris got the scores it sold to others and posted on its website.

Eventually, however, relations between the PGA and Morris soured, because, Morris contended, the PGA adopted regulations intended to prevent Morris from competing with the PGA in the syndication of real-time scores. The regulations - known as Online Service Regulations - were adopted in 1999, and they prohibit credentialed members of the media from selling real-time tournament scores obtained from PGA media centers, without the PGA's consent.

Because tournament golfers play simultaneously on courses that are as big as 150 acres, the collection of scores in real time cannot be done by a single person. Indeed, the PGA has created an elaborate system - called the "Real-Time Scoring System" - by which large numbers of volunteers follow contestants and relay their scores by radio back to PGA media centers, where they are compiled and posted on score boards, for viewing by credentialed members of the media. This meant that as a practical matter, Morris could not collect real-time scores itself; it could get them only from PGA media centers.

Morris reacted to the PGA's Online Service Regulations by filing an antitrust lawsuit against it, in federal court in Florida. Early in the case, Morris sought a preliminary injunction that would have barred the PGA from enforcing those regulations. But Judge Harvey Schlesinger denied Morris' motion (ELR 22:10:21). Morris, however, did not give up. So the PGA then made a motion for summary judgment - a motion that Morris countered with one of its own. Once again, Judge Schlesinger has ruled in favor of the PGA.

Judge Schlesinger has held that the PGA Tour has a property right in the scores compiled by the use of its Real-Time Scoring System. The judge acknowledged that this property right "vanishes" when the scores reach the "public domain," but he added that posting of scores in the PGA media center does not put them in the public domain.

Judge Schlesinger made clear that this property right "does not come from copyright law, as copyright law does not protect factual information, like golf scores." However, the judge added, "the PGA Tour controls the right of access to that information and can place restrictions on those attending the private event, giving the PGA Tour a property right that the Court will protect."

Judge Schlesinger also held that "the PGA Tour has a right to sell or license . . . golf scores . . . on the Internet the same way the PGA currently sells its rights to television broadcasting stations."

Finding that Morris was seeking a judgment that would allow it to "free ride" on the PGA's efforts, Judge Schlesinger concluded that the PGA had not illegally monopolized the market for real-time tournament scores, had not unlawfully refused to deal with Morris, had not engaged in unfair trade practices (prohibited by Florida law), and had not tortiously interfered with Morris' economic interests.

Morris was represented by George D. Gabel, Jr., of Holland & Knight in Jacksonville. The PGA Tour was represented by Gregory F. Lunny of Rogers Towers Bailey Jones & Gay in Jacksonville.

Morris Communications Corp. v. PGA Tour, Inc., 235 F.Supp.2d 1269, 2002 U.S.Dist.LEXIS 25854 (M.D.Fla. 2002)[ELR 24:12:16]

Federal law disqualifying past operators of pirate radio stations from getting low-power radio station licenses is constitutional, appellate court rules after rehearing

Laws that require government licenses to operate broadcast stations are perfectly constitutional. And, as a general rule, laws that set the qualifications for broadcast licensees are too. The constitutionality of one such law has presented a particularly difficult question, however. Originally, a three-judge panel of the federal Court of Appeals in Washington D.C. ruled, with one judge dissenting, that the law was not constitutional (ELR 24:1:18). However, the full court granted a rehearing en banc; and it has held, with two judges concurring and one dissenting, that the law is constitutional after all.

The law in question is one that disqualifies those who ever operated unlicensed - or "pirate" - radio stations from getting low-power radio station licenses. It is part of the Radio Broadcasting Preservation Act of 2000. The reason the law was enacted is that from 1978 to 2000, the FCC declined to license low-power radio stations at all, as a matter of policy. Believing that the policy was unconstitutional, many people engaged in "civil disobedience" by operating unlicensed microbroadcast stations. A fellow named Greg Ruggiero was one of these; he once operated pirate stations in New York City and elsewhere.

Low-power licenses were introduced once again in 2000. But when they were, Congress decided that those who had operated unlicensed stations shouldn't be issued low-power station licenses. Congress offered two reasons for this "character qualification": it would increase compliance with the law by deterring the operation of unlicensed stations in the future; and it would prevent former pirates, who Congress apparently thought would violate other broadcast rules if given the chance, from getting a chance to do so.

Because Ruggiero had operated pirate stations, he was disqualified from getting a low-power license. In response, he challenged the "character qualification" provision of the Act (by petitioning the Court of Appeals for review of an FCC regulation that implements it). It is his challenge the Court of Appeals has wrestled with, in its panel and en banc decisions.

Writing for the majority in the court's most recent, en banc decision, Judge Douglas Ginsburg has held that "The character qualification [provision of the Radio Broadcasting Preservation Act] is a targeted response to the problem of pirate broadcasting, affects only those who violated the license requirement, and does so utterly without regard to the content of, or any view expressed by, their unlicensed broadcasts." What's more, Judge Ginsburg added, "There is a reasonable fit between the character qualification and the Government's substantial interests in deterring unlicensed broadcasting and preventing further violations of the regulations applicable to broadcasters."

For these reasons, the court held that the character qualification provision of the Act "and the [FCC] regulation implementing it do not on their faces violate the First Amendment."

Judges Raymond Randolph and Judith Rogers concurred in separate written opinions of their own. Judge David Tatel, who authored the three-judge panel's original decision, dissented.

Ruggiero was represented by Robert T. Perry. The FCC was represented by Jacob M. Lewis of the Department of Justice.

Ruggiero v. Federal Communications Commission, 317 F.3d 239, 2003 U.S.App.LEXIS 1731 (D.D.C. 2003)[ELR 24:12:17]

Federal court in Los Angeles has jurisdiction over Republic of Austria in suit to recover possession of Gustav Klimt paintings stolen by Nazis in early 1940s, Court of Appeals affirms

Six paintings by renowned artist Gustav Klimt are now in the possession of the Republic of Austria or the national Austrian Gallery. All six paintings portray model Adele Bloch-Bauer; some even have her name in their titles. Each painting has its own story of how it got to where it is today. All six, however, were stolen by the Nazis from Adele Bloch-Bauer's husband in the early 1940s.

The reason that all of this matters is that the paintings are now worth $150 million, and a Los Angeles resident named Maria Altmann wants them. Altmann is the niece and heir of Adele Bloch-Bauer, from whose husband they were stolen.

In an effort to get the paintings, Altmann sued Austria and the Austrian Gallery in federal court in Los Angeles. She sued in Los Angeles, rather than in Austria, for at least two reasons: Los Angeles is where she lives; and in order to file suit in Austria, she would have had to pay a filing fee of $130,000 or more.

Not surprisingly, Austria and the Austrian Gallery argued that they cannot - or at least should not - be sued in Los Angeles. However, District Judge Florence-Marie Cooper denied their motion to dismiss (ELR 23:6:16). And that ruling has now been affirmed on appeal.

Writing for the Court of Appeals, Judge Kim

Wardlaw has held that provisions of the Foreign Sovereign Immunities Act do give jurisdiction to the District Court in Los Angeles, even though those provisions have to be applied retroactively to do so.

Judge Wardlaw explained that Austria and its national Austrian Gallery "profit from the Klimt paintings in the United States, by authoring, promoting, and distributing books and other publications exploiting these very paintings. . . ." Moreover, Judge Wardlaw added, "these actions are sufficient to constitute 'commercial activity' for the purpose of satisfying the [Foreign Sovereign Immunities Act] as well as the predicates for personal jurisdiction."

Finally, the judge held that "because the Republic of Austria 'does business' in the Central District of California, venue is appropriate there and the principles of forum non conveniens do not counsel otherwise."

The appellate court therefore remanded the case to Judge Cooper for further proceedings.

Altmann was represented by E. Randol Schoenberg in Los Angeles. Austria and the Austrian Gallery were represented by Scott P. Cooper of Proskauer Rose in Los Angeles.

Altmann v. Republic of Austria, 317 F.3d 954, 2002 U.S.App.LEXIS 25517 (9th Cir. 2002)[ELR 24:12:17]

Former elephant handler for Ringling Bros. and Barnum & Bailey Circus has standing to sue under Endangered Species Act for Circus' alleged mistreatment of elephants, federal appellate court rules

Ringling Bros. and Barnum & Bailey Circus will have to defend itself, after all, against allegations that it mistreated its elephants. The allegations are made in a federal court lawsuit asserting that the Circus' treatment of its elephants violates the Endangered Species Act.

The lawsuit was filed by the American Society for the Prevention of Cruelty to Animals and others. One of these others is a former Circus employee, Thomas Rider, who was an elephant handler from 1997 to 1999. According to Rider, he quit the Circus because of the way in which it treated its elephants. Rider alleges that he would like to "visit" the elephants again, but can't, because doing so would cause him "aesthetic and emotional injury" so long as they are being mistreated.

The case didn't get far, at first. A federal District Court dismissed it, on the grounds that the ASPCA and Rider did not have standing to pursue the case. However, in a decision by Judge Raymond Randolph, the Court of Appeals has reversed. It held that Rider does have standing, though because the ASPCA seeks the same relief as Rider, the court did not decide whether the ASPCA has standing as well.

According to Judge Randolph, Rider has standing to pursue his Endangered Species Act claims, "[b]ased on his desire to visit the elephants (which we must assume might include attending a performance of the circus), his experience with the elephants, his alleged ability to recognize the effects of mistreatment, and what an injunction would accomplish. . . ."

The ASPCA and Rider were represented by Katherine Anne Meyer. Ringling Bros. and Barnum & Bailey Circus was represented by Harris Weinstein.

American Society for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus, 317 F.3d 334, 2003 U.S.App.LEXIS 1824

(D.C.Cir. 2003)[ELR 24:12:18]

DEPARTMENTS

In the Law Reviews:

Loyola of Los Angeles Entertainment Law Review has published Volume 23, Number 3 with the following articles:

Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface by Mark S. Lee, 23 Loyola of Los Angeles Entertainment Law Review (2003)

Here's Why Hollywood Should Kiss the Handshake Deal Goodbye by Rick Smith, 23 Loyola of Los Angeles Entertainment Law Review (2003)

Regulatory Overreaching: Why the FCC Is Exceeding Its Authority in Implementing a Phase-In Plan for DTV Tuners by Eugene Rome, 23 Loyola of Los Angeles Entertainment Law Review (2003)

Vanderbilt Journal of Entertainment Law and Practice has published Volume 5, Number 2 with the following articles:

Copyright and the First Amendment: After the Wind Done Gone by Joseph M. Beck, 5 Vanderbilt Journal of Entertainment Law & Practice 5 (2003)

Practice Before the Copyright Arbitration Royalty Panel in 17 U.S.C.§ 111 Distribution Proceedings by Mark J. Davis, 5 Vanderbilt Journal of Entertainment Law & Practice 11 (2003)

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Are You Just an Attorney-Or a Trusted Advisor? by David Maister, Charles Green and Robert Galford, 20 Entertainment and Sports Lawyer 1 (2003) (for address, see above)

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The Demise of California's Son of Sam Law by Stephen F. Rohde, 26 Los Angeles Lawyer 14 (2003) (for publshier, see above)

Determining Personal Jurisdiction in Internet-related Litigation by Kent A. Halkett, 26 Los Angeles Lawyer

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Grantham, and Steven C. Krane, 13 Fordham Intellectual Property, Media & Entertainment Law Journal (2003)

The Current State of Sports and the Media: Panel III by Mark Conrad, Laurie Basch, David S. Denenberg, Jim Durham, Jerome S. Ebenstein and Brett Goodman, 13 Fordham Intellectual Property, Media and Entertainment Law Journal (2003)

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Intercollegiate Athletics' Unique Environments for Sexual Harassment Claims: Balancing the Realities of Ahtletics with Preventing Potential Claims by Nancy Hogshead-Makar and Sheldon Elliot Steinbach, 13 Marquette Sports Law Review (2003)

Recent Federal Income Tax Issues Regarding Professional and Amateur Sports by James L. Musselman, 13 Marquette Sports Law Review (2003)

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