IN THE NEWS

Spike Lee is awarded preliminary injunction barring Viacom from using "Spike TV" as name of network, but case is then settled on terms that allow Viacom to use the name

Viacom has premiered its new "Spike TV" network, after settling a right of publicity lawsuit filed against it by filmmaker Spike Lee. The cable network isn't really a new one. It was previously known as "TNN." But Viacom decided to rename the network as part of its strategy to create the "first network oriented primarily to male viewers."

Spike Lee originally sued Viacom, because he regarded the "Spike TV" name to be "a misappropriation and exploitation of his public persona, without his consent." Indeed, network president Albie

Hecht "conceded that Spike Lee was one of the role models for the network name." But Hecht added that the character "Spike" from "Buffy the Vampire Slayer" and director Spike Jonze were too.

Lee's lawsuit alleged claims under sections 50 and 51 of the New York Civil Rights Law (New York's right of publicity statute), and under section 133 of the New York General Business Law, a statute that authorizes injunctions barring the use of names to intentionally deceive or mislead the public, even without proof that anyone actually has been deceived or misled.

The case was assigned to New York Supreme Court Judge Walter Tolub, from whom Lee quickly sought a preliminary injunction. "[A]t first blush," Judge Tolub said, Lee's case looked "to be an exercise in egocentricity."

Indeed, in its defense, Viacom pointed out that "'spike' is both a common name and a word with multiple meanings. In addition to Spike Lee, other show business 'Spikes' inc1ude Spike Jones, the comedic song writer, and Spike Jonze, the highly acclaimed film director; musicians Spike Hughes and Spike Robinson; British comedian Spike Milligan; and jazz musician Spike Wilner. The list of famous 'Spikes' in sports and the arts is . . . exhaustive. . . . [And] Webster's New Collegiate Dictionary lists at least eight definitions for the word 'spike'."

On the other hand, the judge said that "on closer review," he saw Lee's case as "an earnest attempt by a prominent personality to limit what he regards as the commercial exploitation of his public persona." The "closer review" to which Judge Tolub referred included his consideration of a number of affidavits "from prominent people," each of whom "believed, on first impression, that 'Spike TV' was in some way the product of, or is in some manner associated with, Spike Lee."

Judge Tolub also was persuaded by an affidavit from Dr. Samuel Poplin, a professor at the University of California, San Diego, who said that it was his "professional judgment that if an impartial survey were conducted in New York and similar urban center cities, a substantial portion of black men and women aged 18 to 45, and also a substantial, though smaller, proportion of young white professionals, would infer from Viacom's press releases that Spike Lee was associated with Spike TV."

The judge found no evidence that Viacom intended to deceive anyone about Lee's association with its network, and thus he ruled that section 133 of the General Business Law would not support an injunction.

However, sections 50 and 51 of the Civil Rights

Law do not require intent. Viacom argued that no New York case had ever before given protection "to a celebrity's first name, standing alone, without some other indicia of his or her persona." Judge Tolub was not persuaded, however, that protection could not be given to a first name. He was of the opinion, he said, that "in this age of mass communication, a celebrity can in fact establish a vested right in the use of only their first name or a surname. There are many celebrities that are so recognized, including Cher, Madonna, Sting, and Liza." For this reason, the judge decided that "a preliminary injunction will issue under Civil Rights Law section 51, as counsel [for Lee] has made out a prima facie case for relief and a likelihood of success on the merits."

Viacom immediately appealed, seeking an order from the Appellate Division staying the injunction. The appellate court denied Viacom's request for a stay, but did expedite the appeal by scheduling argument for September.

Shortly, thereafter, however, Lee and Viacom settled the case. The terms of the settlement have not been made public, other than the one that allows Viacom to use "Spike TV" for its network.

Lee v. Viacom, Inc., New York Supreme Court Index No. 118880/03 (June 2003), available at http://decisions.courts.state.ny.us/fcas/fcas_docs/2003jun/30011008020031sciv.pdf [ELR 25:3:4]

Record distributors and retail chains settle class action lawsuits filed by states and private parties alleging that CD "Minimum Advertised Price" policies violated antitrust laws

Five major record distributors and three retail record store chains have settled a series of related lawsuits alleging that they violated federal and state antitrust laws by agreeing to CD "Minimum Advertised Price" policies. The lawsuits were filed as private class actions on behalf of consumers in 14 states and territories, and by the Attorneys General of 43 other states and territories. The settlement is said to benefit some 3.5 million consumers who purchased CDs between 1995 and 2000.

The settlement requires the distributors and retailers to pay $67.375 million in cash. It also requires them to provide 5.6 million CDs, having an estimated value of $75.7 million, which will be distributed by the states to libraries and educational institutions. Thus, in all, the settlement is said to be worth more than $143 million.

The origins of these cases date back to the early

1990s when, according to the Federal Trade Commission, large consumer electronics chains triggered a retail price war by selling some CDs and tapes at prices that "offered consumers substantial savings." Faced with this competition, other retailers requested "margin protection" from the record companies; and in 1992 and '93, the record companies responded by adopting Minimum Advertised Pricing policies. At first, these policies merely required retailers to adhere to specified minimum advertised prices in cooperative advertising paid for in part by the record companies themselves.

However, in 1995 and '96, the record companies adopted "stricter" MAP policies that required retailers to adhere to specified minimum advertised prices in all advertising done by retailers, including advertising paid for entirely by retailers themselves.

Retailers who violated the new MAP policies lost all cooperative advertising and promotional funds from record companies, thus ensuring "that even the most aggressive retail competitors . . . stop[ped] advertising prices below MAP."

According to the FTC, the record companies' MAP policies had their intended effect: in 1996, "aggressive retail pricing" was eliminated and retail CD prices were "stabilized." Moreover, according to the FTC, all five majors then raised their wholesale prices.

The FTC made these allegations in proposed complaints that charged each of the five major distributors with violating section 5 of the Federal Trade Commission Act for allegedly engaging in practices that restrained trade unreasonably and hindered competition in the retail and wholesale markets for prerecorded music in the United States. All of the distributors settled with the FTC by agreeing to consent decrees that prohibited them from adopting policies that make the receipt of any cooperative advertising or promotional funds contingent upon the price at which their recordings are offered or sold, and prohibited them from announcing resale or minimum advertised prices of their recordings and then unilaterally terminating those who fail to comply with those prices (ELR 22:1:8).

Within days of the announcement of the distributors' settlement with the FTC, class action lawsuits began to be filed; and those are the lawsuits the distributors and retailers now have settled.

As a result of discovery and expert analysis done in these newly-settled cases, it was estimated that the overcharge attributable to the accused MAP policies came to 23 cents per CD. The plaintiffs' expert economist concluded that if, after trial, the distributors and retailers were found liable, the plaintiffs would be able to prove damages of $245 million. That amount was considerably less than the $480 million in damages announced by the FTC when it settled with the distributors. In any event, the plaintiffs' estimate of $245 million in total damages meant that the $143 million settlement was more than 58% of what the plaintiffs expected to win, if they won. That led federal District Judge Brock Hornby to conclude that the settlement was fair, and he approved it.

Pursuant to the Final Judgment and Order signed by Judge Hornby: EMI paid $6.5 million in cash and provided CDs worth $8.5 million; WEA paid $13.65 million in cash and provided CDs worth $15.75 million; Universal paid $18.85 million in cash and provided CDs worth $21.75 million; Sony paid $12.5235 million in cash and provided CDs worth $14.7015 million; and BMG paid $12.7765 million in cash and provided CDs worth $14.9985 million.

The three retail chains that were sued were:

Musicland, which paid $2 million to settle; Tower Records, which paid $275,000; and Trans World Entertainment, which paid $800,000.

The Final Judgment and Order also bars the distributors from adopting policies that make their payment to retailers of cooperative advertising or promotional funds depend on the prices charged by those retailers. The settling retailers are barred from asking for cooperative advertising or promotional funds based on the retail prices they charge consumers.

Most of the cash portion of the settlement will be distributed to consumers who file claim forms, each of whom will "receive a check for close to $13," Judge Brock estimated. (The exact amount will depend on how many consumers actually file claims.) The cash portion of the settlement also will be used to notify consumers, process their claims, and send them their checks, the cost of which will be $6 to $8 million. The cash portion also will be used to pay $14.3 million to the lawyers who represented the private class members and to the Attorneys General of the states, to be divided among them as they have agreed.

In re Compact Disc Minimum Advertised Price Antitrust Litigation, MDL Docket No. 1361 (D.Maine), Final Judgment and Order (July 2003), Decision and Order on Notice, Settlement Proposals, Class Certification and Attorney Fees (June 2003), available at www.musiccdsettlement.com [ELR 25:3:5]

Free speech rights of website operator were not violated by preliminary injunction barring posting of DeCSS software, California Supreme Court holds in trade secrets case filed by DVD Copyright Control Association; but case is remanded for further review of whether DeCSS was a "trade secret"

The DVD Copyright Control Association has won the third round of its trade secrets lawsuit against Andrew Bunner, the operator of a website from which DeCSS software once could be downloaded. The California Supreme Court has ruled that Bunner's free speech rights were not violated by a preliminary injunction that barred him from continuing to post DeCSS on his site. The case is not over yet, however, and its ultimate outcome is still much in doubt.

The DVD Copy Control Association is a movie industry trade group that controls the rights to the "content scramble system" used to encrypt movie DVDs. The trade secret at issue in the Association's lawsuit against Bunner is a piece of code known as a "master key" that is used by properly-licensed DVD players to decrypt movie DVDs. The DeCSS software posted on Bunner's website revealed the "master key."

The trial court granted the Association's request for a preliminary injunction barring Bunner from continuing to distribute DeCSS. On appeal, the California Court of Appeal assumed that Bunner had violated California's trade secrets law. But the appellate court went on to hold that the injunction violated Bunner's First Amendment free speech rights (ELR 23:7:4).

The Association then appealed, and in an opinion by Justice Janice Brown, the California Supreme Court reversed the Court of Appeal. Justice Brown agreed with Bunner that "restrictions on the dissemination of computer codes in the form of DeCSS are subject to scrutiny under the First Amendment." On the other hand, the Justice agreed with the Association that the preliminary injunction it had won was "content neutral," because the purpose of the injunction was "to protect [the Association's] statutorily created property interest in information - and not to suppress the content of Bunner's communications."

This meant that the injunction was permissible under the First Amendment, so long as it burdened no more speech than was necessary in order to serve a significant government interest. Justice Brown ruled that California's trade secret law does serve the significant government interest of "encouraging innovation and development." And she concluded that the preliminary injunction burdened no more speech than was necessary to protect that interest. Indeed, Bunner himself offered no less restrictive way of protecting the Association's trade secrets. Justice Brown also rejected Bunner's argument that the injunction was a prior restraint.

However, in the final part of her opinion, Justice Brown emphasized what she described as the "limited" nature of the decision. "We merely hold," she said, "that the preliminary injunction does not violate the free speech clauses of the United States and California Constitutions, assuming the trial court properly issued the injunction under California's trade secret law." Justice Brown remanded the case to the Court of Appeal, saying it "should determine the validity of this assumption."

In a lengthy concurring opinion, Justice Carlos Moreno explained why that assumption may not be correct. "Bunner is alleged to have downloaded [the DeCSS source code] from the Internet. . . ." In Justice

Moreno's opinion, this was fatal to the Association's case as a matter of trade secret law, because: "The general rule is that '[o]nce the secret is out, the rest of the world may well have a right to copy it at will; but . . . not . . . the misappropriator or his privies.' . . . DeCSS was not demonstrably secret in this case when Bunner republished it, and Bunner was neither alleged to be the original misappropriator nor to be in privity with any such misappropriators."

Justice Moreno acknowledged that the Association may have a sound case against Bunner, on other grounds. "It may or may not be the case that Bunner's action violated the Digital Millennium Copyright Act (DMCA) . . . ," he noted. "Unlike trade secret law, the DMCA does not inquire into whether technology-circumventing devices are . . . based on secret information. . . . [The Association's] complaint did not allege a violation of the DMCA and that issue is not before us. All I would decide is that it is manifest from the record that the [Association] did not establish a likelihood of prevailing on its trade secret claim."

The DVD Copy Control Association was represented by Robert G. Sugarman of Weil Gotshal & Manges in New York City. Bunner was represented by David A. Greene of the First Amendment Project in Oakland.

DVD Copy Control Association v. Bunner, Calif. Supreme Ct. No. 102588 (Aug. 2003), available at www.courtinfo.ca.gov/opinions/documents/S102588.PDF [ELR 25:3:6]

INTERNATIONAL DEVELOPMENTS

Arsenal Football Club wins infringement suit in U.K. against vendor of unlicensed merchandise bearing Arsenal's registered trademarks

Arsenal Football Club - the British soccer team based in London - has finally won its trademark infringement suit against Matthew Reed, a street vendor of unlicensed merchandise bearing Arsenal's registered trademarks. A British Court of Appeal has held that Reed's sale of unlicensed merchandise violated Arsenal's rights under the British Trade Marks Act of 1994.

Reed is himself an Arsenal fan, and apparently took some care to notify his customers that his merchandise was not made or authorized by the team. Nonetheless, he sold T-shirts, sweatshirts and other clothing items bearing exact reproductions of Arsenal's two registered trademarks. In his defense, Reed argued that his use of Arsenal's marks did not suggest that Arsenal was the source of his merchandise. He said that his customers bought and wore his goods simply to show their "support" for the team and their "loyalty and affiliation" with it.

The British Trade Marks Act is similar to United States trademark law, but not identical. Under the British Act, an unauthorized use "in the course of trade" of a mark "which is identical with the [registered] trade mark" is an infringement - even without proof of likelihood of consumer confusion - if the use is "in relation to goods or services which are identical with those for which it is registered."

The marks used by Reed were identical with Arsenal's registered marks, and Reed's merchandise was identical to the merchandise for which Arsenal registered its marks. As a result, the primary question in the case was whether Reed's use was "in the course of trade." On this issue, Reed's defense was successful, at first. The Chancery Division ruled that Reed's use was not "in the course of trade," because it didn't identify Arsenal as the source of Reed's merchandise.

The Court of Appeal reversed, however. In an opinion by Lord Justice Aldous, the appellate court held that the British Trade Mark Act prohibits any unauthorized use of a mark that would make the mark less likely to be able to perform its function of identifying the source of the goods to which they are affixed.

In Arsenal's case, Justice Aldous acknowledged that Reed's customers may have purchased and worn his goods as badges of support, loyalty and affiliation. "But," he added, "that did not mean that the use by [Reed] would not . . . jeopardise the functions of the

[Arsenal] trade marks. . . . [T]he actions of Mr Reed meant that goods, not coming from Arsenal but bearing the [team's] trade marks, were in circulation. That affected the ability of the trade marks to guarantee the origin of the goods."

This conclusion, by itself, was sufficient to give Arsenal the victory. But Justice Aldous went further. Even though Reed's customers wore his goods as badges of allegiance, "all the evidence suggests that the trade marks do also designate origin of the goods to a substantial number of consumers," Justice Aldous found.

The justice accepted Reed's testimony that he distinguished his goods from official goods in dealing with his customers. "But his goods marked with the [Arsenal] trade marks were identical to those emanating from Arsenal and therefore his use of the word Arsenal would, absent an explanation, carry the same inference as similar use of the trade marks by Arsenal . . . particularly [to] those that received the goods as a present." Justice Aldous concluded that in his view, "the evidence is all one way, namely that use of the trade mark on goods . . . , whether by Arsenal or others does denote origin."

Arsenal was represented by S. Thorley QC, M. Brealey QC, and T. Mitcheson, instructed by Lawrence Jones. Reed was represented by R. Wyand QC, N. Green QC, and A. Roughton, instructed by Duffield Stunt & Son.

Arsenal Football Club v. Reed, [2003] EWCA Civ 96, available at www.courtservice.gov.uk/judgmentsfiles/j1751/arsenal_v_reed.htm [ELR 25:3:7]

Ontario radio station violated Code of Ethics of Canadian Association of Broadcasters when it broadcast episode of "The Phil Hendrie Show" in which Hendrie referred to an Italian doctor as a "wop" and an Italian child as a "guinea baby" and "little greasy kid," Canadian Broadcast Standards Council rules

"The Phil Hendrie Show" is a parody talk radio program that is produced in the United States. It is carried by 84 stations in 38 states, as well as by two stations in Canada. During a show broadcast in November 2002, Hendrie commented on a then-recent news story about an Italian doctor who supposedly cloned a baby, by saying: "[S]ome wop made a baby. And not just any kind of a baby, another guinea baby is foisted upon the world and it was cloned. Eww. Little greasy kid."

That episode was broadcast by Canadian station CKTB-AM in St. Catharines, Ontario, where Hendrie's use of the terms "wop," "guinea" and "little greasy kid" offended a listener. In Canada, offended listeners can do something specific and concrete: they can file written complaints with the Canadian Broadcast Standards Council (CBSC). When they do, broadcasters must respond in writing. And the CBSC then issues written rulings. The offended viewer filed such a complaint, CKTB-AM responded, and the CBSC then ruled against the station.

The CBSC is not a government agency. It was created by private broadcasters to administer program content "Codes" adopted by the Canadian Association of Broadcasters (CAB) and the Canadian Radio-television and Telecommunications Commission. The CBSC is, in other words, part of the Canadian broadcast industry's effort to regulate itself, insofar as program content is concerned. More than 500 Canadian radio and television broadcasters are CBSC members.

Among the Codes administered by the CBSC is the CAB Code of Ethics, one provision of which is known as the Human Rights clause. It provides that because "every person has the right to full and equal recognition and to enjoy certain fundamental rights and freedoms, broadcasters shall ensure that their programming contains no abusive or unduly discriminatory material or comment which is based on matters of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status or physical or mental disability."

CBSC's Ontario Regional Panel concluded that "the broadcast of host Phil Hendrie's comments about Italians is in breach of the Human Rights clause."

The CBSC has, in the past, acknowledged that "[i]t would be unreasonable to expect that the airwaves be pure, antiseptic and flawless. Society is not. Nor are individuals in their dealings with one another." Thus, the question in the Phil Hendrie Show case was whether the terms "wop," "guinea" and "little greasy kid" passed the "pure, antiseptic and flawless" test. The CBSC ruled "they do not." "They are disparaging terms, utterly without redemptive value," the CBSC explained.

The CBSC did not rule that such terms may never be used. "[T]here may be some dramatic programming circumstances (not encountered here) in which the use of such words may be contextually justified," the CBSC acknowledged. But, it added, "their appropriateness should be carefully monitored. In any event, they had absolutely no place in the non-dramatic programming at issue here."

CKTB-AM was required to announce the CBSC's decision, once during peak listening hours and again during the time period in which The Phil Hendrie Show is broadcast. The station also must confirm in writing to the complaining listener and to the CBSC that the required announcement was aired. And it must provide the CBSC with an aircheck copy of the broadcast.

CKTB-AM re an episode of the Phil Hendrie Show, CBSC Decision 02/03-0383 (May 2003), available at www.cbsc.ca/english/decision/030806.htm [ELR 25:3:8]

RECENT CASES

Comic books featuring characters named "Johnny and Edgar Autumn" are protected by First Amendment, so right of publicity lawsuit filed by recording artists Johnny and Edgar Winter should have been dismissed, California Supreme Court rules

Recording artists Johnny and Edgar Winter have suffered a significant setback in their right of publicity lawsuit against DC Comics on account of its publication of a series of comic books featuring characters named "Johnny and Edgar Autumn." The comic books' "Autumn" brothers are albinos, as are the real-life Winter brothers; and there is no dispute that the comic book's characters are "less than subtle evocations of Johnny and Edgar Winter." Nevertheless, the California Supreme Court has ruled that "the comic books are entitled to First Amendment protection." And thus the Court concluded that the Winters' case - or at least most of it - should have been dismissed in response to DC Comics' motion for summary judgment.

In an opinion by Justice Ming Chin, the California Supreme Court applied the test it first announced two years ago in "The Three Stooges" case, Comedy III Productions v. Saderup (ELR 22:12:5). In that case, the Court held that art is protected by the First Amendment from right of publicity claims, if the artist shows that the work contains "significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." In The Three Stooges case itself, the Court determined that the artist "essentially sold, and devoted fans bought, pictures of The Three Stooges, not transformed expressive works by the artist." So in that case, the First Amendment did not protect the artist against claims made by the company that owns The Three Stooges' rights of publicity.

Earlier in the Winter brothers' case, the California Court of Appeal held that the Winters were entitled to a trial on the question of whether DC Comics' comic books contain transformative elements. But the Supreme Court agreed to review the case even before a trial was held (ELR 24:5:11).

The Supreme Court then "reviewed the comic books" itself, and concluded that it could "readily ascertain that they are not just conventional depictions of [the Winter brothers] but contain significant expressive content other than [the Winters'] mere likenesses."

Justice Ming explained that "the books do not depict the [Winter brothers] literally. Instead, [they] are merely part of the raw materials from which the comic books were synthesized. To the extent the drawings of the Autumn brothers resemble the [Winter brothers] at all, they are distorted for purposes of lampoon, parody, or caricature. And the Autumn brothers are but cartoon characters . . . in a larger story, which is itself quite expressive. The characters and their portrayals do not greatly threaten the [Winter brothers'] right of publicity. [Their] fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions."

Though the Supreme Court's decision brings to an end most of Johnny and Edgar Winter's case, it is not entirely done yet. The Winters argued that "the way comic books were advertised is itself actionable, for example, by falsely implying [they] endorsed the product." In a footnote, Justice Chin observed that the advertising issue was "beyond the scope of [the Supreme Court's] grant of review." Thus, Justice Chin left it to the Court of Appeal on remand to decide whether the Winters preserved a cause of action based solely on the advertising of the comic books, and if so, whether that cause of action should be decided by summary judgment or requires a trial. That issue is now pending before the Court of Appeal.

Johnny and Edgar Winters were represented by Vincent Chieffo of Greenberg Traurig in Santa Monica, and by Julia L. Ross and Corey J. Spivey of Gipson Hoffman & Pancione in Los Angeles. DC Comics was represented by Michael Bergman of Weissmann Wolff Bergman Coleman & Silverman in Beverly Hills.

Winter v. DC Comics, 30 Cal.4th 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 2003 Cal.LEXIS 3492 (Cal. 2003) [ELR 25:3:9]

Court of Appeals affirms dismissal of copyright infringement suit by Richard Warren complaining of unlicensed performances of music he composed for "Remington Steele," because compositions were works made for hire whose copyrights are owned by Fox Family (as successor to series' producer MTM Productions)

Composer Richard Warren may have a perfectly valid claim against Fox Family Worldwide, but if he does, it's for breach of contract rather than copyright infringement. That is the consequence of a federal Court of Appeals ruling that affirms the dismissal of Warren's infringement lawsuit against Fox Family, and Fox's licensees The Christian Broadcasting Network and Princess Cruise Lines.

During the 1980s, Warren composed music for the television series "Remington Steele" pursuant to contracts with MTM Productions, the series' producer. The contracts were work made for hire agreements, and that made MTM the owner of the music's copyrights. The contracts also provided that Warren would be entitled to the writer's share of music public performance fees collected by ASCAP or BMI; and they provided that if MTM licensed the use of the series by anyone that didn't have an ASCAP or BMI license, MTM itself would pay Warren a portion of the license fees.

Warren's lawsuit was apparently prompted by licenses to show "Remington Steele" that were issued by Fox Family - MTM's successor - to the Christian Broadcasting Network and to Princess Cruises. Neither of them had ASCAP or BMI licenses at the time, but Fox Family allegedly failed to pay Warren anything in connection with those licenses.

Fox, CBN and Princess argued that Warren is not the owner of the copyrights to the "Remington Steele" music. In an opinion by Judge Michael Daly Hawkins, the Court of Appeal has agreed. Judge Hawkins ruled Warren's contracts were work-made-for-hire agreements, even though some of them did not use the "work made for hire" phrase and none of them recited that Warren's music was "specially ordered or commissioned." That made MTM, and then Fox Family, the owner of the compositions' copyrights, rather than Warren.

Judge Hawkins also ruled that Warren was not entitled to recapture ownership of the copyrights by rescinding his work made for hire agreements, even if Fox Family failed to pay Warren royalties those agreements entitled him to receive.

Finally, the judge held that Warren could not claim a "beneficial interest" in the copyrights that would entitle him to sue for their infringement.

Beneficial interests have been found where composers assigned their copyrights to others. But in a work-made-for-hire relationship, the employer is considered the author. Judge Hawkins agreed with an earlier decision by another appellate court (ELR 9:8:17) that "the legislative history of the [Copyright] Act . . . 'supports the conclusion that Congress did not intend to extend the concept of beneficial ownership to include an employee in a work-made-for-hire arrangement.'"

Warren was represented by Leonard J. Comden of Wasserman Comden Casselman & Pearson in Tarzana. Fox Family, CBN and MTM were represented by Robert C. Welsh of O'Melveny & Myers in Los Angeles. Princess Cruise Lines was represented by Jeffrey C. Briggs of Alschuler Grossman Stein & Kahan in Santa Monica.

Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 2003 U.S.App.LEXIS 9155 (9th Cir. 2003) [ELR 25:3:10]

Sanctuary Records wins dismissal of copyright infringement claim filed by former publisher of songwriter Hugh Thomasson, because recorded songs were co-written by Thomasson with other songwriters from whose publishers Sanctuary also had licenses

Sanctuary Records releases recordings of songs that were co-written by Hugh Thomasson. Sanctuary obtained licenses for those songs from Hustlers, Inc., Thomasson's former publisher, as well as from the publishers of Thomasson's co-writers.

In 1999, however, Thomasson notified Sanctuary that his relationship with Hustlers had "come to an end," and that royalties should thereafter be sent to Justice Writers Publishing, Inc., his new publisher. Sanctuary did as instructed, and got itself sued by Hustlers for doing so.

In a lawsuit filed in federal court in Atlanta, Hustlers alleged that Sanctuary, Thomasson and Justice all infringed Hustlers' copyrights in the songs Thomasson had co-written. Sanctuary did so, Hustlers alleged, by continuing to distribute recordings of those songs, without paying royalties to Hustlers. Hustlers' lawsuit also alleged claims under the federal Lanham Act, and under state law for breach of contract, unjust enrichment, breach of fiduciary duty, fraud and promissory estoppel.

Sanctuary, of course, wanted no part of what looks to be a dispute primarily between Hustlers on the one hand and Thomasson and Justice on the other. So Sanctuary filed a motion of its own, asking the court to dismiss Hustlers' claims against it. Judge Thomas Thrash has dismissed some of Hustlers' claims against Sanctuary, but not all of them.

Judge Thrash dismissed Hustlers' copyright infringement claim against Sanctuary, because Sanctuary had obtained licenses from Thomasson's co-writers' publishers. "It is well established," the judge explained, "that a license from a co-owner of the copyright is a defense to copyright infringement brought by another one of the co-owners."

Judge Thrash also dismissed Hustlers' breach of fiduciary duty claim against Sanctuary. "Under New York law, there is no fiduciary duty between two sophisticated parties, such as Sanctuary and [Hustlers], which enter into an arms length negotiated contract," the judge ruled.

On the other hand, the judge refused to dismiss Hustlers' Lanham Act claim against Sanctuary. This claim apparently was based on copyright notices on Sanctuary recordings that credited Justice rather than Hustlers for the songs co-written by Thomasson. "There is a genuine issue of material fact as to whether consumers may be confused, deceived or misled by Sanctuary's allegedly incomplete listing of the copyright interests . . . ," Judge Thrash ruled (in an opinion written before the Supreme Court decided Dastar v. Twentieth Century Fox (ELR 25:1:7)).

The judge also refused to dismiss Hustlers' claims against Sanctuary for breach of contract, unjust enrichment, fraud and promissory estoppel. Sanctuary argued that those state law claims were preempted by federal copyright law; but Judge Thrash held that they were not. (The judge hasn't yet ruled on the merits of those claims, though.)

Hustlers was represented by Terry Dale Jackson in Atlanta and by Philip Michael Walden, Jr., of Jones

& Walden in Atlanta. Sanctuary was represented by Marva Jones Brooks of Arnall Golden & Gregory in Atlanta.

Hustlers, Inc. v. Thomasson, 253 F.Supp.2d 1285, 2002 U.S.Dist.LEXIS 26469 (N.D.Ga. 2002) [ELR 25:3:10]

Children's Internet Protection Act - requiring public libraries to use filtering software to block sexually explicit websites - is constitutional, U.S. Supreme Court rules

The question of whether the Children's Internet Protection Act is constitutional was a tough one. The 12 federal judges who were asked to answer it disagreed, in an even six-to-six split. But the six who think the Act is constitutional were Justices of the

United States Supreme Court. So their views outweigh the views of the three dissenting Supreme Court Justices and of the three lower court judges who originally held the Act to be unconstitutional. Thus the constitutionality of the Act has been upheld.

The origins of the Children's Internet Protection Act - commonly referred to as "CIPA" - can be traced to efforts by Congress to help public libraries provide Internet access to their patrons. To do this, Congress created two financial aid programs: one entitles libraries to buy Internet access at a discount; the other pays for libraries to acquire computers for Internet access.

Libraries of course were delighted with these financial aid programs - but not with one of the conditions they had to satisfy, in order to qualify for aid. In an effort to prevent children from seeing sexually explicit websites while they or others were using library computers, CIPA requires libraries to use filtering software in order to be eligible to receive financial aid under either of these programs.

The problem with filtering software is that it doesn't work perfectly: it filters out some websites that are not sexually explicit and are perfectly acceptable, even for children; and it fails to filter out some pornographic sites, even though that's what filtering software is supposed to do. For this reason, many libraries do not want to use filtering software. Many library patrons and website publishers don't want them to, either. As a result, the American Library Association spearheaded a lawsuit in which libraries, patrons and website publishers challenged CIPA's constitutionality.

At first, the challengers were successful. A three-judge district court ruled that because filtering software blocks access to some websites that are not sexually explicit, and because there are other ways to protect children using library computers to access the Internet, CIPA was overbroad and thus unconstitutional (ELR 24:6:19).

The Supreme Court, however, has reversed. One fact was critical for the six Justices who found CIPA to be constitutional. CIPA allows libraries to unblock specific websites, or even to disable the filtering software entirely on a specific computer, at the request of a patron.

Chief Justice William Rehnquist (in an opinion joined by Justices Sandra Day O'Connor, Antonin Scalia and Clarence Thomas) ruled that even if filtering software erroneously blocks acceptable websites, "concerns [about over blocking] are dispelled by the ease with which patrons may have the filtering software disabled." The lower court had "viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to request them." Justice Rehnquist did not dispute this was possible. "But," he added, "the Constitution does not guarantee the right to acquire any information at a public library without any risk of embarrassment."

Justice Anthony Kennedy concurred that CIPA is constitutional. He concluded that "If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case." Justice Kennedy acknowledged that some librarians may not be able do so, or may refuse to do so. But if this happens, Justice Kennedy said, "that would be the subject for an as-applied challenge [to the actions of that particular librarian], not the facial challenge [to the constitutionality of CIPA as a whole] made in this case."

Justice Stephen Breyer concurred as well. He found CIPA to be constitutional, because "No clearly superior or better fitting alternative to Internet software filters has been presented." Moreover, "Given the comparatively small burden the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives."

Justices John Paul Stevens, David Souter and Ruth Bader Ginsburg dissented.

Theodore B. Olson, Solicitor General, argued on behalf of the United States. Paul M. Smith of Jenner & Block in Washington D.C. argued on behalf of the American Library Association and other challengers.

United States v. American Library Association, 123 S.Ct. 2297, 2003 U.S.LEXIS 4799 (2003) [ELR 25:3:11]

Obscenity provisions of Communications Decency Act may be unconstitutional, three-judge court decides

Congress enacted the Communications Decency Act in 1996 in an effort to prevent minors from getting access to sexually explicit material on the Internet. Despite the Act's laudable goal, it's having a tough time in the courts.

In 1997, the United States Supreme Court struck down provisions of the Act that prohibited Internet transmission of "indecent" material (ELR 19:2:7). Now, provisions of the Act that prohibit the transmission of "obscene" material are in jeopardy too. A three-judge federal District Court has ruled that the Act's obscenity provisions may be unconstitutional, though the court also ruled that the plaintiffs in the case have a lot to prove in order to win their case.

The challenge to the obscenity provisions of the Communications Decency Act - commonly referred to by its initials "CDA" - has been filed by photographer Barbara Nitke and two non-profit organizations. They operate websites that "display images of adults engaged in nontraditional sexual practices. . . ." Nitke and the two organizations argue that because the definition of "obscenity" depends (in part) on local "community standards," their websites may be deemed "obscene" in some communities in the United States, even though they wouldn't be in other communities. What's worse, they argue, they have no control over the communities from which their websites are accessed, because the Internet allows people to access their webs from anywhere in the U.S.

The "community standards" part of the "obscenity" definition was adopted by the Supreme Court long before the Internet was invented - back in the days when books, magazines and other potentially obscene materials were distributed in physical formats, so publishers and distributors could control where in the U.S. they were made available. Perhaps for this reason, earlier attacks on the constitutionality of the "community standards" part of the "obscenity" definition have not been successful.

The Internet, however, changes all that, because today's Internet technology does not allow website operators to know, let alone control, the locations from which their sites can be viewed. That is the basis on which Nitke and the others have mounted a new challenge to the "obscenity" definition, as it is applied to Internet communications.

The United States government sought dismissal of the case; but the three-judge court refused to do so. In a Per Curiam opinion by Judges Robert Sack, Richard Berman and Gerard Lynch, the court acknowledged that earlier decisions (upholding the "community standards" element of the "obscenity" definition) may no longer be applicable.

In order to show that this is so, the court instructed Nitke and her co-plaintiffs that they would have to prove several things: the total amount of speech affected by the CDA; the amount of speech that is inhibited by the CDA because it may offend community standards in some places but not others, and because website operators actually are suppressing their speech because they can't prevent the viewing of their sites in those communities; and that defenses permitted by the CDA itself - for those who implement good faith measures to restrict access by minors, and for those who use credit card age-verification methods - are not sufficient.

Though Nitke and her co-plaintiffs defeated the government's effort to get their case dismissed entirely, they didn't get all they had asked for. They had asked for a preliminary injunction barring the government from enforcing the CDA until the case is tried. The court, however, declined to issue an injunction. The CDA has been in effect since 1996, and this case was not filed until almost six years later. The government argued, and the court agreed, that their six-year delay in filing suit showed that Nitke and her co-plaintiffs would not be significantly harmed if a preliminary injunction were denied.

Nitke and her co-plaintiffs were represented by John Wirenius of Leeds Morelli & Brown in Carle Place, New York. The government was represented by Andrew W. Schilling, Assistant United States Attorney, in New York City.

Nitke v. Ashcroft, 253 F.Supp.2d 587, 2003 U.S.Dist.LEXIS 4456 (S.D.N.Y. 2003) [ELR 25:3:12]

St. Louis ordinance making it unlawful to allow minors to play violent video games without parents' consent is unconstitutional, federal appellate court holds

A St. Louis ordinance that makes it unlawful to allow minors to play violent video games without their parents' consent has been declared unconstitutional by a federal Court of Appeals. The appellate court held that the ordinance violates the First Amendment. The ruling was issued in a lawsuit filed against St. Louis County by the Interactive Digital Software Association and other organizations and companies that create, distribute and sell or rent video games.

The Court of Appeals' opinion, written by Judge Morris Sheppard Arnold, was short and to the point. It reverses a District Court decision that had held that video games are not speech, and that even if they are, the ordinance was narrowly tailored to satisfy a compelling governmental interest (ELR 24:6:20).

Judge Arnold noted that "If the First Amendment is versatile enough to 'shield [the] painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll'" - as the Supreme Court has said it is - "we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to a similar protection."

Indeed, the appellate court's review of some video games at issue in the case convinced it, Judge Arnold said, that "these 'violent' video games contain stories, imagery, 'age-old themes of literature,' and messages, 'even an "ideology," just as books and movies do.'" As a result, "'they are as much entitled to the protection of free speech as the best literature.'"

Judge Arnold classified the ordinance as a content-based restriction, because it applies only to violent video games and thus regulates video games based on their content. This meant that the ordinance was “presumptively invalid,” and required St. Louis to prove that it was narrowly tailored to serve a compelling interest.

St. Louis argued that the ordinance served two compelling interests: “protecting the ‘psychological well-being of minors’“; and “assisting parents to be the guardians of their children’s well-being.” However, Judge Arnold ruled that St. Louis had not proved that either was a compelling interest.

The judge found that St. Louis had failed to prove that the psychological health of children who play violent video games suffers. In order to show the ordinance was constitutional, St. Louis should have offered “empirical support for its belief that ‘violent’ video games cause psychological harm to minors,” Judge Arnold said.

The judge also observed that no Supreme Court decision had ever "suggest[ed] that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view."

As a result, Judge Arnold remanded the case to the District Court "for entry of an injunction" against enforcement of the ordinance.

The Interactive Digital Software Association was represented by Deanne E. Maynard in Washington, D.C. St. Louis County was represented by Michael A. Shuman in Clayton, Missouri.

Interactive Digital Software Association v. St. Louis County, 329 F.3d 954, 2003 U.S.App.LEXIS 11069 (8th Cir. 2003) [ELR 25:3:13]

Music clearance firm is awarded more than $64,000 in attorney's fees incurred in successful defense of copyright infringement case filed by Bridgeport Music and Westbound Records

Bridgeport Music and Westbound Records have filed hundreds of lawsuits against those they allege have infringed their copyrights. Decisions in those cases are beginning to appear in the advance sheets. On some issues, Bridgeport and Westbound have prevailed, though on others, they have not (ELR 23:8:17, 24:11:12, 25:2:14). Recently a ruling was issued against Bridgeport and Westbound that must have been especially disappointing to them, because it didn't just result in the weakening or even dismissal of one of their cases; it cost them money-out-of-pocket.

Federal District Judge Thomas Higgins has ordered Bridgeport and Westbound to pay more than

$64,000 in attorney's fees to Diamond Time, Ltd., a music clearance firm they had sued for contributory infringement and negligence, as a result of the sale of allegedly infringing recordings by TVT Records, a record company for which Diamond Time had done clearances.

In an earlier (unpublished) order, Diamond Time won a motion for summary judgment dismissing the case against it, on two grounds: Bridgeport and Westbound's infringement claims were barred by the statute of limitations; and their negligence claims were without merit, because Diamond Time didn't owe Bridgeport or Westbound a duty of care.

As the successful party in a copyright infringement case, Diamond Time was entitled to its attorney's fees. Diamond Time's lawyers submitted time records showing they had spent time worth $84,327 in fees. From that, Judge Higgins deducted almost $863 for "duplicate" work, "unnecessary work" or "clerical tasks." That produced a "lodestar" amount of about $80,464, from which the judge deducted another 20%, because part of the law firm's work was devoted to defeating the negligence claim, for which there is no fee-shifting statute.

Bridgeport Music and Westbound Records were represented by D'Lesli M. Davis of King & Ballow in Nashville. Diamond Time was represented by Richard Horton Frank, III, of Stewart Estes & Donnell in Nashville. TVT Records was represented by Robert L. Sullivan of Loeb & Loeb in Nashville.

Bridgeport Music, Inc. v. Lorenzo, 255 F.Supp.2d 795, 2003 U.S.Dist.LEXIS 5877 (M.D.Tenn. 2003) [ELR 25:3:13]

Player agent Frank Bauer loses lawsuit alleging that competing agency Octagon Football interfered with Bauer's contract with quarterback David Carr

Football is a competitive sport, at every level and every stage. Take, for example, the question of who was going to get to represent David Carr in contract negotiations that would follow the 2002 NFL draft. Carr had an outstanding career as Fresno State's quarterback, and was heavily recruited by player agents. There was good reason for the competition among them. Those in the know expected Carr to be chosen early in the 2002 draft, perhaps even in the first round.

Frank Bauer was the first agent to win Carr as a client. The two men signed a representation contract on New Year's Day, 2002. The contract, however, contained a clause that allowed Carr to terminate it on five days written notice. And on January 17th, Carr did just that. The draft was still more than three months away, so Bauer never got to negotiate Carr's contract with the Houston Texans, the then-new NFL expansion team that made Carr the number 1 draft pick of that year.

Instead, Carr's contract was negotiated by Octagon Football, headed by agent Mike Sullivan, with whom Carr had signed a contract on January 22nd. Naturally, it looked to Bauer as though Octagon had persuaded Carr to terminate their January 1st contract. And that is what Bauer alleged, in an interference with contract and unfair competition lawsuit he filed against Octagon in federal court in San Francisco.

Following what appears to have been extensive discovery involving the depositions of all involved, Octagon made a successful motion for summary judgment. Magistrate Judge Elizabeth Laporte concluded that there simply was no evidence that Sullivan or anyone from Octagon did anything to persuade Carr to terminate his contract with Bauer. Indeed, the judge found that Carr had already decided to terminate Bauer's contract, before Sullivan even spoke with Carr for the first time. And the judge found that Carr was the one who initiated contact with Sullivan, "after he decided to terminate his contract with Bauer."

For this reason, Judge Laporte concluded that "No reasonable jury could find that [Octagon] induced Carr to terminate his contract with Bauer." Since Bauer's unfair competition claim was based on the same facts, there was no evidence Octagon had competed unfairly with Bauer either.

Bauer was represented by James M. Morris of Morris & Nakaue in Stockton. Octagon was represented by Ethan D. Dettmer of Gibson Dunn &

Crutcher in San Francisco.

Bauer v. Interpublic Group of Companies, Inc., 255 F.Supp.2d 1086, 2003 U.S.Dist.LEXIS 5202 (N.D.Cal. 2003) [ELR 25:3:14]

Federal District Court dismisses most of Joe Frazier's lawsuit against Indian casino and tribe officials, complaining of unauthorized use of his image in connection with boxing match between his daughter and Mohammed Ali's daughter, because tribal sovereign immunity protected most defendants

In June of 2001, Joe Frazier's daughter fought Mohammed Ali's daughter at the Turning Stone Casino in New York. Frazier's daughter lost the match, but that wasn't the only reason Frazier had reason to be upset.

While in the Casino, Frazier discovered that his image had been used on the surfaces of some of its gaming tables; and he learned that it also had been used on programs, mailings and souvenirs related to the match. Frazier had not authorized the use of his image by the Casino. Indeed, he had never before been associated with gambling. So Frazier did what celebrities do in cases like this: he sued.

Frazier's lawsuit alleged claims under sections 50 and 51 of the New York Civil Rights Act (New York's right of publicity statute). But he filed the lawsuit in federal, rather than state, court. Moreover, since the Turning Stone Casino is owned by the Oneida Indian Nation, he sued the tribe and two of its officials, along with the Casino itself. He also sued the International Boxing Hall of Fame and its Executive Director, who apparently were the fight's promoters.

The case may eventually become interesting on its merits, but its first round was largely procedural. All of the defendants made motions to dismiss, arguing that the court did not have subject matter jurisdiction to hear the case. Federal District Judge Frederick Scullin has agreed, as to most of the defendants.

Frazier's claims are based on state law, rather than federal law, so Judge Scullin concluded he did not have "federal question" jurisdiction. Even more significantly, Indian tribes and their officials have tribal sovereign immunity; and the judge ruled that the immunity insulated from any potential liability most of those Frazier had sued. For that reason, Judge Scullin dismissed Frazier's claims against the Casino, the Oneida Indian Nation, and its officials.

The judge did not dismiss Frazier's claims against the International Boxing Hall of Fame and its Executive Director, because Frazier had alleged that they promoted the fight as "independent contractors," rather than as agents of the Oneida Indian Nation. If that was so, the Judge Scullin ruled, they would not be protected by tribal sovereign immunity. The judge noted, however, that if the facts show that the Hall of Fame and its Executive Director were acting as agents of the tribe, then they too would be immune.

Frazier was represented by H. Todd Bullard of The Bullard Group in Rochester. The Casino and the Oneida Indian Nation and its officials were represented by Peter D. Carmen of Mackenzie Hughes in Syracuse and by David A. Reiser of Zucker Spaeder in Washington D.C. The International Boxing Hall of Fame and its Executive Director were represented by Timothy P. Murphy of Hancock & Estabrook in Syracuse.

Frazier v. Turning Stone Casino, 254 F.Supp.2d 295, 2003 U.S.Dist.LEXIS 4953 (N.D.N.Y. 2003) [ELR 25:3:14]

Former assistant coach of Arizona State's women's basketball team is entitled to trial on claims that he wasn't paid as much as woman assistant coach and was fired for complaining about pay disparity, federal District Court rules

Mark Lewis was an assistant coach for the women's basketball team at Arizona State University for five seasons, from 1996 to 2001. He isn't any more, though, because his contract wasn't renewed for the 2001-2002 season.

There seems to be little dispute about why it wasn't renewed. For much of his tenure, Lewis was paid about the same as two other assistant coaches with similar duties, both of whom were women. His salary was a little more than one, and a little less than the other. But during his last year on the job, ASU hired a new assistant coach named Kim Gervasoni, and paid her $80,000 a year - considerably more than Lewis' $63,860.

Lewis wasn't happy about Gervasoni's salary, and he told the team's head coach so, in no uncertain terms. Indeed, he told the head coach he had lost "trust and respect" for her. Two and half weeks later, the head coach told Lewis his contract wouldn't be renewed. The head coach later testified that after Lewis said what he did, "she no longer felt that [Lewis] could support her or 'sell' her to recruits." Recruiting had been an important part of Lewis' job, and that is why the head coach decided not to renew his contract.

Lewis reacted by filing an employment discrimination lawsuit in federal court in Phoenix. ASU responded with a motion for summary judgment, which was partially - but only partially - successful. Judge Roslyn Silver ruled that Lewis is entitled to a trial on two of his claims: one for unequal pay under Title VII;

and the other for retaliation under Title VII and the Equal Pay Act.

ASU attempted to justify Gervasoni's greater salary with a gender-neutral reason: Gervasoni had been earning $74,000 a year as a head coach at a California community college, and she needed more to move to Arizona. Title VII does recognize a "market forces" defense. But Judge Silver held that it didn't apply here, because ASU didn't show that the market value of Gervasoni's skills was higher than the value of Lewis' skills. Gervasoni's prior salary, by itself, was not enough to establish a "market forces" defense, the judge held.

Judge Silver also held that Lewis' complaint to the head coach about Gervasoni's higher salary was an activity that is "protected" by Title VII and the Equal Pay Act, so ASU couldn't terminate his employment for that reason. The head coach asserted that Lewis was terminated for insubordination because of his statement that he had lost "trust and respect" for her. But the judge said that this may be a "mixed motive case," and all Lewis had to do was show that a "substantial factor" in his termination was his complaint about Gervasoni's greater salary; he didn't have to prove that his complaint was the only factor.

For these reasons, Judge Silver denied ASU's motion for summary judgment as these two claims. The judge did however grant summary judgment to ASU on two of Lewis' other claims: one for pay disparity under the Equal Pay Act (because his responsibilities were different - even though greater! - than Gervasoni's), and another for retaliation under the First Amendment.

Lewis was represented by James M. Jellison of Schleier Jellison & Schleier in Phoenix. ASU was represented by Michael King Goodwin, Office of the Attorney General Liability Management Section, in

Phoenix.

Lewis v. Smith, 255 F.Supp.2d 1054, 2003 U.S.Dist.LEXIS 5984 (D.Ariz. 2003) [ELR 25:3:15]

Getty Images did not breach fiduciary duty to photographer, or breach contract by which photographer appointed Getty her agent, nor did Getty infringe photographer's copyrights, federal District Court rules

When Getty Images acquired stock photography agency Tony Stone Images in 1995, Getty became the photo agent for Penny Gentieu, with whom Tony Stone had signed an exclusive agency contract a couple of years before. For a while, relations between Gentieu and Getty were good; but then they turned sour.

Gentieu didn't like the terms of a modified contract that Getty proposed, after it began issuing licenses from its website. She didn't think Getty was collecting or paying her all the royalties she was owed. And she objected, especially, to Getty's issuing licenses to photographs taken by other photographers - photos that featured the same subject matter and were shot in the same style as her own.

Gentieu's dissatisfaction eventually erupted into a wide-ranging, multi-claim lawsuit in federal court in Chicago. The lawsuit alleged claims for breach of contract, breach of fiduciary duty and copyright infringement. But - with the exception of her claim for unpaid royalties, which Getty settled by paying her the full amount she claimed - the lawsuit has come to naught. Federal District Judge Milton Shadur has granted Getty's motion for summary judgment, dismissing the case "in its entirety." And in the course of his lengthy decision, Judge Shadur has characterized Gentieu's claims (for everything except unpaid royalties) as "ascribable to an overexaggerated sense of self-importance" and as an "attempt at self-aggrandizement."

Of greatest interest to others in the entertainment business was Gentieu's claim that Getty breached its fiduciary duty to her, when it licensed the use of photos taken by other photographers that were shot in the same style as Gentieu's. Judge Shadur acknowledged that the contract between Gentieu and Getty "created a principal-agent relationship that placed on Getty a fiduciary duty to treat Gentieu 'with the utmost candor, rectitude, care, loyalty, and good faith.'" However, Judge Shadur added, "Agency law recognizes . . . that an agent can act on behalf of competing principals without violating its fiduciary duty where the agent believes that it is privileged to undertake such representation and has disclosed its representation of competitors to the principals involved."

In this case, it wasn't disputed that Gentieu was aware that Getty would represent photos taken by "multiple photographers" that had the same subject matter as those taken by Gentieu. The "very nature of the stock photography business requires that the stock agency solicit images on the same subject so that it can offer clients a menu of images to chose from," the judge explained.

Gentieu's breach of contract claim was based on a clause that required Getty to use its "best efforts" to license Gentieu's photos and to maximize her earnings. Getty argued that "best efforts" clauses are unenforceable in Illinois, unless they specify the level of performance they require. But Judge Shadur ruled that there was an exception to that general rule where one party must depend on the other's best efforts for income. That was so in this case, the judge found, because Gentieu's only income was her share of the income from licenses issued by Getty.

Nonetheless, Judge Shadur rejected Gentieu's "best efforts" claim, for two reasons. First, there was no evidence that Getty urged other photographers to create photos that would replace Gentieu's. Second, Gentieu's contract gave Getty the "sole discretion" to set the terms and conditions of the licenses it issued to users, and imposed no obligation on Getty to put Gentieu's photos on its website.

Judge Shadur also rejected Gentieu's copyright infringement claims. These claims were based on the alleged similarity between Gentieu's photos and those taken by other photographers who Getty also represented, and licenses for which Getty issued to users. The judge ruled that none of the photos about which Gentieu complained was substantially similar to the copyrightable elements of Gentieu's photos. Rather, he found that although some of the complained-of photos "share a common idea" with Gentieu's photos, her copyrights do not protect that idea. What's more, none of the complained-of photos was an exact duplicate of Gentieu's photos, and in fact, all of the complained-of photos had "numerous visible differences" from hers.

Finally, even if some of the complained-of photos might have been considered substantially similar, the judge found that Getty had made a "compelling showing" that all were independently created, and thus were not infringing for that reason too.

Gentieu was represented by William T. McGrath of Davis Mannix & McGrath in Chicago. Getty Images was represented by Michael O. Warnecke of Mayer Brown Rowe & Maw in Chicago.

Gentieu v. Tony Stone Images/Chicago, Inc., 255 F.Supp.2d 838, 2003 U.S.Dist.LEXIS 4694 (N.D.Ill. 2003) [ELR 25:3:16]

Collectors of art works attributed to Russian artist Lazar Khidekel may have valid claim under New York laws prohibiting deceptive acts and unfair competition in lawsuit against artist's son and daughter-in-law triggered by their false statements to "ARTnews" and "Le Devoir"

Art collectors Rene and Claude Boule may get some financial satisfaction, eventually, in their lawsuit against the son and daughter-in-law of artist Russian Lazar Khidekel. So far, the Boules have been awarded only $7110, even though they proved that Khidekel's son and daughter-in-law made false statements about artworks in the Boules' collection that were published in ARTnews and Le Devoir.

The Boules' collection includes some 176 works attributed to Khidekel. In 1991, apparently in preparation for an exhibition in Canada, the Boules paid the artist's son $7090 to sign certificates of authenticity for sixteen of their Khidekel paintings. A couple of years later, however, the artist's son and daughter-in-law offered their own Khidekel artworks for sale. And shortly thereafter, they told ARTnews and Le Devoir that paintings that the Boules' attributed to Khidekel were "fakes." What's more, the son denied signing certificates of authenticity, and they denied ever telling the Boules that their Khidekel paintings were authentic.

Federal District Judge Miriam Cedarbaum awarded the Boules $7090 - the amount they paid for the certificates of authenticity - on the grounds that the artist's son breached a contract with the Boules by denying he had signed them. The judge awarded the Boules an additional $20 on their defamation claim - but not more, because they hadn't proved any actual damage to their reputations (ELR 23:5:14, 23:11:16). However, Judge Cedarbaum dismissed the Boules' Lanham Act claim, as well as their claims under New York state laws that prohibit deceptive acts and unfair competition.

On appeal, the Boules have done somewhat better. In an opinion by Judge Denise Cote, the Court of Appeals has affirmed the dismissal of the Boules' Lanham Act claim, on the grounds that the statements made by Khidekel's son and daughter-in-law to ARTnews were not commercial speech, and thus were not reached by the Lanham Act.

On the other hand, Judge Cote ruled that Section 349 of New York's General Business Law prohibits deceptive acts, and that Section 349 "allows recovery not only by consumers [as Judge Cedarbaum had thought] but also by competitors if there is 'some harm to the public at large.'" Thus, the Boules will be entitled to recover under Section 349, if they are able to show that consumers were likely to have been misled by statements made by Khidekel's son and daughter-in-law in ARTnews and Le Devoir in which they falsely denied the son had signed certificates of authenticity and falsely denied telling the Boules that their Khidekel paintings were authentic.

The Boules also will be entitled to recover general damages under New York's common law of unfair competition by disparagement, if they are able to prove they were injured.

The Boules were represented by Gerald A. Rosenberg of Katten Muchin Zavis & Rosenman in New York City. Khidekel's son and daughter-in-law were represented by Anastasios Sarikas in Astoria. Leonard Hutton Galleries (through which Khidekel's son and daughter-in-law offered their Khidekel paintings for sale) was represented by Martin R. Gold of RubinBaum in New York City.

Boule v. Hutton, 328 F.3d 84, 2003 U.S.App.LEXIS 7734 (2nd Cir. 2003) [ELR 25:3:17]

Court of Appeals upholds FCC order permitting public television stations to carry advertising on "ancillary and supplementary services" on digital television channels

When public television stations eventually convert to digital broadcasting, they will be able to sell advertising on their "ancillary and supplementary services." The FCC so ruled in an Order issued in 2001 (ELR 23:6:11). And the Court of Appeals has upheld that Order by denying a "petition for review" filed by three public interest organizations: the Office of Communication of the United Church of Christ, the Alliance for Community Media, and the Center for Digital Democracy.

The appellate court's ruling does not mean that viewers of "Masterpiece Theatre" or "The News Hour with Jim Lehrer" will suddenly be seeing commercials for cars, tires, beer or soap. (Nor, alas, does it mean that public stations will be able to discontinue their periodic pledge drives and other appeals for financial support.)

When public stations go digital, technology will enable them to use their frequencies to transmit "ancillary and supplementary services," such as subscription television, data transmission, teletext, interactive material, and aural messages - in addition to conventional television programming. The FCC's 2001 Order, and the Court of Appeal ruling upholding it, will allow public stations to sell advertising on those ancillary and supplementary services. But public stations still will be required to broadcast conventional television programming, and they will not be allowed to sell advertising in connection with that programming.

Though the question of whether public television stations should be able to sell advertising in connection with any of their transmissions is a significant public policy question, the challenge to the FCC's 2001 Order was one of statutory interpretation. The statute in question is section 399b of the Communications Act - a provision that prohibits public stations from "broadcasting . . . any advertisement."

At first blush, the language of section 399b would appear to prohibit public television stations from using their digital channels to transmit advertising, not only when they broadcast programming, but even when they transmit other things like data or text. That in fact is what the public interest organizations argued to the FCC, and then to the Court of Appeals, in opposition to the request by public stations for authority to carry advertising on their "ancillary and supplementary services."

However, in earlier FCC proceedings, the word "broadcasting" was defined to mean "programming" made "available to all members of the public, without any special arrangements or equipment." Things that public stations do not make available to all members of the public, because special arrangements or equipment are necessary to get them, are not "broadcasting" but are instead "ancillary and supplemental services."

As a result, in its 2001 Order, the FCC determined that section 399b of the Federal

Communications Act does not prohibit public stations from carrying advertising on their "ancillary and supplemental services." And in an opinion by Judge Judith Rogers, the Court of Appeals has held that the FCC "reasonably interpreted § 399b to prohibit only 'broadcast' and not other transmissions of advertisements by [public] stations."

The public interest organizations were represented by Harold Feld. The FCC was represented by Daniel M. Armstrong, Associate General Counsel of the FCC. The Association of Public Television Stations was represented by Kevin C. Newsom.

Office of Communication v. Federal Communications Commission, 327 F.3d 1222, 2003 U.S.App.LEXIS 8749 (D.C. Cir. 2003) [ELR 25:3:17]

Dismissal of state court lawsuit filed by non-union recording engineer against Skywalker Sound, alleging failure to pay IATSE wages and related claims, is affirmed by California Court of Appeal, because employee's claims were preempted by federal labor law

Robert M. Levy is a recording engineer who has worked for Skywalker Sound since 1995. Skywalker is a subsidiary of Lucasfilm Ltd., and some of its work involves the production of music soundtracks for movies and videos. Skywalker also does audio-only work for producers of music CDs.

The distinction between the part of Skywalker's business that involves movie and video soundtracks and the part of its business that involves music CDs is important, because until 1999, employees who did soundtrack work were unionized and those who did music CD work were not. That is, until 1999, Skywalker had a collective bargaining agreement with IATSE that covered only those employees who mixed sound for film and video; the collective bargaining agreement itself provided that it did not cover those who mixed sound for music CDs.

Though Skywalker's music CD work was non-union, IATSE did of course want Skywalker to hire union members to do that work. To encourage Skywalker to do so, the collective bargaining agreement provided that if Skywalker hired IATSE members to do non-union work, certain union benefits (like night premiums, and meal and rest periods) would not apply.

When Levy was hired by Skywalker, he was hired into a non-union slot. Since he wasn't a member of IATSE, he wasn't paid IATSE wages. For several years, this was fine with Levy, because, he alleged, Skywalker told him he could not be a union member and still do the music CD job he was hired to do.

Eventually, however, Levy learned that he could have been an IATSE member; and if he had been, he would have earned more money. So Levy sued, in California state court, alleging claims for breach of contract, tortious misrepresentation, and violations of the California Labor Code.

Skywalker denies that Levy was told he couldn't be a union member. But so far, at least, that factual dispute has not been litigated. Instead, Skywalker made a motion for summary judgment, arguing that all of Levy's claims were preempted by federal labor law. The trial court agreed, and dismissed the case. And the California Court of Appeal has affirmed.

In an opinion by Justice Ignazio Ruvolo, the appellate court has held that all of Levy's claims are based on the IATSE collective bargaining agreement, and thus were preempted by section 301 of the federal Labor Management Relations Act. That section gives federal courts - not state courts - jurisdiction to hear suits for the violation of contracts between an employer and labor organization.

Levy of course argued that he was not a union member when Skywalker's complained-of activities took place, so his suit did not involve the violation of a contract between an employer and a labor organization. But Justice Ruvolo responded that Levy's contract and California Labor Code claims sought benefits Skywalker had agreed to pay union members in the IATSE collective bargaining agreement. And Levy's tortious misrepresentation claim was based on a provision of the collective bargaining agreement as well - the provision that would have allowed him to be an IATSE member and still work on non-union music CDs.

Levy was represented by Bruce M. Towner of Towner Law Offices in San Francisco. Skywalker Sound was represented by Robert G. Hulteng of Littler Mendelson in San Francisco.

Levy v. Skywalker Sound, 134 Cal.Rptr.2d 138, 2003 Cal.App.LEXIS 716 (Cal.App. 2003) [ELR 25:3:18]

Court dismisses Larry Flynt's lawsuit against Secretary of Defense seeking order that would have allowed Hustler Magazine correspondent to accompany American combat troops in Afghanistan

Hustler Magazine created a name, and a readership, for itself by publishing photos of naked women. But its owner, Larry Flynt, wants to broaden the scope of its coverage to include articles about war.

This was prompted, it appears, by the U.S. war in Afghanistan.

Shortly after that war began, Hustler asked the Department of Defense for permission to have a correspondent accompany U.S. soldiers on combat missions. The Department of Defense didn't say "no." In fact, it sort of said "OK." But war being war, and the Department of Defense being what it is, Hustler's correspondent never got to go into the field with U.S. forces.

Flynt responded by filing a lawsuit against Secretary of Defense Donald Rumsfeld. In it, Flynt argued that the Department of Defense had violated Hustler's First Amendment rights, and Flynt sought an injunction that would have prevented the Department from continuing to bar Hustler's correspondent from seeing actual combat.

The case hasn't gone well for Hustler. Early on, Judge Paul L. Friedman denied the magazine's motion for a preliminary injunction, on the grounds that the Defense Department hadn't actually denied Hustler's request (ELR 24:1:9). Now, Judge Friedman has dismissed Hustler's suit altogether, on essentially the same grounds.

In response to the Defense Department's motion to dismiss, Judge Friedman held that the case isn't yet "ripe" for review, because "it is possible if not probable that [Hustler's correspondent] Mr. Buchbinder will be granted access to combat ground forces." This was so, the judge explained, because the Defense Department put Buchbinder's name on a waiting list of journalists who want to accompany U.S. soldiers in combat. The judge reasoned that Buchbinder's name may eventually reach the top of that list, even though it still hadn't, a year and a half after Hustler first made its request.

Flynt was represented by John Perazich in

Washington D.C. Secretary Rumsfeld and the Department of Defense were represented by John R. Griffiths of the U.S. Department of Justice, in Washington D.C.

Flynt v. Rumsfeld, 245 F.Supp.2d 94, 2003 U.S.Dist.LEXIS 2281 (D.D.C. 2003) [ELR 25:3:19]

Previously Reported:

Dismissal of John J. Nance's suit against Random House is affirmed. A federal Court of Appeals has affirmed the dismissal of author John J. Nance's lawsuit against Random House. The appellate court's decision was marked "may not be cited as precedential authority . . . " and simply indicated that the dismissal was affirmed "substantially for the reasons stated in the district court's thorough opinion." The District Court had ruled that the publisher's good faith rejection of Nance's "unsatisfactory" manuscript did not breach their contract, and thus the publisher was entitled to a return of the advance Nance had been paid for the book (ELR 24:7:19). *Nance v. Random House, Inc.*, 63 Fed.Appdx. 596, 2003 U.S.App.LEXIS 10366 (2nd Cir. 2003)

Stay granted. United States Supreme Court Justice Sandra Day O'Connor has granted a stay in a case in which Maria Altmann has sued the Republic of Austria in federal court in Los Angeles to recover six paintings by artist Gustav Klimt that are now in the possession of the Republic or the national Austrian Gallery. The Republic argues that the District Court in Los Angeles does not have jurisdiction to hear the case. The District Court, however, ruled that it does (ELR

23:6:16), and the Court of Appeals agreed (ELR 24:12:17). Justice O'Connor's stay prevents the case from proceeding in Los Angeles until the full Supreme Court decides whether to grant or deny the Republic of Austria's petition for certiorari. If the petition is denied, the stay will automatically terminate. *Republic of Austria v. Altmann*, 123 S.Ct. 2129, 2003 U.S.LEXIS 4060 (2003)

Opinion published. The decision of the federal District Court in the Grokster case (Grokster/Morpheous decision, ELR 24:11:4) has been published. *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 259 F.Supp.2d 1029, 2003 U.S.Dist.LEXIS 6994 (C.D.Cal. 2003)
[ELR 25:3:19]

DEPARTMENTS

Entertainment Lawyer News:

Steven Beer joins Greenberg Traurig. Steven Beer has joined Greenberg Traurig as a shareholder in its New York office where he will head the office's Film practice. Beer has counseled numerous film companies, including: Belladonna Pictures, Solaris Entertainment, Janus Films, Seneca Falls Productions, Isis Pictures, Lot 47, Dakota Films and Ruff Ryders Film and Video. Other clients included: Eon Bailey, Rachel Perry, Wu-Tang Clan, Blackground Records, Ripe Records, Rosario Dawson, Maya, iVillage, Transcontinental Records, writers Amy Talkington, Debra Eisenstadt, Jill Kargman and Carrie Doyle-Karasyov, directors Shemi Reut, Kirby Dick, and musical artists Aaron Carter, Nick Carter, O-Town, the

Backstreet Boys, N'Sync, LMNT and Britney Spears. He has worked with Disney Records as an Executive Producer. Beer also has served as producer, producer's representative and/or legal counsel on dozens of film projects, including: "Death of a Dynasty," "Empire," "Crossroads," "L.I.E," "Black and White," "Daughter From Denange," and "Tumbleweeds." Beer serves on the Executive Board of the New York and National Independent Feature Project, the founder of R&B FM, a production company specializing in music-oriented films, and is a co-founder of the Center for the Protection of Athletes Rights. Prior to joining Greenberg Traurig, Beer was a founding partner of Rudolph & Beer, and before that he was associated with the entertainment law firm Frankfurt, Kurnit, Klein & Selz.

Joseph Costa, Alan Abrams and Charles

Coate form Costa Abrams & Coate. Joseph P. Costa, Alan Abrams and Charles M. Coate have announced the formation of their new boutique entertainment law firm in Santa Monica, California. The three lawyers bring more than fifty years of legal experience to their partnership and will provide a full range of legal services to their clients. The partners of Costa Abrams & Coate have counseled major corporate, studio and agency clients such as ATT, Foote Cone & Belding, TriStar Pictures and The Gersh Agency. In addition, they have worked with major independent production and distribution companies such as Nu Image, The Kushner-Locke Company, Franchise Pictures, Dino De Laurentiis and represented artists such as Lucy Liu, Christopher Lloyd, Debra Winger, Tobe Hooper and the Estate of Bob Marley in transactional and litigation matters. Joseph P. Costa brings over fifteen years of litigation and transactional experience to the firm. He worked in the litigation departments of Finley, Kumble, Wagner; Ervin, Cohen & Jessup and Leopold, Petrich & Smith before opening up his own firm. In addition to his wide ranging litigation work, Costa works with an array of entertainment and media clients in the capacity of general counsel. Presently, Costa serves as a panel attorney for the California Lawyers for the Arts. Alan Abrams served in senior legal and business affairs positions with the Writers Guild of America, West, Paramount Pictures Corporation and Imagine Films as well as other independent companies, before venturing into private practice in 1991. Abrams' private practice includes a variety of corporate and independent producers, distribution companies, literary/talent agencies, legitimate stage producers, directors, writers, performers, song writers and other individuals, for whom he has negotiated a wide variety of deals. He has facilitated the production of hundreds of hours of film and television programming during the course of a twenty-five year career in the entertainment industry as an attorney and business affairs executive. Charles M. Coate began practicing law in 1989 and has focused on business and entertainment litigation since 1991. As a litigator, he has represented or been retained by AIG, St. Paul Fire & Marine Insurance Company, American Airlines, Nu Image, Inc. and Franchise Pictures, Inc., in addition to numerous motion picture producers, distributors and financiers. In recent years he has also litigated or resolved disputes involving Twentieth Century Fox, MGM, Miramax Film Corporation, Madonna, Larry King and Aaron Spelling, among others. Coate is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Fourth and Ninth Circuits and the courts of the State of California. He is also a long standing member of the Entertainment Sections of the

Beverly Hills and Los Angeles County Bar Associations.

"Entertainment Lawyer News" is a new feature of the ENTERTAINMENT LAW REPORTER. It reports lateral moves, promotions, honors and the like - the sorts of news that readers of the Reporter may be interested in learning about others in the entertainment law profession. To have your news included in future issues, send announcements by email to Sobel@EntertainmentLawReporter.com. [ELR 25:3:20]

In the Law Reviews:

Indefinitely Renewable Copyright by William M. Landes & Richard A. Posner, 70 The University of

Chicago Law Review 471 (2003)

Website Libel and the Single Publication Rule by Sapna Kumar, 70 The University of Chicago Law Review 639 (2003)

Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood by David Zelenski, 76 Southern California Law Review 979 (2003)

"To Promote the Progress of Science": The Copyright Clause and Congress's Power to Extend Copyrights by Senator Orrin G. Hatch and Thomas R. Lee, 16 Harvard Journal of Law & Technology 1 (2002)

From Investor Fantasy to Regulatory Nightmare: Bad Network Economics and the Internet's Inevitable Monopolists by Bruce Abramson, 16 Harvard Journal of Law & Technology 159 (2002)

The Florida Law Review has published the Dunwody Distinguished Lecture in Law and Commentaries in Volume 55, Number 3:

The Creative Commons by Lawrence Lessig, 55 Florida Law Review (2003)

Prolegomenon to a Memetic Theory of Copyright: Comments on Lawrence Lessig's The Creative Commons by Thomas F. Cotter, 55 Florida Law Review (2003)

Creativity or Commons: A Comment on Professor Lessig by Jeffrey L. Harrison, 55 Florida Law Review (2003)

Neighborhood Watch: The Negation of Rights Caused by the Notice Requirement in Copyright Enforcement Under the Digital Millennium Copyright Act by Colin Folawn, 26 Seattle University Law Review 979 (2003)

Lanham Act Cannot Prevent Unaccredited Copying of Uncopyrighted Work , 20 The Computer & Internet Lawyer 27 (2003) (edited by Arnold & Porter, published by Aspen Publishers)

Sixth Circuit Adopts Second Circuit's "Artistic Relevance" Approach to Balancing First Amendment Interests and Lanham Act Protections, 15 Intellectual Property & Technology Law Journal 11 (2003) (edited by Weil, Gotshal & Manges, published by Aspen Publishers)

Eldred and Lochner: Copyright Term Extension and

Intellectual Property as Constitutional Property by Paul M. Schwartz and William Michael Treanor, 112 The Yale Law Journal (2003)

The Columbia Journal of Law & the Arts has published Volume 26, Number 1 with the following articles:

The Author as Risk-Sharer by William Cornish, 26 The Columbia Journal of Law & the Arts 1 (2003)

Does the Copyright Clause Mandate Isolationism? by Graeme W. Austin, 26 The Columbia Journal of Law & the Arts 17 (2003)

Essay: How Copyright Got a Bad Name For Itself by Jane C. Ginsburg, 26 The Columbia Journal of Law & the Arts 61 (2003)

Arts Education: A Fundamental Element of Public School Education by Emily Hunter Plotkin, 26 The Columbia Journal of Law & the Arts 75 (2003)

Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics by Jon M. Garon, 88 Cornell Law Review 1278 (2003)

The Michigan Journal of International Law has published Volume 24, Number 3 with a Special Feature entitled Cyberage Conflicts Law with the following articles:

Introduction: The Yahoo! Case and Conflict of Law in the Cyberage by Mathias Reimann, 24 Michigan Journal of International Law 663 (2003)

Yahoo! Cyber-Collision of Cultures: Who Regulates?

by Horatia Muir Watt, 24 Michigan Journal of International Law 673 (2003)

Enforcement of Foreign Judgments, The First Amendment, and Internet Speech: Notes for the Next Yahoo! V. LICRA by Molly S. Van Houweling, 24 Michigan Journal of International Law 697 (2003)

A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law by Mark F. Kightlinger, 24 Michigan Journal of International Law 719 (2003)

Assessing Clashes and Interplays of Regimes from a Distributive Perspective: IP Rights Under the Strengthened Embargo Against Cuba and the Agreement on TRIPS by Robert Dufresne, 24 Michigan

Journal of International Law 767 (2003)

Promoting Intellectual Property for Economic Growth by Ambassador Rita Hayes, 36 Vanderbilt Journal of Transnational Law 793 (2003)

Anti-Circumvention: Has Technology's Child Turned Against Its Mother? by Terri Branstetter Cohen, 36 Vanderbilt Journal of Transnational Law 961 (2003)

NAFTA Chapter 11 and Professional Sports in Canada by Robert A. Schmoll, 35 Vanderbilt Journal of Transnational Law 1027 (2003)

Category III Films and VCDs: The Failure of Deterrence in the Copyright Ordinance of Hong Kong by Allen Woods, 36 Vanderbilt Journal of Transnational Law 1073 (2003)

The University of Illinois Journal of Law, Technology & Policy has published Volume 2002, Issue 2 as a Symposium entitled Legal Regulation of New Technologies: Protection, Privacy, and Disclosure with the following articles:

Legal Regulation of New Technologies: Reflections on Liberty, Control, and the Limits of Law by Bruce P. Smith, 2002 University of Illinois Journal of Law, Technology & Policy 281 (2002)

The Digital Millennium Copyright Act and its Legacy: A View From the Trenches by Edward W. Felten, 2002 University of Illinois Journal of Law, Technology & Policy 289 (2002)

Common Law and Statutory Restrictions on Access: Contract, Trespass, and the Computer Fraud and Abuse

Act by Maureen A. O'Rourke, 2002 University of Illinois Journal of Law, Technology & Policy 295 (2002)

The Effect of Proposed Amendments to Uniform Commercial Code Article 2 by Peter B. Maggs, 2002 University of Illinois Journal of Law, Technology & Policy 311 (2002)

Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use by Haimo Schack, 2002 University of Illinois Journal of Law, Technology & Policy 321 (2002)

Intellectual Property and the Internet: A Japanese Perspective by Masanobu Katoh, 2002 University of Illinois Journal of Law, Technology & Policy 333

(2002)

Fordham Intellectual Property, Media and Entertainment Law Journal has published Volume 13, Number 3 with the following articles:

Mickey Mice? Potential Ramifications of Eldred v. Ashcroft by Hugh C. Hansen, David O. Carson, Eben Moglen, Wendy Seltzer and Charles Sims, 13 Fordham Intellectual Property, Media and Entertainment Law Journal (2003)

www.TheGovernmentHasDecidedItIsInYour(ReadOur)BestInterestNotToViewThis.com: Should the First Amendment Ever Come Second? by Joel R. Reidenberg, Ann Beeson, Jacob M. Lewis, Charles Sims and Lee Tien, 13 Fordham Intellectual Property, Media and Entertainment Law Journal (2003)

Internet Killed the Video Star: How In-House Internet Distribution of Home Video Will Affect Profit Participants by Konrad Gatien, 13 Fordham Intellectual Property, Media and Entertainment Law Journal (2003)

The Columbia Journal of Law & the Arts has published Volume 26, Number 2 with the following articles:

Big Picture, Fine Print: The Intersection of Art and Tax by Anne-Marie E. Rhodes, 26 The Columbia Journal of Law & the Arts 179 (2003)

Achieving Balance in International Copyright Law Review of the WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Perfromances and Phonograms Treaty: Commentary and Legal Analysis by Jane C. Ginsburg, 26 The Columbia Journal of Law & the Arts 201 (2003)

Protecting Children in the Digital Age: A Comparison of Constitutional Challenges to CIPA and COPA by Susannah J. Malen, 26 The Columbia Journal of Law & the Arts 217 (2003)

Art Conservation: Problems Encountered in an Unregulated Industry by Sarah E. Botha, 26 The Columbia Journal of Law & the Arts 251 (2003)

Rights of Access and Reply to the Media in the United States Today by Jerome A. Barron, 25 Communications and the Law 1 (2003) (published by William S. Hein, 1285 Main Street, Buffalo, NY 14209-1987)

Discouraging "Objectionable" Music Content: Litigation, Legislation, Economic Pressure, and More Speech by Tracey DiLeonardo & Juliet Dee, 25 Communications and the Law 13 (2003) (for publisher,

see above)
[ELR 25:3:21]