INTERNATIONAL DEVELOPMENTS

Dutch appellate court affirms preliminary injunction barring continued publication in Holland of novel "Tanya Grotter and the Magical Double Bass," in suit alleging novel infringes copyright to J.K. Rowling's "Harry Potter and the Philosopher's Stone" and "Harry Potter" trademarks

A Court of Appeal in Amsterdam has affirmed a preliminary injunction that bars the publication in the Netherlands of a novel entitled Tanya Grotter and the Magical Double Bass. The injunction was issued in a case that alleges that Tanya Grotter infringes The Netherlands copyright to J.K. Rowling's Harry Potter and the Philosopher's Stone, which is licensed to Dutch publisher Uitgeverij De Harmonie B.V.; and the "Harry Potter" trademark which is owned by Time-Warner

Entertainment.

Tanya Grotter was written by Russian author Dimitri Yemets, and was licensed to the Dutch publishing company Uitgeverij Byblos B.V. for translation and publication in The Netherlands. Byblos acknowledged that Tanya Grotter is derived from Harry Potter, but nevertheless argued that the preliminary injunction should not have been issued, for three reasons.

Byblos asserted that Tanya Grotter should be considered a "new original endeavour." The Court of Appeal did not agree. It found that the story lines of the two books, the location and size of their respective wizardry schools, the characters (including their main characters), and their plots "are so much alike that the impression left by the [Tanya Grotter] story is in too many essential and characteristic aspects identical to that of [Harry Potter] in order to consider [Tanya

Grotter] an independent creation."

Byblos also argued that Harry Potter is only "an insubstantially copyright protected work" because "many [of its] elements [were] allegedly derived by Rowling from the public domain, and . . . the books Groosham Grange and Groosham Grange II of Horowitz." Again, however, the appellate court did not agree. "[R]eliance on a comparison with these books must fail," it said. "Although some elements are the same, these two books deal with an entirely different story, have different characters and a main character who does not resemble Harry at all. . . . The 'similarities' pointed out by Byblos . . . are partly strained, partly exaggerated, partly taken out of context, or so superficial of nature that they cannot affect the new and original character of [Harry Potter]."

Finally, Byblos argued that Tanya Grotter was a "permissible parody" of Harry Potter. Though Tanya

Grotter does parody Russian society, those passages "are of course irrelevant," the appellate court said. The court could find no other parodying elements in Tanya Grotter.

The court "noted that [Russian author] Yemets is entirely free to lay out his world views in (children's) books and to exploit his writing talent. He is also free to build on earlier literature, but . . . with his own story. Byblos has failed to clarify or justify with sound reasons why this was done in a (potentially competitive) manner within the framework of the storylines of [Harry Potter]. . . . Yemets has overstepped the legitimate boundaries."

Byblos did not challenge the lower court's conclusion that "Tanya Grotter" has the same number of syllables and the identical ending "otter," and thus audibly and visually corresponds with the trademark "Harry Potter." Instead, in the mistaken belief that it would prevail on appeal with its copyright arguments, Byblos simply argued that "trademark laws cannot prohibit what is allowed under copyright laws." Since the Court of Appeal affirmed the copyright injunction, "there is no further need to deal in more depth with Byblos' [trademark] assertion," the court said. "In any case," the court added, Byblos "used the sign commercially and for no valid reason, thus deriving unlawful benefits from the trademark Harry Potter while impairing the distinctive power or reputation of the trademark Harry Potter, which has become very strong."

J.K. Rowling, Time-Warner and the Dutch publisher of the Harry Potter books were represented by Eric Keyzer and Paul Reeskamp of Allen & Overy in Amsterdam. Byblos was represented by Anton Quaedvlieg and Jacqueline Schaap of Klos, Morel, Vos en Schaap in Amersterdam.

Uitgeverij Byblos B.V. v. Rowling, Court of Appeal of Amsterdam, Cause List No. 844/03 SKG (Nov. 2003), available at www.EntertainmentLawReporter.com/decisions/250804.pdf [ELR 25:8:4]

British court awards OK! magazine more than £1 million in suit against Hello! magazine on account of Hello's publication of photos taken by paparazzo at wedding of Michael Douglas and Catherine Zeta-Jones who had granted OK! exclusive rights; Douglas and Zeta-Jones awarded £14,600 as well

Almost immediately after Michael Douglas and Catherine Zeta-Jones were married in the Plaza Hotel in New York City, Hello! magazine published photos of their wedding. The photos were taken by a British-born but U.S.-based paparazzo named Rupert Thorpe.

How, exactly, Thorpe got into the wedding, with his camera, is a mystery. Douglas and Zeta-Jones had taken very elaborate precautions to prevent gate-crashers - and especially to prevent unauthorized photos, even by their invited guests.

Douglas and Zeta-Jones did so, in part, to protect their privacy. But they also did so for what a British judge later found to be financial reasons. Douglas and Zeta-Jones had granted exclusive wedding photo rights to OK! magazine - a fierce competitor to Hello! As a result, Hello's publication of the photos not only violated the couple's privacy, it also violated OK's exclusive rights. A lawsuit was the predictable and actual result, and the results are now in. Hello! has lost; Douglas and Zeta-Jones have won; and OK! has won even more.

The Chancery Division of the British High Court of Justice awarded OK! a judgment against Hello! of

£1,033,156 (the equivalent of about $1.7 million). Douglas and Zeta-Jones were awarded £14,600 (about $24,000). This judgment came at the end of the third round of the case.

The first round was a battle over whether Hello! would be able to publish the photos at all. Douglas and Zeta-Jones got wind of Hello's plans before the photos were published, and they obtained (what in the United States would be called) a preliminary injunction against Hello's doing so. The injunction, however, was reversed by the British Court of Appeal, in a precedent-setting decision. The appellate court vacated the injunction on the grounds that money damages would be adequate. But in the course of that opinion, the Court of Appeal also ruled that the couple does have a "right of privacy" under British law - a right that had never before been recognized in Britain, at least not so explicitly (ELR 22:10:8).

Freed from the injunction, Hello published the photos, thereby setting the stage for the second round of the case. The issue in round two was whether Hello actually would be held liable. In an opinion by the Chancery Division's Mr. Justice Lindsay, it was - though on narrower grounds than the Court of Appeal's earlier decision would have authorized. Justice Lindsay held that Hello's actions were a "breach of confidence" and a violation of the U.K. Data Protection Act. But the Justice declined to find Hello liable for invading Douglas' and Zeta-Jones' privacy, in part because he concluded that privacy law would not have entitled them to any greater damages than their more traditional claim for breach of confidence. (ELR 24:12:6)

The exact amount of their damages, and those of OK!, was left for the third round of the case. That question too was tried before Justice Lindsay, during a hearing that lasted 12 days. Determining how much to award was difficult, the Justice candidly acknowledged, because it had to be done by referring "to the inescapably hypothetical, even speculative, basis of what would have been the case if only the events properly complained of had not occurred. . . ." What's more, the parties "sought to . . . prove[]or disprove[] [these events] as if in all respects one were dealing throughout with fact."

Nevertheless, Justice Lindsay did what had to be done, and came to these conclusions - about events that "had not occurred." He found that OK! would have published two issues (not just one, as Hello had argued) featuring what would have been exclusive wedding photos. OK! would have printed 2.5 million copies of the first issue and 1.625 million copies of the second (not fewer, as Hello had argued). Of those, OK! would have sold 1.8 million copies of the first issue and 1.2 million of the second, for a total of 3 million copies (not fewer, as Hello had argued). It would have cost OK! £1,886,524 to print and sell those issues (an amount not disputed by Hello). OK! lost advertising revenues of £153,659 (not less, as Hello had argued).

Using these figures, Justice Lindsay calculated that the "3 million sales of the [two issues] would have brought in 3 million x £1.85 [OK's cover price] x 62.3% [the percentage actually received by OK] = £3,457,650 but would have cost £1,886,524, a net gain of £1,571,126. The actual sales of [OK's issues featuring wedding photos was] 1,169,376 copies, [and] brought in 1,169,376 x £1.85 x 62.3% = £1,347,764, having cost [to print and sell] £992,504, a net gain of £355,260. The difference in net gain was thus some £1,215,860 but from which £314,819 is to be subtracted [for revenues from sales of a third issue with wedding photos sold by OK! in an effort to minimize its damages] and advertising . . . of £153,659 to be added.

Overall that loss is £1,054,706 but I propose to reduce that figure to reflect that some sales of OK! may have been lost (it is impossible to say how many) by reason of events which . . . are in my view too remote to be laid at Hello!'s door. I reduce the loss by £28,000 to £1,026,706." OK! incurred additional "wasted costs" of £6,450 to print the first of its wedding photo issues on a rush basis - thereby bringing OK's total damages to £1,033,156.

Justice Lindsay had an easier time calculating the damages suffered by Douglas and Zeta-Jones. He awarded them £3,750 each "for distress" plus an additional £7,000 for costs they incurred in preparing and approving the photos OK! published on a rush basis, plus an additional £50 each for Hello's violation of their rights under the Data Protection Act.

Douglas, Zeta-Jones and OK! may be awarded something more, in a separate yet-to-conducted hearing, on their claims against the California-based photo agency that sold Rupert Thorpe's unauthorized photos to Hello!. Those claims got sidetracked in a dispute over whether British courts have jurisdiction over the agency. The Court of Appeal held that they do (ELR 24:12:6), but that ruling came too late to try those claims along with those against Hello itself.

Douglas, Zeta-Jones and OK! were represented by A. Wilson Q.C. and D. Sherborne (instructed by Addleshaw Goddard). Hello! was represented by J. Price Q.C. and G. Fernando (instructed by Charles Russell and M Law).

Douglas v. Hello! Ltd., [2003] EWHC 2629 (Ch), available at http://www.courtservice.gov.uk/judgmentsfiles/j2044/douglas.htm [ELR 25:8:5]

Vancouver radio station violated Canadian Association of Broadcasters codes by broadcasting Valentine's Day episode of "The Tom Leykis Show" that contained sexually explicit comments

On Valentine's Day 2003, Tom Leykis hosted his daily radio show from a bar in Hollywood, California. Though Valentine's Day is associated, by most, with romance, Leykis was anything but romantic, during that broadcast.

"Playing to his location audience," he "consistently characterized women as gold-diggers, emphasized that they merited no special treatment or acknowledgment on Valentine's Day, underscored only their worth as objects for male gratification, and put breasts on display, as best he could in a radio context." What's more, "He continually used, or condoned the use by others of . . . 'bitch' [and] 'whore' and 'vagina' in reference to women and did not hesitate to adorn the panoply of offensive words with adjectival phrases such as 'god awful big fat bitch', 'money whore', 'another illiterate ignorant vagina', 'stupid bitch', 'money greedy bitch', 'pathetic chicks' and so on."

Leykis' comments were met with "mindless cheers and catcalls of the audience at the tavern from which the show was broadcast." But not all of his listeners were amused.

The program was broadcast by CHMJ-AM in Vancouver, British Columbia, as well as by stations in the United States. And a listener in Vancouver was deeply offended.

The Tom Leykis Show is a call-in program geared primarily towards young males, and is known to feature an opinionated host who discusses issues such as sex and women, as well as money and pop culture. Moreover, the Valentine's Day broadcast was preceded by an advisory that warned listeners that the show "may contain content of an adult nature and is intended for mature audiences only. Please listen responsibly." In fact, that advisory was repeated at the end of nine of the program's 14 commercial breaks and news updates during its first three hours.

In Canada, radio listeners can complain about broadcast content to the Canadian Broadcast Standards Council; and the Vancouver woman who was offended by Leykis' broadcast did just that, successfully.

The Council found that by broadcasting the Valentine's Day episode of the Tom Leykis Show, CHMJ-AM breached provisions of the Canadian Association of Broadcasters' Code of Ethics and its Sex-Role Portrayal Code. Those codes prohibit "unduly discriminatory comment on the basis of gender and the making of negative or degrading comments on the role of women in society," and the broadcast of "unduly sexually explicit material."

The Council commended the station for broadcasting listener advisories, but added "that no advisories, whether in the television or the radio context, can have the effect of absolving a broadcaster from a breach of standards. . . ."

The Council pointedly observed that "programming that may be acceptable in the United States may not meet the more respectful standards in the Canadian corner of the global village."

CHMJ-AM was required to announce the Council's decision once during peak listening hours and again during the time period in which the program had been broadcast. The station was not barred from continuing to broadcast the Tom Leykis Show; but it dropped the show anyway, even before the Council issued its decision.

CHMJ-AM re Tom Leykis Show (Valentine's Day), CBSC Decision 02/03-0673 (July 2003), available at http://www.cbsc.ca/english/decisions/decisions/2003/031121.htm [ELR 25:8:6]

RECENT CASES

Lawsuit by The Coasters and other recording artists claiming ownership of digital rights in recordings made under contracts signed decades ago is dismissed again, because contracts assigned digital rights to record companies

A class action lawsuit filed against four major record companies by The Coasters, The Chambers Brothers, The Drifters and The Main Ingredient has been dismissed by New York state court Judge Helen

Freedman.

The lawsuit alleged that the recording artists, rather than the record companies, own the rights to digital versions of recordings made decades ago. The artists therefore sought damages for the record companies' release of unencrypted digital CDs that permit recordings to be redistributed over the Internet without authorization. The artists also sought an "equitable share" of the settlements the record companies reached with MP3.com, as a result of its unlicensed copying of CDs.

This is the second time the case has been dismissed. It was filed first in federal District Court in New York City. Judge Jed Rakoff granted the record companies' motion to dismiss that filing, on the grounds that the contracts signed by the artists gave the "record companies the right to manufacture, distribute and permit public performances of the artists' recordings 'by any method now known, or hereafter to become known,' or words to that effect, [and] no reasonable person could understand the contract to assign only the rights relating to vinyl records, with plaintiffs retaining the digital rights." (ELR 22:12:10). That ruling was reversed on appeal, however, for reasons more procedural than substantive (ELR 24:2:11). But when the case got back to Judge Rakoff, it was dismissed again, without an opinion, "for lack of subject matter jurisdiction," pursuant to a stipulated order.

Immediately after the federal case was dismissed, it was refiled in New York state court. The federal court stipulation authorized the state court refiling. But the artists have done no better in state court than they did in federal. Judge Freedman dismissed the artists' complaint, largely for the same reasons Judge Rakoff had dismissed it.

Judge Freedman interpreted the artists' recording contracts to "clearly anticipate development of new technologies," just as a similar contract had been interpreted by the New York Court of Appeals in The Ronettes case, the year before (ELR 24:11:10). The artists attempted to distinguish their case from The Ronettes' case by arguing that their agreements included provisions of an AFTRA union contract. But Judge Freedman was not persuaded. She concluded that the AFTRA contract concerned compensation and benefits, but did not affect provisions of the artists' personal contracts "that convey the artists' property rights to the record companies."

Judge Freedman also rejected the artists' fiduciary duty claims. She explained that "under New York law, an artist's assignment of rights to a record company in exchange for royalties does not create a fiduciary duty." Even if it did, the judge said, breach of fiduciary duty claims have a three-year statute of limitations, while the alleged breach took place long before that in the early 1980s when digital CDs were first released.

The artists' good faith and fair dealing claim, and their negligence claim, fared no better. Judge Freedman dismissed those on the grounds that the covenant of good faith "does not impose any obligation . . . beyond what the explicit terms of the contract provide." The negligence claim failed, because the artists' contracts authorized the record companies to release digital recordings, and because that claim too was barred by the statute of limitations.

Finally, Judge Freedman rejected the artists' claim for an "equitable share" of the record companies' recovery from their settlements with MP3.com (ELR 22:4:4, 22:6:5). The judge held that the Copyright Act "does not give rights to 'beneficial owners' to equitable apportionment of damages recovered for infringement."

The artists were represented by Fred Isquith of Wolf Haldenstein Adler Freeman & Herz in New York City, and Mark Rifkin of Feldman & Rifkin in Jenkintown. Time Warner was represented by Katherine B. Forrest of Cravath Swaine & Moore in New York City. Universal Music Group was represented by Andrew H. Bart of Pryor Cashman Sherman & Flynn in New York City, and Russell J. Frackman of Mitchell Silberberg & Knupp in Los Angeles. Sony Music Entertainment was represented by Jay Cohen of Paul Weiss Rifkind Wharton & Garrison in New York City. BMG Entertainment was represented by Charles B. Ortner of Proskauer Rose in New York City.

Sylvester v. Time Warner, Inc., 763 N.Y.S.2d 912, 2003 N.Y.Misc.LEXIS 997 (Sup. 2003) [ELR 25:8:7]

Entertainment Risk Insurance Policy required Continental Casualty to defend Warner Bros. in Francis Ford Coppola's "Pinocchio" case

Continental Casualty Company had a duty to defend Warner Bros. against Francis Ford Coppola's claim that the studio interfered with a deal he had made with Columbia Pictures to produce and direct a live-action version of "Pinocchio." A majority of a federal Court of Appeals has so ruled, in a declaratory relief lawsuit filed by Warner Bros. against the insurance company, in response to Continental Casualty's assertion that it had no such duty under the Entertainment Risk Insurance Policy it had sold to the studio.

Warner Bros.' victory in this case now appears to close the file on a matter that at one time looked like a multi-million dollar disaster for the studio. Coppola's original lawsuit was provoked by a letter Warner Bros. sent to Columbia Pictures a decade ago, when Warner Bros. heard that Coppola and Columbia were discussing the production of a live-action "Pinocchio." The letter asserted that Coppola already had an agreement with Warner Bros. for such a project - an agreement that would "preclude" Coppola from making "Pinocchio" for Columbia. The letter persuaded Columbia not to make Coppola's "Pinocchio" movie, and that is why he sued.

In the first round of that case, Coppola was hugely successful. A jury returned a verdict in his favor for $20 million in actual damages plus $60 million in punitive damages. Warner Bros. persuaded the trial judge to set aside the jury's award of punitive damages but not its award of actual damages, so a $20 million judgment was entered against the studio.

On appeal, however, Warner Bros. did better. A California Court of Appeal ruled that the letter sent by Warner Bros. to Columbia, asserting rights in Coppola's "Pinocchio" project, was legally privileged. The $20 million judgment was therefore reversed (ELR 22:11:4). And the California Supreme Court denied Coppola's request that it review the case (ELR 23:4:19). That brought the main lawsuit to a successful conclusion for Warner Bros.

To achieve its victory, Warner Bros. incurred what must have been substantial (though undisclosed) defense costs - costs that it claimed were covered by an Entertainment Risk Insurance Policy it had purchased from Continental Casualty Company. That is, Warner Bros. asserted that under the terms of the policy, Continental had a duty to defend Coppola's case. The policy's terms provided the studio with coverage for claims of "piracy," and in earlier insurance coverage cases, "piracy" has been defined to include claims for misrepresentation and interference with prospective economic advantage - the kinds of claims, in other words, Coppola had made.

Continental, however, denied that the policy covered Warner Bros. in Coppola's case, for two reasons. First, Continental asserted that the policy covered Warner Bros. against claims that the studio violated the property rights of others - rights to creative material such as plots, characters, trade names and the like. Coppola's lawsuit made no such claim. Second, Continental argued that the policy covered Warner Bros. only against claims made as a result of the studio's dissemination of material to a "mass audience." Coppola had sued Warner Bros. on account of a letter it sent only to Columbia Pictures, not to a mass audience.

When Continental denied coverage, Warner

Bros. filed a lawsuit against it, successfully. Federal District Judge Stephen Wilson granted the studio's motion for summary judgment (in an unpublished ruling), declaring that Continental did have a duty to defend. Continental appealed, but Warner Bros. has been successful once again.

In a Memorandum opinion marked "not appropriate for publication and may not be cited," the Court of Appeals has affirmed Warner Bros.' victory. By a vote of 2-to-1, the appellate court's majority has held that Warner Bros. made a "plausible claim" that Coppola's claims were for "piracy and misappropriation covered by the Policy," and thus Continental had a "duty to defend under California law."

What's more, the majority said, the fact that Warner Bros.' letter was not sent to a mass audience didn't matter, because another provision of the policy gave the studio coverage for claims based on things it did in connection with its "gathering or acquisition" of material. The majority interpreted this provision as covering "the pre-production activity of acquiring and defending its property interest in a creative work," which is exactly what Warner Bros.' letter to Columbia was designed to do.

Judge Stephen Reinhardt wrote a short but forceful dissent. As far as he was concerned, "There is simply no potential for [insurance company] liability here . . . no matter how broad the duty to defend may be under California law. . . ." Judge Reinhardt noted that one paragraph of the policy covered the studio for claims arising out its dissemination of material to a mass audience, and another paragraph covered it for claims arising out its acquisition of information. Coppola's claims, he said, were "of neither type."

Judge Reinhardt faulted the majority for relying on the policy's definition of "claims" in a different paragraph - a definition that he said should have been read in connection with the paragraphs concerning coverage for specific types of claims. The definition of "claims," he said, should not have been read to broaden the coverage provided by those other paragraphs.

Warner Bros. was represented by Michael J. O'Connor of White O'Connor Curry Gatti & Avanzado in Los Angeles. Continental Casualty was represented by Neil H. Selman of Selman Breitman in Los Angeles.

Time Warner Entertainment v. Continental Casualty Co., 72 Fed.Appx. 586, 2003 U.S.App.LEXIS 15314 (9th Cir. 2003) [ELR 25:8:8]

Court refuses to disqualify singer's law firm in suit against booking agency, though firm associate had previously done legal work for agency, because no actual conflict of interest was shown

Singer Marie Claire Cremers - who performs professionally as "Amber" - has sued a booking agency known as Nightlife Productions as well as three of its employees. The lawsuit seeks to recover appearance fees for performances by Amber that were arranged by Nightlife. Apparently, the allegedly unpaid fees were those that Nightlife was supposed to forward to Amber, after collecting them from those who promoted her performances, and after deducting its commissions.

The precise details of the dispute haven't appeared in a published opinion, because the merits have yet to be resolved. Instead, the case veered off on a collateral issue: whether Amber could be represented in her lawsuit by litigator Wallace Collins who is Of

Counsel to Serling Rooks & Ferrara in New York City. Nightlife filed a motion to disqualify Collins and the entire Serling Rooks & Ferrara firm, on the grounds that Serling Rooks associate Theodore D. Weis had previously done legal work for Nightlife.

The New York Code of Professional Responsibility does indeed require the disqualification of a lawyer who represents one client in an earlier matter and then seeks to represent another "in a substantially related matter which is adverse to the interests of the former client." What's more, if one lawyer in a firm is disqualified, "there is a rebuttable presumption that all the attorneys in the firm are disqualified."

These are the principles on which Nightlife relied in seeking the disqualification of Amber's lawyers. However, Judge Paul Feinman has denied Nightlife's motion, because his review of the facts did not persuade him there was any actual conflict of interest, or a sufficient appearance of impropriety, to warrant interference with Amber's choice of counsel in this case.

Weis acknowledged that before its dispute with Amber arose, he negotiated two contracts on behalf of Nightlife - one for a promotional tour for a record company, and the other a management agreement with another performer. Weis said both contracts were "fairly rudimentary" and "typical" of contracts he also had negotiated for other clients. Neither involved Nightlife's "proprietary business information." None of the work Weis did for Nightlife involved Amber. In fact, he said he didn't know that Nightlife and Amber had dealings with one another, until he became aware of their dispute. What's more, when he did learn of their dispute, Weis "promptly" contacted Nightlife to say he would no longer represent it. And he assured the judge that he had not disclosed any information concerning Nightlife to Collins or the firm and "will not do so."

Amber was a client of Serling Rooks' senior partner, Joseph Serling, and had been for several years - before Weis negotiated contracts for Nightlife.

Collins, who represents Amber in her suit against Nightlife, is Of Counsel to Serling Rooks, and handles litigation matters referred to him by the firm. However, he said he never gave legal advice to Nightlife and never discussed the contracts Weis had negotiated for it.

Judge Feinman rejected Nightlife's contention that the two contracts negotiated by Weis involved "facts and circumstances . . . substantially similar" to those involved in Amber's case. And the judge rejected the argument that Serling Rooks had acquired confidential information. "It is insufficient to offer 'generalized assertions' of 'access to confidences and secrets,''' Judge Feinman said.

Amber was represented by Wallace Collins of Serling Rooks & Ferrara in New York City. Nightlife was represented by Douglas J. Pick in New York City.

Cremers v. Brennan, 764 N.Y.S.2d 326, 2003 N.Y.Misc.LEXIS 786 (N.Y.CityCiv.Ct. 2003) [ELR 25:8:9]

Jennifer Lopez wins first two rounds of trademark case alleging that her "Glow by J.Lo" beauty products infringe Glow Industries' trademark

Jennifer Lopez is a conglomerate, all by herself. Not only is she an internationally known actress, singer, dancer and fashion designer, she has her own line of beauty products too. They are made by Coty and are marketed under the "Glow by J.Lo" brand, apparently with enormous success. Coty says it sold almost $18 million worth of "Glow by J.Lo" products in the United States alone, the first month they were available.

The success of the "Glow by J.Lo" line has caused considerable distress to Glow Industries, Inc., a California company that sells fragrance, bath and body care products under its own "Glow" brand. Glow Industries' sales have been much smaller than Coty's. But Glow Industries' products were included in a care package delivered by Reese Witherspoon in a scene in the movie "Legally Blond." And they've been promoted in other favorable ways too, including an acknowledgment in the closing credits for the movie "Pearl Harbor" (because its producers bought several "Glow" products for the movie's cast and crew).

Glow Industries began using "Glow" in 1999, more than three years before Coty began using "Glow by J.Lo" in 2002. What distresses Glow Industries is the possibility - its says "likelihood" - that consumers will mistakenly think that its "Glow" products are part of Coty's "Glow by J.Lo" line. In legal terms, this would be "reverse confusion." And that's exactly what Glow Industries called it in a trademark infringement lawsuit it filed against Jennifer Lopez and Coty in federal District Court in Los Angeles.

So far, the case has not gone well for Glow Industries. Early on, Judge Margaret Morrow denied its motion for a preliminary injunction, in a long opinion that might have made some plaintiffs - though not Glow Industries - give up right then.

Judge Morrow noted that many makers of fragrances and lotions use the word "glow" in their trademarks, in addition to Glow Industries and Coty. For that and other reasons, the judge concluded that "it is not likely that Glow [Industries] will ultimately prove a likelihood of consumer confusion." Worse yet, she also concluded that Glow Industries "has not established that it will likely prove it is the owner of a protectible mark. . . ."

In law, as in sports, the best defense is often a good offense, and that is the strategy adopted by Jennifer Lopez in this case. Shortly after Glow Industries filed its lawsuit against her, Lopez acquired the federally-registered trademark "Glow Kit" from someone who until then had not been related to anyone in the case. The owner of that mark had first used it before Glow Industries began using "Glow." So once Lopez acquired the "Glow Kit" mark, she filed a counterclaim against Glow Industries alleging that it was infringing her "Glow Kit" trademark.

Glow Industries responded to the counterclaim with a motion for summary judgment. The motion sought dismissal of Lopez's counterclaim on two grounds. It argued that the assignment of the "Glow Kit" mark to Lopez was invalid; and it argued that even if the assignment were valid, there was no likelihood of confusion between its mark "Glow" and "Glow Kit." Neither argument was successful.

The invalid-assignment argument rested on the legal principle that trademarks may not be assigned by themselves. Assignments are valid only if they are accompanied by goodwill - something that Glow Industries argued did not occur in connection with Lopez's acquisition of "Glow Kit." Judge Morrow concluded that this issue could not be decided with a summary judgment motion, because it requires an assessment of the significance of a one-year lease-back of the "Glow Kit" mark that Lopez granted to its first owner, and an assessment of whether Lopez's use of "Glow Kit" will be sufficiently similar to its former owner's use.

Judge Morrow also determined that the no-likelihood-of-confusion (between "Glow" and "Glow Kit") issue could not be decided with a summary judgment motion either. It couldn't, she explained, because there were disputed facts relevant to the multi-factor likelihood of confusion test.

So, for both of these reasons, Judge Morrow denied Glow Industries' motion for summary judgment seeking dismissal of Lopez's counterclaim.

Glow Industries was represented by Kenneth I. Sidle and Corey J. Spivey of Gipson Hoffman & Pancione in Los Angeles, Arthur Aaronson of Aaronson & Aaronson in Encino, and Katherine Hendricks of Hendricks & Lewis in Seattle. Jennifer Lopez and Coty were represented by John E. Porter of Paul Hastings Janofsky & Walker and Joseph M. Gabriel of Liner Yankelevitz Sunshine & Regenstreif in

Los Angeles, Lisa Ann Pearson of Fross Zelnick Lehrman & Zissu in New York City, Laura A. Wytsma of Sonnenschein Nath & Rosenthal in Los Angeles, and Mark S. Lafayette of Gursky & Ederer in New York City.

Glow Industries, Inc. v. Lopez, 252 F.Supp.2d 962, 2002 U.S.Dist.LEXIS 25928 (C.D.Cal. 2002); *Glow Industries, Inc. v. Lopez*, 273 F.Supp.2d 1095, 2003 U.S.Dist.LEXIS 13707 (C.D.Cal. 2003) [ELR 25:8:9]

Antitrust laws not violated by agreements between Blockbuster and major studios for revenue-sharing from homevideo rentals, in return for lower up-front payments by Blockbuster, federal appellate court affirms in case filed by independent video retailers who were unable to make similar deals

Revenue-sharing agreements between Blockbuster and the major studios' homevideo companies do not violate antitrust laws, a federal Court of Appeals has ruled, in a case brought by three independent video retailers on behalf of themselves and all other similarly situated retailers.

The agreements at issue in the case date back to 1997 when, instead of selling videocassettes to Blockbuster at wholesale prices, studios began "leasing" cassettes to Blockbuster in return for less-than-wholesale up-front prices plus a percentage of Blockbuster's rental revenues. The agreements also are "output" deals, because they required Blockbuster to carry all homevideo titles released by each studio, regardless of a movie's box office performance or "local market considerations." Previously, Blockbuster was able to "cherry pick" a homevideo company's offerings, and took those factors into consideration in deciding which homevideos to stock.

The studios did not make this leasing arrangement available to the complaining independent retailers, and that is what prompted their allegations that Blockbuster had conspired with the studios in violation of the Sherman Act and the Robinson-Patman Act. The case went to trial in federal court in Texas, but the trial didn't go well for the independent retailers. At the end of the retailers' case-in-chief, Blockbuster and the studios moved for judgment as a matter of law, and the court granted their motion. The retailers appealed, but have done no better.

In a short opinion that, despite its importance, has been marked "should not be published and is not precedent," the Court of Appeals has affirmed. The trial had not produced direct evidence of a conspiracy, though Judge Jerry Smith acknowledged that circumstantial evidence that "tends to exclude the possibility of independent action" would have been sufficient.

The retailers did introduce documents and testimony about the studios' "parallel behavior," but Judge Smith concluded that none of that evidence "tended to exclude the possibility of independent conduct." Judge Smith noted, for example, that there had been "almost no evidence whatsoever, circumstantial or otherwise, that the studios engaged in any direct communication during their respective negotiations with Blockbuster or that any studio agreed, at Blockbuster's request, not to make output revenue-sharing terms available to independents."

The independents had argued that the studios' "parallel conduct gives rise to an inference of conspiracy." But Judge Smith disagreed. "The mere fact that [the studios] followed similar courses of action," he said, "does not support such an inference."

For these reasons, the appellate court affirmed the independents' loss of their Sherman Act claim.

Judge Smith also rejected the independents' Robinson-Patman Act claim. That Act prohibits price discrimination, but "only where customers are otherwise purchasing on like terms and conditions." Here, that was not the case, the judge concluded, because independent retailers were able to "select tapes title-by-title after box office results were known, while Blockbuster was committed to purchasing a studio's entire output." Blockbuster also "undertook long-term obligations under its agreement with the studios," unlike the independents who did not.

The independent retailers were represented by David Edward Warden of Yetter & Warden in Houston and other firms. Blockbuster and the studios were represented by Kenneth R. Logan of Simpson Thacher & Bartlett in New York City and other firms.

Editor's note: The facts of this case illustrate that the laws of economics trump the laws of Congress, one way or the other, just as water always runs downhill. At the beginning of the homevideo industry in the early 1980s, studios wanted retailers to pay royalties on their rentals. Retailers, however, didn't want to, and couldn't be forced to, as a result of the Copyright Act's "first sale doctrine." In 1984, the music industry persuaded Congress to amend that doctrine to prohibit rentals without consent (ELR 6:8:21), and the software industry did too in 1990 (ELR 12:10:20). The movie industry, however, was unable to persuade Congress to bar unauthorized video rentals (ELR 5:3:20). Years later, Blockbuster volunteered to share revenues from rentals - in effect, to pay royalties - even though the "first sale doctrine" doesn't require it to. And independent video retailers wanted to do likewise - enough to file this lawsuit!

Cleveland v. Viacom, Inc., 73 Fed.Appx. 736, 2003 U.S.App.LEXIS 17717 (5th Cir. 2003) [ELR 25:8:10]

Buena Vista Home Entertainment wins copyright infringement suit complaining of Video Pipeline's unauthorized Internet display of clip previews; preliminary injunction affirmed on appeal, and summary judgment granted to Buena Vista

Buena Vista Home Entertainment has won its copyright infringement suit against Video Pipeline, Inc. At issue in the case was Video Pipeline's display of homevideo clip previews on the Internet, without Buena Vista's permission. Two courts have now held that this practice infringed Buena Vista's copyrights; and those infringements were not excused by the fair use doctrine or the copyright misuse doctrine. One court also held that Video Pipeline's Internet clip previews infringed trademarks owned by Buena Vista and by the production companies whose home videos

Buena Vista distributes: Disney, Hollywood Pictures, Touchstone and Miramax.

Internet movie piracy is now a matter of serious concern, but Video Pipeline is not a pirate. Instead, it creates and distributes movie trailers to retail video stores. Indeed, for many years, it did so with Buena Vista's consent, using trailer materials supplied by Buena Vista itself. Before the Internet became a retail marketplace, all of Video Pipeline's trailers were distributed on videotape to homevideo stores for promotional exhibition on television monitors located within those stores.

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

Using Video Pipeline's service, Internet video retailers could give customers the ability to view 2-minute trailers, simply by clicking on "preview" buttons on the retailers' websites. Doing so would seamlessly transport customers to Video Pipeline's own server, from which requested trailers would be streamed; and Video Pipeline would charge retailers fees based on the number of streams their customers requested.

Though Video Pipeline handled the technology of all of this just fine, it did not get a license from Buena Vista to do any of it. Indeed, when Buena Vista objected - and asked for the return of the trailer materials it had earlier provided to the company -

Video Pipeline began creating digital trailers from copies of videos its store clients had purchased.

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

The reason that two courts have ruled on this case already is purely procedural. Early in the case, federal District Judge Jerome Simandle granted Buena Vista's motion for a preliminary injunction (ELR 24:3:11). Video Pipeline immediately appealed the injunction; but while the appeal was pending, other aspects of the case continued to be litigated in the District Court. Judge Simandle ruled, for example, that a Buena Vista counterclaim for unjust enrichment was preempted by federal copyright law; but he declined to dismiss its other counterclaims for trademark infringement, unfair competition, breach of contract, replevin and conversion (ELR 24:7:25).

Shortly before the Video Pipeline's appeal from the preliminary injunction was decided, Judge Simandle granted Buena Vista's motion for summary judgment on the merits. In a lengthy and quite methodical opinion, Judge Simandle ruled - as he had before, in issuing a preliminary injunction - that Video Pipeline infringed Buena Vista's copyrights by using Buena Vista's movies in ways that were not permitted by the fair use doctrine.

In his decision granting summary judgment, the judge also rejected Video Pipeline's other defenses. The judge found that Buena Vista was entitled to bring its copyright infringement claims, even though it had not separately registered copyrights to its own trailers. It was enough, the judge decided, that Buena Vista had registered the copyrights to the movies from which those trailers had been made.

Judge Simandle also rejected Video Pipeline's "copyright misuse" defense. He held that earlier cases applying that doctrine had involved clauses in licensing agreements that prevented licensees from creating competing works. "That doctrine is inapplicable here, where no such anti-competitive clauses are at issue," he said. The judge also was unpersuaded by Video Pipeline's estoppel and implied license arguments.

Judge Simandle ruled in Buena Vista's favor in connection with its trademark claim, finding that there was a likelihood that consumers would mistakenly believe that Buena Vista created or authorized Video Pipeline's clip previews. And he granted Buena Vista's summary judgment motion on its breach of contract, unfair competition, replevin and conversion claims as well. (The replevin and conversion claims asserted that Video Pipeline failed to return trailer materials Buena

Vista had once given Video Pipeline.)

Shortly after Judge Simandle granted Buena Vista's summary judgment motion, the Court of Appeals finally affirmed the preliminary injunction that had been issued at the beginning of the case. Judge Thomas Ambro decided that the appeal was not moot, because no final judgment had been entered yet. Judge Ambro affirmed the injunction, because he too was persuaded that Video Pipeline had infringed Buena Vista's copyrights by engaging in conduct that was not excused by the fair use or copyright misuse doctrines.

Judge Ambro's reasoning was similar - though not identical - to Judge Simandle's. Judge Ambro applied the four fair use factors somewhat differently. And Judge Ambro's analysis of the copyright misuse doctrine was more extensive. The two judge's ultimate conclusions were the same however.

Video Pipeline was represented by Paul R.

Fitzmaurice, Gary D. Fry and Lisa A. Sabatino of Pelino & Lentz in Philadelphia. Buena Vista Home Entertainment was represented by Gary A. Rosen, and Patrick Madamba, Jr., of Akins Gump Strauss Hauer & Feld in Philadelphia.

Video Pipeline, Inc. v. Buena Vista Home Entertainment, 275 F.Supp.2d 543, 2003 U.S.Dist.LEXIS 14086 (D.N.J. 2003); *Video Pipeline, Inc. v. Buena Vista Home Entertainment*, 342 F.3d 191, 2003 U.S.App.LEXIS 17757 (3d Cir. 2003) [ELR 25:8:11]

Cajun phrases in lyrics of Mystikal's recording "Shake Ya Ass" do not infringe copyright belonging to maker of "Cajun in Your Pocket" device, because phrases were not "original"

Jive Records and rap artist Mystikal have defeated a copyright infringement lawsuit filed against them by Emanation, Inc., a Louisiana company that designs, makes and distributes novelty items. At issue in the case were two phrases recorded in Emanation's "Cajun in Your Pocket" device - a toy that plays back "authentic Cajun sayings" in response to the push of a button. In all, "Cajun in Your Pocket" plays six phrases, two of which Emanation accused Jive and Mystikal of using in the lyrics for their recording "Shake Ya Ass."

The two phrases in question were "We Gon Pass a Good Time, Yeah, Cher," and "You Gotta Suck Da Head of Dem Der Crawfish." These phrases were, in fact, on Emanation's "Cajun in Your Pocket" device and on Mystikal's recording. What's more, Mystikal conceded that he had access to a "Cajun in Your Pocket."

Nevertheless, Jive and Mystikal denied liability for copyright infringement, and thus responded to Emanation's lawsuit with a motion for summary judgment. Their motion was granted, and that decision has been affirmed the Court of Appeals in a Per Curiam opinion marked "should not be published and is not precedent."

In order to be eligible for copyright protection, works have to be "original." The evidence, however, showed that the phrases at issue in this case were actual, common "authentic Cajun sayings" - exactly as the packaging for "Cajun in Your Pocket" claimed.

"Cajun in Your Pocket" was created by Emanation's president, Steve Winn, who asserted that he had altered the Cajun sayings in which he claimed copyright. He inserted the words "we gon" and "yeah" into one phrase, and apparently inserted the words "dat der crawfish" into the other.

The Court of Appeals ruled that "no reasonable juror could conclude" that these additions would make Winn's version of the phrases "original." As a result, the appellate court concluded that "Emanation cannot satisfy the 'originality' requirement" for copyright protection.

Emanation, Inc. v. Zomba Recordings, Inc., 72 Fed.Appx. 187, 2003 U.S.App.LEXIS 17146 (5th Cir. 2003) [ELR 25:8:12]

Dixie Cups' victory in suit complaining that music publisher falsely claimed to be author of 1963 song "Iko, Iko," and failed to pay royalties on post-renewal exploitation, is affirmed

Music fans of a certain age will remember

Barbara Anne Hawkins, her sister Rosa Lee Hawkins, and their cousin Joan Marie Johnson. The trio began writing songs and performing together as the "Dixie Cups" in the early '60s. One of the songs they wrote and recorded back then was "Iko, Iko" - a song that was featured in the soundtrack of the movie "Mission Impossible II" as recently as 2000.

The Dixie Cups registered their copyright to "Iko, Iko" in 1964 and assigned it to music publisher Joe Jones the following year. The assignment didn't include the renewal term, and when the time came, the Dixie Cups renewed its copyright in their own names.

All of this became the subject of judicial scrutiny, because Jones made claims about the song which the Dixie Cups said were not true. He claimed to be its author. And he claimed that in 1968, he and the Dixie Cups entered into a "settlement agreement" that relieved him of the obligation to pay royalties to the

Dixie Cups, as he was previously required to do under their 1965 publishing agreement. Jones apparently failed to pay royalties to the Dixie Cups even after they renewed and regained ownership of the copyright to "Iko, Iko" in 1992.

This prompted the Dixie Cups to sue Jones for breach of contract, seeking money damages and dissolution of their 1965 contract - a contract that remained relevant even after the Dixie Cups renewed their song's copyright, because the renewal gave them ownership of the copyright in the United States only, while Jones remained its owner in foreign territories. Jones responded to the lawsuit with a counterclaim for copyright infringement. And in due course, the case was tried to a jury in federal court in New Orleans.

The Dixie Cups won, completely. The judge entered judgment "as a matter of law" in favor of the Dixie Cups in connection with Jones' infringement counterclaim. And the jury returned a verdict in favor of the Dixie Cups on their breach of contract claim. It awarded them $409,508 in damages, and ownership of the song's copyright and all licenses Jones had issued. Jones appealed, but came out worse than if he had simply complied with the judgment. The Court of Appeals has determined that his appeal was frivolous and has awarded the Dixie Cups their attorney's fees and costs as sanctions.

In an opinion marked "should not be published and is not precedent," Judge Reynaldo Garza affirmed the judgment against Jones on his infringement counterclaim. Judge Garza ruled that Jones did not own the song's copyright, because the 1965 assignment did not contain language expressly granting renewal rights, as would have been necessary for the assignment to transfer the renewal term. Moreover, Jones' testimony that he was the author of "Iko, Iko" contradicted statements he had made in an earlier case, as well as the 1965 publishing agreement that named the Dixie Cups as the song's writers.

Judge Garza also affirmed the breach of contract judgment in favor of the Dixie Cups. Though Jones argued that a 1968 "settlement agreement" relieved him of the obligation to pay royalties, the Dixie Cups testified that they had refused to sign it, and that the signatures that appeared on the document introduced by Jones at trial were "forged." Judge Garza noted that "the jury believed [the Dixie Cups], not Jones," and the "credibility of this evidence is not an issue for appellate review."

The Dixie Cups were represented by Suzette Toledano Becker in New Orleans and Oren J. Warshavsky of Gibbons Del Deo Dolan Griffinger & Vecchione in New York City. Jones was represented by Joe Jones, Jr., in Lake View Terrace, California.

Hawkins v. Jones, 74 Fed.Appx. 391, 2003 U.S.App.LEXIS 18060 (5th Cir. 2003) [ELR 25:8:13]

Illustrated editions of "Tarzan" books commissioned by Edgar Rice Burroughs, Inc., and published in 1972 and 1976, were "works made for hire," so heirs of illustrator Burne Hogarth are not entitled to renewal terms of books' copyrights, federal Court of Appeals holds

In 1972 and 1976, Watsun-Guptill published illustrated editions of Tarzan of the Apes and Jungle Tales of Tarzan. Both books were written by Edgar Rice Burroughs, and were first published so long ago that their texts went into the public domain in the late 1960s and early '70s. The illustrations, however, were commissioned by Edgar Rice Burroughs, Inc. (a company formed by Burroughs to manage his literary rights), especially for the Watsun-Guptill editions, so their copyrights are valid, even today.

"Neither the 1972 nor the 1976 book enjoyed substantial sales." But their copyrights are valuable enough to justify a surprisingly complex legal battle over their ownership. That battle has been fought between Burroughs, Inc., and the heirs of Burne Hogarth who was the artist Burroughs, Inc., commissioned to create the books' illustrations.

In an opinion by Judge Jon O. Newman, the Second Circuit Court of Appeals has held that the Hogarth's heirs do not own the books' copyrights, for reasons that mean that Burroughs, Inc., does. But getting to that result required a long and scholarly opinion that included some criticism of the way in which Burroughs, Inc., handled the books' copyright registrations. (In fact, that criticism caused the Court of Appeals to deny Burroughs, Inc., its costs on appeal, even though Burroughs, Inc., was the prevailing party.)

The central issues in the case were: (1) whether Hogarth's illustrations were "works made for hire," under the Copyright Act of 1909 which was in effect when the books were first published; and (2) if so, whether Burroughs, Inc., as the commissioning party, or Hogarth's heirs, are entitled to the renewal terms of the books' copyrights. The renewal term of the copyright to the 1972 book has begun already; and the renewal term of the copyright to the 1976 book will begin in 2005.

When Burroughs, Inc., commissioned Hogarth to create illustrations for the Watsun-Guptill editions, their written agreement did not identify the illustrations as "works made for hire" - thus giving rise to the first issue. However, before the current Copyright Act of 1976 changed the definition of a "work made for hire," works were "made for hire" so long as they were created at the "instance and expense" of the commissioning party, at least in the Second Circuit. Though Hogarth's heirs argued otherwise, Judge Newman had no difficulty concluding that Hogarth's illustrations had been created at the "instance and request" of Burroughs, Inc., and thus they were "works made for hire."

At first blush, that appeared to resolve the second issue too, because the renewal term belongs to the "author" of a work, and the "author" of a work made for hire is the commissioning party rather than the person who was commissioned to actually create it. On the other hand, at one time, Second Circuit decisions suggested that the commissioning party is the owner of the copyright to a work made for hire, because the actual creator assigned the copyright to the commissioning party by implied agreement. In fact, this is what the United States Supreme Court seemed to suggest in its decision in CCNV v. Reid (ELR 11:3:12).

This "implied assignment" theory would have been very helpful to Hogarth's heirs, because Hogarth died in 1996 - well before either copyright was eligible for renewal. And that would have meant that Hogarth's "implied assignment" would not have included a transfer of the renewal terms to Burroughs, Inc.

Judge Newman, however, noted that the Second Circuit had abandoned the "implied assignment" theory of works made for hire, and had held that the commissioning party was the "author," and as such was entitled to the renewal term. Judge Newman reasoned that the Supreme Court's CCNV v. Reid decision did not require a different result now, because CCNV v. Reid was decided under the Copyright Act of 1976 - not the 1909 Act that controlled Hogarth's heirs' claim - and the Supreme Court's mention of the assignment theory was merely in the "historical account" portion of its opinion, and was not a basis for its conclusions.

This meant that Burroughs, Inc., as the commissioning party of illustrations of works made for hire, was entitled to the renewal terms of those works - unless one of Hogarth's heirs' other arguments was persuasive. Ultimately, Judge Newman decided those arguments were not persuasive, though one of them did lead to the criticism that resulted in Burroughs, Inc., not being awarded its costs on appeal.

When Watson-Guptill first registered the copyrights to the 1972 and 1976 books, it identified Edgar Rice Burroughs, Inc., as the "claimant" but Burne Hogarth as the "author." Years later, in 1999, Burroughs, Inc., filed corrections with the Copyright Office indicating that the books were works made for hire authored by Edgar Rice Burroughs, Inc. But the company's delay in doing so enabled Hogarth's heirs to argue that the company's claim to ownership of the renewal copyrights was barred by the statute of limitations, by laches and estoppel, and by the presumption - created by the registration certificates - that Hogarth was the author.

Judge Newman rejected all of these arguments. He held that the statute of limitations does not bar an affirmative defense, which is where Burroughs, Inc., asserted its ownership of the renewal terms. He ruled that Hogarth's heirs had not relied to their detriment on the erroneous registrations, which defeated their laches and estoppel argument. And he held that the presumption created by the registration certificates had been adequately rebutted. Judge Newman added, however, that he was "disturbed that a corporation as sophisticated in the protection of its copyrights as [Burroughs, Inc.] did not correct the registrations" earlier. He added, if Burroughs, Inc., "had . . . been more attentive to the filings made on its behalf, this litigation would in all likelihood have been avoided or at least reduced in scope."

Hogarth's heirs were represented by Peter Herbert of Lankler Siffert & Wohl in New York City. Burroughs, Inc., was represented by Roger L. Zissu of Fross Zelnick Lehrman & Zissu in New York City.

Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 2003 U.S.App.LEXIS 18032 (2nd Cir. 2003) [ELR 25:8:14]

NCAA is enjoined from enforcing "Two in Four Rule" that prohibited college basketball teams from competing in more than two non-NCAA tournaments every four years; federal District Court concludes that Rule violates federal antitrust law

The NCAA has suffered a significant loss, in an antitrust lawsuit filed against it by promoters of college basketball tournaments. At issue in the case was the NCAA's "Two in Four Rule" - a rule that allows Division I college basketball teams to compete in no more than two non-NCAA tournaments every four years. The Rule was adopted in 1999, and according to the promoters who filed the suit, the Rule has reduced the number of tournament games they are able to present, and thus the number of games that college basketball fans are able to watch. The Rule did this by making Division I teams - who previously were eligible to compete in the promoters' tournaments every year - ineligible to do so two out of every four years.

Many of the tournaments affected by the Rule are high-profile competitions that are played before the regular NCAA season begins and during Thanksgiving and Christmas school breaks. They include such tournaments as the Coaches v. Cancer Classic (played in Madison Square Garden and televised by ESPN), the BCA Invitational, and America's Youth Classic. Though the tournaments themselves are well-known, the way in which they are organized is less so.

College basketball teams play most of their games each year against other teams in their conferences. Teams that enjoy successful seasons also play in post-season conference tournaments. And 64 teams that emerge from that process compete in the NCAA Championship Tournament. This means that most Division I college basketball games are, in effect, scheduled for each team, automatically.

Not all games are scheduled automatically, however. NCAA rules permit Division I teams to play as many as 28 games a season, in addition to conference post-season and NCAA tournaments. This means that teams have space on their calendars to play 11 or so games a year that they are able to schedule for themselves. Moreover, they are permitted to play in "certified" tournaments - that is, tournaments not sponsored by their conferences or the NCAA - if they wish to do so. And participation in a certified tournament counts as just one game (towards the annual limit of 28), even if a team plays several games in the tournament.

The promoters who sued the NCAA over the Two in Four Rule all staged certified tournaments. Their complaint wasn't with that aspect of the Rule.

Rather, they objected that the Rule disqualified colleges from participating in their tournaments, two out of every four years. In their lawsuit, the promoters alleged that the Rule violated the Sherman Act. And federal District Judge Edmund Sargus has agreed.

Judge Sargus agreed with the NCAA that the Two in Four Rule should be evaluated under the antitrust law's more tolerant "Rule of Reason," rather than under the stricter "Per Se Rule" or even using a "quick look analysis." Nevertheless, after a lengthy and quite careful evaluation of the facts, Judge Sargus concluded that the Two in Four Rule flunked even the Rule of Reason, and thus violated the Sherman Act.

The judge found that the Two in Four Rule "caused a substantial reduction in the number of school-scheduled basketball games." Judge Sargus noted that "In the absence of an offsetting benefit, a rule which simply limits output and competition to the detriment of consumers violates federal antitrust law."

This meant that to avoid liability, the NCAA had to establish a bona fide justification for the Rule by demonstrating the virtues of the policy. The NCAA did offer two virtuous justifications. It said that the Rule limited the number of games played each season out of concern for "student welfare." And the NCAA argued that the Rule gave lesser-known schools more opportunities to play in desirable tournaments.

These may have been adequate justifications if the NCAA had proved them, but it did not. Instead, Judge Sargus found that "Neither of these justifications are credible."

They weren't credible, the judge said, because at the same time the Rule was adopted, "the NCAA actually increased the overall number of games each team could play per season." Thus, although the number of school-scheduled games was reduced, the total number of games was increased, something "hardly benefiting student welfare," Judge Sargus concluded.

Also, although increasing the number of games that lesser-known teams could play was admirable, that isn't what happened in fact. Instead, "the number of exempt games played by lesser-known, non-power conference teams has actually decreased, resulting in harm to the class of teams which the NCAA claims its rule would benefit."

For these reasons, Judge Sargus granted the promoters' request for a permanent injunction barring the NCAA from enforcing its Two in Four Rule.

The promoters were represented by Wilbert Benjamin Markovits of Markovits & Greiwe in Cincinnati. The NCAA was represented by James A. Wilson, Jr., of Vorys Sater Seymour & Pease in Columbus.

Worldwide Basketball and Sports Tours v. National Collegiate Athletic Association, 273 F.Supp.2d 933, 2003 U.S.Dist.LEXIS 13073 (S.D.Ohio 2003) [ELR 25:8:15]

Boston University not liable for injuries suffered by Manhattan College basketball player who was punched by BU player during game, Massachusetts Supreme Court rules

In December of 1998, Boston University hosted an intercollegiate basketball game with Manhattan College. The outcome of that game was of no professional concern to the Supreme Judicial Court of Massachusetts - though the Court has studied the details of some things that happened during (and before) it was played. What interested the Court was a brief on-court "scuffle," during which Manhattan College player Ken Kavanagh was punched in the nose by BU player Levar Folk.

Kavanagh's nose was broken, though he played later in the game anyway. What concerned the Court, however, wasn't the extent of Kavanagh's injuries.

Rather, what concerned the Court was whether BU and its coach could be held vicariously liable for those injuries. In a unanimous opinion by Justice Martha Sosman, the Supreme Judicial Court has held that they could not, and so it affirmed the dismissal of Kavanagh's lawsuit against them.

Justice Sosman rejected Kavanagh's argument that Folk was BU's "agent" and thus BU was liable for Folk's actions. Student are neither employees nor servants of the schools they attend, the justice explained, not even those who receive scholarships or financial aid that enables them to attend.

Kavanagh also argued that BU and its coach were themselves negligent for failing to protect him from Folk's allegedly "foreseeable assault and battery." Justice Sosman rejected this argument on the grounds that the facts failed to show that Folk's actions were foreseeable. Moreover, she held that BU did not have a duty to Kavanagh, because no special relationship existed between them.

Kavanagh was represented by Michael J. O'Reilly in Boston. BU and its coach were represented by Lawrence S. Elswit, Associate General Counsel of BU in Boston.

Kavanagh v. Trustees of Boston University, 795 N.E.2d 1170, 2003 Mass.LEXIS 643 (Mass. 2003) [ELR 25:8:16]

Destruction of mural did not violate Visual Artists Rights Act, Court of Appeals agrees

Four federal judges have unanimously agreed that the manager of the Empire State Plaza in Albany, New York, did not violate the rights of artist Joanne

Pollara when he tore down and damaged a mural she had painted and installed there. The judges were unable to agree, however, on why her rights weren't violated.

In a lawsuit against the Plaza manager, Pollara alleged that he violated her rights under the Visual Artists Rights Act. VARA, as the Act is known for short, is a 1990 amendment to the Copyright Act that provides certain moral rights to those who create works of visual art of recognized stature (ELR 12:10:19).

Following a one day bench trial, federal District Judge David Hurd ruled against Pollara on two grounds. He held that the mural was not a "work of visual art" - as that term is defined by the Act - even though it was "visually appealing and demonstrated a great deal of artistic ability and creativity." Moreover, even if Pollara's mural were a "work of visual art," he held that it was not a "work of recognized stature," because it was created solely to publicize a particular event, and therefore would not have been preserved or displayed again. (ELR 24:6:16)

Pollara appealed, without success. Writing for two judges of the Court of Appeals, Judge Dennis Jacobs noted that "Not every artist has rights under VARA, and not everything called 'art' is protected by such rights." Among other things, the Act does not protect advertising or promotional art works, even if they are works "of recognized stature."

Pollara's mural was "promotional and advertising," because the "banner was created for the purpose of drawing attention to an information desk, as part of a lobbying effort, and the banner overtly promotes in word and picture a lobbying message." Judge Jacobs therefore concluded that the mural was "not a 'work of visual art' subject to protection under VARA."

Judge John Gleeson agreed that the mural wasn't protected by VARA, "but for a different reason" than that relied on by Judge Jacobs. Judge Gleeson didn't think the promotional nature of the mural necessarily disqualified it from VARA protection. Instead, he concluded that the mural "was not a work of recognized stature," because it had never been exhibited before it was destroyed.

Pollara was represented by Paul C. Rapp of Cohen Dax & Koenig in Albany. The Plaza's manager was represented by Andrea Oser of the Office of the Attorney General of New York in Albany.

Pollara v. Seymour, 344 F.3d 265, 2003 U.S.App.LEXIS 19646 (2nd Cir. 2003) [ELR 25:8:16]

Vermont statute making it a crime to distribute electronic material "harmful to minors" over the Internet, even from outside of Vermont, is unconstitutional, Court of Appeals agrees; but injunction is narrowed to bar state from enforcing it only against Internet speech on which lawsuit was based

Howard Dean isn't the governor of Vermont any more. Now he's a leading candidate for President. But when he was governor, Dean signed into law a statute that makes it a crime to distribute electronic material "harmful to minors," even if done over the Internet and even if done from, say, a website outside of Vermont. In return, Dean got himself sued - along with a host of other Vermont law enforcement officials - by the ACLU and others.

What the plaintiffs had in common was that they, or organizations they represent, operate websites containing sex-related materials. Though some of the plaintiffs were residents of other states, and actually have no presence in Vermont, they feared that they could be prosecuted under the new statute, because they have no way to deny Vermont residents access to their websites.

Federal District Court Garvan Murtha agreed with the plaintiffs and completely enjoined enforcement of the Vermont statute (ELR 24:6:20). The state appealed, but Judge Murtha's ruling has been affirmed, for the most part.

Writing for the Court of Appeals, Judge John Walker, Jr., agreed that the Vermont statute is unconstitutional for two reasons: because the burdens it puts on protected speech violate the First Amendment; and because it violates the "dormant Commerce Clause."

However, Judge Walker concluded that the injunction was too broad. He reasoned "that because plaintiffs challenged the statute based on their own speech, it is preferable to determine the validity of the statute only as applied to that speech." For that reason, Judge Walker agreed with Vermont's officials that "the injunction should be modified to enjoin them from enforcing the statute . . . only as applied to the internet speech upon which plaintiffs based their suit. . . ."

The plaintiffs were represented by Michael A. Bamberger of Sonnenschein Nath & Rosenthal in New York City. Vermont's officials were represented by Joseph Leon Winn, Assistant Vermont Attorney General, in Montpelier.

American Booksellers Foundation v. Dean, 342 F.3d 96, 2003 U.S.App.LEXIS 17908 (2d Cir. 2003) [ELR 25:8:17]

Previously Reported:

Naxos' sale of restored public domain recordings does not violate rights of Capitol Records, federal District Court confirms. After federal District Judge Robert Sweet granted Naxos' motion for summary judgment in a lawsuit filed against it by Capitol Records (ELR 25:5:10), Capitol provided the judge with more evidence in support of its argument that the case should be allowed to go to trial. Capitol's case complained of Naxos' sale of restored versions of classical, 1930s-era recordings, which Capitol asserted violate its rights under New York state law, though (or perhaps because) the recordings are now in the public domain as a matter of federal copyright law. Capitol's new evidence did not persuade Judge Sweet to change his earlier ruling, however. Instead, for reasons virtually identical to those he relied on before, the judge once again granted Naxos' summary judgment motion. *Capitol Records, Inc. v. Naxos of America, Inc*., 274 F.Supp.2d 472, 2003 U.S.Dist.LEXIS 13215 (S.D.N.Y. 2003) [ELR 25:8:18]

Michael Jackson's brothers settle case alleging Jackson 5 album "Pre-History: The Lost Steeltown Recordings" actually is a recording by "Ripples and Waves". Michael Jackson's brothers Tito, Marlon, Jackie and Jermain Jackson have agreed to settle a pair of lawsuits concerning the origins of "Pre-History: The Lost Steeltown Recordings," a CD released in 1996. The CD was said to be by the "Jackson 5," the group that consisted of Michael and his brothers before Michael began his solo career. One of the two lawsuits alleges that "Pre-History" is actually an old recording made by "Ripples and Waves" and not by the Jackson 5 at all. The other lawsuit alleges that the Jackson brothers, including Michael, failed to give credit to record producer Gordon Keith and "Ripples and Waves" for their work on "Pre-History." Early in the case, Michael Jackson sought to have the case against him dismissed on procedural grounds; but he was not successful (ELR 24:8:8). Michael has not joined in the recent settlement, and thus remains a defendant in both cases. [ELR 25:8:18]

Don King settles lawsuit filed by boxer Terry Norris. Boxing promoter Don King has settled a lawsuit filed against him by Terry Norris by reportedly agreeing to pay the fighter $7.5 million. According to news accounts, Norris - a former World Boxing Council super welterweight champion - claimed that King "stole money from him," apparently during the time Norris was under contract to King. Before the case was settled, it produced one published opinion of interest to boxing promoters and fighters generally. A New York appellate court held that a contract that gave King the right to promote Norris' fight with Felix Trinidad was not necessarily void, even though the fight took place in Madison Square Garden, and even though King did not have a New York boxing promoter's license at the time Norris signed the contract. King did get a New York license before the fight was held, and the appellate court held that that was soon enough, so long as the evidence showed that the location of the fight had not been selected when the contract was signed (ELR 22:4:23). [ELR 25:8:18]

Supreme Court grants and denies cert. The United States Supreme Court has agreed to hear an appeal by the Republic of Austria in a case filed against it in federal court in Los Angeles by Maria Altmann, seeking to recover possession, from the national Austrian Gallery, of Gustav Klimt paintings stolen by the Nazis in the early 1940s. A federal Court of Appeals held that the Los Angeles court does have jurisdiction over Austria (ELR 24:12:17); and it is that ruling the Supreme Court will review, in response to Austria's petition for certiorari. Republic of Austria v. Altmann, 124 S.Ct. 46, 2003 U.S.LEXIS 5431 (2003). However, the Supreme Court denied a petition for certiorari filed by Al Jardine, a former member of The Beach Boys, who wanted the Court to review a lower court's ruling that he infringed the "Beach Boys" trademark by using the "Beach Boys" phrase in connection with his live performances (ELR 24:12:11). Jardine v. Brother Records, Inc., 124 S.Ct. 155, 2003 U.S.LEXIS 5431 (2003). The Supreme Court also denied a petition for certiorari filed by Bridgeport Music seeking review of a decision that held that a federal court in Nashville does not have jurisdiction to hear Bridgeport's rap sampling copyright infringement lawsuit against music publishers located in Texas (ELR 25:2:14). Bridgeport Music, Inc. v. Still N the Water Publishing, 124 S.Ct. 399, 2003 U.S.LEXIS 7473 (2003). [ELR 25:8:18]

DEPARTMENTS

Entertainment Lawyer News:

Ira Selsky joins Dreier LLP. Ira B. Selsky has joined Dreier LLP in the firm's entertainment department in New York City. Selsky, who is Of Counsel to the firm, is an expert in music publishing. With a career that spans decades, he has held counsel and business positions at United Artists Corporation, ABC Records, Warner Bros. Records, Rondor Music, MGM/UA Communications, and most recently at EMI Music Publishing where he was Vice President, Legal and Business Affairs. He was a partner for several years at Grubman Indursky & Schindler in New York City. Before moving to New York, he was in private practice in Los Angeles as a solo practitioner and as Of Counsel with the law firm Myman Abell Fineman & Greenspan. Selsky has been involved in the negotiation and drafting of virtually every type of music-related agreement, including acquisitions and sales of assets, and motion picture and television agreements. As an expert in the industry, he has worked with litigation counsel on numerous cases and is experienced as an arbitrator and expert witness. He has lectured at law schools and industry events regarding music publishing and sampling, and has counseled companies, talent and management. Selsky received his law degree from New

York University School of Law, and is admitted to practice both in New York and California.

Peter Dekom joins Weissmann Wolff. The law firm of Weissmann, Wolff, Bergman, Coleman, Grodin & Evall has announced that Peter J. Dekom has joined the Beverly Hills-based firm as Of Counsel. Dekom is a respected film, television and entertainment finance lawyer who has been listed by Forbes among the top 100 U.S. lawyers, and in Premiere as one of the 50 most powerful people in Hollywood. Dekom was a senior partner in Bloom, Dekom, Hergott & Cook before leaving the firm in 1995 to consult and write. He recently published Not on My Watch: Hollywood vs. the Future, a book that studies new media and its effect on the film industry. In addition to his book, Dekom has authored dozens of articles about various aspects of the film and television business. He is the American

Bar Association's Division Chairman for Film, Television, Cable and Radio, and has served as both President and Chairman of the American Cinematheque (presently emeritus) and as an adjunct professor at UCLA. As Film Advisor to New Mexico, he drafted and shepherded incentive legislation that reinvigorated film and television production in the state. Dekom graduated with highest academic distinction in 1973 from UCLA School of Law after receiving an undergraduate degree at Yale University in 1968. During his career, Dekom's clients have included talent such as Andy Davis, Paul Haggis, Ron Howard, John Travolta, Robert Towne and Keenen Ivory Wayans, and institutions such as Fujisankei Communications Group, Imagine Entertainment, JVC and Lucasfilm. He will continue to represent both talent and institutional clients at Weissmann Wolff.

Marshall Goldberg appointed General Counsel of Writers Guild of America, west. Marshall Goldberg has been appointed General Counsel of the Writers Guild of America, west. After graduating with honors from Harvard College, Goldberg received his J.D. at Stanford Law School and was selected to give the school's valedictory address. He clerked for U.S. District Judge Robert F. Peckham in San Francisco and subsequently became a litigator for Petty, Andrews, Tufts, and Jackson. He was counsel to the U.S. Senate Judiciary Subcommittee on Constitutional Rights, which had jurisdiction over all legislation involving civil rights, civil liberties, and constitutional amendments. He also served as counsel to Senators Birch Bayh and John Tunney. As an attorney and later legislative liaison for the U.S. Department of Justice's Civil Rights Division, Goldberg oversaw all legislative matters for the division. Goldberg also is a professional television and film writer. His TV credits include Paper Chase, L.A. Law, It's Garry Shandling's Show, Newhart and Life Goes On. As a WGAw member, Goldberg has been a trustee of the Writers Guild-Industry Health and Pension Fund, has served as chairman of the trusts, and has been co-chair of the Fund's benefits committee.

Marsha MacBride appointed Executive VP of NAB's Legal and Regulatory Affairs Department. Marsha J. MacBride has been named Executive Vice President of the National Association of Broadcasters' Legal and Regulatory Affairs Department. The National Association of Broadcasters is a trade association that promotes and protects the interests of free, over-the-air local radio and television stations in Washington, before Congress, federal agencies and the courts, and elsewhere around the world. McBride heads the NAB legal team that provides representation for local broadcasters before the Federal Communications Commission and the courts, and provides counsel to radio and television stations on legal issues. She served as Chief of Staff to FCC Chairman Michael Powell from 2001 to September 2003, during which time she also chaired the FCC Homeland Security Policy Council. Except for a two-year stint as Vice President in The Walt Disney Company's Washington office from 2000-2001, MacBride has served in numerous high-level jobs at the FCC since 1991. Among her positions: Legal Advisor to Commissioner Michael Powell (1999-2000); Executive Director, Task Force on Y2K Conversion (1998-2000); Acting Deputy, Cable Services Bureau (1997-1998); Legal Advisor to Commissioner James Quello (1995-1997); and Staff Attorney, Political Programming Branch (1991-1994). From 1985 to 1991, MacBride was a communications

attorney in private practice in Washington. She is a 1985 graduate of the George Washington University Law School, and a 1981 graduate of Douglass College, Rutgers University.
[ELR 25:8:19]

In the Law Reviews:

"Don't Be A Scene Stealer" by Jack Valenti, 11 CommLaw Conspectus: Journal of Communications Law and Policy 307 (2003) (published by Catholic University of America School of Law)

Shifting the Burden: The Unconstitutionality of Section 512(h) of the Digital Millennium Copyright Act and Its Impact on Internet Service Providers by Matthew Amadeo, 11 CommLaw Conspectus: Journal of

Communications Law and Policy 311 (2003) (for publisher, see above)

The Expert Agency and the Public Interest: Why the Department of Justice Should Leave Online Obscenity to the FCC by Robert K. Magovern, 11 CommLaw Conspectus 327 (2003) (for publisher, see above)
Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & the Dangers of Prohibition by Thomas James Friedrich, 11 CommLaw Conspectus 369 (2003) (for publisher, see above)

Comm/Ent: Hastings Communications and Entertainment Law Journal has published Volume 25, Number 2 with the following articles:

The Perils of Telemarketing Under the Telephone

Consumer Protection Act: Sending Unsolicited Faxes Costs Dallas Cowboys $1.73Mmillion, Leaves Dallas Mavericks Under Full Court Pressure by Paul J. Batista, 25 Comm/Ent: Hastings Communications and Entertainment Law Journal (2003)

China and the Prior Consent Requirement: A Decade of Invasion and Counter-Invasion By Transfrontier Satellite Television by Mei Ning Yan, 25 Comm/Ent: Hastings Communications and Entertainment Law Journal (2003)

Jazz Photo and the Doctrine of Patent Exhaustion: Implications to TRIPS and International Harmonization of Patent Protection by Daniel Erlikhman, 25 Comm/Ent: Hastings Communications and Entertainment Law Journal (2003)

How to Constitutionally Protect Against Virtual Child Pornography by Emanuel Shirazi, 25 Comm/Ent: Hastings Communications and Entertainment Law Journal (2003)

Copyright Law and Free Speech After Eldred v. Ashcroft by Michael D. Birnhaek, 76 Southern California Law Review 1275 (2003)

Eldred v. Ashcroft: International Influences and the Outer Limits of the Copyright Clause by Shiloh A. Daum, 29 North Carolina Journal of International Law and Commercial Regulation (2003) (published by University of North Carolina School of Law)

Vanderbilt Journal of Entertainment Law & Practice has published Volume 6, Number 1 with the following articles:

Major League Baseball's Answer to Salary Disputes and the Strike: Final Offer Arbitration: A Negotiation Tool Facilitating Adversary Agreement by Brien M. Wassner, 6 Vanderbilt Journal of Entertainment Law and Practice 5 (2003)

Making a Mountain Out of a Mogul: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation Under NCAA Amateurism Rules by Gordon E. Gouveia, 6 Vanderbilt Journal of Entertainment Law & Practice 22 (2003)

The Impact of Digital Distribution on the Duration of Recording Contracts by Revella Cook, 6 Vanderbilt Journal of Entertainment Law & Practice 40 (2003)

New Media-New Rules: The Digital Performance Right and Streaming Media over the Internet by Joseph E. Magri, 6 Vanderbilt Journal of Entertainment Law & Practice 55 (2003)

Idea Men Should Be Able to Enforce Their Contractual Rights: Considerations Rejecting Preemption of Idea-Submission Contract Claims by Celine Michaud and Gregory Tulquois, 6 Vanderbilt Journal of Entertainment Law & Practice 75 (2003)

Almost Famous: Reality Television Participants as Limited-Purpose Public Figures by Darby Green, 6 Vanderbilt Journal of Entertainment Law & Practice 94 (2003)

New Video Game: Japan's Video Game Producers Lose at the Litigation Game by Dan Rosen, 6 Vanderbilt Journal of Law & Practice 119 (2003)

Solutions Are On Track: Digital File Sharing Spun in a Positive Light by Beth A. Thomas, 6 Vanderbilt Journal of Entertainment Law & Practice 129 (2003)

Collecting Society Practices Retard Developments of Online Music Market: A European Perspective by Thomas C. Vinje, Dieter Paemen, and Jenny Romelsjo, 12 The Computer and Internet Lawyer 14 (2003) (edited by Arnold & Porter, published by Aspen Publishers)

Will Professional Athletes Continue to Choose Their Representation Freely? An Examination of the Enforceability of Non-Compete Agreements Against Sports Agents by Jason Gershwin, 5 University of Pennsylvania Journal of Labor and Employment Law (2003)

Universal City Studios v. Corley: Web Owners Beware, Do Not Speak of Your Neighbor's Website, 48 The Wayne Law Review 1527 (2003)

The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm and Criminal Theory by Geraldine Szott Moohr, 83 Boston University Law Review 731 (2003)

All the Athletes Are Equal, But Some Are More Equal Than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for Its Future by J. Brad Reich, 108 Penn State Law Review (2003)

An Essay on Property Rights in Milestone Home Run Baseballs by Steven Semeraro, 56 SMU Law Review 2281 (2003)

Missing the Net: The Law and Economics of Alberta's NHL Players Tax by Donald J.S. Brean and Aldo Forgione, 41 Alberta Law Review (2003)

A Public Interest Defence to Copyright Infringement? by D F C Thomas, 14 Australian Intellectual Property Journal (2003) (published by Law Book Ltd., 44-50 Waterloo Road, N. Ryde NSW 2113 Australia.)

Web Site Outages: Isn't It Time to Do More? by Jason F. Bedell, 82 Oregon Law Review 159 (2003)

Entertainment Law, published by Ingenta and available from www.frankcass.com/jnls, has issued Volume 2, Number 2 with the following articles:

European Sports Federations: A Critical Review of the

Options for Incorporation by Tom Burns, 2 Entertainment Law 1 (2003) (for website, see above)

The Birth of European Union Sports Law by Richard Parrish, 2 Entertainment Law 20 (2003) (for website, see above)

The First-Sale Doctrine in International Intellectual Property Law: Trade in Copyright Related Entertainment Products by Theo Papadopoulos, 2 Entertainment Law 40 (2003) (for website, see above)

The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively "Within the Family of Sport" by Ian Blackshaw, 2 Entertainment Law 61 (2003) (for website, see above)

The Home Copying Loophole Widens: Sony & Others

v. Easyinternetcafe by Dominic Free and Nic Garnett, 2 Entertainment Law 84 (2003) (for website, see above)

Reflections on the Harry Reynolds Litigation by David McArdle, 2 Entertainment Law 90 (2003) (for website, see above)

Book Review: Deciding What We Watch: Taste, Decency and Media Ethics in the UK and the USA by Colin Shaw, reviewed by Shaun Kimber, 2 Entertainment Law 98 (2003) (for website, see above)

Book Review: Drugs in Sport edited by David Mottram, reviewed by John O'Leary, 2 Entertainment Law 99 (2003) (for website, see above)

Book Review: Global Intellectual Property Rights: Knowledge, Access and Development edited by Peter

Drahos and Ruth Mayne, reviewed by Charlotte Waelde, 2 Entertainment Law 101 (2003) (for website, see above)

Book Review: Cyberspace Law: Commentaries and Materials by Yee Fen Lim, reviewed by Clive Walker, 2 Entertainment Law 104 (2003) (for website, see above)

Personality, Endorsement and Everything: The Modern Law of Passing Off and the Myth of the Personality Right by Gary Scanlan, 25 European Intellectual Property Review 563 (2003) (published by Sweet and Maxwell, www.sweetandmaxwell.co.uk)

Re-Thinking the Chinese Copyright Law in the Digital Age by Haochen Sun, 6 The Journal of World Intellectual Property 895 (2003)

(www.wernerpubl.com)

A Primary Concern: Author Joe Klein and the "of and concerning" Requirement to Protect Journalists in Libel Suits, 27 The News Media and the Law 40 (2003) (published by the Reporters Committee for Freedom of the Press, www.rcfp.org/behind thehomefront)

All Things Not-So-Equal: Entertainers-Turned-Politicians and the FCC's Equal-Time Rule, 27 The News Media and the Law 42 (2003) (for website, see above)

A High-Powered Battle: Low Power Radio Stations Seek to Extend Their Reach, 27 The News Media and the Law 44 (2003) (for website, see above)
[ELR 25:8:20]