IN THE NEWS

Ohio State sophomore Maurice Clarett is eligible for NFL draft, because NFL rule limiting eligibility to players who graduated from high school at least three football seasons before violates federal antitrust law, federal District Court rules

Maurice Clarett has been declared eligible for the 2004 National Football League draft, even though he is only a sophomore at Ohio State University, and even though only two football seasons have passed since he graduated from high school. Two things are remarkable about this development.

The first is that, on paper, Clarett is not eligible. The NFL barred underclassmen from being eligible for the draft as long ago as 1925, when running back "Red" Grange left the University of Illinois to play for the

Chicago Bears. In response to the ensuing controversy, the NFL adopted a rule that required players to be four football seasons out of high school to be eligible to play in the League. In 1990, the rule was modified to shorten the time to three seasons.

The second remarkable thing about Clarett being declared eligible for this year's draft is that it wasn't done by League Commissioner Paul Tagliabue. It was done instead by federal District Judge Shira Scheindlin, in an antitrust lawsuit filed by Clarett against the NFL. In response to cross-motions for summary judgment, Judge Scheindlin has held that the NFL's eligibility rule violates federal antitrust law, and that is why she declared Clarett eligible for the next NFL draft that will take place in April 2004.

In order to get to this precedent-setting result, Judge Scheindlin had to deal with three separate issues - a task that required a 71 page opinion.

The first issue was whether the three-season eligibility rule was simply immune from Clarett's antitrust attack because it was bargained about with the NFL Players Association, and is thus protected by an antitrust doctrine known as the "labor exemption." The "labor exemption" provides that employment terms that would otherwise violate the Sherman Act are entirely exempt from the antitrust laws, if they are agreed to in a collective bargaining agreement negotiated between an employer (or group of employers) and a labor union. The NFL argued that its draft eligibility rule was negotiated with the NFL Players Association, and is exempt for that reason. On this issue, the NFL had support from three earlier antitrust cases that arose in professional basketball: Caldwell v. American Basketball Association (ELR 17:12:9); National Basketball Association v. Williams (ELR 16:11:15); and Wood v. National Basketball Association (ELR

8:12:12).

Judge Scheindlin disagreed, however. She distinguished all three cases, saying that none of them involved "job eligibility." Instead, she reasoned, "The league provisions addressed in Wood, Williams, and Caldwell govern the terms by which those who are drafted are employed. The [NFL] Rule [at issue in Clarett's case], on the other hand, precludes players from entering the labor market altogether, and thus affects wages only in the sense that a player subject to the Rule will earn none. But the Rule itself . . . does not concern wages, hours, or conditions of employment and is therefore not covered by the . . . labor exemption."

Judge Scheindlin also rejected the NFL's "labor exemption" defense for another reason. "Clarett's eligibility was not the union's to trade away," she said. Finally, she found that the NFL had not shown that the draft eligibility rule had actually been the subject of bargaining with the Players Association.

The second issue was whether Clarett had "standing" to challenge the eligibility rule on antitrust grounds. Antitrust "standing" rules are not intuitive, and that is why the NFL was able to make a vigorous argument on this point. Judge Scheindlin wasn't persuaded however, and in the end, she concluded that, "Clarett's injury - his exclusion from the NFL - flows directly from the anticompetitive effects of the Rule, and thus constitutes antitrust injury. Accordingly, Clarett has antitrust standing."

The third issue was whether the draft eligibility rule was "unreasonable," because it would violate the antitrust laws only if it were. The NFL argued that there were four justifications for the rule, all of which made it reasonable. But Judge Scheindlin thought not.

Two justifications were based on the NFL's desire to protect younger players from injury and the ill effects of over-training. The judge said that these could be "dismissed out of hand." She acknowledged that "The NFL's concern for the health of younger players is laudable," but, she added, "it has nothing to do with promoting competition." This was important, and fatal for the NFL, because the only justifications that are relevant for antitrust purposes are those that promote competition.

Two other justifications concerned the NFL's desire to protect itself and its teams from the "costs associated with injuries." These too were "ineffective" justifications, for two reasons. Injury costs affect a "different market" than the player personnel market. And the NFL's desire to minimize costs "is not a legitimate procompetitive justification."

Because Judge Scheindlin found that the NFL had not offered any procompetitive justifications for the eligibility rule, she concluded there was no need for a trial. So she granted Clarett's motion for summary judgment.

Clarett was represented by Alan C. Milstein of Sherman Silverstein Kohl Rose & Podolsky in Pennsuaken, New Jersey. The NFL was represented by Gregg H. Levy of Covington & Burling in Washington, D.C.

Editor's Note: The question of whether the NFL's eligibility rule is immune from antitrust attack by the "labor exemption" is more difficult than Judge Scheindlin made it seem, and it's entirely possible (indeed likely) that at least one other judge - Second Circuit Judge Ralph Winter - would have disagreed with her. Judge Scheindlin's conclusion that "Clarett's eligibility was not the union's to trade away" seems intuitively correct; but it isn't necessarily the law, even in the Circuit where she sits. In distinguishing Wood v. National Basketball Association, Judge Scheindlin described it accurately but incompletely. That case also involved a direct antitrust challenge to the NBA draft - a challenge that included the argument that the draft is illegal because it affects players who are not NBA Player Association members. In an opinion by Judge Winter, the Second Circuit responded to Wood's argument that the draft was illegal because it affected players who are outside the bargaining unit by saying that this was a "commonplace consequence of collective agreements," and that the National Labor Relations Act explicitly defines "employee" in a way that includes workers outside the bargaining unit. What's more, ever since the United States Supreme Court's decision (in favor of the NFL) in Brown v. Pro Football (ELR 18:2:3), the "labor exemption" may now be available to professional sports leagues even for employment issues about which there has been no actual bargaining with Players Associations. The labor exemption is a very significant issue in Clarett's case, because if it applies, the NFL's eligibility rule is immune from antitrust attack even if - as Judge Scheindlin found - it is "unreasonable."

Clarett v. National Football League, Case No. 03 Civ. 7441 (SAS) (S.D.N.Y., Feb. 5, 2004), available at www.nysd.uscourts.gov/courtweb/public.htm [ELR 25:9:4]

New England Patriots' termination of season tickets of 20-year holder, because of disorderly conduct of ticket user during 2002 Green Bay Packers game at Gillette Stadium, is upheld by Massachusetts state court

When the New England Patriots won Super Bowl XXXVIII, the team was on a roll. Not only had it won the preceding 14 games in a row, it also had won - just a month before - an important lawsuit in the Suffolk Superior Court. In a short and to-the-point decision, Justice Thomas Connelly confirmed the Patriots' right to terminate season tickets "for any cause."

The case was filed by Yarde Metals, Inc., a Connecticut corporation that had been a Patriots season ticket holder for 20 years. Yarde had six tickets for the 2002 season, and as was its custom, it gave some of them to customers, including a customer named Mikel LaCroix, for that year's Green Bay Packers game.

During that fateful game, the demand for men's room facilities at Gillette Stadium - where the Patriots play their home games - outstripped supply. The wait to get to the front of the line stretched to 20 minutes. Women are accustomed to restroom delays, but men are not. And for some reason, the line that day to

Gillette's women's room was so short that some men used the women's room, rather than wait for their own.

LaCroix was one. Though he had used a closed stall in the women's room, the Foxboro police arrested him and ejected him from the game. The next day, he appeared in court and "admitted to facts sufficient for a finding of guilt of disorderly conduct." That, however, was not the end of the matter. A few days after that, the Patriots terminated all of Yarde's season tickets, and told the company to return them for a full refund. Instead, Yarde sued.

The tickets themselves provided that they were "revocable licenses" that the Patriots could terminate "at any time and for any reason." But in its lawsuit, Yarde asserted that because it had held those tickets for 20 years, the tickets were not mere licenses. Yarde asserted that it had a right, under contract and property law, to use and renew those tickets every year, and that the Patriots could not revoke the tickets "without cause."

Justice Connelly agreed with Yarde that the Patriots' termination of the company's season tickets, on account of one problem in 20 years, was "draconian." But the judge agreed with the Patriots that the team had every legal right to do so.

The tickets did have certain property-like characteristics. But Judge Connelly determined that they were the property of the Patriots, not Yarde. As to Yarde, the tickets were mere licenses, just as the tickets themselves said. "The Patriots grant season ticket holders a license to attend home games at Gillette Stadium," the judge found. And this was fatal to Yarde's case, because "Revocability is a primary characteristic of a license."

Indeed, Massachusetts courts held long ago that the relationship between the buyer and seller of a ticket is one of "revocable license." If the seller terminates the license, its only obligation is to refund the purchase price - something the Patriots said it would do, when the tickets were returned.

For these reasons, the judge granted the Patriots' motion for dismissal of Yarde's lawsuit. (And, apparently to be certain the company would get a refund,
he ordered the Patriots to refund the price of the unused tickets for the 2002 season.)

The Patriots were represented by Daniel L. Goldberg and Terry Klein of Bingham McCutchen in Boston.

Yarde Metals, Inc. v. New England Patriots, Suffolk Superior Court, Civil Action No. 2003-3832E (Mass.Sup.Ct. 2003), available at www.EntertainmentLawReporter.com/decisions/250905.pdf [ELR 25:9:5]

WASHINGTON MONITOR

FCC proposes to fine Young Broadcasting $27,500 for television broadcast of “Morning News” segment featuring cast member of play “Puppetry of the Penis” who exposed his penis on air, proposes to fine Clear Channel Broadcasting $715,000 for indecent radio broadcasts of “Bubba and the Love Sponge,” and fines Infinity Broadcasting $27,500 for indecent radio broadcast of “Deminski and Doyle Show”

The exposure of Janet Jackson’s bare breast during the Super Bowl half-time show this month will become yet another in a string of “indecency” proceedings recently conducted by the Federal Communications Commission. Indeed, the FCC has been especially busy on the indecency front as of late. In the weeks preceding Jackson’s appearance on worldwide TV, the FCC released three separate rulings in such cases. And in all three cases, the FCC fined, or has proposed to, broadcasters for indecent broadcasts.

"Puppetry of the Penis" case

Of the three, the case that's most similar to the Janet Jackson matter is a proceeding prompted by a "Morning News" broadcast in October 2002 by television station KRON-TV in San Francisco. During a segment that featured an interview with two actors who were appearing in the play "Puppetry of the Penis," one of the actors exposed his penis on air.

The on-air exposure was very brief and apparently unintentional. (It happened while the actor was turning away from the camera towards an audience behind him.) What's more, the show's hosts immediately apologized on air, the station issued a written press release of apology, and the station even suspended those of its employees who were involved.

Nevertheless, the FCC issued a Notice of Apparent Liability for Forfeiture, finding that the broadcast violated the federal statute that prohibits the broadcasting of "indecent" material and an FCC regulation that prohibits the broadcasting of indecent material between 6 am and 10 pm. The Notice proposes to fine Young Broadcasting of San Francisco, KRON-TV's owner, $27,500, the maximum amount authorized by statute for a single violation.

Young Broadcasting didn't deny that the broadcast depicted a sexual organ, which is one element of an indecency finding. And FCC found that the depiction was "patently offensive," because it was "graphic" and apparently intended to pander, titillate or shock, which is the second element of an indecency finding.

The FCC has proposed the maximum fine, because it concluded the offense was "egregious," in part because station personnel knew the actors were wearing nothing beneath their capes and yet "failed to take adequate precautions."

FCC rules give Young Broadcasting an opportunity to respond and object to the proposed fine, before it becomes a final FCC order.

"Bubba and the Love Sponge" case

In an entirely separate case, the FCC also has issued a Notice of Apparent Liability of Forfeiture proposing to fine Clear Channel Broadcasting $755,000 on account of indecent broadcasts of "Bubba and the Love Sponge" show by Clear Channel radio stations in Florida.

The host of the offending program is Todd "Bubba" Clem. On several shows broadcast from July to December 2001, Clem had on air conversations with callers and guests about such things as "oral sex, penises, testicles, masturbation, intercourse, orgasms and breasts." These conversations easily violated the FCC's ban on patently offensive broadcasts about sexual organs. And because the offending programs were broadcast between 6 am and 10 pm, the FCC had no trouble concluding that they apparently violated the law.

Clear Channel did come away with one small victory. The listener who filed the initial complaint with the FCC also objected to what he said was the program's promotion of illegal drugs. That complaint did "not warrant enforcement action," the FCC concluded, because as a result of "the Commission's limited role overseeing programming content, mandated by the First Amendment . . . , there is no rule or statutory provision barring a licensee from airing material referencing drug use."

The total amount of the proposed fine is as large as it is, because each of the offending shows was broadcast by more than one Clear Channel station, so that, in all, there were 26 airings of indecent programming. The FCC assessed the maximum amount, $27,500, for each, which came to $715,000. It also added an additional $40,000 on account of four alleged violations of record keeping requirements, involving the stations' failure to have copies of the "Bubba" show complaint in their public inspection files, as required by FCC rule.

FCC rules give Clear Channel an opportunity to respond and object to the proposed fine, before it becomes a final FCC order.

"Deminski and Doyle Show" case

In the third case, the FCC has fined Infinity

Broadcasting $27,500 on account of an indecent radio broadcast of the "Deminski and Doyle Show" in January 2002. The show's hosts had "separate discussions with nine individuals who called the show to talk about sexual activities. Callers and the show's hosts described in detail how specifically named sexual acts are performed. The broadcast included explicit and graphic sexual references, including references to anal and oral sex, as well as explicit and graphic references to sexual practices that involve excretory activities."

In this case, Infinity responded to the FCC's Notice of Apparent Liability by arguing that the FCC's indecency rules are unconstitutional under the First Amendment, and that there was no justification for imposing the maximum fine of $27,500.

The First Amendment argument had already been rejected in opinions of the United States Supreme Court and the federal Court of Appeals (ELR 17:7:9).

And the FCC quickly concluded that Infinity's reliance on a more recent Supreme Court decision striking down a ban on Internet indecency was misplaced, because the Supreme Court itself had distinguished broadcasting from the Internet (ELR 19:2:7).

The FCC did acknowledge that in earlier indecency cases, it had imposed fines of only $7,000 each. But it said that this was a case of "egregious misconduct" that justified the statutory maximum of $27,500, because the "material that Infinity broadcast was extremely graphic, lewd and offensive and continued over an extended period of time and included conversations with nine callers over a 30-minute period." The First Amendment does not require the FCC to adopt specific, detailed standards for appropriate sanctions, in order to impose the maximum penalty permitted by statute, the FCC concluded.

In re Clear Channel Broadcasting, FCC 04-17 (Jan. 2004), available at http://hraunfoss.fcc.gov/ edocs_public/attachmatch/FCC-04-17A1.pdf; *In re Young Broadcasting of San Francisco*, FCC 04-16 (Jan. 2004), available at http://hraunfoss.fcc.gov/ edocs_public/attachmatch/FCC-04-16A1.pdf; *In re Infinity Broadcasting*, FCC 03-302 (Dec. 2003), available at http://hraunfoss.fcc.gov/ edocs_public/ attachmatch/FCC-03-302A1.pdf [ELR 25:9:7]

INTERNATIONAL DEVELOPMENTS

British common law does not include right of privacy, House of Lords decides, in decision that interprets seemingly contrary ruling in Michael Douglas/Catherine Zeta-Jones case against Hello! magazine to mean only that breach of confidence claims no longer require a confidential relationship

British common law does not include the right of privacy, after all, the House of Lords has ruled. (The House of Lords is roughly the U.K. counterpart to the United States Supreme Court.) The case in which this significant ruling was issued did not arise in an entertainment or media industry dispute. Instead, it arose in a case filed by a woman who was striped-searched before being allowed to visit her son in Armley Prison in Leeds, England, where he was awaiting trial on charges of drug dealing. The prison's practice of strip-searching all visitors is "controversial," Lord Hoffman explained, "because having to take off your clothes in front of a couple of prison officers is not to everyone's taste."

The reason the case is of interest to readers of the Entertainment Law Reporter is that just a few years ago, the U.K. Court of Appeal held - or appeared to - that a right of privacy does exist in British law, as a result of the U.K.'s adherence to the European Convention on Human Rights. That ruling was issued in the lawsuit filed by Michael Douglas and Catherine Zeta-Jones against Hello! magazine, as a result of Hello!'s threatened publication of unauthorized photos of their wedding (ELR 22:10:8). That pre-trial decision dealt with the propriety of (what in the United States would be called) a preliminary injunction barring Hello! from publishing the photos. The Court of Appeal set aside the injunction on the grounds that money damages would be sufficient. But in the course of that ruling, it created what looked like a common law right of privacy, upon which Douglas and Jones could rely in the subsequent trial.

Douglas and Zeta-Jones won the trial (ELR 24:12:6) and were awarded damages (ELR 25:8:5). But Mr. Justice Lindsay (the trial judge) specifically rejected the couples' claim for invasion of privacy, holding instead that they were entitled to prevail on their breach of confidence claim. Given the Court of Appeal's earlier ruling that British law did recognize a right of privacy, Justice Lindsay's decision not to rely on privacy law seemed surprising. But in light of the House of Lords' recent decision, Justice Lindsay's ruling proved prescient.

The mother who filed the Armley Prison strip-search case relied on the Court of Appeal's decision in

Douglas/Zeta-Jones case to support her argument that British law does recognize a common law right of privacy. But the House of Lords read the Douglas/Zeta-Jones decision more narrowly. Lord Hoffman said that the Douglas/Zeta-Jones decision simply meant that "in relation to the publication of personal information obtained by intrusion, the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary."

Editor's note: There may well be a significant difference between an American-style right of privacy and a British-style claim for breach of confidence without need for a confidential relationship. This is so, because - as the preceding quote suggests - a key fact in the Douglas/Zeta-Jones case was that the unauthorized photos were taken as a result of an "intrusion." If "intrusion" is necessary to make out a successful claim under British law, some claims that would be successful under American privacy law - those where private information is obtained without "intrusion" and then disclosed - would not be under British breach of confidence law.

Wainwright v. Home Office, [2003] UKHL 53, www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/wain1.htm [ELR 25:9:9]

Auto insurance advertising that featured "Mr. Goggomobil" character from earlier Yellow Pages commercials did not infringe commercials' copyrights but did violate Trade Practices Act, Australian Federal Court decides

Australian actor Tommy Dysart has played a number of roles over the course of his career, including the role of "Mr. Goggomobil" in television commercials for the Yellow Pages. The Goggomobil was a "rare, inexpensive and relatively unknown car . . . manufactured in the 1950s." One commercial portrayed Dysart's character as the owner of an old Goggomobil who used the Yellow Pages to locate difficult-to-find replacement parts. The commercials were televised in Australia during the 1990s, and they made a lasting and favorable impression.

A couple of years after the Goggomobil commercials were discontinued due to "budgetary constraints," Royal & Sun acquired Shannons, an insurance company that specialized in insuring vintage and classic cars. Royal & Sun decided to expand Shannons' business by exposing it to all of those who owned "special" cars. As part of that effort, Royal & Sun's ad agency "came up with the idea of using Dysart and a Goggomobil for Shannons advertising."

Royal & Sun agreed this was a good idea for several reasons. Using Dysart would make the Shannons commercials "instantly recognisable," because viewers were aware of him and the car from the Yellow Pages ads. The Goggomobil too was familiar to viewers as a result of the Yellow Pages ads, and was the type of car that Shannons wanted to insure. Indeed, using a Goggomobil "would assist in cutting through the 'clutter' of advertising in the press as it had . . . gained considerable exposure through the Yellow Pages TV commercials . . . and would therefore most likely be remembered by Shannons target market."

The resulting commercials for Shannons featured Dysart's character using a telephone to find an insurance company that was familiar with his Goggomobil.

Though imitation is said to be the sincerest form of flattery, Telstra Corporation Ltd. - which by then was the owner of the Yellow Pages - was not flattered. In fact, it responded to the Shannons commercials by filing a lawsuit in the Federal Court of Australia alleging the infringement of the copyrights it its commercials, and alleging violations of the Australian Trade Practices Act (the Australian counterpart to the United States' Lanham Act).

Telstra's lawsuit has been successful, though only in connection with its Trade Practices Act claims.

Judge Ronald Merkel dismissed Telstra's copyright claim. He acknowledged that the Yellow Pages and Shannons commercials both "feature a memorable character ('Mr Goggomobil'), an unusual and distinctive motor vehicle (a Goggomobil), the use of the telephone to help solve an obscure problem in relation to that vehicle and the telling of that story in a humorous manner." These similarities did not amount to copyright infringement, however, the judge concluded, because they "relate to the ideas and concepts . . . rather than to their expression, and are not sufficient to constitute the 'reproduction' of a substantial part of the first Goggomobil advertisement." In other words, Judge Merkel explained, "the first Shannons advertisement conjures up the first Goggomobil advertisement and its ideas and concepts but does not reproduce a substantial part of the substance or expression of the 'dramatic' events comprising that advertisement."

On the other hand, in support of its Trade Practices Act claim, Telstra introduced evidence that "focus groups" who were shown the Yellow Pages and Shannons commercials "were left with the impression that . . . 'Mr Goggomobil' was now using the Yellow Pages and his telephone to shop for car insurance." Judge Merkel concluded that the "Shannons advertisement misrepresents that it is also an advertisement by Yellow Pages or that Yellow Pages is in some way associated or connected with that advertisement or with locating the services offered in it." For this reason, the Shannons commercial was "misleading or deceptive," and thus violated Telstra's rights under the Trade Practices Act.

The question of Telstra's damages still remains to be determined.

Telstra was represented by WT Houghton QC and AJ Ryan, and Solicitors Mallesons Stephen Jaques. Royal & Sun was represented by C Golvan SC and S Ricketson, and Solicitors Middletons.

Telstra Corporation Limited v. Royal & Sun Alliance Insurance Australia Limited, [2003] FCA 786, available at www.austlii.edu.au/au/cases/cth/federal_ct/ 2003/786. html [ELR 25:9:9]

RECENT CASES

KISS and Polygram Records win dismissal of Vinnie Cusano's claims for songwriter royalties for "Lick it Up" album; burden was on Cusano to prove accountings were inaccurate, not on KISS and Polygram to prove they were accurate, federal District Court rules

Vincent "Vinnie" Cusano used to be a guitarist and songwriter for the band KISS. He wasn't a partner in the band. Instead, he was an employee. In fact, he had a written agreement with the band. And one provision of that agreement gave "KISS" ownership of certain songs Cusano wrote, including songs he wrote for the band's "Lick it Up" album. The agreement provided that Cusano was entitled to the songwriter's share of income from those songs, and it provided that

KISS would give quarterly accounting statements to Cusano.

All of this matters, because many years later, a wide variety of disputes broke out between Cusano and KISS - including disputes over whether KISS, and its record company Polygram Records, accurately accounted to Cusano for his songwriter royalties from the "Lick it Up" album. Insofar as Cusano was concerned, this was more than an accounting or simple breach of contract matter. In his opinion, it also involved breached fiduciary duties, fraud, misrepresentation, and conversion. And the complaint Cusano filed against KISS and Polygram in federal court in Los Angeles so alleged.

After a great deal of pre-trial litigation, involving motions and even an appeal (ELR 23:9:18, 24:4:16), it appears as though most, and perhaps all, of Cusano's claims have been dismissed, without ever going to trial.

KISS and Polygram responded to Cusano's claims for "Lick it Up" royalties with a motion for summary judgment; and federal District Judge Howard Matz has granted that motion.

The most significant issue in the case concerned the question of who had the burden of proving that royalties were or were not accurately accounted for. The usual rule is that a plaintiff has the burden of proving its claims. That rule would have imposed the burden on Cusano to prove that KISS and Polygram did not accurately account for his royalties. Cusano, however, never audited the "Lick it Up" accounting records, so he couldn't meet that burden.

Instead, he argued that the burden was on KISS and Polygram to prove they had accounted accurately. In support of that argument, Cusano relied on a decision of the California Court of Appeal in a case filed by author Gary Wolf against Disney over royalties from "Roger Rabbit." That decision did indeed impose on Disney the burden of proving that its accountings to Wolf were accurate (ELR 24:10:4).

Judge Matz, however, ruled that in Cusano's case, the burden of proof remained with Cusano. In the "Roger Rabbit" case, Wolf had attempted to audit Disney's financial records, but Disney withheld some. In Cusano's case, by contrast, Cusano never attempted to audit the financial records of KISS or Polygram, even though his contract gave him the right to do so. Judge Matt concluded that ". . . shifting the burden of proof when Cusano chose to ignore his audit right would result in unfairness, and would reward irresponsible and derelict conduct."

The judge also dismissed Cusano's breach of fiduciary duty claim. He explained that Cusano did not have a fiduciary relationship with Polygram. And KISS's duty to collect royalties and pay them to

Cusano did not create a fiduciary duty between them, either.

Cusano's fraud and misrepresentation claims fared no better. They merely alleged that KISS breached contractual duties to Cusano. And Cusano provided no evidence that Polygram rendered inaccurate accountings. The judge dismissed Cusano's conversion claim, because Cusano never owned the royalties he claimed were unpaid; he merely had a contractual right to receive them.

And if all this were not enough, Judge Matz concluded by ruling that Cusano waited so long before filing his lawsuit, that it was barred by a provision in his contract that required him to object to royalty statements within two years.

Cusano was represented by Jeffrey S. Benice in Costa Mesa and Stephen P. Collette of Little & Collette in Marina del Rey. KISS and Polygram were represented by John H. Lavely, Jr., Brian G. Wolf and Paul Karl Lukacs of Lavely & Singer in Los Angeles.

Cusano v. Klein, 280 F.Supp.2d 1035, 2003 U.S.Dist.LEXIS 20739 (C.D.Cal. 2003) [ELR 25:9:11]

Artist whose design was infringed by Baltimore Ravens' logo was not entitled to recover any part of team's revenues from certain merchandise or from sources other than merchandise, Court of Appeals affirms

Security guard and amateur artist Frederick Bouchat won a remarkable copyright battle against the NFL's Baltimore Ravens, when he persuaded a jury that NFL Properties copied a design he had submitted to the Ravens when it created the Ravens' logo. Despite uncontradicted testimony by Ravens' officials that they never received Bouchat's faxed submission, and no evidence the Ravens' had forwarded it to NFL Properties even if the team had received it, the Court of Appeals affirmed a judgment of "infringement" in favor of Bouchat (ELR 22:10:16, 23:4:19).

At the time Bouchat submitted his design, he indicated that if the team used it, he wanted a letter of recognition and an autographed helmet. By the time his infringement judgment was affirmed, however, he wanted much more. He wanted all of the Ravens' profits "attributable to the infringement," as authorized by section 504(b) of the Copyright Act.

Instead, after a jury trial on the issue of damages, and some rulings that preceded that trial, he got nothing at all. And that judgment too has been affirmed by the Court of Appeals.

The Ravens' revenues were from: (1) the sale of merchandise bearing the team logo, sold under circumstances that indicated that the logo may have contributed to consumers' decisions to buy it; (2) the sale of logo-bearing merchandise whose sale would not have been affected by the logo; (3) sales of game tickets, food, parking, broadcast rights and sponsorships; (4) payments by logo licensees of "minimum guarantee shortfalls"; and (5) free merchandise provided to NFL Properties by licensed vendors of logo-bearing merchandise.

At the pretrial stage, in response to the Ravens' motion for partial summary judgment, federal District Judge Marvin Garbis ruled that revenues from categories 2 through 5 were not attributable to the infringement (ELR 24:8:9), and thus at trial, Bouchat was not permitted to offer the jury evidence of those revenues.

Bouchat did offer the jury evidence of revenues from sales of merchandise bearing the team logo, where the logo may have contributed to its purchase. The jury was instructed to decide whether the Ravens had proved, by a preponderance of the evidence, that revenues from those sales "were attributable to factors other than the . . . infringement of Bouchat's copyright." The jury decided the Ravens had proved that its revenues from those sales were attributable to factors other than the infringement, and thus the jury awarded Bouchat nothing.

On appeal, Bouchat argued that Judge Garbis had erred by excluding evidence of revenues from categories 2 through 5. In an opinion by Judge Robert King, the Court of Appeals disagreed. It held that it had been proper to grant summary judgment as to those revenues, for one of two reasons.

First, Judge King agreed that there was no conceivable connection between the infringement and revenues from minimum guarantee shortfalls or free merchandise. So summary judgment as to those was proper.

Second, though Judge King acknowledged that there was a "conceivable" connection between the infringement and revenues from certain merchandise and game tickets and the like, he found that the Ravens submitted evidence "that established beyond reasonable debate" that none of those revenues was attributable to the team's use of the infringing logo "rather than some other logo." This shifted the burden back to Bouchat to offer evidence that those revenues might have been affected by the infringing logo. Bouchat offered only speculation, but no evidence, that might have been so. So summary judgment was proper as to those revenues as well, Judge King concluded.

Judge Emory Widener dissented.

Bouchat was represented by Howard J.

Schulman of Schulman & Kaufman in Baltimore. The Ravens were represented by Robert Lloyd Raskopf of White & Case in New York City.

Bouchat v. Baltimore Ravens Football Club, 346 F.3d 514, 2003 U.S.App.LEXIS 20443 (4th Cir. 2003) [ELR 25:9:12]

After jury verdict in favor of TVT Records in lawsuit over recordings by Ja Rule, trial judge rejects Def Jam's argument that it should win or be granted a new trial, but judge does reduce punitive damages awarded to TVT from $108 million to just over $29 million

In 2001 and 2002, TVT Records and Def Jam Records made a couple of deals with one another that didn't turn out as expected.

TVT Records thought that as a result of the 2001 deal, it got permission from Def Jam to make and release an album featuring Ja Rule. By the time the 2001 deal was made, Ja Rule was a solo artist and was signed to an exclusive recording agreement with Def Jam. Earlier in his career, though, Ja Rule was signed to TVT as a member of Cash Murda Click, a rap group also known by its initials CMC. TVT wanted to release one more CMC album, using some old tracks and some new ones that Ja Rule had agreed to record for the new album; and that's why TVT needed Def Jam's consent.

As a result of the 2002 deal, Island Def Jam thought it got licenses from TVT to include two as-yet unreleased recordings made by CMC back when it was under contract to TVT, in a new Ja Rule album called "The Last Temptation" and in a CD and DVD being made by record producer Irv Gotti.

Neither company got what it expected, however. After TVT licensed Def Jam to use the CMC recordings in "The Last Temptation," Def Jam told TVT that Def Jam had rejected the 2001 deal, so TVT couldn't make a new CMC album after all. What's more, Def Jam told Ja Rule he couldn't make a new album for TVT, though Ja Rule was willing and even eager to do so.

In retrospect, the consequences of all this were foreseeable, at least in part. TVT sued Def Jam and Lyor Cohen (who was then Def Jam's Chairman) for breach of contract, interference with contract, fraudulent concealment, and copyright infringement. The case was hotly contested. TVT sought and obtained a preliminary injunction barring Def Jam from including the CMC tracks in Ja Rule's "The Last Temptation" (ELR 24:10:9). There followed a barrage of pretrial motions and rulings (ELR 25:1:18, 25:4:22).

The case then went to trial, during which more motions resulted in still more rulings (ELR 25:4:22).

Then the jury reached a stunning verdict. It not only found Def Jam and Cohen liable on all claims, it awarded TVT more than $132 million in damages (ELR 24:11:6). The jury awarded TVT compensatory damages of almost $24 million, assessed against Def Jam and Cohen, jointly and severally, plus an additional $108 million in punitive damages, $52 million of which was assessed against Def Jam individually, and $56 million against Cohen individually.

Not surprisingly, this result set the stage for two post-trial motions by Def Jam and Cohen: a motion for judgment as a matter of law (despite the jury's verdict), or for a new trial; and a motion for remittitur (i.e., to reduce the verdict). Federal District Judge Victor Marrero has denied Def Jam and Cohen's motion for judgment or a new trial. But the judge has granted their motion for remittitur.

The trial lasted almost three weeks and produced a transcript of 3,500 pages. As befitting a case of that length, and a verdict of that magnitude, Def Jam and Cohen's motion for judgment or a new trial raised a host of issues, ranging from whether, as a matter of law, they had committed the tort of interference with contract, to whether comments made by TVT's lawyer during trial were improper, to whether the jury's verdict was supported by the weight of the evidence.

Judge Marrero responded with an opinion of 40 printed pages, dealing with each issue in factual and legal detail. In the end, he decided that Def Jam and Cohen had interfered with TVT's agreement with Ja Rule; the jury's verdict was supported by substantial evidence; and that the comments of TVT's lawyer during trial did not warrant a new trial.

Though the judge denied Def Jam and Cohen's motion for judgment or a new trial, Def Jam didn't come away completely empty-handed. TVT had asked the judge to order Def Jam to recall and destroy all copies of the Gotti CD and DVD. The jury had ruled that Def Jam's use of those tracks infringed TVT's copyrights, apparently finding that Def Jam had fraudulently obtained a license to use them, by not revealing that it was going to reject the 2001 deal that would have authorized Ja Rule to make a new CMC recording for TVT. Judge Marrero upheld that finding. But he ruled that it would be inappropriate to order the recall and destruction of the Gotti CDs and DVDs, in part because TVT was awarded compensatory and statutory damages for those infringing discs. Instead, the judge ordered Def Jam not to manufacture any more copies of the Gotti CDs and DVDs that contain the two CMC tracks.

Judge Marrero was equally thorough in ruling on Def Jam and Cohen's remittitur motion. He wrote a second, separate opinion, almost 50 pages in length, in response to that motion. It begins with a scholarly, law review-like analysis of the law of punitive damages, which he then applies to the facts of this case. For reasons that are painstakingly explained, the judge concluded that the jury's punitive damage award was excessive, especially its award against Cohen. Judge Marrero therefore reduced the punitive damage award against Cohen from $56 million to $3 million. And he reduced the punitive damage award against Def Jam from $52 million to just over $26 million.

TVT Records was represented by James E. d'Auguste of Akin Gump Strauss Hauer & Feld in New York City. Island Def Jam was represented by Michael T. Mervis of Proskauer Rose in New York City. Lyor Cohen was represented by Robert J. Eddington of

Proskauer Rose, and by Matthew S. Dontzin and James M. LaRossa, in New York City.

TVT Records v. Island Def Jam Music Group, 279 F.Supp.2d 366, 2003 U.S.Dist.LEXIS 15270 (S.D.N.Y. 2003); *TVT Records v. Island Def Jam Music Group*, 279 F.Supp.2d 413, 2003 U.S.Dist.LEXIS 15271 (S.D.N.Y. 2003) [ELR 25:9:12]

Appellate court reverses dismissal of claim that Disney infringed HyperTV's patents for simultaneous viewing of TV and websites

The Walt Disney Company will have to defend itself, after all, against claims that it infringed patents belonging to HyperTV Networks. Earlier in the case, federal District Judge Jed Rakoff dismissed those claims, in response to Disney's motion for summary judgment (ELR 24:5:18). But in an opinion by Judge Richard Linn, the Court of Appeals for the Federal Circuit has held that Judge Rakoff misconstrued a critical term in HyperTV's patents, and improperly prevented HyperTV from arguing that Disney infringed its patents under the "doctrine of equivalents," whether or not Disney did so "literally."

At issue in the case is a system used by Disney that allows cable-TV subscribers to view Disney programming and Disney websites, simultaneously. Viewers may want to do so, for example, in order to watch a Disney quiz show and "play along" with it at the same time. HyperTV Networks owns patents on a system that permits users to view television programs and access sites anywhere on the Web, simultaneously. In its lawsuit, HyperTV alleges that Disney's system is sufficiently similar to its own patented system that

Disney's system infringes those patents.

In order to decide the case, it was necessary to define the meaning of the term "uniform resource locator," as that term was used in HyperTV's patent applications. A uniform resource locator (also known as a "URL") is a string of letters, punctuation and sometimes numbers that people use to find sites. In everyday language, URLs are a cross between street addresses and phone numbers.

The definition of "URL" was critical to the outcome of the case, because Disney's system uses URLs that direct viewers only to Disney's own websites, while HyperTV's patents cover a system that uses URLs that allow viewers to access any website. This difference raised the question of whether HyperTV's patents also cover systems that limit access to specific sites. Judge Rakoff thought not; and that is why he dismissed HyperTV's lawsuit.

The Court of Appeals, however, held that properly construed, HyperTV's patents cover systems that give viewers access to any type of website. For that reason, the appellate court reversed the dismissal of the case, and remanded it to Judge Rakoff so he (or a jury) could consider whether Disney's system infringes HyperTV's patents, as the appellate court has now construed those patents.

In addition, the Court of Appeals held that when the "infringement" issue is decided, HyperTV is entitled to argue that Disney's system infringes under the "doctrine of equivalents" - even if Disney's system is not literally the same as HyperTV's. Under the "doctrine of equivalents," HyperTV's patents would be infringed if Disney's system does what HyperTV's system does in a different but "equivalent" way.

HyperTV was represented by Kenneth W. Starr of Kirkland & Ellis in Washington D.C. Disney was represented by Matthew D. Powers of Weil Gotshal & Manges in Redwood Shores CA.

ACTV, Inc. v. Walt Disney Co., 346 F.3d 1082, 2003 U.S.App.LEXIS 20498 (Fed.Cir. 2003) [ELR 25:9:13]

"Wing Nut Hat" images on Detroit Red Wings t-shirts and Coca-Cola bottlecaps do not infringe design patent owned by hat's creators, but court refuses to dismiss creators' copyright infringement claims

Marc and David Kellman are, by their own account, "devoted fans" of the NHL's Detroit Red Wings. They're also pretty clever designers who make thorough use of intellectual property law to protect their creations. All of this became clear as a result of a patent and copyright infringement suit the Kellmans have filed against the Red Wings and the Coca-Cola Company, as a result of what looks to be the Red Wings' overly-expansive interpretation of a trademark assignment the Kellmans once granted to the team.

The Kellmans are the designers of a novelty foam hat shaped like a wing nut. They created the hat, they've explained, so that they and other Red Wings fans could show they are "nuts" about the "Wings." Soon after designing the hat, the Kellmans demonstrated their IP savvy by: (1) obtaining a design patent for its design; (2) registering their copyright in its design; and (3) applying for a federally registered trademark for "Wing Nut." Early on, the Red Wings and the Kellmans had some disagreements about the hat. But those were settled with an agreement by which the Kellmans assigned their "Wing Nut" trademark to the Red Wings, in return for royalties from the team's sales of "Wing Nut" merchandise. However, the agreement provided that the Kellmans would retain "any copyright and patent rights" in the hat's design, so that the Kellmans themselves - not the Red Wings - were the ones who were to manufacture the hats.

The agreement meant that the Red Wings could put the words "Wing Nut" on t-shirts and other merchandise, and even license other companies to do so too. But the Red Wings went one step further. They sold t-shirts bearing an image of the "Wing Nut Hat," and they also licensed Coca-Cola's use of an image of the hat on soft drink bottlecaps.

The Kellmans responded with a patent and trademark infringement suit, to which the Red Wings and Coca-Cola replied with a motion to dismiss. Each side has come away with half - but only half - of what it wanted.

Federal District Judge John O'Meara rejected the Red Wings' argument that their agreement with the Kellmans authorized the team to use images of the hat, as well as the "Wing Nut" trademark. He read the agreement to be a license to use the words, but not a license to use the patent or trademark.

On the merits, the judge refused to dismiss the Kellmans' copyright claim. He rejected the Red Wings' argument that the hat was "merely a 3D depiction of a common hardware device." Instead, he found it to be "artistic expression of the idea of fanatical support for the Detroit Red Wings in the form of a novelty foam hat shaped like a wing nut." He also found that the images on the Red Wings' t-shirts could be found to be "substantially similar (if not identical)" to the Kellmans' copyrighted design. And the judge concluded that reasonable people could find "remarkable similarities" between the Kellmans' design and the image on Coca-Cola's bottle caps.

On the other hand, Judge O'Meara did dismiss the Kellmans' design patent claims. A design patent protects the non-functional aspects of an ornamental design. The fundamental question in the case was "whether a design patent can be infringed when the articles of manufacture are so entirely different (i.e., a novelty hat versus a t-shirt or bottle cap) that no reasonable person would purchase the t-shirt or bottle cap thinking that he or she was purchasing the novelty hat." The judge concluded that the answer is "no" - that is, a design patent is infringed only when the items are so similar that consumers could be confused, something that would not happen in this case.

The Kellmans were represented by Andrew M. Zack of Munro & Zack in Troy. The Red Wings and Coca-Cola were represented by David N. Zacks of Lewis & Munday in Detroit, Michael J. Kline of the

Coca-Cola Company and Bruce W. Baber of King & Spalding in Atlanta, and Gerald E. McGlynn, III, of Bliss McGlynn in Troy.

Kellman v. Coca-Cola Co., 280 F.Supp.2d 670, 2003 U.S.Dist.LEXIS 15447 (E.D.Mich. 2003) [ELR 25:9:14]

Author Mark Helprin stated valid breach of contract claim against Harcourt, based on publisher's rejection of Helprin's manuscript as "unacceptable," federal court rules, but court does dismiss author's fraud claim

Author Mark Helprin and publishing company Harcourt have come a long way since 1989 when they entered publishing agreement with one another that paid Helprin $2 million in advances for five books. The direction they've come is an unpleasant one, though. The two are now locked in a lawsuit in which Helprin alleged that Harcourt not only breached their contract, but did so fraudulently. As a result, the author sought recession of the contract and punitive damages as well.

Harcourt did publish Helprin's first book under their agreement - the novel Memoir from Antproof Case - in 1995. But when Helprin submitted a manuscript in 2002 for what he thought would be their second book together, Harcourt rejected it as "unacceptable." That is what triggered Helprin's lawsuit.

Helprin alleged that Harcourt did not reject his manuscript "in good faith." The publisher responded with a motion to dismiss the case, arguing that the contract itself limited Helprin's remedies to his recapturing the rights to his rejected manuscript. The contract could be read as providing just that. But federal District Judge Victor Marrero read it differently. He determined that the "crucial question" in the case was "what constitutes an 'acceptable' work" - and who gets to decide?

Citing earlier book industry cases that had raised this same issue, Judge Marrero decided that it would be "illogical" for acceptability to be judged by an author. On the other hand, those same precedents had imposed on publishers an obligation to make acceptability decisions in "good faith." And in deciding whether publishers had acted in good faith, those earlier cases had looked at the amount of editorial assistance publishers had offered to authors before deciding their manuscripts were not acceptable.

In this case, Helprin alleged that Harcourt had offered no editorial assistance whatsoever, nor had it given him an opportunity to cure whatever defects

Harcourt had found in his manuscript, before the publisher rejected it. As a result, Judge Marrero ruled that Helprin had stated a valid breach of contract claim against Harcourt, and the judge denied the publisher's motion to dismiss that claim. The judge also held that rescission of the agreement is a possible remedy for Helprin's contract claim, because if his manuscript was rejected in bad faith, that "could . . . undermine the entire purpose of the Agreement."

On the other hand, the judge did grant Harcourt's motion to dismiss Helprin's fraud claim. He did so, because he determined that Harcourt's only alleged fraud was its assertion that it had rejected Helprin's manuscript pursuant to their agreement. The judge also granted Harcourt's motion to strike Helprin's request for punitive damages.

Finally, Judge Marrero refused to dismiss Helprin's separate claim that Harcourt had breached their agreement by failing to spend at least $100,000 - as their agreement required - promoting Memoir from Antproof Case. The judge denied Harcourt's motion to dismiss that claim, solely because he did not have enough facts to decide whether or not that provision of the agreement may have been breached.

Helprin was represented by John P. Madden, Jr., of Moses & Singer in New York City.

Helprin v. Harcourt, Inc., 277 F.Supp.2d 327, 2003 U.S.Dist.LEXIS 13978 (S.D.N.Y. 2003) [ELR 25:9:15]

In music publishers' infringement suit against MP3.com, federal District Court makes pre-trial rulings on significant copyright issues, including scope of public performance and Harry Fox Agency licenses, and expert opinion on value of license MP3.com should have obtained

Valuable things sometimes come in small packages. A recent example is a short opinion by federal District Judge Jed Rakoff, in a copyright infringement lawsuit filed by several music publishers against MP3.com. In fewer than seven pages, Judge Rakoff made rulings on a half-dozen pre-trial motions, some of which raised significant copyright issues of interest to the entire entertainment industry, as well as the parties themselves.

MP3.com ran afoul of copyright law when it copied thousands of CDs to its own servers, so that

Internet-connected computer users could listen online to CDs they already owned. Why, exactly, people would want to do that was a question for MBAs. Whether MP3.com could enable them to do it, without licenses from record companies and music publishers, became a question for JDs and for Judge Rakoff.

Judge Rakoff is the judge who got to hear the copyright infringement lawsuits that inevitably followed, as well as some right of publicity lawsuits filed against MP3.com by recording artists themselves. The judge has issued several published opinions in these cases (ELR 21:12:4, 22:4:4, 22:12:10, 23:17:18, 25:4:20). As a result, many of their legal issues have been decided; and some of the cases have been settled (ELR 22:6:5). Not all the cases have been settled, however, nor have all their issues been decided.

In a case filed against MP3.com by Country Road Music and other publishers, both sides made motions for partial summary judgment; and both sides got some of the rulings, but only some, that they hoped to get.

Judge Rakoff agreed with the publishers that the public performance licenses MP3.com eventually got from ASCAP, BMI and SESAC did not impliedly authorize MP3.com to reproduce the licensed songs on MP3.com's server. The judge emphasized that performance and reproduction rights are entirely separate rights, and that the license MP3.com obtained from BMI explicitly provided that it "not" grant reproduction rights. What's more, MP3.com could have made this argument in earlier cases filed against it by other music publishers, but didn't. So MP3.com was barred from making it in this case "as a matter of collateral estoppel," as well as on the merits, the judge concluded.

On the other hand, Judge Rakoff agreed with

MP3.com that the reproduction license it eventually got from the Harry Fox Agency, when it settled cases filed by many other music publishers, did authorize MP3.com to reproduce songs that are co-owned by publishers who were not a party to that earlier case (or to the settlement). This was so, the judge explained, because "a license from a co-holder of a copyright immunizes the licensee from liability to the other co-holder for copyright infringement."

The judge also agreed with MP3.com that the opinion of the publishers' expert on the value of the license MP3.com should have obtained was not admissible. The publishers' expert, Barry Massarsky, offered his opinion that the value of a license that would have permitted MP3.com to make server copies of the publishers' songs would have been $142,961 "per composition." He reached that conclusion by beginning with the amount paid by Musicmaker.com (a website that was not a party to this case) to Jimmy Page and the Black Crowes for the right to copy and sell downloads of their recordings. Massarsky then made several adjustments to the Musicmaker.com license fee, to account for the fact that its license covered different uses and different songs than the one MP3.com should have obtained.

Massarsky's analysis was quite sophisticated and nuanced. But it wasn't sophisticated or nuanced enough to satisfy Judge Rakoff. The judge noted several significant differences between the Musicmaker.com license and the one MP3.com would have needed to do what it did - differences for which Massarksy had made no adjustments. Massarksy explained that he did not adjust for those differences, because the hypothetical license he was valuing would have been negotiated before MP3.com began operations and would have included its payment of a non-refundable advance.

Judge Rakoff rejected this explanation, however, saying, among other things, that it was an error to begin with a "benchmark license for a use different from that made by the infringer."

Judge Rakoff also agreed with MP3.com that any statutory damages that might be awarded would be calculated on a per-CD basis, rather than on a per-song basis, because the Copyright Act itself provides that for statutory damages purposes, a compilation is a single work even though it is comprised of separate and independent works.

Finally, Judge Rakoff granted MP3.com's motion to dismiss claims alleging infringement of songs that were not registered in the Copyright Office until after the publishers had filed their Second Amended Complaint in this case. Often, a copyright owner is permitted to file an amended complaint alleging a copyright registration that was accomplished after the original complaint was filed. In this case, however, the three-year statute of limitations had passed before a half-dozen songs were registered. And the judge held that it would "not" be "appropriate" to allow the publishers to file an amended complaint after the statute of limitations had elapsed.

Country Road Music and the other publishers were represented by Michael Elkin of Thelen Reid & Priest in New York City. MP3.com was represented by Jeffrey A. Conciatori of Quinn Emanuel Urquhart Oliver & Hedges in New York City.

Country Road Music, Inc. v. MP3.com, Inc., 279 F.Supp.2d 325, 2003 U.S.Dist.LEXIS 15005 (S.D.N.Y. 2003) [ELR 25:9:16]

Demand letters sent by DirecTV threatening legal action against suspected signal pirates were protected by Georgia anti-SLAPP statute, federal court decides in opinion dismissing recipients' lawsuit against company and its law firm

Satellite TV signal piracy is a significant problem for companies like DirecTV. And like others whose goods and services are pirated, DirecTV did something about it. It had its law firm - Stump Storey & Callahan, in Orlando - send letters to thousands of people who purchased unscrambling devices.

DirecTV had obtained their names and addresses from device sellers' customer lists that were seized by U.S. Marshals pursuant to writs issued by a United States District Court. Stump Storey & Callahan's letters explained that it was illegal to unscramble DirecTV signals without authorization; and they informed recipients that DirecTV would sue them unless they settled before complaints were filed.

Apparently operating on the theory that the best defense is an aggressive offense, six of those who received the letters filed a lawsuit of their own against DirecTV and its law firm. The lawsuit alleged that the letters amounted to extortion and violated the Georgia Fair Business Practices Act and the Georgia RICO Act.

These were novel theories, and they didn't get far. DirecTV and its law firm responded with a motion to dismiss the case entirely. And in a short and to-the-point decision, federal District Judge Marvin Shoob has granted their motion.

DirecTV and its law firm argued that their demand letters were protected from potential liability by Georgia's anti-SLAPP statute. "SLAPP" is an acronym for "strategic lawsuit against public participation." The statute protects against lawsuits that interfere with First Amendment rights.

"The filing of a lawsuit is a well-recognized aspect of the First Amendment right to petition the government for a redress of grievances," Judge Shoob explained. And pre-litigation demand letters are protected by the statute too, he held.

The six who filed the lawsuit complained that DirecTV "did not make an adequate investigation into the facts before sending the demand letters," and they complained that "the demand letters contain false, misleading, or deceptive statements." Judge Shoob was unmoved. "If so," he responded, "their remedy would be to obtain dismissal of the lawsuit on the merits and then pursue sanctions . . . or an action for malicious prosecution."

The judge also rejected the notion that the letters constituted "extortion." He was "not aware," he said, "of any authority holding that a demand to settle a claim before pursuing litigation amounts to extortion."

The plaintiffs in the case were represented by Paula Jeanette McGill and Lisa Dionne Wright in Atlanta. DirecTV and its law firm were represented by Dennis Gary Lovell, Jr., of Carlock Copeland Semler & Stair in Atlanta and by Michael E. Williams and Dale H. Oliver of Quinn Emanuel Urquhart Oliver & Hedges in Los Angeles.

Buckley v. DirecTV, Inc., 276 F.Supp.2d 1271, 2003 U.S.Dist.LEXIS 18928 (N.D.Ga. 2003) [ELR 25:9:17]

Record companies are not entitled to attorneys' fees after Chambers Brothers and other groups dismissed suit claiming ownership of copyrights to digital versions of their recordings, because dismissal was not a judgment or court-ordered consent decree

The Chambers Brothers, The Coasters, The Drifters and The Main Ingredient were - for a while - locked in litigation over the question of whether they own the copyrights to digital versions of their recordings or their record companies do. The answer to that question mattered, because the record companies had settled a copyright infringement lawsuit of their own against MP3.com (ELR 22:6:5), and the groups claimed that they were entitled to the settlement proceeds because they owned the copyrights that MP3.com had infringed.

As things turned out, a New York state court held that their record companies own those copyrights, because of language in the groups' recording agreements (ELR 25:8:7).

However, before the case was decided as a matter of contract interpretation, the groups had sued their record companies in federal court, seeking resolution of their claims as a matter of federal copyright law. Early on, they lost in federal court too (ELR 22:10:10). But that setback was overturned by a federal Court of Appeals, for procedural reasons (ELR 24:2:11). After their case got back to federal District Court, the groups dismissed it, by stipulation, so they could refile it in state court, as they later did.

These procedural details matter, because once the federal copyright claims were dismissed, the record companies made a motion for attorneys' fees, pursuant to the provision of the Copyright Act that authorizes courts to award fees to the "prevailing party." The groups, however, claimed that they were really the prevailing party with respect to their copyright claim, even though they dismissed it, because their lawsuit had been a "catalyst" that caused the record companies to pay them part of the amount the companies had recovered in their own infringement suit against MP3.com. As a result, the groups argued that the record companies' motion for fees was frivolous, thus entitling the groups to monetary sanctions, for which they filed a motion of their own.

Federal District Judge Jed Rakoff has denied both sides' motions.

He denied the record companies' motion for attorneys' fees, because in 2001, the United States Supreme Court held, in a non-copyright case called Buckhannon v. West Virginia, that for the purpose of all federal attorneys' fees statutes, a party is the "prevailing party" only if it gets a judgment on the merits or a court-ordered consent decree. The groups' dismissal of its case against the record companies was neither a judgment nor a consent decree, and thus the record companies were not the "prevailing party," as defined by the Supreme Court in Buckhannon.

On the other hand, Judge Rakoff held that the record companies' request for fees was "far from . . . vexatious[] or in bad faith." In Buckhannon, the Supreme Court had specifically rejected the "catalyst theory" upon which the groups had based their argument. Indeed, said the judge, "were it not for Buckhannon," the companies' motion for fees "might well have prevailed." So for that reason, Judge Rakoff also denied the groups' request for sanctions.

The Chambers Brothers and other groups were represented by Fred Taylor Isquith of Wolf Haldenstein Adler Freeman & Herz, and by Mark C. Rifkin of

Feldman & Rifkin, in New York City. The record companies were represented by Robert Juman of Quinn Emanuel Urquhart Oliver & Hedges, Katherine B. Forrest of Cravath Swaine & Moore, Charles B. Ortner of Proskauer Rose, and Suzan Arden or Pryor Cashman Sherman & Flynn, in New York City.

Chambers v. Time Warner, Inc., 279 F.Supp.2d 362, 2003 U.S.Dist.LEXIS 15444 (S.D.N.Y. 2003) [ELR 25:9:17]

World Wrestling Entertainment loses lawsuit complaining of Big Dog Sportswear's parodies of "The Rock," "Stone Cold Steve Austin" and the "Undertaker"

Big Dog Sportswear designs, makes and sells t-shirts and other merchandise that parody the entertainment industry's most successful properties. Its current line takes on "Lord of the Rings," "The Matrix," "Harry Potter," "South Park," "SpongeBob SquarePants," "Sex and the City" and other huge hits.

Among these high achievers, Big Dog included three properties owned by World Wrestling Entertainment: "The Rock," "Stone Cold Steve Austin" and the "Undertaker" - three characters that appear on WWE television programs such as "Raw" and "War Zone." Apparently, however, WWE didn't feel honored by Big Dog's decision to give WWE characters the same treatment it gave to "Harry Potter" and the others. Instead, WWE sued Big Dog in federal court, alleging the infringement of WWE's copyrights, trademarks and rights of publicity.

This much can be said about WWE's decision to sue: the company got its money's worth, measured by the amount of work done on the case by federal District

Judge David Cercone. The judge wrote a 30-page opinion in which he painstakingly analyzed, point by point, WWE's claims and Big Dog's defenses. The ultimate outcome, however, isn't one the WWE would have paid for, if had known the result in advance. Judge Cercone granted Big Dog's motion for summary judgment, and entered judgment against WWE.

WWE took issue with Big Dog t-shirts and other merchandise bearing eight different designs. One, for example, featured a dog character named "Bone Cold Steve Pawstin" and the phrase "Open Up a Can of Woof Ass!" (On television, WWE's Steve Austin frequently uses the phrase "Open Up a Can of Whoop Ass," and WWE claims a common law trademark in that phrase.) The design also included Big Dog's own name and the words "This is a Parody."

In response to WWE's copyright infringement claims, Judge Cercone did a four-part fair use analysis, and concluded that Big Dog's designs were "parodies" and are entitled to the fair use defense.

In response to WWE's trademark infringement claims, the judge did a 10-part consumer confusion analysis, and concluded that Big Dog's designs - including the "This is a Parody" disclaimer - "clearly indicate . . . the merchandise is a broad spoof . . . and there is no likelihood of confusion."

Judge Cercone rejected WWE's tarnishment claim because, he said, "it is difficult . . . to find that WWE's marks have been diluted in any way," especially because "artistic parody . . . carries the free speech protections of the First Amendment."

WWE's right of publicity claims fared no better, because "Big Dog has added significant artistic and imaginative expression to its graphics that outweighs the state law interest in protecting WWE's rights of publicity."

In the end, Judge Cercone concluded that "Big Dog's parodies convey a simple message that business and product images need not always be taken too seriously, and we are reminded that we are free to laugh at the images and associations linked with these icons." What's more, the judge said, "Denying Big Dog the opportunity to poke fun at WWE characters and symbols that have become such a major component in today's entertainment media, would constitute a serious curtailment of a protected form of expression."

WWE was represented by Jerry S. McDevitt of Kirkpatrick & Lockhart in Pittsburgh. Big Dog Sportswear was represented by Mark R. Hamilton of Zimmer Kunz in Pittsburgh.

World Wrestling Federation Entertainment v. Big Dog Holdings, Inc., 280 F.Supp.2d 413, 2003 U.S.Dist.LEXIS 21209 (W.D.Pa. 2003) [ELR 25:9:18]

Federal appellate court upholds dismissal of Lanham Act claims asserted by owners of Times Square buildings and billboards depicted in "Spider-Man" movie in digitally altered form; but appellate court rules that companies' state law claims, including claim for trespass by laser beam, should not have been dismissed "with prejudice"

The owners of buildings and billboards in Times Square made some novel claims against Sony Pictures, as a result of the way their buildings and billboards were shown in the movie "Spider-Man." All of those claims - some under federal law and others under New York state law - were summarily dismissed by federal District Judge Richard Owen (ELR 24:7:18). And the dismissal of the federal claims has been affirmed on appeal.

However, in a Summary Order marked "May

Not Be Cited as Precedential Authority," the Court of Appeals has held that Judge Owen should not have dismissed the owners' state law claims "with prejudice."

At the heart of the case is the owners' complaint that their buildings and billboards were not shown in the movie as they really appeared at the time the movie was filmed. Instead, in producing "Spider-Man," the buildings and billboards were digitally altered. A complex Samsung billboard, for example, was digitally replaced with a simpler one for USA Today.

Why, exactly, this was done, appears to be in dispute. Sony said that the buildings and billboards in Times Square were so "advertising-encrusted" that they were not as "artistically satisfying [in] appearance" as they might have been. On the other hand, the owners of the digitally-altered buildings and billboards alleged that Sony replaced actual advertising and signage in order to "generate revenue" from companies whose ads and signs were digitally inserted in the movie.

Sony scanned the buildings and billboards in question with a laser light beam, in order to create digital images of them as the first step in the creation of the offending scene. This allegedly amounted to "trespass" under New York state law. And the altered versions of the buildings and billboards allegedly violated their owners' trademark and trade dress rights, under New York state law.

The merits of the trespass allegation presented "an unsettled question of state law," the Court of Appeals said. And though Sony would have a First Amendment defense to the trademark and trade dress claims if the digital alterations have "any artistic relevance" to the movie, Sony had not yet shown that was so, when the case was dismissed. As a result, the appellate court vacated the dismissal of the state law claims and remanded those with instructions that they be dismissed "without prejudice," so the owners may file them in state court, if they choose to do so.

The building and billboard owners were represented by Thomas H. Golden of Wilkie Farr & Gallagher in New York City. Sony Pictures was represented by Bruce P. Keller of Debevoise & Plimpton in New York City.

Sherwood 48 Associates v. Sony Corp., 76 Fed.Appx. 389, 2003 U.S.App.LEXIS 20106 (2nd Cir. 2003) [ELR 25:9:19]

Penthouse wins dismissal of some claims by tennis player Anna Kournikova resulting from publication of partially nude photos of another woman who magazine falsely identified as Kournikova

In its June 2002 issue, Penthouse published photos of a woman sunbathing topless. A headline on the magazine's cover said the woman was Anna Kournikova, but it wasn't. The woman actually pictured in the magazine was Judith Soltesz-Benetton. This mistake triggered four separate lawsuits (at least): one by Soltesz-Benetton in federal court in New York City; two more by disappointed Penthouse readers in state courts in Chicago and Miami; and another by Kournikova herself, in federal court in Los Angeles.

Soltesz-Benetton settled her case, on terms that included a requirement that Penthouse destroy 18,000 copies of the June 2002 issue that were still in its possession. But it appears that Kournikova's lawsuit is going to be hard-fought. Penthouse won the first round, when Judge Gary Fees dismissed some of the tennis player's claims; but others still remain. (The status of the two state court lawsuits in Chicago and Miami couldn't be determined by the Entertainment Law Reporter, as this issue went to press.)

In addition to at least four other claims, Kournikova alleged, in her Fifth Cause of Action, claims against Penthouse for "false advertising" and "false endorsement," both under section 43(a) of the Lanham Act. Judge Feess' analysis of these claims was thorough and lengthy. In the end, however, he concluded that both should be dismissed.

He ruled in favor of Penthouse on the false advertising claim, because there was no evidence that Kournikova suffered a "competitive injury" as a result of being falsely identified as the topless sunbather.

Judge Fees ruled in favor of the magazine on the false endorsement claim, because Kournikova had not shown that a reasonable consumer might conclude that she had voluntarily associated herself with Penthouse.

Competitive injury and consumer mistake about voluntary association are essential elements of false advertising and false endorsement claims. Since there was evidence of neither, the judge granted Penthouse's motion for summary judgment on Kournikova's Fifth Cause of Action. Her other causes of action still remain to be litigated.

Kournikova was represented by William E. Wegner of Gibson Dunn & Crutcher in Los Angeles. Penthouse was represented by Stephen G. Contopulos of Sidley Austin Brown & Wood in Los Angeles.

Kournikova v. General Media Communications, 278 F.Supp.2d 1111, 2003 U.S.Dist.LEXIS 13159 (C.D.Cal. 2003) [ELR 25:9:19]

Federal appeals court affirms dismissal of Dow Jones' lawsuit seeking order that would have barred Harrods from pursuing defamation action in Great Britain, complaining of humorous Wall Street Journal article published in response to Harrods' April Fool's day press release

In a short "Per Curiam" decision, a federal Court of Appeals has affirmed the dismissal of a case that began with a joke. The joke was an April Fool's Day press release issued by Harrods Department Store in London reporting that the company's chairman, Mohamed Al Fayed, would be announcing plans the next day "to 'Float' Harrods." The Wall Street Journal misunderstood. It thought the press release was serious, and it published a news article reporting on the contents of the release.

When the Journal realized its mistake, it published a correction, and then an article that contained a bit of its own humor. The article was headlined "The Enron of Britain?" and it cautioned readers that "If Harrods, the British luxury retailer, ever goes public, investors would be wise to question its every disclosure." The article then reported on Harrods' April Fool's day joke and questioned whether Harrods could "get in trouble for messing with the facts" by issuing a bogus press release.

According to Dow Jones, the article was intended to reflect "the Journal's own brand of wry, light-hearted humor." But Harrods was not amused, and filed a defamation lawsuit in London. London is more than Harrods' home. It's located in a country whose defamation laws are much more favorable to plaintiffs (like Harrods), and much more threatening to defendants (like the Journal), than such laws are in the United States.

Dow Jones & Company - the Journal's publisher - countered with a lawsuit of its own, in federal court in New York City. Dow Jones' suit sought declaratory and injunctive relief that, if granted, would have barred Harrods from proceeding with its lawsuit in London. Dow Jones' lawsuit was brought under the federal Declaratory Judgment Act - a statute that would have authorized District Judge Victor Marrero to grant the relief Dow Jones sought.

Whether that relief would have done Dow Jones any good in a court in London is another question altogether. And as things turned out, it's a question that won't be answered. Judge Marrero dismissed Dow Jones' case for a number of reasons. Among other grounds, Judge Marrero noted that Act gave him the discretion to decline to hear the case, even if he had jurisdiction to hear it. And he exercised his discretion not to. (ELR 24:12:12)

Dow Jones appealed, but without success. The Court of Appeals observed that "Dow Jones's complaints about the district court's decision amount to little more than the argument that the district court should have balanced the various factors [for exercising discretion] differently." The appellate court concluded that Judge Marrero had not based his decision on an "erroneous view of the law," nor on a "clear error of fact." For these reasons, it concluded that Judge Marrero had not abused his discretion in dismissing the case, and it affirmed the dismissal for that reason.

Dow Jones was represented by Jack M. Weiss of Gibson Dunn & Crutcher in New York City. Harrods was represented by Bruce R. Ewing of Dorsey & Whitney in New York City.

Dow Jones & Company, Inc. v. Harrods Limited, 346 F.3d 357, 2003 U.S.App.LEXIS 20743 (2nd Cir. 2003) [ELR 25:9:20]

Commercial TV networks win copyright infringement suit against EchoStar, because it sold distant network programming to ineligible subscribers

The commercial television networks and their affiliates have won a copyright infringement suit against EchoStar, the satellite TV company that operates the DISH Network. EchoStar provides two kinds of commercial network programming to DISH subscribers: the signals of local network stations to subscribers who live within the stations' local markets; and the signals of distant network stations to subscribers who live outside the stations' markets. The only signals at issue in this case were those broadcast by distant network stations. Local network signals, and the signals of cable/satellite networks like CNN and HBO were not.

Subscribers are willing to pay for distant network signals for two reasons: (1) Some of those signals carry the home games of subscribers' local sports teams. This would happen, for example, when a team was playing at home, and the game was being televised by a network affiliate in the visiting team's city, but not being televised by the home team's network affiliate. (2) Some of distant network signals carry programs broadcast in other cities earlier or later than they are broadcast by subscribers' local network affiliates; and subscribers prefer to watch at that different time.

The Copyright Act gives satellite TV companies, like EchoStar, a statutory license to retransmit local network signals, and distant network signals to some - but only some - subscribers. The Copyright Act does not permit satellite TV companies to retransmit distant network signals to all of their subscribers, because Congress wanted to preserve the long-existing network/affiliate TV program distribution system - a system that depends on network affiliates being the exclusive source of network programming for viewers in their local markets.

On the other hand, for technical reasons, some people simply cannot receive good quality signals from their local network affiliates. Congress wanted to do something for those folks too. So, the Copyright Act does permit satellite TV companies to sell distant network signals to viewers who cannot receive an adequate quality signal from their local network affiliate. Satellite TV companies have the burden of proving that those to whom they sell distant signals are entitled to receive them. But the definition of what constitutes an inadequate quality signal is very technical.

EchoStar insisted that it only sold distant signals to those who were entitled to receive them. The networks said that EchoStar also was selling distant network signals to subscribers who were not eligible.

The case has been hard-fought. In its pre-trial stages, EchoStar challenged, without success, the constitutionality of the statutory provision that prohibits it from selling distant network signals; and it challenged, successfully, a preliminary injunction that had been issued against it (ELR 23:10:20, 24:3:18).

When the case finally went to trial, EchoStar lost, almost entirely. Federal District Judge William Dimitrouleas found that EchoStar had failed to prove that distant network signals had been sold only to eligible subscribers. Indeed, the judge found that EchoStar had sold distant network signals to hundreds of thousands of subscribers who were not eligible. As a result, Judge Dimitrouleas has enjoined EchoStar from continuing to do so.

EchoStar did salvage one scrap of the case though. If the judge had found that EchoStar had engaged in a "pattern and practice of willful or repeated" sales of distant network signals to ineligible subscribers, he would have been authorized by the Copyright Act to bar EchoStar from selling distant network signals to anyone, eligible or not. Judge Dimitrouleas found that EchoStar had not engaged in such a "pattern and practice," so the injunction he issued only bars the company from selling to those who are not eligible.

The networks and their affiliates were represented by David Michael Rogero in Coral Gables, and several other firms. EchoStar was represented Kenneth M. Myers of Squire Sanders & Dempsey in Miami, and others.

CBS Broadcasting, Inc. v. EchoStar Communications Corp., 276 F.Supp.2d 1237, 2003 U.S.Dist.LEXIS 9707 (S.D.Fla. 2003) [ELR 25:9:21]

Host of radio sports talk show did not defame host of competing radio show by suggesting he was about to have "oral sex" with male guest, Alabama Supreme Court rules

The Alabama Supreme Court has rescued Paul Finebaum, the host of a radio sports talk show, from the possibility he would have to defend himself at trial against allegations that he defamed a competing sports talk show host. The lawsuit was filed by Matt Coulter in response to a remark made by Finebaum, on the air, while talking with a caller about how well college football recruiters are treated by sportscasters and coaches.

Apparently to illustrate the point that recruiters are treated too well, Finebaum said he had listened to Coulter's program that morning, and that Coulter and a male guest had "really slobbered over each other," so that Finebaum "really thought they were going to start performing oral sex on one another."

Finebaum responded to Coulter's lawsuit with a motion to dismiss. But the trial judge denied his motion, so for a while, it looked as though Coulter's case would go to trial. Then, however, the Alabama Supreme Court agreed to hear Finebaum's pre-trial appeal. And it agreed with Finebaum that Coulter's case should have been dismissed.

In an opinion by Justice Douglas Johnstone, the Supreme Court held that in the context of Finebaum's sports talk program, his "oral sex" comment was not a statement that could "'reasonably [be] interpreted as stating actual facts' about [Coulter]." It was only "rhetorical hyperbole," which is "protected by the First Amendment." Moreover, Coulter did not present evidence "that Finebaum intended to imply that Coulter is a homosexual." Nor did Coulter present evidence that

"Finebaum made the statement with actual malice."

For these reasons, the Supreme Court remanded the case to the trial court, and instructed it to enter a judgment in favor of Finebaum.

Coulter was represented by Robert Hayes of Hayes & Swinford in Birmingham. Finebaum was represented by Warren B. Lightfoot of Lightfoot Franklin & White in Birmingham.

Finebaum v. Coulter, 854 So.2d 1120, 2003 Ala.LEXIS 35 (Ala. 2003) [ELR 25:9:21]

University of Texas denied due process to world-class swimmer from Singapore by declaring her ineligible for competition, Texas appellate court rules in decision upholding injunction that allowed her to participate in NCAA championships

Joscelin Yeo was able to participate in the 2002 NCAA Women's Swimming and Diving Championships, but only because a Texas state court issued an injunction that barred the University of Texas from declaring Yeo ineligible. That injunction has been upheld by the Texas Court of Appeals. What's more, the appellate court has held that some intercollegiate athletes have a constitutionally protected interest "in their athletic reputation" - interests that their colleges "have an obligation to protect . . . in making eligibility determinations."

Yeo is from Singapore and competed as a

member of its national team in two Olympic Games, before she enrolled in college in the United States and began participating in intercollegiate athletics here. As a result of events that began with Yeo's transfer from the University of California to the University of Texas, Yeo was declared ineligible to participate in a number of UT swim meets, including the 2002 NCAA championships.

The events that led to Yeo's loss of eligibility were unusual - so much so that Justice Mack Kidd said that characterizing them as "unique" would be "an understatement." Indeed, Justice Kidd found that "the one clear and undisputed fact revealed by this record is that Joscelin Yeo is entirely blameless for any of the eligibility problems that subjected her to eligibility sanctions."

It also was beyond dispute, however, that the Texas Supreme Court had previously held that students do not have a constitutionally protected interest in participating in extracurricular activities in general, and that the 5th Circuit Court of Appeals had held, several times, that students have no protected interest in athletic participation in particular (ELR 7:6:19, 7:7:15).

Justice Kidd distinguished those cases, however. He emphasized that Yeo had not asserted a right to "compete in intercollegiate athletics." Rather, she had come to UT with an "already established athletic reputation" that would have been damaged if she had been declared ineligible to participate. All she asserted was a right to protect that reputation - something she was entitled to do, Justice Kidd decided.

Justice Kidd also emphasized that "Not every student-athlete has a protected interest in their athletic reputation." Those that do, however, "have a right to be informed of any potential eligibility problems and to be afforded an opportunity to participate in the determination of their individual eligibility status." UT ran afoul of this right by declaring Yeo ineligible without informing her of the problem, or giving her an opportunity to respond, until after it declared her ineligible.

The appellate court also affirmed the lower court's refusal to allow the NCAA to intervene in the case.

Yeo was represented by Diane M. Henson in Austin. The University of Texas was represented by John F. Morehead, Assistant Attorney General, in Austin. The NCAA was represented by Linda J. Salfrank of Spencer Fane Britt & Browne in Kansas City.

National Collegiate Athletic Association v. Yeo, 114 S.W.3d 584, 2003 Tex.App.LEXIS 5931 (Tex.App. 2003) [ELR 25:9:22]

Previously Reported:

Representation in Jennifer Lopez/Glow Industries Case. In the Jennifer Lopez/Glow Industries trademark case (ELR 25:8:9), the lead attorney for Jennifer Lopez was Robert L. Sherman of Paul Hasting Janofsky & Walker in New York City. [ELR 25:9:22]

DEPARTMENTS

Entertainment Lawyer News:

Manatt Phelps & Phillips and Parcher Hayes & Snyder announce merger. Manatt, Phelps & Phillips, a national law and consulting firm, has announced that the lawyers of Parcher Hayes & Snyder have joined Manatt's New York office. The Parcher firm is one of the nation's premier litigation boutiques and represents some of America's best known companies and most prominent individuals, primarily in the entertainment and media industries. Twelve Parcher attorneys will join Manatt including name partners Peter Parcher, Steven Hayes and Orin Snyder, partners Cynthia Arato and Gregory Clarick, counsels Andrew DeVore, Robert Jacobs and Alon Markowitz, and associates Marc Isserles, Avi Weitzman, Monica Youn and Elise Zealand. The combination will grow Manatt's New York office to 65 attorneys. The addition of the Parcher firm comes on the heels of Manatt's recent acquisition in New York of the nation's top advertising, marketing and media law group, led by industry leaders Linda A. Goldstein and Jeffrey S. Edelstein (ELR 25:7:27). The Parcher firm's entertainment and media clients include Bertelsmann, Time Warner Inc., Sony Music, HBO, the William

Morris Agency, The Nederlander Organization, Warner Music Group, Turner Broadcasting System, Inc., GreeneStreet Films LLC, Bruce Springsteen, Paul Simon, Bob Dylan, Ozzy and Sharon Osbourne, Mariah Carey and Julie Andrews. Manatt's entertainment and media clients include Yahoo!, ESPN, Reader's Digest, Anschutz Entertainment Group, Lions Gate Entertainment, Beacon Pictures, Tapestry Films, Knight Ridder, Michael Douglas, Robin Williams, Mel Brooks, Barbra Streisand, Cher, Dr. Phil, Al Franken, Neve Campbell, The Eagles, Carole King, Diane Warren, Tyrese, R. Kelly, Josh Groban, Lisa Marie Presley and Neil Young. The two firms share client relationships with Time Warner, Sony Pictures Entertainment, DreamWorks, The Rolling Stones and the Osbournes. Peter Parcher is a Fellow of the American College of Trial Lawyers and of the International Association of Trial Lawyers; he is a graduate of Hofstra University (1958) and of the St. Johns University School of Law (1961). Steven Hayes is a graduate of the University of Virginia (1970) and of the Columbia University School of Law (1973); he has taught entertainment law and litigation, and served as general counsel of the New York City Office of Management and Budget in the late 70's. Orin Snyder is a graduate of Wesleyan University (1983 - high honors; Phi Beta Kappa) and of the University of Pennsylvania Law School (1986 - cum laude); prior to joining the Parcher firm, he served as an Assistant United States Attorney in the United State's Attorney Office for the Southern District of New York, including as Chief of the Narcotics Unit; he is on the Editorial Board of Entertainment Law & Finance and lectures in the areas of entertainment litigation, trial skills and criminal law. Cynthia Arato is a graduate of the University of Pennsylvania (1986 - cum laude) and of the Columbia University School of Law (1991 - Harlan Fisk Stone Scholar; Managing Editor, Columbia Journal of Transnational Law); prior to joining the Parcher firm, she was an associate at Latham & Watkins and Blanc, Williams, Johnston & Kronstadt. Gregory Clarick is a graduate of Princeton University (1986 - cum laude) and of the New York University School of Law (1990 - Executive Editor, New York University Law Review); prior to joining the Parcher firm, he served as a Law Clerk to the Honorable Robert R. Merhige, Jr., U.S. District Court, Eastern District of Virginia, and as an associate at Paul, Weiss, Rifkind, Wharton & Garrison. Andrew DeVore is a graduate of Middlebury College (1988 - cum laude) and of the New York University School of Law (1996 - cum laude; Articles Editor, New York University Law Review); prior to joining the Parcher firm, he served as an Assistant United States Attorney in the Southern

District of New York, as a Law Clerk to the Honorable Thomas C. Platt, Jr., U.S. District Court, Eastern District of New York, and as an associate at Debevoise & Plimpton. Robert Jacobs is a graduate of UCLA (1988) and of the Southwestern University School of Law (1992 - cum laude; Editor in Chief; Southwestern University Law Review; Bradley Scholarship; Reiss Scholarship; University Scholarship; First Place, ASCAP Nathan Burkan Writing Competition); prior to joining the Parcher firm, Robert served as a Law Clerk to Chief Judge Gregory W. Carman, U.S. Court of International Trade, and as an associate at Weil, Gotshal & Manges. Alon Markowitz is a graduate of Brandeis University (1983 - cum laude) and of the Harvard Law School (1990 - cum laude). Marc Isserles is a graduate of Sarah Lawrence College (1993) and of the Harvard Law School (1998 - magna cum laude; Notes Editor, Harvard Law Review; Joshua

Montgomery Sears Prize); prior to joining the Parcher firm, he served as a Law Clerk to the Honorable Laurence H. Silverman, U.S. Court of Appeals for the District of Columbia Circuit, for the Honorable Stephen G. Breyer, Supreme Court of the United States, and as an associate at O'Melveny & Myers. Avi Weitzman is a graduate of the University of Kentucky (1996 - summa cum laude) and of the Harvard Law School (1999 - cum laude; Senior Editor, Harvard Civil Rights, Civil Liberties Law Review; Fulbright Fellowship); prior to joining the Parcher firm, he served as a Law Clerk to Justice Dalia Dorner, Supreme Court of Israel, as a law clerk to the Honorable Shira A. Scheindlin, U.S. District Court, Southern District of New York, and as an associate at Debevoise & Plimpton. Monica Youn is a graduate of Princeton University (1993 - with honors), of Oxford University (1995) and of the Yale University School of Law (1998 - Notes Editor, Yale

Law Journal; Articles Editor, Yale Law and Policy Review); prior to joining the Parcher firm, and following her studies as a Rhodes Scholar, she served as a Law Clerk to the Honorable John T. Noonan, Jr., U.S. Court of Appeals, Ninth Circuit, and as an associate at Patterson, Belknap, Webb & Tyler. Elise Zealand is a graduate of Loyola College of Maryland (1991 - magna cum laude), and of the Columbia University School of Law (1993 - Kent Scholar; Harlan Fisk Stone Scholar; Research Editor, Columbia Journal of Law and Social Problems); prior to joining the Parcher firm, Elise worked as a Law Clerk to the Honorable William C. Conner, Senior District Judge, U.S. District Court, Southern District of New York, and as an associate at Cahill Gordon & Reindell and at Sullivan & Cromwell.

David M. Given becomes name partner in Phillips Erlewine & Given. David M. Given has become a name partner in the San Francisco law firm Phillips Erlewine & Given. Given specializes in entertainment and intellectual property law. His clients include individuals and businesses in music and merchandising, television, internet and other broadcast media, real estate and software development, among others. Given is a past Chair of the American Bar Association's Forum on the Entertainment & Sports Industries. He has been a Lecturer at the University of California, Berkeley, Boalt Hall School of Law, where he taught Entertainment Law. He is a graduate of Cornell University and the University of Virginia School of Law.

Elissa D. Hecker named chair of NYSBA Entertainment, Arts and Sports Law Section. Elissa D. Hecker, associate counsel of The Harry Fox Agency, has been named chair of the New York State Bar Association's 1,700-member Entertainment, Arts and Sports Law Section. The Fox Agency is the licensing affiliate of the National Music Publishers' Association, for which Hecker specializes in legal, educational, and policy matters concerning music rights and publishing, and serves as the director of the Agency's Anti-Piracy Program. She received her undergraduate degree from Union College in 1995 and her law degree from Brooklyn Law School in 1998. Hecker also serves as editor-in-chief of the section's Journal, is a founding member of its Pro Bono Committee, and co-founded the NYSBA Pro Bono Internet Clinic. Active in many community and professional organizations, Hecker is a member of the Copyright Society of the U.S.A. and

chairs its FACE Initiative Website for Children. She is an organizer and executive producer of Musicians On Call "Project Playback," a singer/songwriter program at Memorial-Sloane Kettering Cancer Center. She is a frequent lecturer on music and entertainment topics at universities and law schools.
[ELR 25:9:23]

In the Law Reviews:

Entertainment and Sports Lawyer, a publication of the American Bar Association's Forum on the Entertainment and Sports Industries, www.abanet.org/forums/entsports/ esl.html, 800-285-2221, has published volume 21, Number 3 with the following articles:

Screen to Stage: Hollywood Movies Sing on Broadway by Elliot H. Brown, 21 Entertainment and Sports Lawyer 1 (2003) (or website, see above)

Options for Foreign Trademark Protection: Comparison of the Madrid Protocol and the Community Trademark System by Johanna F. Sistek, 21 Entertainment and Sports Lawyer 1 (2003) (for website, see above)

Music Licensing-from the Basics to the Outer Limits by Cydney A. Tune, 21 Entertainment and Sports Lawyer 1 (2003) (for website, see above)

Putting the Color into Black and White: Artists, Dealers and Agreements by Robyn Freedman, 21 Entertainment and Sports Lawyer 3 (2003) (for website, see above)

Internet Ticket Scalping: If You Can't Beat 'em, Join 'em by Robert E. Freeman and Daniel Gati, 21 Entertainment and Sports Lawyer 6 (2003) (for website, see above)

Determining the Strength of Literary Characters for License Negotiations by William Dolan, 21 Entertainment and Sports Lawyer 10 (2003) (for website, see above)

Athlete Signature-Lines: Maximizing Endorsement Value for the Professional Athlete by Serena Morones, 21 Entertainment and Sports Lawyer 12 (2003) (for website, see above)

New Web-based Alternative Dispute Resolution Systems by Bob Pimm and Teri Kirk, 21 Entertainment and Sports Lawyer 29 (2003) (for website, see above)

The Columbia Journal of Law & the Arts has published Volume 27, Number 1 with the following articles:

All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art by F. Jay Dougherty, 27 The Columbia Journal of Law & the Arts 1 (2003)

How Many Guests May Attend a Wedding Reception Before ASCAP Shows Up? Or, What Are the Limits of the Definition of Perform "Publicly" Under 17 U.S.C. § 101? by Daniel Cantor, 27 The Columbia Journal of Law & the Arts 79 (2003)

Proving Willfulness in Trademark Counterfeiting Cases by Tal S. Benschar, David A. Kalow and Milton

Springut, 27 The Columbia Journal of Law & the Arts 121 (2003)

Say What?: Blogging and Employment Law in Conflict by Paul S. Gutman, 27 The Columbia Journal of Law & the Arts 145 (2003)

The Journal of the Copyright Society of the USA, www.csusa.org, has published Volume 51, Number 1 with the following articles:

Peter Pan's Rights: "To Die Will Be an Awfully Big Adventure" by Catherine Seville, 51 Journal of the Copyright Society of the USA 1 (2003) (for website, see above)

Entropy and Atrophy: The Still Uncertain Status of the Fair Use of Unpublished Works and the Implications for Scholarly Criticism by Timothy Hill, 51 Journal of the Copyright Society of the USA 79 (2003) (for website, see above)

Judge Leval's Transformation Standard: Can It Really Distinguish Foul from Fair? by Mitch Tuchman, 51 Journal of the Copyright Society of the USA 101 (2003) (for website, see above)

"Recent Developments in Copyright": Selected Annotated Cases by David Goldberg, Robert W. Clarida, and Thomas Kjellberg, 51 Journal of the Copyright Society of the USA 139 (2003) (for website, see above)

A Geriatric View of Motion Picture Piracy by Bernard R. Sorkin, 51 Journal of the Copyright Society of the USA 237 (2003) (for website, see above)

Book Review: The Osterbergs' Substantial Similarity in Copyright Law by Alan J. Hartnick, 51 Journal of the Copyright Society of the USA 243 (2003) (for website, see above)

The Sports Lawyers Journal, published by the Sports Lawyers Association and edited by the students of Tulane University School of Law, has published Volume 10, Number 1 with the following articles:

The Impact of Major League Baseball's Local Television Contracts by Jeff Friedman, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig's Contraction Plan Was Never a Sure Deal by Marc Edelman, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

Fraser v. Major League Soccer: A New Window of Opportunity for the Single-Entity Defense in Professional Sports by Cliff Mendelsohn, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

The Antitrust Issues of NCAA College Football Within the Bowl Championship Series by Mark Hales, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

Equal Rights Level Playing Field: What Title IX Money Cannot Buy by Richard H. Yetter III, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

Preserving and Protecting Title IX: An Analysis and History of Advocacy and Backlash by Nicole Stern, 10

The Sports Lawyers Journal (2003) (for publisher, see above)

When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems by Melanie Aubut, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

Are Athletes Above the Law? From a Two-Minute Minor to a Twenty-Year Sentence: Regina v. Marty McSorley by Gregory Schiller, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

Dying to Play: School Liability and Immunity for Injuries That Occur as a Result of School-Sponsored Athletic Events by Andrew F. Beach, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

Football May Be Ill, But Don't Blame Bosman by William Duffy, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

The Federal Government and Regulation of Internet Sports Gambling by Todd A. Lubben, 10 The Sports Lawyers Journal (2003) (for publisher, see above)

The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms by Christopher Jensen, November 2003 Stanford Law Review 531 (2003)

Rocked & Rolled: Illegal File Sharing and Record Label Suits by R. Scott Feldmann, January 2004 California Lawyer 20 (2004) (California Lawyer, Circulation, P.O. Box 54026, Los Angeles, CA 90054-0026)

1984 and Beyond: Two Decades of Copyright Law by Tyler T. Ochoa, Santa Clara Computer & High Technology Law Journal 167 (2003)

Writings in the Margin (of Error): The Authorship Status of Sound Recordings Under United States Copyright Law, 34 Cumberland School of Law, Samford University (2003-2004)

The Specter of Crypto-Anarchy: Regulating Anonymity-Protecting Peer-to-Peer Networks by John Alan Farmer, 72 Fordham Law Review 725 (2003)

Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"? by Casey Duncan, 13 Minnesota Journal of Global Trade 87 (2004)

Limitations to the Cross-Border Taxation of Artistes and Sportsmen Under the Look-Through Approach in Article 17 (1) of the OECD Model Convention (Part II) by Angel J. Juarez, 43 European Taxation 457 (2003) (published by the International Bureau of Fiscal Documentation, www.ibfd.org)

The Houston Law Review has published a Symposium Issue entitled Considering Copyright: Institute for Intellectual Property & Information Law Symposium with the following articles:

Misappropriation: A Dirge by Richard A. Posner, 40 Houston Law Review 621 (2003)

America's Cultural Record: A Thing of the Past? by Laura N. Gasaway, 40 Houston Law Review 643 (2003)

Eldred, the First Amendment, and Aggressive Copyright Claims by Alfred C. Yen, 40 Houston Law Review 673 (2003)

Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, and Bartnicki by Eugene Volokh, 40 Houston Law Review 697 (2003)

The United States and International Copyright Law: From Berne to Eldred by William Patry, 40 Houston Law Review 749 (2003)

Burn Berne: Why the Leading International Copyright Convention Must Be Repealed by Alan Story, 40 Houston Law Review 763 (2003)

Digital Rights Management: Trafficking in Technology

That Can Be Used to Circumvent the Intellectual Property Clause by Kristin Brown, 40 Houston Law Review 803 (2003)

Caught in a Corporate Panty Raid: Moseley v. V Secret Catalogue, Inc. by Susan Turcotte, 40 Houston Law Review 867 (2003)

Licensing Intellectual Property Outside the United States by Kathryn F. Twiddy, 23 The Licensing Journal 6 (2003) (edited by Grimes & Battersby, published by Aspen Publishers)

The Entertainment Law Review, published by Sweet & Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 15, Number 1 with the following articles:

Derivative Aspects of Character and Perceived

Attributes in Persona as Forms of Intellectual Property (Part II) by Gary Scanlan, 15 Entertainment Law Review 1 (2004) (for website, see above)

Collectivity v Exclusivity: Conflict in the Broadcasting Arena by Daniel Geey, 15 Entertainment Law Review 7 (2004) (for website, see above)

Copyright in the Bahamas: One Step Forward, Two Steps Back by George Hwang, 15 Entertainment Law Review 12 (2004) (for website, see above)

Wise Words from the Lord Hoffman on Libel Damages in The Gleaner v Adams by Jonathan Coad, 15 Entertainment Law Review 23 (2004) (for website, see above)

Earlier Rights and Passing Off by Ieuan Jolly, 15

Entertainment Law Review 25 (2004) (for website, see above)

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[ELR 25:9:25]