BUSINESS AFFAIRS

Net Profits Deals: The Recording Industry's New Contract Du Jour

by Bob Donnelly

As an attorney for recording artists, I have seen many new waves of music come and go during the past thirty years. These trends occasionally beget a new form of legal agreement. For example, the popularity of hip-hop music spawned the decidedly anti-artist "production agreement." And the digital revolution has led to the development of new agreements for telephonic "ring-tones." The new contract du jour is the so-called "net profits" deal. This is the one where artists are told that their band and the record company will "split everything 50/50." These deals are typically the province of the small "indie" labels that seem to be growing at warp speed as the "majors" continue to merge themselves out of existence. Just a few years ago, I would only rarely come across this type of deal (usually from a good small label like Kill Rock Stars). Today I would estimate that "net profits" deals represent approximately one-quarter of all the new indie labels deals that I negotiate.

Whether or not "net profits" deals are as "artist-friendly" as advertised deserves closer scrutiny. In a conventional record deal, the record company pays for the following costs on a non-recoupable basis: manufacturing, warehousing, shipping, advertising, distribution, marketing, promotion and publicity. (Generally, if any of the last three services are provided by non-record company independents, 50% of those costs may be recouped out of the artists' share of royalties.) In a "net profits" deal, the record company recoups all of these costs "off the top" (i.e., out of the first monies received from the sale of CD's). Even the band's roadie can understand that so far, this "artist friendly" agreement may not be so "artist friendly."

The rationale of indie record companies for why artists should happily embrace a recoupment formula that is worse than that offered by the majors (who thought that was possible?) is based on the eventual 50/50 split of profits. (The operative word here is "eventual.") When one closely analyzes these deals, one often discovers that they are only 50/50 when it serves the record company's interest.

An Indie Band/Indie Label Hypothetical

Consider the following illustration. The deal process usually begins when an indie band (let's call them "The Self-Deceivers") delivers a fully-mixed master recording which they produced at the band's own expense. Even if the artists use some home recording equipment and Pro-Tools technology, it is likely that they will have invested approximately $25,000 into the production of their album. In a typical "net profits" deal, artists will receive a nominal advance that is less than the amount they had previously invested in recording costs. For example, assume that The Self-Deceivers receive a $10,000 advance from their indie label ("Artie Fufkin Records"). The net result penalizes the band twice. To begin with: The Self-Deceivers are already out-of-pocket $15,000, because unlike the record company which gets to take all of its costs "off-the-top," artists do not! Second, the $10,000 payment which the band received was in the form of an "advance" which means it must be recouped solely out of the band's share of "net profits." (Does this sound like a 50/50 deal to you so far?)

Upon closer scrutiny of the "net-profits" contract, you will probably find that Artie Fufkin Records has also awarded itself certain other advantages. For example, it is not uncommon for a record company to take a deduction in the form of an "administration fee" or "marketing fee," nor is it uncommon for a record company to simply pay the artist on less than 100% of all records sold. (Assume that Fufkin has decided to pay itself an "administrative fee" of 15% of all gross earnings.)

Another example of creative record company accounting practices is to consider money paid out in the form of mechanical royalties to be an advance solely against the artist's share of the royalties. (Not all indies do this, but many do.) This is another example of how these "net-profit" deals are actually worse than a conventional record deal, because mechanicals are not usually considered to be a recoupable expense in a conventional deal.

After listening to my explanation as to why this deal is not equitable for my client, indie label president Artie Fufkin (who formed his own record company after Spinal Tap's "Tap Into America" Tour) would probably argue: "But the artist will still be better off because I'm splitting the net-profits with them on an equal basis." Let's crunch some numbers to see if this is true.

For the purpose of this hypothetical, assume that the cost of manufacturing a CD with color booklet and jewel box is eighty cents ($.80) per unit. Assume also that Fufkin is spending $1.50 per unit on marketing, advertising, promotion and publicity. As discussed, The Self-Deceivers received a $10,000 advance and are being paid seventy ($.70) cents per unit in mechanical royalties, assuming a three-quarters of statutory rate on eleven compositions. (God forbid that the record company would actually pay their "partner" the full 100% statutory mechanical rate.) Finally, assume that Artie Fufkin Records was charging a wholesale price of $11.00 per unit from which it actually netted $8.25 after deducting a distribution fee of 25%. (Naturally, wholesale prices and distribution fees can vary, so these numbers are simply intended to be typical of many indie deals.) Let's see how much money each of the "50/50 partners" in this deal will realize if the first Self-Deceivers album sells 30,000 units (which is a respectable number by indie standards):

"Net Profits Deal"
(assuming sales of 30,000 units)

Gross Receipts

30,000	units
x$8.25	per unit ($11 wholesale - 25% distribution)
$247,500	gross receipts

Costs Recoupable "Off-the-Top"

30,000	units
x$0.80	per unit for manufacturing
$24,000	manufacturing costs

30,000	units
x$1.50	per unit for marketing/promotion/etc.
$45,000	marketing/promotion costs

$24,000	manufacturing
$45,000	marketing/promotion/etc.
$69,000	total recoupable "off-the-top"

Costs Recoupable Solely Against Artists' 50% Share of Net Profits

30,000	units
x$0.70	per unit for mechanicals
$21,000	mechanical royalties

$10,000	advance

$21,000	mechanical royalties
$10,000	advance
$31,000	total recoupable against artists' share

Computation of Net Receipts

$247,500	gross receipts
x 15%	record label's "administration fee" %
$37,125	record label's administration fee

$247,500	gross receipts
-$37,125	record label's administration fee
-$69,000	off-the-top costs
$141,375	net receipts

Computation of Artists' Net Profits

$141,375	net receipts
x 50%	artists' % of net profits
$70,688	artists' share of net profits before costs
-31,000	costs recoupable against artists' share
$39,688	artists' share of net profits

Computation of Record Label's Net Profits

$141,375	net receipts
x 50%	record label's % of net profits
$70,688	label's share of net profits before costs

$$70,688	label's share of net profits before costs
+ 37,125	label's 15% administration fee
$107,813	label's share of net profits

Division of Net Profits

$31,000	mechanicals and advance paid to artists
$39,688	artists' share of net profits
$70,688	total amount of artists' share versus
$107,813	label's share of net profits

If you also factor in the additional $15,000 that it cost The Self-Deceivers to make this album (for which the artist received neither a reimbursement nor a credit against gross receipts as Fufkin did for every dollar it spent), the artists wind up with a net gain of less than $56,000 on 30,000 units sold. (This figure assumes the artists do not have to share mechanical royalties with third party songwriters or music publishers; if they do have to share mechanicals, it would further diminish their net gain.)

This hypothetical also assumes that Fufkin is using a third party distribution company, which is usually the case for indie labels. However, if Fufkin is handling its own distribution in this "net-profits" arrangement, the record company adds another $82,500 to the money it will receive. In that case, this "50/50" deal looks like this: record company's share: $190,300; artists' share: less than $56,000.

Now let's compare this to the conventional record label deal where artists are paid on a royalty basis. We will assume the same number of units sold (30,000 units) at the same net wholesale price ($8.25/unit), the same artist advance ($10,000) and the same mechanical royalty rate ($.70/unit). The Self-Deceivers will be paid an artist royalty of $1.40 per unit (which is typical of what artists might net after the artists' royalty rate is applied against a retail selling price of $17 less a 25%, the packaging deduction and a 15% free goods deduction). In this scenario, the artists will receive only their royalties and will not share in any eventual net profits.

"Conventional Record Deal"
(assuming sales of 30,000 units)

Gross Receipts

30,000	units sold
x$8.25	per unit ($11 wholesale - 25% distribution)
$247,500	

Artists' Royalties

30,000	units
x 15%	free goods deduction %
4,500	free goods

30,000	units sold
-4,500	free goods
25,500	units royalty-bearing units

25,500	units
x$1.40	per unit record royalty
$35,700	record royalties

25,500	units
x $0.70	per unit mechanical royalty
$17,850	mechanical royalties

$35,700	record royalties
$17,850	mechanical royalties
$53,550	total artists' royalties

Costs Recoupable Against Artists' Royalties

```
$10,000     artists' advance
```

Net Amount Received by Artists

```
$53,550     total artists' royalties
-10,000     artists' advance
$43,550     net royalties received by artists
```

Costs Payable by Record Company from Gross Receipts

```
30,000      units
x$0.80      per unit (manufacturing)
$24,000     manufacturing costs

30,000      units
x$1.50      per unit (marketing/promotional/ etc.)
$45,000     market/promotional costs

$53,550     paid to artists (advance + royalties)
```

Amount Retained by Record Label

$247,500	gross receipts
-$24,000	manufacturing costs
-$45,000	market/promotional costs
-$53,550	paid to artists (advance + royalties)
$124,950	amount retained by record label

Division of Net Profits

$53,550	total amount of artists' share
	versus
$124,950	label's share of net profits

So let us recap: In the so-called "artist friendly" net profits partnership-type arrangement, the artists will net a total of less than $56,000 that includes all advances, record royalties and mechanical royalties. In the conventional record deal (that we have all learned to loathe and fear), the artists' all-in receipts will be approximately $54,000 which is only $2,000 less than the net profits deal.

When confronted with this evidence Artie Fufkin is now likely to argue: “Okay, maybe it’s not more profitable at 30,000 units, but wait until they sell platinum; that’s when this net profits deal will really pay off big time for the artists!”

It’s important to examine this claim since Fufkin’s point-of-view represents a common myth surrounding these net profits deals. Let’s examine this proposition using the above-described paradigm based upon sales of one million units.

In the conventional record deal, The Self-Deceivers would receive the same $10,000 advance in addition to $700,000 in mechanicals and $1,190,000 in record royalties (i.e., $1.40 per unit x 1 million units less a 15% free goods deduction) for a total of $1,900,000 if their album reaches the platinum sales plateau. (The previously stated artists’ record royalties would be reduced by any amounts spent by the label on tour support and 50% of any amounts spent on independent promotion.)

In the net profits calculation, we will assume that marketing costs, which are traditionally front-end loaded, will be reduced and amortized from $1.50 per unit to $1.00 per unit based upon sales of 1 million units. I will also assume that Fufkin Records was able to get a more favorable manufacturing price (sixty cents per unit versus the eighty cents per unit which they paid on smaller manufacturing runs). As a result the calculation would look like the following:

"Net Profits Deal"
(assuming sales of 1 million units)

Gross Receipts

```
1,000,000   units
x   $8.25   per unit ($11 wholesale - 25%
            distribution)
$8,250,000  gross receipts
```

Costs Recoupable "Off-the-Top"

```
1,000,000   units
x   $0.60   per unit  for manufacturing\
$600,000    manufacturing costs

1,000,000   units
x   $1.00   per unit for marketing/promotion/etc.
$1,000,000  marketing/promotion costs

$  600,000  manufacturing costs
$1,000,000  marketing/promotion costs
$1,600,000  costs recoupable "off-the-top"
```

Costs Recoupable Solely Against Artist' 50% Share of Net Profits

1,000,000	units
x $ 0.70	per unit for mechanicals
$ 700,000	mechanical royalties
$ 10,000	artists' advance
$700,000	mechanical royalties
+$10,000	artists' advance
$710,000	costs recoupable from artists' share

Computation of Net Receipts

$8,250,000	gross receipts
x 15%	label's administrative fee %
$1,237,500	label's administrative fee
$8,250,000	gross receipts
-1,237,500	label's administrative fee
-1,600,000	costs recoupable "off-the-top"
$5,412,500	net receipts

Computation of Artists' Net Profits

$5,412,500	net receipts
x 50%	artists' share %
$2,706,250	artists' share before recoupable costs
- 710,000	costs recoupable from artists' share
$1,996,250	artists' share of net profits

Computation of Record Label's Net Profits

$5,412,500	net receipts
x 50%	label's share %
$2,706,250	label's share
+1,237,500	label's administrative fee
$3,943,750	record label's share of net profits

Division of Net Profits

$ 710,000	mechanicals and advance paid to artists
$1,996,250	artists' share of net profits
$2,706,250	total amount of artists' share
$2,706,250	total amount of artists' share
	versus
$3,943,750	record label's share of net profits

So if The Self Deceivers achieve platinum sales, Fufkin is correct. The band will make more money under the net profits deal (approximately $2,700,000) than they would under the conventional record deal (approximately $1,900,000).

Once again this assumes that Fufkin is using a third party distributor. If the record company handled its own distribution, Fufkin adds another $2,750,000 to its share of revenues. So what does a "50/50" partnership deal look like when the artists sell a million CD's and the record company handles its own distribution? Like this: record company: $6,700,000; artists: $2,700,000.

Admittedly, at this present point in time there is no "standard" music industry net profits deal, but the hypothetical used here is typical of how these deals are often structured. Unfortunately (from the artists' point of

view), many net profits deals also contain provisions which award the record company an income or ownership interest in the artists' music publishing and/or merchandise rights. If the artists' potential lost income from these categories is factored in, the net profits deal would almost always be an inferior choice (even in the unlikely event that the band sold a million CD's).

It is my hope that this comparative analysis will disabuse artists and their managers and attorneys of the notion that they are always better off by accepting a so-called 50/50 net profits deal. All of which leads me to one very discomforting notion. I never thought I'd live long enough to regard the 100-page Sony recording contract as "the good old days."

Bob Donnelly is a music attorney with offices in New York City. He started nearly 30 years ago as in-house counsel for Leber-Krebs (which was then the country's largest management company). As a solo practitioner, Bob has represented artists, managers and publishers who have awarded him more than 40 Platinum plaques. He has been active on some key music industry legislative matters (such as the "works-for-hire"

dispute). Bob is a frequent music industry lecturer and contributor to Billboard and other music trade and law journals. In June, he is being given an award for service by Volunteer Lawyers for the Arts.
[ELR 25:12:4]

INTERNATIONAL DEVELOPMENTS

Joint Authorship Battle Takes Center Stage: British Court Decides that Playwright Marie Jones is Sole Author of Award-Winning Play "Stones in His Pockets"; Co-Authorship Claim of Play's Original Director Pam Brighton is Rejected

by Les Christy

All the world's a stage, and all the men and women merely players.[1] Unless, however, they are also directors or playwrights. The decision of Justice Park in Brighton and Dubbeljoint v Marie Jones[2] given in London on 18 May 2004 is the first to examine the copyright provisions of the standard Theatrical Management Association and Writer's Guild of Great Britain contract for new plays ("TMA contract") and theatrical industry practice during the production of new plays.

The facts of the case

Pam Brighton, the first claimant, is a director for stage and radio. Marie Jones, the defendant, is an actress and playwright for stage, television, radio and screen. Brighton and Jones were founders of Dubbeljoint Theatre Company Limited ("Dubbeljoint"), the second claimant, in Belfast in 1991.

Dubbeljoint commissioned Jones on a TMA contract in 1996 to write Stones In His Pockets. The TMA contract, a standard since 1993, provides that "the copyright in the play shall remain vested in the writer"[3] and that any changes to the script during production of the play accrue to the copyright of the writer.[4] Brighton, also the artistic director of Dubbeljoint, was appointed to direct the first production of the play but in her case there was no written contract. Brighton was not aware of Jones' TMA contract or even its standard copyright terms. The cast comprised two actors performing multiple roles.

Before the script was written all those involved in the production had regular discussions about the subject matter and nature of the play and all contributed ideas and anecdotes. The concept was that the play would be set on and around a Hollywood set, filming in rural Ireland. The two principal characters would be extras on the set, but each actor would have to also play several other characters. In discussions some of the characters and incidents were developed, including the suicide of a local boy by drowning from which the play's title is derived.

Before Jones started work, Brighton sent her, unsolicited, several pages of scripted dialogue for opening the play ("draft opening script"). Parts of this draft opening script recorded their ongoing discussions, other parts were original. Jones did not use the dialogue from the draft opening script but did use some of the settings and sequences of events in writing her own opening for the play. The play was fully scripted when rehearsals began in July 1996.

During rehearsals the script was altered and refined to add new dialogue and scenes through a collaborative process between Jones, Brighton and the actors which resulted in a final typewritten script crediting Jones as the author[5] ("the 1996 script"). The TMA contract gives the writer control over all suggested changes to the text of their play, which Jones' exercised.

The critical issue concerned the nature of Brighton's contribution during the rehearsals. Jones said it was not a writer's contribution, and no more than would be expected of any director. Brighton claimed she was responsible for devising scenes and the actual form of dialogue on the page, claims the judge rejected. Further, the judge rejected any suggestion that Brighton had contributed substantial plot changes.

The play opened in August 1996 and briefly toured Ireland, to modest success. Jones was credited in programs and promotional material as the writer and Brighton was credited as the director. Neither Brighton nor Dubbeljoint had any further involvement with the play or subsequent productions.

In 1999 Jones rewrote parts of the play for a new production at the Lyric in Belfast, creating a new dramatic work ("the 1999 Script"). The director of the Lyric production was Jones' husband, Ian McElhinney. The production was a huge critical and commercial success transferring to the West End in 2000, where it won two Olivier Awards including Best New Comedy, and Broadway where McElhinney received a Tony Award nomination for directing.

Brighton first notified Jones of her claims in November 2001, five years after the play was written. Explaining her delay in bringing the claim Brighton said that she had no idea, and no intention at the time the play was written, that she might be a co-author. It was only when she consulted her lawyers, years later, that she was advised that she was a joint author. By March 2004 Jones had written 29 plays for the stage, Brighton had written none.

The copyright claims

Brighton advanced two separate claims. The primary claim was that she was a joint author with Jones of the 1996 Script, and therefore joint owner of the copyright in the play, on the basis of contributions that she made to the script in rehearsals. The secondary claim was that Jones had infringed her copyright in the draft opening script by reproducing in the 1999 Script a substantial part of the draft opening script without Brighton's consent. (It was common ground that the 1999 Script reproduced a substantial part of the 1996 Script and that if the 1996 Script reproduced a substantial part of the draft opening script (as Brighton alleged) then so too did the 1999 Script.)

Dubbeljoint separately claimed damages for breach of Jones' warranty that she was the sole author of the play (Clause 20 of the TMA contract).

The law on joint authorship

The law of copyright is governed by the Copyright, Designs and Patents Act 1988 ("CDPA"). Section 1 provides that copyright exists in original literary or dramatic works. A manuscript for a play is the epitome of a dramatic work. Section 11 contains the general rule that the author of a work is the first owner of copyright in it. Section 9 defines an "author" as the person who creates the work.

Section 10(1) defines a "work of joint authorship" as "a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors." The elements of joint authorship are: (1) that each person must make a "significant and original"[6] contribution to the creation[7] of the work, (2) that there must be collaboration between the authors in creating the work, and (3) their contributions must not be separate (in the sense of being able to be separately identified in the work). Although a person can become a joint author even if he has not set pen to paper, because another person records what the author has created,[8] what is essential is a direct responsibility for what appears on the page.[9]

United States[10] and Canadian[11] law on joint authorship contain a fourth element, namely that there must be a "mutual intention" of the authors, at the time of writing, to create a joint work. The UK Court of Appeal has rejected the suggestion that this fourth element can be read into Section 10(1).[12]

Section 16(2) states that copyright in a work is infringed by a person who without the license of the copyright owner does, or authorizes another to do, any of the acts restricted by copyright. The "acts restricted by copyright" are set out in Section 16(1) and include copying the work or performing the work in public. In another departure from U.S. law, in the UK, a joint author cannot exploit a work of joint authorship without the consent of all of the other authors[13] or grant a license to another person to do so.[14] Although there is no copyright in a mere idea, and although the protection afforded by copyright is not to have your work "copied," it is nevertheless possible for a work to be copied and infringed although not a single sentence from the original can be found in the copy, for example, where the original elements in the plot of a play or novel are taken.[15]

Ruling on the copyright claims

The court rejected the joint authorship claim on three separate grounds:

(1) Brighton did not contribute in rehearsals as

an author because she did not devise dialogue or make any significant contribution to the plot of the 1996 Script;

(2) just as Dubbeljoint was bound by Clause 6 of the TMA contract, so too was Brighton by being contracted to Dubbeljoint to direct the production; and

(3) it was unrealistic to try to distinguish between Brighton's and the actors' contributions to the script in rehearsals; the actors did not become joint authors by exercising their acting skills and Brighton could not be a joint author by exercising her directing skills, although both had contributed to making the script better.

The court found that Jones had copied a substantial part of the elements of plot from the draft opening script when writing the opening of the 1996 Script, and these were reproduced in the 1999 Script, but the court nevertheless rejected the claim of copyright infringement because it found that Brighton had consented to these acts of copying and to the exploitation of the 1999 Script. Consent was implied because: (1) the draft opening script was sent to Jones' unsolicited and without any express conditions; and (2) Brighton did not raise any issue until November 2001 by which time Jones had already entered into all of the key contracts to exploit the play. The implied consent was, however, effectively revoked by the litigation such that Jones could not in the future exploit the 1999 Script without Brighton's permission. However, that has no impact on existing contracts for exploitation and Jones is free to rewrite the opening of the 1999 Script to exclude the material taken from the draft opening script (i.e., create a "2004 Script").

The effect of the decision is that Brighton's claims to an equal share in the writer's royalties from the play and to be compensated for infringement of her copyright in the draft opening script failed.

Ruling on the TMA contract claims

Dubbeljoint brought two further claims against Jones for breach of contract. The first was that Jones had failed to pay the royalty participation owed to Dubbeljoint under Clause 16 (Management Participation). Jones' agent certified and paid the sum due prior to trial. The second was that Jones had failed to credit Dubbeljoint in theatre programs as required by Clause 15 (Management). Prior to trial Jones gave an undertaking to give credit in future programs. Dubbeljoint, however, claimed that it was entitled to compensation for loss suffered as a result of Jones' failure to give credit. Jones denied that Dubbeljoint had suffered any loss and offered £1 in nominal damages before trial, which Dubbeljoint rejected. The Court found that Dubbeljoint had suffered no loss whatsoever and, therefore, awarded no damages.

Analysis

As we know; success has many fathers, but failure is an orphan. Brighton acknowledged that she was making her claim because Stones became, much to everyone's surprise, and years after it was written, a commercial and critical success. What this case demonstrates, above all, is the need to have mutually consistent, standard agreements in place for all participants in the creative process. No one can predict from the outset which play, or in what circumstances it, will be a hit.

Fortunately for the playwright here, the TMA Agreement alone was adequate to see off the joint authorship claim. The case has, however, exposed a loophole in the existing contractual arrangements allowing copyright infringement claims to be made by directors who provide notes to the writer before the play has been written (when Clause 6 of the TMA contract takes effect). The obvious solution is to amend the copyright provisions of the standard TMA/Equity Directors Agreement, and its non-TMA equivalents, to ensure any copyrights in directors' contributions to the text of the play, whenever given, become the property of the writer. In addition, Clause 6 of the TMA contract could be extended to deal with pre-script contributions. Such an arrangement would encourage contributors to think about and be forthcoming about their intentions.

The facts of this case also illustrate the stark difference in approach to the issue of joint authorship between the UK and North America. In the U.S. or Canada, Brighton would have failed at the outset due to the absence of any "mutual intention" concerning joint authorship. While it might strike the layperson as odd that authors can collaborate to create a work without any intention of doing so, in the UK joint authorship is essentially a question of fact. The North American approach has much to commend it. After all, if a director or any other person involved in a new production wants to be recognized as a writer, or co-author, then that is a matter that should be raised by them at the outset and agreed before the play is written. To do otherwise, as this case demonstrates, is to store up trouble for the future.

[Notes:]

Les Christy conducted Marie Jones' defense. He is a barrister specializing in copyright, media and entertainment at Pinsents solicitors, London, and can be contacted at les.christy@pinsents.com or by phone (from the U.S.) at 001-44-207-418-9527.

1 As You Like It

2 Pamela Brighton and Dubbeljoint Theatre Company Ltd v Marie Jones [2004] EWHC 1157 (CH)

3 Clause 13 (Copyright and Moral rights)

4 Clause 6 (Textual Integrity): "Any changes of any kind whatsoever in the text, stage business, or title of the play made by anyone and approved by the writer shall be deemed to be part of the play and shall accrue to the copyright of the play and become the sole property of the writer."

5 Giving rise a statutory presumption of sole authorship: CDPA Section 104(2)

6 Godfrey v Lees [1995] EMLR 307 at 325

7 Fylde Microsystems Ltd v Key Radio Systems Ltd [1998] FSR 449

8 Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd [1995] FSR 818

9 Robin Ray v Classic FM [1998] FSR 622 at 636
10 Childress v Taylor 945 F.2d 500 (2d Cir. 1991)
11 Darryl Neudorf v Nettwerk Productions Ltd [2000] RPC 935
12 Beckingham v Hodgens [2003] EMLR 18, paras 49-54 (The Bluebells case).
13 Section 10(3) of the CDPA
14 Powell v Head (1879) 12 ChD 686
15 Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] 1 WLR 2416, 2422.
[ELR 25:12:9]

IN THE NEWS

Music industry agrees with New York Attorney General on procedures for payment of almost $50 million in unclaimed artist and songwriter royalties

The nation's leading music companies have begun to pay almost $50 million in unclaimed royalties to thousands of performers and songwriters, pursuant to an agreement they recently reached with New York State Attorney General Eliot Spitzer. The agreement was prompted by a two-year investigation by Spitzer's office that found that many artists and writers were not being paid royalties, because music companies did not have their current addresses.

This problem affected star performers - including David Bowie, Dolly Parton, Harry Belafonte, Liza Minnelli, Dave Matthews, Sean Combs and Gloria

Estefan - as well as lesser known musicians.

Spitzer said that as a result of this agreement, "new procedures will be adopted to ensure that the artists and their descendants will receive the compensation to which they are entitled."

The music companies who have agreed to the new procedures include: Sony Music Entertainment; Sony ATV Music Publishing; Warner Music Group; UMG Recordings; Universal Music; EMI Music Publishing; EMI Music North America; BMG Songs; Careers-BMG Music Publishing; BMG Music; and the Harry Fox Agency.

They have agreed to: list the names of artists and writers who are owed royalty payments on company websites; post advertisements in leading music industry publications explaining procedures for unclaimed royalties; work with music industry groups and unions to locate artists who are owed royalty payments; and share artists' contact information with other music companies. They also have agreed to have the heads of their royalty, accounting and legal departments meet regularly to review the status of royalty accounts and take steps to improve royalty payment procedures. And they have agreed to apply New York State's Abandoned Property Law to the unclaimed royalties of those who cannot be located. That law requires unclaimed property to be turned over to the state (the technical term is "escheat") which will hold it until a claim is made.

Spitzer thanked the companies for their cooperation. He noted that the procedures they have agreed to actually go "beyond what the law requires." The companies worked with the Attorney General's office to "resolve the matter in a way that will help artists and their descendants," Spitzer said.

Spitzer also thanked music industry attorney Bob

Donnelly, who originally brought the matter to the attention of his office and then helped identify ways to resolve it.

Spitzer noted that while royalty disputes are common in the entertainment industry, this particular problem did not involve disagreement over the terms of the recording contract or the amount of the royalty payment. Instead, it was a matter of music companies not having accurate contact information to mail royalty payments. Pursuant to the agreement, the companies will make a greater effort to locate and stay in touch with artists who are owed payments.

Spitzer said the recording companies had improved their efforts to find missing artists since the investigation began two years ago and that, collectively, the companies had already returned more than $25 million to those who were owed funds. An additional $25 million is expected to be distributed as part of the settlement.

The matter was handled by Assistant Attorneys General Gary R. Connor, Harriet B. Rosen, Patricia Cheng and Joseph Wilson of the Attorney General's Investment Protection Bureau, under the direction of Acting Deputy Attorney General Terryl Brown Clemons.

$50 Million in Royalties Returns to Artists: Deal With Record Industry Sets New Procedures for Recovery of Unclaimed Asset, N.Y. State Attorney General's Office, Press Release (May 2004), www.oag.state.ny.us/press/2004/may/may4a_04.html [ELR 25:12:12]

NEW LEGISLATION AND REGULATIONS

New York enacts child performer protection statute requiring trust accounts, work permits, employment certifications, and employer-provided education when child performers are absent from school

New York has enacted a statute designed to protect child performers who live or work in that state. The statute does so in three ways: by requiring 15% of the child performer's gross earnings to be placed in trust until the child reaches the age of 18; by requiring work permits and employment certifications that will be administered and enforced by the New York Department of Labor; and by requiring employers to provide education to child performers when their schedules require them to be absent from school.

The New York statute is modeled on the

"Coogan Law," a statute first enacted in California in 1939 to ensure that child performers receive a portion of their earnings when they become 18 years old. In 2000, California strengthened the Coogan Law by requiring 15% of child performers' earnings to be held in trust until they turn 18 (ELR 21:6:19). California amended its Coogan Law yet again in 2003 to provide child performers with additional protections (ELR 25:6:13). New York's new legislation will protect the earnings of child performers in ways that are similar to the recently-amended California law.

The New York law requires the parent or guardian of a child performer to create a Child Performer Trust Account and to provide the child performer's employer with the information the employer needs to withhold and transfer 15% of the performer's earnings into that account. If the parent or guardian fails to provide the needed information, the law requires the employer to forward the withheld 15% to the New York Child Performer's Holding Fund.

The new law requires child performers to have work permits obtained from the New York Department of Labor. And those who employ child performers must obtain from the Department of Labor a "certificate of eligibility to employ a child performer." It is illegal to employ child performers without work permits and eligibility certificates.

The new law also requires employers to provide a New York State certified teacher, or a teacher with credentials recognized by the state of New York, when a child performer's schedule requires the child to be absent from school. New York State recognizes teaching credentials from California and 32 other states (including Massachusetts, New Jersey, Connecticut and Pennsylvania). So if a motion picture production company, filming on location in New York, hires children from California and New York, and hires a certified teacher from California, that teacher would be able to teach both states' children. Also, if a New York resident child performer works on a production in California, the New York child performer can be taught by a certified California teacher there.

The New York law applies broadly to children who perform directly, or through a loan-out company, or through a casting agency. And the law's trust account provisions apply as well to those who buy or sell literary, musical or dramatic properties, a person's likeness or life story, and voice recordings.

New York Child Performer Education and Trust Act of 2003, available at http://assembly.state.ny.us/leg/?bn=A07510&sh=t [ELR 25:12:13]

WASHINGTON MONITOR

MPAA and independent program syndicator settle Phase II dispute over distribution of 1997 cable retransmission royalties among program suppliers; in separate proceeding, Librarian of Congress accepts Copyright Arbitration Royalty Panel decision concerning Phase I distribution of 1998 and 1999 cable retransmission royalties

The Copyright Office and copyright owners have been exceedingly busy as of late, resolving disagreements about the proper distribution of cable retransmission royalties for 1997, 1998 and 1999. Those disagreements have been the subject of two separate proceedings, each of which has been massive and complicated in its own right. The 1997 royalty proceeding has finally come to an end, as a result of a settlement. And the first phase of the proceeding over royalties for 1998 and 1999 has been concluded, unless there is an appeal.

The royalties at issue in both proceedings are those paid by cable-TV systems in return for the right to retransmit copyrighted non-network television programs that are broadcast over the air by television stations that are "distant" from the cable systems' subscribers. Cable systems have this right by virtue of a compulsory license that Congress wrote into the current Copyright Act when it was passed in 1976. Since the license is in the Act, and thus not negotiated between cable systems and copyright owners, Congress also had to devise a procedure for determining the amount that cable systems would pay, and a procedure for dividing those payments among copyright owners whose programs are retransmitted.

Both of the recently-concluded proceedings involved disputes over the division of royalties among copyright owners. The procedure for dividing those royalties involves two steps or "Phases." In Phase I, royalties are divided among categories of owners, such as: movie and television program producers; sports leagues; and songwriters and music publishers. In Phase II, the royalties allocated to each category are further divided among the copyright owners in their category.

The recently-settled proceeding involving 1997 royalties involved a Phase II division of royalties between producers represented by the MPAA, and a single television program distributor known as Litton Syndications which was represented by an organization known as the Independent Producers Group (or IPG for short). The disagreement between the MPAA and IPG involved many different issues, and before the case was settled, it was the subject of two separate Copyright

Arbitration Royalty Panel hearings and decisions.

Despite the enormous efforts that went into those two hearings, the Register of Copyrights concluded that their results were flawed. And thus the Librarian of Congress ordered a third CARP hearing (ELR 23:9:8). Both sides appealed from that order. But before the Court of Appeals could rule, the MPAA and IPG settled, on terms the Copyright Office has not released. That made the Librarian's order "moot," so at the recommendation of the Register of Copyrights, the Librarian has vacated the order as well as the CARP's first and second decisions.

The proceeding involving 1998 and 1999 royalties involved a Phase I division of royalties among categories of copyright owners. The CARP hearing over these royalties was complicated for at least two reasons.

First, cable retransmission royalties are divided into three different funds: the "Basic Fund" into which all cable systems pay; the "3.75% Fund" into which cable systems pay if they retransmit distant signals they would not have carried before 1980 when the FCC eliminated its "distant signal rule"; and the "Syndex Fund," into which cable systems pay if they retransmit syndicated programming they would not have carried before 1980 when the FCC eliminated its "syndicated exclusivity" rule. Each of these three funds is allocated among categories of copyright owners in different proportions.

Second, the type of evidence that is the most relevant to the proper allocation of each Fund is hotly disputed.

For these reasons, the 1998-1999 CARP proceeding generated 20,000 pages of testimony and resulted in a 94-page CARP decision. If copyright owners are not satisfied with a CARP decision, the law authorizes them to petition the Register of Copyrights to "modify" it; and they did. The Register, however, has recommended that the CARP's decision be accepted "in full," and the Librarian of Congress has done so.

The Register's recommendation deals with several distinct issues. The most significant concerns a dispute between the MPAA (on behalf of movie and TV program producers) and the sports leagues (the NFL, NHL, NBA, Major League Baseball and the NCAA) over which of their surveys most accurately reflected the "relative marketplace value" of their respective programs. Because the cable compulsory license has existed for more than a quarter-century, there is no actual marketplace data on this question, so the CARP had to forecast what would happen in the "hypothetical marketplace" that would have existed if there were no cable compulsory license.

The sports leagues offered a statistical survey, called the "Bortz survey," of the responses of cable programming executives who were asked what value they placed on the six types of programming involved in the proceeding. The MPAA offered a study, called the "Nielsen study," that measured how much distant signal programming cable subscribers viewed.

The CARP determined that the sports leagues' Bortz survey was better for determining the relative value of different types of programming, because it reflected the opinions of cable executives concerning the value of programs they carry in order to attract and retain subscribers. While the MPAA's Nielsen study showed what cable subscribers actually watched, it said "nothing" about whether those programs motivated them to subscribe to cable or remain subscribers, the CARP concluded.

In its petition to modify the CARP's decision, the MPAA attacked this reasoning as "arbitrary." But in a lengthy analysis, the Register concluded that the CARP had not been arbitrary in deciding that the Bortz survey was the "best evidence of marketplace value."

As a result, the Librarian has ordered that for 1998: program suppliers (represented by the MPAA) receive about 38% of the Basic Fund, 41% of the 3.75% Fund, and 96% of the Syndex Fund; sports leagues receive about 36% of the Basic Fund and 38% of the 3.75% Fund; songwriters and music publishers receive 4% of each of the three funds; television broadcasters (as the owners of the copyrights of programs they produce themselves) receive about 14% of the Basic Fund and 15% of the 3.75% Fund; and other copyright owners receive the rest. For 1999, program suppliers were awarded a little less of the Basic and 3.75% Funds, while the sports leagues were awarded a little more.

The exact percentages - out to five decimal places - are published in the Register's recommendation. Surprisingly, however, the fact that is of greatest interest to copyright owners is not published - namely, how much money, in dollars, is being distributed.

Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds, Library of Congress, Copyright Office, 69 Federal Register 23821 (Apr. 30, 2004), available at www.copyright.gov/fedreg/2004/69fr23821.html; *Distribution of 1999 and 1999 Cable Royalty Funds*, Library of Congress, Copyright Office, 69 Federal Register 3606 (Jan. 26, 2004), available at www.copyright.gov/fedreg/2004/69fr3606.html [ELR 25:12:14]

RECENT CASES

Photos of Barbie doll in absurd and sexual positions were fair use, and thus did not infringe Mattel's copyrights, trademarks or trade dress, federal appellate court affirms

Photographer Thomas Forsythe has defeated infringement claims asserted against him by Mattel, and may even be awarded the attorneys' fees he incurred in doing so. Mattel's legal wrath was not lightly incurred. It was triggered by a series of photographs in which Forsythe depicted the company's "Barbie" dolls, nude, in "various absurd and often sexualized positions." Forsythe's photographs were not particularly successful, as a commercial matter. (Evidence showed that purchases by Mattel's investigators accounted for at least half of his total sales.) Nevertheless, Mattel sued Forsythe for copyright, trademark and trade dress infringement, and related state law claims.

Federal District Judge Ronald Lew granted Forsythe's motion for summary judgment, though the judge denied the photographer's request for $1.6 million in attorneys' fees. Both sides took an appeal, from which Forsythe has emerged completely victorious. In an opinion by Judge Harry Pregerson, the Court of Appeals has affirmed the summary judgment Forsythe won. Moreover, the appellate court reversed the denial of Forsythe's request for fees and has remanded the case to the lower court for reconsideration of that request.

Judge Pregerson agreed that Forsythe's photos did not infringe Mattel's copyrights, because the photos were a fair use. They were a parody of Barbie and "highly transformative." The amount of Barbie's figure used was "justified." Forsythe's photos had "no discernable impact" on Mattel's market for derivative uses of Barbie. And "the benefits to the public in . . . allowing artistic freedom and expression and criticism of a cultural icon . . . are great."

Forsythe used the word "Barbie" in the title of his photos (and on his website), but doing so did not infringe Mattel's trademark, Judge Pregerson concluded. It did not, he explained, because they "accurately describe the subject of the photographs, which in turn depict Barbie and target the doll with Forsythe's parodic message." What's more, the titles do not mislead the public into believing that Mattel sponsored Forsythe's work. Thus, the judge said, "the public interest in free and artistic expression greatly outweighs its interest in potential consumer confusion about Mattel's sponsorship. . . ."

Judge Pregerson also affirmed the dismissal of

Mattel's trade dress claims. "Barbie would not be readily identifiable in a photographic work without use of the Barbie likeness and figure. Forsythe used only so much as was necessary to make his parodic use of Barbie readily identifiable, and it is highly unlikely that any reasonable consumer would have believed that Mattel sponsored or was affiliated with his work." These findings made Forsythe's use of Barbie a "nominative fair use" of Mattel's trade dress, rather than an infringement of it.

Finally, because Forsythe's use of Barbie was "transformative," Judge Pregerson concluded that Mattel's state law claims "are barred by the First Amendment."

Mattel was represented by Adrian M. Pruetz of Quinn Emanuel Urquhart Oliver & Hedges in Los Angeles. Forsythe was represented by Annette L. Hurst of Howard Rice Nemerovski Canady Falk & Rabkin in

San Francisco.

Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792, 2003 U.S.App.LEXIS 26294 (9th Cir. 2003) [ELR 25:12:16]

Assignee of Mexican film producers may enforce restored copyrights to Mexican films once in the public domain in U.S., but unlicensed U.S. broadcaster and syndicators are not liable for attorneys' fees or statutory damages for films first copied or broadcast before copyrights were restored and registered for U.S. copyright, federal District Court rules

Several years ago, the United States did a remarkable thing. It restored the copyrights to a lot of foreign works that had fallen into the public domain in the U.S. The Act that did this dealt with many things besides copyright - it was called the "Uruguay Round Agreements Act" - and the part that dealt with copyright did so in a complicated, and in many respects ambiguous, fashion. (ELR 17:3:3)

Many Mexican movies had their U.S. copyrights restored by that Act. Because those movies have real commercial value in the U.S. marketplace, disputes - triggered by the Act's complicated and ambiguous provisions - are now being litigated in federal courts.

One of these lawsuit was filed by Peliculas Y Videos Internacionales, a Mexican corporation that acquired, by assignment from their producers, several Mexican movies whose copyrights have been restored. Peliculas has sued Harriscope of Los Angeles, the owner of television stations that have broadcast some of those movies, as well as Media Resources

International and Television International Syndicators, companies that created pan-and-scan versions of the movies and then licensed them to Harriscope. Peliculas alleges that by copying, licensing and broadcasting these Mexican movies, Harriscope, Media Resources and Television International have infringed Peliculas' now-restored copyrights.

The case is not over yet. But in response to cross-motions for summary judgment, District Judge William Rea has made two pre-trial rulings of some significance. One favors Peliculas; the other favors Harriscope, Media Resources and Television International.

In the ruling that favors Peliculas, Judge Rea held that it could enforce the rights it claims - the right to reproduce, license and broadcast the movies - even though it wasn't the company that actually produced them. Harriscope (and the others) argued that Peliculas couldn't enforce those rights, because the Act "vests" restored copyrights "in the author . . . as determined by the law of the source country of the work."

In this case, the "source country" is Mexico. Thus the issue was whether Peliculas qualified as the movies' "author," even though it acquired them by assignment and wasn't their producer. Under Mexican law, moral rights can't be assigned, though "exploitation" rights can.

In an earlier, unrelated case involving Mexican movies, alleged infringers argued that corporations couldn't be "authors" at all, under Mexican law; but the court held that they could (ELR 25:4:11). Judge Rea agreed with that conclusion; but by itself, it didn't control the outcome of this case, because the companies who filed that case actually were the producers of the movies in dispute. In this case, Peliculas was not. Nevertheless, Judge Rea found that Mexican law permits the assignment of exploitation rights; and since those were the rights Peliculas seeks to enforce in this case, the judge held that it can.

In the ruling that favors Harriscope (and the others), Judge Rea held that they cannot be held liable for attorneys' fees or statutory damages in connection with movies they copied and broadcast before the U.S. copyrights to those movies were restored and were registered for copyright. Given the facts of this case, this turned into a two (or even three) part ruling.

Twenty-two of the 29 movies involved in the case were copied and first broadcast before 1996, when copyrights to the Mexican movies were restored. Peliculas can't recover fees or statutory damages for those, because the Act provides that fees and statutory damages can't be recovered for activities involving specific works that were begun before the copyrights to those works were restored, even if those activities continue after the works' copyrights were restored.

Four other movies were copied and broadcast after their copyrights were restored, but before their U.S. copyrights were registered. Those activities were infringements. But Judge Rea held that Peliculas can't recover fees or statutory damages for those, because the Copyright Act doesn't allow fees or statutory damages for infringements that occur before registration.

The evidence concerning the remaining three movies didn't show when they were copied and broadcast. So Judge Rea couldn't decide, in response to a motion for summary judgment, whether Peliculas will be able to recover fees and statutory damages for those.

Peliculas was represented by Jason K. Feldman of John S. Mumford Law Offices in Los Angeles. Harriscope was represented by James J. S. Holmes of Sedgwick Detert Moran & Arnold in Los Angeles. Media Resources International and Television

International Syndicators were represented by Corine Zygelman of Murchison & Cumming in Los Angeles.

Peliculas Y Videos Internacionales v. Harriscope of Los Angeles, 2004 U.S.Dist.LEXIS 2302 (C.D.Cal. 2004) [ELR 25:12:16]

Iranian embargo does not prohibit importation of Iranian movies, assignment of Iranian movie copyrights, or payment of royalties to Iranian film producers, Court of Appeals rules in infringement case filed by assignee against unlicensed broadcaster

Masood Kalantari is an Iranian film distributor. He imported three Farsi language Iranian movies - "Snow Man," "Two Women" and "Corrupted Hands - from their Iranian producers who assigned the movies' copyrights to Kalantari, including the exclusive right to distribute and exhibit those movies in the U.S. Though the United States and Iran do not have a copyright treaty with one another, these three movies were first published in the U.S. simultaneously with their first publication in Iran; and thus they were eligible for U.S. copyright protection for that reason. They were eligible, that is, unless some other provision of U.S. law precluded their protection here, or made the assignment to Kalantari ineffective.

The reason a question about the effectiveness of the assignments arose is that the movies were broadcast in the U.S., without Kalantari's permission, by National Iranian TV, so Kalantari sued NITV for infringement. NITV responded with a motion for summary judgment in which it argued that the Iranian trade embargo prohibited Kalantari from buying any rights in the movies, and that without a valid assignment of the movies' copyrights, he had no copyrights that could be infringed. The District Court agreed, and granted NITV's motion.

On appeal, however, Kalantari has prevailed. In an opinion by Judge Susan Graber, the Court of Appeals has held that the Iranian trade embargo did not prohibit Kalantari from importing the movies, did not prohibit the assignment of the movies' copyrights to him, and did not prohibit him from paying the Iranian producers for those assignments.

Judge Graber reached this conclusion, quite easily, because the U.S. statute on which the Iranian embargo is based specifically prohibits bans on the importation "from any country" of films, records, and other types of "information materials." Indeed, the Iranian embargo regulations themselves specifically exempt "informational materials" from their general ban on the importation of Iranian goods and services.

For this reason, Judge Graber concluded that "the exemption plainly allows a United States person to pay Iranians in exchange for the importation of a movie."

Moreover, the Iranian embargo regulations also authorize any transaction "ordinarily incident" to permitted transactions. Judge Graber concluded that copyright assignments are "incidental" to the permitted importation of Iranian movies.

To confirm that this reading of the Iranian embargo regulations is correct, Judge Graber compared the Iranian embargo to the Cuban embargo. Both embargos are based on the same statute, and the language of the "informational materials" exemption from both embargos is "substantially the same." The Cuban regulations contain examples which specifically state that a transaction by which a Cuban exports a Cuban movie to a U.S. party, and licenses the U.S. party to exploit the movie in the U.S., in return for payments by the U.S. party to the Cuban exporter, would be an "authorized" transaction. Given the similarity in the language of the Iranian and Cuban regulations, Judge Graber concluded that this example shows that similar transactions involving Iranian movies are authorized as well.

Kalantari was represented by Ali Kamarei in Palo Alto. National Iranian TV was represented by Martin N. Refkin of Gallagher & Gallagher in Los Angeles.

Kalantari v. NITV, Inc., 352 F.3d 1202, 2003 U.S.App.LEXIS 25118 (9th Cir. 2003) [ELR 25:12:17]

Television cameraman must pay taxes on $80,000 of $200,000 settlement he received from Dennis Rodman, following injuries cameraman suffered when allegedly kicked by Rodman during Chicago Bulls game, because settlement included cameraman's agreement not to defame Rodman, talk about incident, disclose settlement terms, or assist criminal prosecution

On January 15, 1997, Eugene Amos, Jr., was a television cameraman with a courtside view at a game between the Chicago Bulls and the Minnesota Timberlakes. Courtside can be good, especially for cameramen; but in one respect, Amos' view was a little too close. Back then, Dennis Rodman was still playing for the Bulls. During the game, Rodman fell out of bounds, landed on Amos, and then allegedly kicked the cameraman, injuring Amos badly enough that he was taken by ambulance to a hospital.

That injury gave rise to two related disputes: the first between Amos and Rodman; and the second between Amos and the Internal Revenue Service.

Amos' dispute with Rodman was settled quite quickly. Rodman paid Amos $200,000. In return, Amos waived all claims he might have had against Rodman, the Bulls, and the NBA. What's more, Amos also agreed, in writing, that he wouldn't defame Rodman, talk about the kicking incident, disclose the settlement's terms, or assist in any criminal prosecution. The written settlement agreement didn't indicate how much of the $200,000 was for Amos' injuries and how much for the rest. But the agreement did specify that if Amos broke any of his promises, he would have to pay Rodman damages of $200,000.

That took care of the first dispute, but the terms of the settlement agreement gave rise to the second.

As a general rule, tax must be paid on income from all sources. There is, however, an important exception to this rule. Damages received - from lawsuits or settlements - on account of “personal injuries” may be excluded from taxable income. That is, no tax at all has to be paid on personal injury damages.

Amos excluded the $200,000 he received from Rodman when he reported his 1997 income to the IRS. He did so, because he considered the entire $200,000 to be damages for his injuries. The IRS, however, thought otherwise. It considered virtually all of the $200,000 - in fact, all but $1 of it - to be payment for Amos’ promise not to defame Rodman, not to talk about the incident, not to disclose the settlement’s terms, and not to assist a criminal prosecution. The IRS came to this conclusion, because the agreement required Amos to, in effect, refund the $200,000, if he broke any of those promises. To the IRS, that meant the money was not really damages for Amos' personal injuries.

Amos' dispute with the IRS wound up in the Tax Court, which - Solomon-like - split the baby, giving 60% of it to Amos and 40% to the IRS. That is, Judge Carolyn Chiechi found, "based on [her] review of the entire record," that Rodman had paid Amos $120,000 on account of his physical injuries and $80,000 for his promises. This meant that Amos had to pay income tax on $80,000 of the settlement, but not on the other $120,000.

Amos was represented by Terrance A. Costello. The IRS was represented by Blaine C. Holiday.

Amos v. Commissioner of Internal Revenue, T.C. Memo. 2003-329 (2003), available at www.ustaxcourt.gov/InOpHistoric/Amos.TCM.WPD.pdf [ELR 25:12:18]

Gennifer Flowers' defamation and false light claims against Hillary Clinton are dismissed, but court refuses to dismiss similar claims against James Carville and George Stephanopoulos, in case complaining about statements they made in published books and on television

Gennifer Flowers sued James Carville, Hillary Clinton, George Stephanopoulos and Little, Brown & Company back in 1999, in federal court in Nevada. The case alleged that the defendants defamed her and invaded her privacy, as a result of things they said on television or wrote in books about Flowers' assertion that she had an affair with President Bill Clinton, back when he was governor of Arkansas.

The case has generated four published opinions so far, though it hasn't gotten beyond the pre-trial law-and-motion stage yet. The first three opinions all dealt with the legal adequacy of the allegations of Flowers' often-amended complaint (ELR 22:9:20, 24:10:13, 25:7:19). In the third of those opinions, District Judge Philip Pro held that Flowers' then most-recent complaint stated some valid claims for defamation, invasion of privacy, and conspiracy (ELR 25:7:19), so the case entered its next phase.

In that next phase, Carville, Stephanopoulos and Hillary Clinton all moved for summary judgment, on the grounds that the statute of limitations barred Flowers' remaining claims. Judge Pro has agreed that Flowers' claims against Clinton were barred by the statute of limitations, and thus he granted her motion. But Judge Pro concluded that summary judgment on whether Flowers' claims against Carville and Stephanopoulos are barred by the statute of limitations "is not appropriate at this time."

Judge Pro's opinion is a tour through Nevada's ever-changing law on when a cause of action for conspiracy to defame and invade privacy begins to run, in cases where complained-of statements accuse a public figure of dishonesty. In short, the four-year statute of limitations begins to run when the plaintiff knows or should have known that the complained-of statements were made by the conspiring defendants with knowledge the statements were false or with reckless disregard of their falsity.

Judge Pro found that Flowers knew the complained-of statements were made more than four years before she filed suit, and she knew that Hillary Clinton knew the complained-of statements were false when Clinton made them (assuming, one presumes, they were false). Thus, Judge Pro granted Clinton's summary judgment motion.

The result with respect to the motions of Carville and Stephanopoulos was different, for a counterintuitive reason. Though Flowers knew - more than four years before she sued them - that Carville and Stephanopoulos made the complained-of statements, Carville and Stephanopoulos have not yet proved that Flowers knew - more than four years before she sued them - that they knew their statements were false (again, presuming they were false).

Flowers was represented by Rex A. Bell of Bell Lukens Marshall & Kent in Las Vegas. Hillary Clinton was represented by Walter R. Cannon of Rawlings Olson Cannon Gormley & Desruisseaux in Las Vegas. Carville was represented by Paul R. Hejmanowksi of Lionel Sawyer & Collins in Las Vegas. Stephanopulous was represented by Andrew P. Gordon of McDonald Carano Wilson in Las Vegas.

Flowers v. Carville, 292 F.Supp.2d 1225, 2003 U.S.Dist.LEXIS 21896 (D.Nev. 2003) [ELR 25:12:19]

Operators of restaurant and lounge that performed music without ASCAP license are enjoined from further infringements, and ordered to pay music publishers statutory damages and attorneys' fees

Twin sisters who used to operate the "Twins Lounge," a restaurant and lounge in Washington, D.C., have been ordered to pay three music publishing companies - Harrison Music, EMI Mills Music and Chappell & Co. - a total of $22,000. The order took the form of a judgment in a copyright infringement suit filed against the sisters, because they permitted musicians to perform live music without an ASCAP license.

The sisters didn't deny liability. They simply asked that the music publishers not be awarded all the damages and fees they sought, and the sisters asked that no injunction be entered against them. Neither side got all that it wanted, but the publishers did better.

In a short and to-the-point ruling, federal District Judge Richard Leon awarded the publishers statutory damages of $2,000 per infringement, for a total of $10,000. This was less than the $3,000 per infringement (and $15,000 total) the publishers had sought. But it was more than the sisters were willing to pay - and it was more than the $5,316 license fee the sisters would have paid ASCAP for a license. Indeed, the $10,000 award was 13% of the total revenues of the "Twins Lounge" during the year the infringements took place. Judge Leon explained that the award was justified because the publishers had repeatedly "warned" the sisters they needed an ASCAP license, and because damages had to exceed what a license would have cost so the sisters were not "rewarded for copyright infringement."

The publishers also had sought almost $15,900 in attorneys' fees, not all of which they got. Judge Leon found the $325 per hour fee charged by one lawyer to be "reasonable and appropriate." But the judge concluded that the amount of time devoted to the case by that lawyer and another was "more . . . than appears reasonably necessary." As a result, the judge awarded $10,500 in fees, in addition to the publishers' full costs of just over $1,500.

Finally, Judge Leon enjoined the sisters from committing any further infringements of ASCAP-licensed music. The sisters had argued they should not be enjoined, because the Twins Lounge was no longer operating. But the judge found that the sisters had a history of operating similar establishments without music performance licenses, and that their "propensity to violate copyright law" justified an injunction in this case.

The publishers were represented by Benjamin

Louis Zelenko of Baach Robinson & Lewis in Washington, D.C. The sisters were represented by Larry C. Williams in Washington, D.C.

Harrison Music Corp. v. Tesfaye, 293 F.Supp.2d 80, 2003 U.S.Dist.LEXIS 23620 (D.D.C. 2003) [ELR 25:12:19]

Previously Reported:

Supreme Court denies cert. The United States Supreme Court has denied petitions for certiorari in these previously reported cases: Alameda Films v. Authors Rights Restoration Corp., 124 S.Ct. 814, 2003 U.S.LEXIS 8609 (2003) (ELR 25:4:11), a copyright infringement suit filed by Mexican film production companies against United States film distributors, in which the Court of Appeals held that the Mexican film production companies own restored U.S. copyrights to Mexican movies that once were in the public domain in the United States, except those movies that are in the public domain in Mexico too; LaFace Records v. Parks, 124 S.Ct. 925, 2003 U.S.LEXIS 9015 (2003) (ELR 25:5:11), in which a Court of Appeals held that civil rights activist Rosa Parks is entitled to a trial of her Lanham Act and right of publicity claims against LaFace Records and the rap group OutKast, complaining about the title of their Grammy-nominated recording "Rosa Parks"; Top Rank, Inc. v. Florida State Boxing Commission, 124 S.Ct. 1045, 2004 U.S.LEXIS 55 (2004) (ELR 25:1:17), which held that a Florida gross receipts tax on boxing promoters does not violate the First Amendment; McFarlane v. Twist, 124 S.Ct. 1058, 2004 U.S.LEXIS 76 (2004) (ELR 25:6:15), where the Missouri Supreme Court held that NHL player Tony Twist is entitled to a trial in his right of publicity lawsuit against the publisher of the comic book "Spawn" that featured a villainous character named "Tony Twist," because the comic book is not protected by the First Amendment and Twist's name may have been used to obtain commercial advantage; Deep v. Recording Industry Association of America, 124 S.Ct. 1069, 2004 U.S.LEXIS 91) (ELR 25:5:9), where the Seventh Circuit Court of Appeals affirmed an injunction against Aimster, because it agreed that the evidence supported the conclusion that the instant messenger music swapping service is likely to be found to be contributory infringer; Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 124 S.Ct. 1410, 2004 U.S. LEXIS 1052 (ELR 25:8:11), in which the Ninth Circuit Court of Appeals affirmed a preliminary injunction that was granted to Buena Vista in a copyright infringement suit that complained about

Video Pipeline's unauthorized Internet display of movie clip previews.

Review granted. The California Supreme Court has agreed to review Finke v. Walt Disney Co., in which a Court of Appeal held that a former New York Post journalist had established a reasonable probability of prevailing in her libel lawsuit against Disney, as a result of complaints Disney made to the Post, that allegedly resulted in the journalist being fired, about the accuracy of the journalist's articles about Winnie-the-Pooh litigation (ELR 25:6:18). However, the Supreme Court deferred further action in the case until it first decides a related issue in an unrelated case. Finke v. Walt Disney Co., 6 Cal.Rptr.3d 424, 79 P.3d 541, 2003 Cal.LEXIS 8667 (Cal. 2003).

Judgment published in CD "Minimum Advertised Price" case; settlement with music club members approved. During the 1990s, the five major record companies adopted policies that allegedly affected the minimum prices that could be advertised for their CDs. Those policies were challenged, on antitrust grounds, by the Federal Trade Commission; and in due course, the record companies settled the FTC's claims (ELR 22:1:8). In the immediate wake of that settlement, lawsuits were filed as private class actions on behalf of consumers in 14 states and territories, and by the Attorneys General of 43 other states and territories. In due course, those lawsuits were settled too, on behalf of all CD customers except those who were music club members (ELR 25:3:5). The final judgment in those cases has now been published, along with a separate ruling in which federal District Judge Brock Hornby approved an amended settlement of behalf of music club members. *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 292 F.Supp.2d 182, 2003 U.S.Dist.LEXIS 24856 (D.Me. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 292 F.Supp.2d 184, 2003 U.S.Dist.LEXIS 24171 (D.Me. 2003).

Appellate court affirms most rulings concerning Houston adult entertainment ordinance. Early in 1997, the City of Houston amended its ordinance regulating adult entertainment businesses in ways that sparked opposition by 88 establishments and 105 individuals who own or work in Houston-area cabarets, movie theaters, arcades, minitheaters, video stores, bookstores, modeling studios and tanning salons. Some of those amendments, though not all, were declared unconstitutional by federal District Judge Nancy Atlas, in a very lengthy opinion (ELR 21:1:19).

Dissatisfied with that result, Houston appealed, with little success. In a lengthy opinion of its own, the Court of Appeals has affirmed virtually all of Judge Atlas' opinion. Indeed, the only rulings it reversed were those that invalidated a distance restriction, interior design restrictions, and permit and identification card requirements. Even now, though, the case isn't entirely over. The appellate court has remanded the case for reconsideration of the distance restriction; Judge Atlas has been directed to determine whether that restriction "affords reasonable alternative avenues of communication" for the city's adult entertainment businesses. *N.W. Enterprises Inc. v. City of Houston*, 352 F.3d 162, 2003 U.S.App.LEXIS 24021 (5th Cir. 2003)

Decisions published. These previously reported decisions have now been published: Newton v. Diamond, 349 F.3d 591, 2003 U.S.App.LEXIS 22635 (9th Cir. 2003) (ELR 25:7:12); Elvis Presley Enterprises v. Passport Video, 349 F.3d 622, 2003 U.S.App.LEXIS 22775 (9th Cir. 2003) (ELR 25:7:13); Pro-Football, Inc. v. Harjo, 284 F.Supp.2d 96, 2003 U.S.Dist.LEXIS 17180 (D.D.C. 2003) (ELR 25:6:8); Caterpillar Inc. v. Walt Disney Co., 287 F.Supp.2d 913, 2003 U.S.Dist.LEXIS 18618 (C.D.Ill. 2003) (ELR 25:6:8); Carter-Clark v. Random House, Inc., 768 N.Y.S.2d 290, 2003 N.Y.Misc.LEXIS 1228 (N.Y.Sup. 2003) (ELR 25:6:7).
[ELR 25:12:20]

DEPARTMENTS

Entertainment Lawyer News:

Don Engel forms association with Fox & Spillane. Gerard P. Fox and Jay M. Spillane of Fox & Spillane have formed an association with entertainment trial lawyer Donald S. Engel. Engel is a partner in the Los Angeles law firm of Engel & Engel, where he practices entertainment and media law and litigation. He taught law at New York University School of Law, Rutgers Law School and the University of Florida School of Law; was a member of the Board of Editors of the Copyright Bulletin of the United States Copyright Society and trustee of the Society; was chairman and member of numerous copyright and trademark committees of California, New York and national bar associations; and has written articles on entertainment litigation, copyright and related matters and presented numerous seminars on those topics. He was the recipient of the Hastings Law School 1986 Roscoe Barrow Memorial Award from COMM/ENT Hastings Journal of Communications and Entertainment Law for his "successful representation of various recording artists in defending their right to perform" and for speaking out against "unfair practices by many music industry attorney-agents and record companies." Engel received his LL.B. from New York University School of Law. Among his recording artist clients whose grievances resulted in litigation against their record companies are Babyface, The Beach Boys, Boston, Toni Braxton, Bush, Cameo, the Dixie Chicks, the Gap Band, Sammy Hagar, Don Henley, L.A. Reid, Teena Marie, Meat Loaf, Olivia Newton-John, Kenny Rogers, Henry Rollins, Donna Summer, TLC, Luther Vandross, The Whispers and Barry White. Fox &

Spillane is a business litigation law firm specializing in entertainment and media cases and has represented clients in motion pictures, music, television, Internet, sports and related industries.

Carole Handler and William Patry join Thelen Reid & Priest as partners. Thelen Reid & Priest has announced the addition of two new partners to its growing Entertainment and Media practice. Carole Handler, a nationally recognized expert in copyright, antitrust, and intellectual property issues, joins as partner in the Los Angeles office, and noted author and copyright practitioner William Patry joins as a partner in the firm's New York office. Handler joins Thelen Reid from O'Donnell & Schaeffer where she focused her practice on the interface between copyright and antitrust law, particularly where competitive issues arise from exploitation of intellectual property rights.

She also has experience in entertainment, and in the fields of technology, telecommunications, pharmaceuticals, medical devices, weight loss, and energy. Handler has tried many cases in the state and federal courts, including significant copyright cases of first impression that established the motion picture industry's exclusive rights to control the distribution and performance of their copyrighted works in new media. She represented Marvel Enterprises in its successful battle to reclaim the rights to its signature character "Spider-Man," and has developed antitrust theories for the National Basketball Association in its litigation with WGN and the Chicago Bulls. Handler received a J.D. from the University of Pennsylvania Law School and an A.B., with honors, in history and literature from Radcliffe College. She has been an adjunct Professor of Trademark Law at the University of California Law School and the University of

Southern California Law School and a guest lecturer at Columbia University School of Law and Loyola Law School. She was named one of California's Lawyers of the Year for 2001 and one of the top 30 women litigators in Los Angeles in 2002 and 2003. William Patry has authored several copyright treatises, including a forthcoming 3,000-page comprehensive work on all aspects of copyright law, and the definitive work on the fair use privilege, The Fair Use Privilege in Copyright Law. He has also written numerous articles on the subject, most recently with Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. Patry has an active litigation practice at both the trial and appellate levels, representing clients in infringement suits in the music, record, book publishing, software, architecture, and telecommunications industries. Prior to entering private practice, Patry served as Copyright Counsel to the

United States House of Representatives' Committee on the Judiciary where he drafted significant amendments to the Copyright Act. He also served as Policy Planning Advisor to the Register of Copyrights at the United States Copyright Office, where he assisted in developing domestic and international copyright policy. He has testified numerous times before Congress and is an expert on legislative procedure. In 1998, Patry was appointed by the U.S. Court of Appeals for the Second Circuit as the court's expert on international copyright choice of law.
[ELR 25:12:22]

In the Law Reviews:

Loyola of Los Angeles Entertainment Law Review has published Volume 24, Number 1 with the 2003 Law & Technology Association Conference: Ideas Without Boundaries: Creating and Protecting Intellectual Property in the International Area with the following articles:

Keynote: The International Information Society by Lawrence Lessig, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Copyright's Long Arm: Enforcing U.S. Copyrights Abroad, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Tracking Pirates in Cyberspace, 24 Loyola of Los

Angeles Entertainment Law Review (2004)

Oral Argument Before the United States Supreme Court in the Matter of Salvador Dolly v. Nugenera, Inc. by Petty Tsay, Brian Kucsan, Craig Countryman and Lisa Wang, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Slip Opinion: Salvador Dolly v. Nugenera, Inc. by Ninth Circuit Justices Alex Kozinski and Kim M. Wardlaw, and California Supreme Court Justice Ming W. Chin, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Has Collusion Returned to Baseball? Analyzing Whether a Concerted Increase in Free Agent Player Supply Would Violate Baseball's "Collusion Clause" by Marc Edelman, 24 Loyola of Los Angeles

Entertainment Law Review (2004)

Case Closed: Federal Courts Resolve the Question of an Exclusive Licensee's Ability to Sublicense a Copyright by Emily Ayers, 24 Loyola of Los Angeles Entertainment Law Review (2004)

Entertainment and Sports Lawyer, published by the Forum on the Entertainment and Sports Industries of the American Bar Association, www.abanet.org/forums/entsports/esl.html, has published Volume 21, Number 4 with the following articles:

WADA, Doping and THG by John T. Wendt, 21 Entertainment and Sports Lawyer (2004) (for website, see above)

Whose Song Is It, Anyway? by Michael A. Einhorn, 21 Entertainment and Sports Lawyer (2004) (for website, see above)

The Hazards of Divorce for Professional Athletes by Meredith Brennan and Mark Momjian, 21 Entertainment and Sports Lawyer (2004) (for website, see above)

Music Licensing - From the Basics to the Outer Limits by Cydney A. Tune, 21 Entertainment and Sports Lawyer (2004) (for website, see above)

Ambush Marketing: The Legal Background for Sport Marketers by Steve McKelvey and John Grady, 21 Entertainment and Sports Lawyer (2004) (for website, see above)

Online Music Distribution: Proposal for a Digital First Sale Doctrine by Brian Mencher, 21 Entertainment and Sports Lawyer (2004) (for website, see above)

Cardozo Arts & Entertainment Law Journal has published Volume 21, Numbers 2-3 with the following articles:

Copying for Religious Reasons: A Comment on Principles of Copyright and Religious Freedom by Thomas C. Berg, 21 Cardozo Arts & Entertainment Law Journal 287 (2003)

UCITA, Copyright, and Capture by Deborah Tussey, 21 Cardozo Arts & Entertainment Law Journal 319 (2003)

Can Police Track Your Wireless Calls? Call Location

Information and Privacy Law by Laurie Thomas Lee, Ph.D., 21 Cardozo Arts & Entertainment Law Journal 381 (2003)

The Recording Academy Entertainment Law Initiative 2003 Legal Writing Contest winners are as follows:

Family Feud in the Entertainment Industry: Section 304(a) of the Copyright Act and its Impact on Estate Distribution by Heather Hubbard, 21 Cardozo Arts & Entertainment Law Journal 407 (2003)

The Silenced Minority: When the RIAA Charges College Radio for Online Broadcasts, Will the Public End Up Paying? by Eleanor Lackman, 21 Cardozo Arts & Entertainment Law Journal 413 (2003)

Heartbreak Hotel in B-Flat Broke: Music, Money and

(Un)Fair Use by L. Richard Walton, 21 Cardozo Arts & Entertainment Law Journal 423 (2003)

The Muhammad Ali Boxing Reform Act: Its Problems and Remedies, Including the Possibility of a United States Boxing Administration by Devin J. Burstein, 21 Cardozo Arts & Entertainment Law Journal 433 (2003)

Entertainment Law Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has published Volume 15, Issue 3 with the following articles:

Viral Online Copyright Infringement in the United States and the United Kingdom: the End of Music or Secondary Copyright Liability? Part 1 by Warren R. Shiell, 15 Entertainment Law Review 63 (2004) (for website, see above)

International Television Programme Sales: Define Your Natural Market by Claudio Di Persia, 15 Entertainment Law Review 72 (2004) (for website, see above)

To Be and To Have: Copyright Perspectives on Etre et Avoir by Jeremy Phillips and Ilanah Simon, 15 Entertainment Law Review 80 (2004) (for website, see above)

The Plot Thickens: Formats, Sequels, and Spin-offs after Goggomobil by Therese Catanzariti, 15 Entertainment Law Review 85 (2004) (for website, see above)

Piracy: DMCA Wars by Shannon Yavorsky and David Haubert, 15 Entertainment Law Review 94 (2004) (for website, see above)

E-commerce in the Bahamas by George Hwang, 15 Entertainment Law Review 97 (2004) (for website, see above)

Book Review: The Commerical Appropriation of Personality by Huw Beverley-Smith, 15 Entertainment Law Review 105 (2004) (for website, see above)

Book Review: Art and Copyright by Simon Stokes, 15 Entertainment Law Review 105 (2004) (for website, see above)

The Idaho Law Review has published Volume 40, Number 2 as a Symposium entitled First Amendment and the Media-Exploring Contemporary Problems Facing America with the following articles:

Let Me Hear Your Web Sights - Visual and Aural

Metaphors for the Internet by Stuart J. Kaplan, 40 Idaho Law Review (2004)

A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings by Daniel Stepniak, 40 Idaho Law Review (2004)

Secrecy's Assault on the Constitutional Right to Open Trials by Susan Dente Ross, 40 Idaho Law Review (2004)

Meida Law in Idaho: Where Are We? by Debora K. Kristensen, 40 Idaho Law Review (2004)
Rosenbloom's Ghost: How a Discredited Decision Lives On in Libel Law by James C. Mitchell, 40 Idaho Law Review (2004)

The Independent Examination Rule in the Ninth

Circuit: Suzuki Motor Corp. v. Consumers Union by Cathy R. Silak, 40 Idaho Law Review (2004)

Protecting Pedophiles and Valuing Virtual Child Pornography by Jeremy G. Ladle, 40 Idaho Law Review (2004)

Freedom of Libel: How an Expansive Interpretation of 47 U.S.C. § 230 Affects the Defamation Victim in the Ninth Circuit by Andrea L. Julian, 40 Idaho Law Review (2004)

Texas Review of Entertainment and Sports Law has published Volume 5, Number 1 with the following articles:

How the Home Team Can Keep From Getting Sacked: A City's Best Defense to Franchise Free Agency in

Professional Football by Bradley J. Stein, 5 Texas Review of Entertainment and Sports Law 1 (2003)

Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation by Mark Doman, 5 Texas Review of Entertainment and Sports Law 37 (2003)

A (Not So) Safe Harbor: Substantial Propotionality as a Measure of Effective Accomodation by Tshaka C. Randall, 5 Texas Review of Entertainment and Sports Law 79 (2003)

The Cincinnati Bengals' Legal Obligation to Win: A Case Study for the Public Funding of Stadiums and a Roadmap for Municipal Investment by Elan Daniels, 5 Texas Review of Entertainment & Sports Law 99 (2003)

Life After Napster: Will Its Successors Share Its Fate? by H. Michael Drumm, 5 Texas Review of Entertainment & Sports Law 157 (2003)

Comm/Ent, Hastings Communications and Entertainment Law Journal, has published Volume 25, Numbers 3-4 and Volume 26, Number 1 with the following articles:

An Economic Analysis of Domain Name Policy by Karl M. Manheim and Lawrence B. Solum, 25 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

Examining the Evidence: Post-Verdict Interviews and the Jury System by Nicole B. Casarez, 25 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

The Biology of the Broadcast Flag by Susan P. Crawford, 25 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

Unmasking "Crack_Smoking_Jesus": Do Internet Service Providers Have a Tarasoff Duty to Divulge the Identity of a Subscriber Who is Making Death Threats? by Jon B. Eisenberg & Jeremy B. Rosen, 25 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

File-Sharing, Copyright, and Privacy by Stephen Keating, 25 Comm/Ent, Hastings Communications and Entertainment Law Journal (2003)

Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of "Universal Service" by Patricia M. Worthy, 26 Comm/Ent, Hastings

Communications and Entertainment Law Journal 1 (2003)

Publishing Privacy: Intellectual Property, Self-Expression and the Victorian Novel by Jessica Bulman, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal 73 (2003)

Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling - A Clue Illuminated and Obscured by Susan J. Latham, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal 119 (2003)

Building Rome in a Day: What Should We Expect from the RIAA? by Valerie Alter, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal 155 (2003)

Virginia Sports and Entertainment Law Journal has published Volume 2, Issue 2 with the following articles:

Genetic Testing: The Future of Athlete Selection? by Ben Sellenger, 2 Virginia Sports and Entertainment Law Journal 207 (2003)

Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909 by Douglas A. Hedenkamp, 2 Virginia Sports and Entertainment Law Journal 254 (2003)

How to Curb Professional Sports' Bargaining Power Vis-à-vis the American City by Marc Edelman, 2 Virginia Sports and Entertainment Law Journal 280 (2003)

Pandora's Box is Open: Criminal Prosecution Implemented; Violent Play in the National Hockey League Eliminated by Debra L. Feldman, 2 Virginia Sports and Entertainment Law Journal 310 (2003)

Stadium Naming Rights: An Assessment of the Contract and Trademark Issues Inherent to Both Professional and Collegiate Stadiums by Robert H. Thornburg, 2 Virginia Sports and Entertainment Law Journal 328 (2003)

Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes by Jonathan L. H. Nygren, 2 Virginia Sports and Entertainment Law Journal 359 (2003)

A Bad Bet: Federal Criminalization of Nevada Collegiate Sports Books by Ronald J. Rychlak, 4

Nevada Law Journal 320 (2003-2004)

Underground Appeal: A Sample of the Chronic Questions in Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society by Chris Johnstone, 77 Southern California Law Review 397 (2004)

A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights by Cambra E. Stern, 51 UCLA Law Review 849 (2004)

Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels by Jennifer M. Anglim, 45 Harvard International Law Journal 239 (2004)

TIVO and the Incentive/Dissemination Conflict: The

Economics of Extending Betamax to Personal Video Recorders by Maribel Rose Hilo, 81 Washington University Law Quarterly 1043 (2003)

Has the Shot Clock Expired? Pryor v. NCAA and the Premature Disposal of a "Deliberate Indifference" Discrimination Claim Under Title VI of the Civil Rights Act of 1964 by Andrew M. Habenicht, 11 George Mason Law Review 551 (2003)

The Faux Fix: Why a Repeal of Major League Baseball's Antitrust Exemption Would Not Solve Its Severe Competitive Balance Problems by Andrew E. Borteck, 25 Cardozo Law Review 1069 (2004)

Time Face the Analog Music: How Traditional Radio Broadcasters Infringe Copyrighjts and What the Music Industry and Congress Can Do to Stop Them by Joyce

Craig-Rient, 72 The George Washington Law Review (2004)

From Ashes to Fire: Trademark and Copyrights in Transition by Gerard N. Magliocca, 82 North Carolina Law Review (2004)

Copyright in the Information Society: Scenario's and Strategies by Erwin Arkenbout, Frans van Dijk and Peter van Wijck, 17 European Journal of Law and Economics 237 (2004) (available from www.kluweronline.nl)

"Primary Video" and Its Secondary Effects on Digital Broadcasting Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment by Michael M. Epstein, 87 Marquette Law Review (2004)

The University of Chicago Law Review has published a Colloquium on Intellectual Property including the following articles:

TRIPS-Round II: Should Users Strike Back? by Rochelle Cooper Dreyfuss, 71 The University of Chicago Law Review 21 (2004)

The Marginal Cost Controversy in Intellectual Property by John F. Duffy, 71 The University of Chicago Law Review 37 (2004)

The Constitutional Protection of Trade Secrets under the Takings Clause by Richard A. Epstein, 71 The University of Chicago Law Review 57 (2004)

Render Copyright unto Caesar: On Taking Incentives Seriously by Wendy J. Gordon, 71 The University of

Chicago Law Review 75 (2004)

Ex Ante versus Ex Post Justifications for Intellectual Property by Mark A. Lemley, 71 The University of Chicago Law Review 129 (2004)

A New Dynamism in the Public Domain by Robert P. Merges, 71 The University of Chicago Law Review 183 (2004)

The Digital Video Recorder: Unbundling Advertising and Content by Randal C. Picker, 71 The University of Chicago Law Review 205 (2004)

Moral Rights in Informational Technology: A New Kind of "Personal Right?" by Mira T. Sundara Rajan, 12 International Journal of Law and Information Technology 32 (2004) (www.ijlit.oupjournals.org)

Communications and the Law, published by William S. Hein, wshein.com, has issued Volume 25, Numbers 2 and 3 with the following articles:

Vanishing First Amendment Protection for Symbolic Expression 35 Years After United States v. O'Brien by Mark R. Arbuckle, 25/2 Communications and the Law 1 (2003) (for publisher, see above)

A Tale of Two Cases: Right of Publicity versus the First Amendment by Sharlene A. McEvoy & William Windom, 25/2 Communications and the Law 31 (2003) (for publisher, see above)

Proposed Changes in Media Ownership Rules: A Study in Ventriloquism? by Ann L. Plamondon, 25/2 Communications and the Law 47 (2003) (for publisher, see above)

On the Wings of Nike: A Streamlined Approach to the Commercial Speech Doctrine by Anne Cunningham & Craig Freeman, 25/3 Communications and the Law 1 (2003) (for publisher, see above)

Determining What Constitutes Opinion by Deckle McLean, 25/3 Communications and the Law 33 (2003) (for publisher, see above)

Free Speech Rogues and Freaks: An Analysis of Amusing and Bizarre Litigants of Free Expression by F. Dennis Hale, 25/3 Communications and the Law 55 (2003) (for publisher, see above)

Frankly, We Do Give a . . . Darn! Hollywood's Battle Against Unauthorized Editing of Motion Pictures: The "CleanFlicks" Case by Nicole Griffin Farrell, Volume 2003/3 Utah Law Review 1041 (2003)

Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games by Patrick M. Garry, 57 SMU Law Review 139 (2004)

Celebrity Misrepresentation & the Federal Lanham Act: The Public Fights Back, 78 St. John's Law Review 233 (2004)

Northwestern University Law Review has published Volume 98, Number 2 with a symposium on Personal Jurisdiction in the Internet Age with the following articles:

Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision by Allan R. Stein, 98 Northwestern University Law Review (2004)

Aliens, the Internet and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction by Wendy Perdue, 98 Northwestern University Law Review (2004)

Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction by Patrick J. Borchers, 98 Northwestern University Law Review (2004)

Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy by Andrea M. Matwyshyn, 98 Northwestern University Law Review (2004)

Promoting Progress Through Perpetual Protection? The Struggle to Place Limits on Congress's Copyright Power by Todd John Canni, 53 Catholic University

Law Review 161 (2003)

Emory Law Journal has published Volume 53, Number 1 with Essays on Television Regulation:

All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation by Thomas W. Hazlett, 53 Emory Law Journal 233 (2004)

The Role of Politics and Policy in Television Regulation by Christopher S. Yoo, 53 Emory Law Journal 255 (2004)

The Rise and Fall of Trademark Law's Functionality Doctrine by Mark Alan Thurmon, 56 Florida Law Review (2004)

Rutgers Computer and Technology Law Journal has published Volume 30, Number 1 with the following articles:

Toward a Criminal Law for Cyberspace: A New Model of Law Enforcement? by Susan W. Brenner, 30 Rutgers Computer and Technology Law Journal 1 (2004)

Pornography, Community and the Internet-Freedom of Speech and Obscenity on the Internet by Dr. Yuval Karniel and Haim Wismonsky, 30 Rutgers Computer and Technology Law Journal 105 (2004)

A Crusade in the Public Domain: The Dastar Decision by Kurt M. Saunders, 30 Rutgers Computer and Technology Law Journal 161 (2004)

Let's Keep It on the Download: Why the Educational

Use Factor of the Fair Use Exception Should Shield Rap Music from Infringement Claims by Evans C. Anyanwu, 30 Rutgers Computer and Technology Law Journal 179 (2004)

Harmonizing Fair Use and Self-Help Copyright Protection of Digital Music by Jacob Weiss, 30 Rutgers Computer and Technology Law Journal 203 (2004)

Practicing Reverse Engineering in an Era of Growing Constraints Under the Digital Millennium Copyright Act and Other Provisions by Jeffrey D. Sullivan and Thomas M. Morrow, 14 Albany Law Journal of Science and Technology (2003)

Implied Licenses by Legal Estoppel by Rachel Clark Hughey, 14 Albany Law Journal of Science and Technology (2003)

One Cyberswamp Predator Pops Up and Slides into Dangerous IP Waters by Jason Allen Cody, 14 Albany Law Journal of Science and Technology (2003)

Intellectual Property and Constitutional Norms by Thomas B. Nachbar, 104 Columbia Law Review 272 (2004)

The Marquette Intellectual Property Law Review has published Volume 8, Number 1 with the following articles:

Market Definition in Intellectual Property Law: Should Intellectual Property Courts Use an Antitrust Approach to Market Definition? by Anna F. Kingsbury, 8 Marquette Intellectual Property Law Review 63 (2004)

Trade Dress: Should Only the Secondary Meaning

Trade Dress Standard Apply to Product Packaging? Or Should Courts Continue to Use the Inherently Distinctive Standard? by Jennifer L. Barwinski, 8 Marquette Intellectual Property Law Review 119 (2004)

Protection for Indigenous Peoples and Their Traditional Knowledge: Would a Registry System Reduce the Misappropriation of Traditional Knowledge? by Thomas J. Krumenacher, 8 Marquette Intellectual Property Law Review 143 (2004)

Counting Down Another Music Marathon: Copyright Arbitration Royalty Panels and the Case of Internet Radio by Sara J. O'Connell, 8 Marquette Intellectual Property Law Review 161 (2004)

DePaul-LCA Journal of Art and Entertainment Law has published Volume 13, Number 2 with the following articles:

Copyright Ownership & the Impact on Academic Libraries by Laura N. Gasaway, 13 DePaul-LCA Journal of Art and Entertainment Law 277 (2003)

Culture Club or The Clash? Historic Preservation, Aesthetic Uniformity and Artistic Freedom by Timothy L. Binetti, 13 DePaul-LCA Journal of Art and Entertainment Law 313 (2003)

Re-Pressing the Internet: Journalists Battle for Equal Access by Zrinka Rukavina, 13 DePaul-LCA Journal of Art and Entertainment Law 351 (2003)

Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of

2003 by Karin F. Borke, 13 DePaul-LCA Journal of Art and Entertainment Law 381 (2003)

The Inability of Copyright Laws to Keep Pace with Technology: Will Greenberg v. National Geographic Stymie Technology or Can a Balance Be Struck?, 49 The Wayne Law Review 145 (2003)

Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking by Laurence R. Helfer, 29 The Yale Journal of International Law 1 (2004)

Are You Content With the Content? Intellectual Property Implications of Weblog Publishing by Attiya Malik, 21 The John Marshall Journal of Computer & Information Law 439 (2003)

Online Collaborative Media and Political Economy of Information: A Case Study by Caio M.S. Pereira Neto, 21 The John Marshall Journal of Computer & Information Law 511 (2003)

Expanding the DMCA: The Importance of Regulating Computer Code by Luke Antonsen, 21 The John Marshall Journal of Computer & Information Law 567 (2003)

A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement by Eric Goldman, 82 Oregon Law Review 369 (2003)

U.S. Professional Sport Organization Policies Shift to Embrace Legalized Gambling Entities: A Roll of the Dice? by Stephen M. McKelvey, 14 Journal of Legal Aspects of Sport (2004) (published the National Sports

Law Institute, Marquette University School of Law, www.law.marquette.edu)

Issues in the Standard of Care for Certified Athletic Trainers by Sharon A. West and Margaret E. Ciccolella, 14 Journal of Legal Aspects of Sport (2004) (for publisher, see above)

Has the Shot Clock Expired? Pryor v. NCAA and the Premature Disposal of a "Deliberate Indifference" Discrimination Claim Under Title VI of the Civil Rights Act of 1964 by Andrew M. Habenicht, 11 George Mason Law Review 551 (2003)

Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels by Jennifer M. Anglim, 45 Harvard International Law Journal 239 (2004)

The Protection of Traditional Knowledge: Towards a Cross-cultural Dialogue on Intellectual Property Rights by Chidi Oguamanam, 15 Australian Intellectual Property Journal (2004) (published by The Law Book Co. Ltd. 44-50 Waterloo Road, N. Ryde NSW 2113 Australia)

Anticircumvention Under the DMCA: Where Do We Stand After Five Years? by Robert P. Taylor and Ethan B. Andelman, 21 The Computer and Internet Lawyer 1 (2004) (edited by Arnold & Porter, published by Aspen Publishers)

Copyright, the First Amendment, and the Right of Publicity: The Expansion of "Transformative Uses" by Michael Landau, 21 The Computer & Internet Lawyer 13 (2004) (for publisher, see above)

DC Circuit Court Deals a Blow to RIAA by E. Leonard Rubin, 21 The Computer & Internet Lawyer 33 (2004) (for publisher, see above)

Photos of "Barbie Enchiladas" Constituted Fair Use of Barbie Image, 21 The Computer & Internet Lawyer 35 (2004) (for publisher, see above)

Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to their Student-Athletes, 37 Wake Forest Law Review (2002)

Interscholastic Sports: Why Exculpatory Agreements Signed by Parents Should Be Upheld, 76 Temple Law Review 619 (2003)

New Age Antitrust: Narrowing Antitrust for

Multimedia Mergers by Meredith Z. Maresca, 21 The Journal of Law and Commerce 111 (2001) (published by University of Pittsburgh)

Shop Wars: Copyright, Moral Rights and Comparative Advertising by Alexandra Sims, 10 New Zealand Business Law Quarterly 9 (2004) (http://www.brookers.co.nz/catalogue/title.asp?p=719)

Will Copyright Eat Gator? The Conflict Between Copyright, the Computer Desktop, and Customization of the Internet Experience by Peter Randall, 1 University of Illinois Journal of Law, Technology & Policy 259 (2003)

Whose Rights Are These Anyway? - A Rethinking of Our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property by

Suzanne Milchan, 28 American Indian Law Review 157 (2003-2004) (published by University of Oklahoma, http://www.law.ou.edu/lawrevs/ailr/)

Global IP Development: A Recommendation to Increase WIPO and WTO Cooperation by William T. Fryer, III, 9 University of Baltimore Intellectual Property Law Journal 171 (2001)
[ELR 25:12:23]