Commentary

Solving the P2P Problem: An Innovative Marketplace Solution

by Rob Kasunic[†]

It seems that no matter whom you ask or what you read in the press, the outlook for copyright appears bleak. The reasons for these apocalyptic assessments, however, depend on your perspective.

For instance, in a recent article, "The Tyranny of Copyright",[1] anecdotal abuses of the Digital Millennium Copyright Act (DMCA)[2] by certain copyright owners were cited as evidence of the wayward direction of the copyright law. These abuses and other "copyright horror stories" have allegedly been growing over the past few years, culminating in attempts to stifle student speech by Diebold Election Systems, law suits brought by the recording industry against individual file sharers, attempts to force the Girl Scouts to pay royalties for singing around the campfire and the ban by the motion picture industry on sending DVDs to Academy Award screeners. The article's "fair and balanced" depiction of the state of the copyright law "inadvertently" neglected to mention that other sections of the DMCA provided a mechanism for counter-notices that the students might have used to have the Diebold material put back online had Diebold not first withdrawn its threat,[3] that the file

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[1] Robert S. Boynton, *The Tyranny of Copyright*, New York Times Magazine, January 25, 2004: http://www.nytimes.com/2004/01/25/magazine/25COPYRIGHT.html?pagewanted=print&position=/.

[2] Pub. L. No. 105-304 (1998).

[3] *See*, Letter from Robert J. Urosevich, Dec. 3, 2003: http://www.eff.org/Legal/ISP_liability/OPG_v_Diebold/diebold_wdrawal_letter.php. This letter was sent to an upstream provider of Diebold and I have been criticized for stating that the counter-notice provision could have remedied this situation given that OSPs do not have to make counter-notice available. While this is certainly true, the failure to provide counter-notice creates potential liability for OSP's who improperly takedown or disable access to material. In this case, the upstream OSP did not take down the material. The full consideration of the propriety of section 512's burden shifting is, however, beyond the scope of the article.

I note that some of the criticisms of copyright abuse and misuse, e.g., take-down notices, cease and desist letters, and infringement actions (and the claim that fair use is "the right to hire a lawyer"), are more appropriately viewed as critiques of our legal system as opposed to problems limited to copyright, i.e., it is expensive to litigate. Public interest lawyers, either pro bono or efforts by organizations, have the potential to offset such a perceived imbalance. Furthermore, the Copyright Act stands apart from many areas of the law in that it intentionally affords "prevailing" defendants the potential for recovery of attorney's fees and costs. Although claims may at times be silly or misguided, e.g., the threat by Mattel against Klaus Barbie doll (http://www.artcomic.com/shock75.html) or the threat by Ludlow Music against the Jib Jab parody of Woodie Guthrie's This Land is Your Land (http://www.eff.org/deeplinks/archives/001779.php) such claims often lose or evaporate upon a vigorous defense. The Court stated in *Fogarty v. Fantasy, Inc.*, 510 U.S. 517 (1998), that although the Copyright Act did not adopt the British Rule, Congress provided courts with complete discretion in awarding attorney's fees to prevailing plaintiffs and defendants alike. Significantly, the Court stated:

> More importantly, the policies served by the Copyright Act are more complex, more measured,

sharers sued by the RIAA had been accused of offering massive quantities of copyrighted works to others around the world to be freely copied[4] and that soon after the screener ban was lifted,[5] watermarked copies of Oscar nominated movies began finding their way onto the Internet.[6] Okay, the threat against the Girl Scouts revealed poor judgment,[7] but let's face it, mistakes happen. When a mistake like that happens, it seldom happens again. Most of these "horror stories" were resolved in the copyright critics' favor. The exception is the suits against individual file "sharers" uploading and downloading copyrighted works on peer-to-peer networks on the Internet. Do these law suits against file distributors validate the critics' claims of copyright abuse?

Others believe that unauthorized peer-to-peer distribution of a work over the Internet demonstrates the current inadequacy of our copyright laws. Unless growth of illegal peer-to-peer distribution can be stopped, they say our system will collapse. Peer-to-peer networks have the capacity to undermine the value of all works. Without adequate incentives to encourage the creation of works, the well will dry up. Of course, no one can compete with free, they say. Does the prevalence of illegal file sharing mean our laws must be strengthened?

The resolution of the peer-to-peer dilemma remains perplexing and elusive. The controversies surrounding peer-to-peer file distribution present one of the most profound challenges to copyright law to date. By examining the controversy and some of the proposals for resolution, this article concludes that a critical step toward resolving the peer-to-peer problem has already occurred in the form of an innovative marketplace alternative to free – the Apple iPod and the Apple iTunes service.

The Language of P2P

From the perspective of copyright owners generally, the primary object of their attention has been focused on preventing unlawful peer-to-peer (P2P) file sharing. Copyright owners aptly point out that euphemistically referring to taking and trading copyrighted works online without payment as "sharing" is a creative means of recasting reality – file "sharing" with strangers is really file taking from copyright owners. Sure, in some cases people offer their collections to others to take, but these generous individuals never give or surrender anything that is theirs. "Sharing" music is something very different from what we try to teach our children, where one child relinquishes something so that another may take a turn. Rather, these music "sharers" generously provide other people's "works" and, through the miracle of technology, never relinquish a thing. This gift of music costs the giver nothing, costs the taker nothing,

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> than simply maximizing the number of meritorious suits for copyright infringement. . . . To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. . . . Thus a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.

Fogarty v. Fantasy, Inc., 510 U.S. 517, 527 (1998).

The litigation process can be instrumental in furthering the ultimate goal of copyright law. Criticism of the legal system tends to miss this important point. Remember, fair use did not exist until *the courts* created it!

[4] *See e.g.*, John Borland, RIAA sues 261 file swappers, CNET News.com, Sept. 8, 2003: http://news.com.com/2100-1023_3-5072564.html.

[5] *See e.g.*, *Screener Ban Lifted for Oscar Voters*, WESH.com, Oct. 23, 2003: http:// www.wesh.com/ entertainment/2578117/detail.html.

[6] *See e.g.*, Associated Press, *Two more Oscar screeners found on Net*, Jan. 15, 2004: http://www.cnn.com/2004/ SHOWBIZ/Movies/01/15/oscar.screeners.copies.ap/

[7] For stories on the threat and recant, see, Lisa Bannon, *Birds sing, but campers can't - unless they pay up,* Star Tribune, 1996; Ken Ringle, *ASCAP Changes Its Tune; Never Intended to Collect Fees for Scouts' Campfire Songs, Group Says*, The Washington Post, 1996, reprinted at: http://www.law.umkc.edu/faculty/projects/ ftrials/communications/ASCAP.html. See also, *Girl Scouts Change Their Tunes,* San Francisco Chronicle, Aug. 23, 1996: http://www.sfgate.com/cgi-bin/ article.cgi?file=/chronicle/archive/1996/08/23/MN14140 .DTL.

Further investigation into the background of this threat revealed that there was more to this story than met the eye. Apparently, a letter was initially sent to the American Camping Association, an organization of which the Girl Scouts of the U.S.A is a member. After the fallout from the Girl Scouts' publicity over the royalty request, a royalty deal was worked out for all ACA members requiring each camp to pay $1.00 per camp each year for use of all ASCAP songs. The current licensing arrangement is addressed on the ACA website at: http://www.acacamps.org/campline/ 04m_music.htm. Irving Berlin, a founding member of ASCAP, apparently felt betrayed by the entire episode, because he had previously established the God Bless America Fund, dedicating royalties to the Boy and Girl Scout of America. See, http://www.loc.gov/exhibits/treasures/ trm019.html, and http://www.ascap. com/about/history/.

and pays the creator of the work nothing.

To get people away from the rhetorical use of "sharing" in relation to the unauthorized distribution of copyrighted works over the Internet, some copyright owners have chosen to replace the term with another one – "piracy." Conjuring up images of recording industry representatives forcing teenagers to walk off the plank, this term does little to defuse the rhetorical hyperbole. It seems that what has been called the "delicate balance of copyright" has taken on a whole new character. The balance is now often sought by opposing interests taking increasingly extreme and polarized positions in an effort to influence the public debate in their favor. [8]

Most of the time the rhetoric merely obscures the ability to discuss real problems and reasonable solutions. The debate tends to digress into unproductive distractions. For example, copyright owners' charges of "piracy" in relation to use of peer-to-peer file "sharing" are often countered with the claim that the record companies and the movie studios make too much money or that these industries don't pay artists fairly or that they don't really create products that the public wants, and thus, don't deserve the prices they are charging. While there may be some legitimate concerns about copyright owners failing to meet reasonable consumer expectations, the claims of Robin Hood-like altruism are nothing more than a distraction. A *post hoc* rationalization for taking something for nothing may ease the consciences of file sharers, but it does little to address the heart of the problem – artists and creators deserve to get paid for their works. Justifying theft is no better than calling a twelve-year-old who uses the Internet to get free music a pirate.

Might it not be time to deflate the rhetoric and start focusing on common ground and real solutions? Maybe the problem is simply one of greed.[9] We live in a time of excess. Copyright owners often want too much control. The public often wants too much for free – something for nothing. All too often, neither side seems capable of empathy. Yet finding a common ground or the proper balance between these conflicting interests is the essence of copyright. The controversy over P2P is an excellent case in point for this seeming lack of empathy, both for copyright owners' attempts to control the technology and the public's willingness to abuse it.

In many ways, the DMCA was the culmination of copyright owner's attempt to avoid the current problems associated with peer-to-peer file trading. Copyright owners feared the Internet's potential to allow the distribution of unlimited, perfect digital copies of copyrighted works around the globe instantaneously. They realized that while technology could be used to protect against technological reproduction and distribution, technology alone was insufficient. Technological protections could always be hacked and a constant technological arms race between copyright owners and hackers was not the optimal environment for marketplace stability. Not only would consumers object to constant changes in formats or compatibility problems, but constant changes in protection would be likely increase costs and thereby drive up prices to consumers. Legal protection of technological measures could facilitate a marketplace detente.

But anticipating the course of technology and trying to preemptively control it often proves futile. As the Audio Home Recording Act[10] revealed, attempts to harness emerging technology tends to redirect technology to alternative courses. Technology tends to flow like water around obstacles, aided, of course, with the guidance of creative technologists and lawyers. While the DMCA provided copyright owners with considerable control to facilitate and encourage distribution of digital works on the Internet, it did not anticipate or specifically address the peer-to-peer distribution of digital works, where one unprotected copy of a work could be quickly propagated throughout a decentralized network of unrelated individuals. There was also an underestimation of the public's reaction to the DMCA. The potential for control bred distrust. Attempts to assert control fostered contempt.

The music and recording industry bore the brunt of these miscalculations for a number of reasons. The culture and popularity of music was one reason. With popular music blossoming out of counter-culture ideals and principally being sought by teenagers and college students who often tend to view social and legal restrictions with disdain, music was ripe for the picking with this new technology. It was also one of the few types of works available in unprotected digital form on CDs.[11] The relatively small size of the digital music files

[8] For a thoughtful discussion about the delicate balance of copyright, *see*, David Nimmer, *The Metamorphosis of Contract into Expand*, 87 Calif. L Rev. 17 (1999).

[9] Jane C. Ginsburg, *Essay – How Copyright Got a Bad Name For Itself*, 26 Columbia Journal of Law & the Arts, No. 1 (2002): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=342182.

[10] The Audio Home Recording Act of 1992 added chapter 10, entitled "Digital audio Recording Devices and Media," to title 17. Pub. L. No. 102-563, 106 Stat. 2304, 2312.

[11] At the time of release, there were practical limitations on reproduction – there was no CD reproduction equipment on the market at the time. Copyright owners have historically relied on such practical limitations – nonexistent or inefficient forms of reproduction and distribution technology – as a limit on the potential scope of infringement. Personal computers and the Internet have effectively eliminated most practical limitations on reproduction and distribution, but technological

coupled with emerging compression technology, with advances in CD copying technology, and with expanding hard drives, made music a perfect candidate for downloading. Distribution of songs also gave users an option of customization that they had long desired and at a price that couldn't be beat.

Now it is true that the music industry approached the online distribution of works with, giving them the benefit of the doubt, frustrating caution. Some interpreted this hesitation as a clear sign that the copyright industries were unwilling to give the public works in the form that they desired, that they were clinging to antiquated brick-and-mortar business models simply to maximize their profits. Without dismissing this view, other factors were necessarily playing a role as well.

Unauthorized file "sharing" services such as the former Napster and its progeny have a couple of significant business advantages over legitimate services. The most noted advantage is that they do not have to pay artists. It has been said many times that the labels and others can't compete with free. Whether or not this is true is a question we will return to, but the question interestingly skips a perhaps more important advantage, namely, that unauthorized services do not require authorization.

When Grokster or Aimster began offering their software for the primary purpose of facilitating distribution of copyrighted works, they did not need to get permission from a single songwriter or copyright owner. On the other hand, creating a legitimate service requires negotiating with the copyright owner of the musical work or fulfilling the requirements of a compulsory license, and negotiating with the copyright owner in the sound recording for every single song to be offered over the service. Since a great majority of the contracts previously in existence never envisioned the digital streaming or the digital downloading of these works, clearances for the works have to be negotiated before being included in the legitimate service. Given the breadth of the music industry and the variety of artists and agents, it will come as no surprise that an undertaking of this magnitude is not accomplished quickly. Even though the number of legitimate services have increased, their music libraries contain many holes due to the reluctance of some artists and copyright owners to participate. In many cases the difficulty lies in simply identifying the copyright owner or owners from whom permission must be sought.

Once the music industry became convinced that they must begin to compete with the free services, price was not the only obstacle. Additionally, the first legitimate services demonstrated other fundamental problems. Not only did these services have very incomplete music libraries that bore little resemblance to the unbounded offerings available on the illegitimate services, they also offered access and distribution models vastly different from what users seemed to desire and from what users had become accustomed to getting from illegitimate services – downloadable music.[12] These early services, such as MusicNet, Pressplay and Rhapsody provided subscription services which allowed access to songs for on-demand streaming, but provided little, if any, availability for downloading music. Slowly, a few of these services began initiating some download options, but severely limited the number of downloads or the medium in which the user could download these works. Listen.com's Rhapsody service,[13] for instance, was one of the first services to offer music from all five of the major labels for streaming on demand or through its many webcast radio channels. Yet even now, it allows burning only directly onto a writable CD rather than to the hard drive of a computer. While Rhapsody represented major progress in relation to the other legitimate services and to the legitimate distribution of music over the Internet generally, it did not approach the flexibility of use that could be obtained through the many illegitimate P2P file trading services.

The Legal Battles over P2P

The marketplace was not, however, the only forum for combating the illegal trading of copyrighted works. After the legal struggle to stop centralized trading through Napster's service concluded, the music industry's legal battle encountered more difficult challenges. Decentralized P2P systems quickly replaced users' demand for readily available downloadable music that was not yet available from legitimate services. These decentralized systems posed a more difficult legal question about the extent to which networks, like the

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protection measures may be viewed as an attempt to replicate practical limits.

[12] One notable exception to these subscription models was eMusic which was the first service to offer legal downloads of MP3s, but principally of independent labels and artists. This maverick service was not able to compete against Napster at a time when the major labels were unwilling or unable to authorize downloads of music to legitimate services. eMusic was ultimately sold by its original owners. The service continues to exist under new ownership as a download service and now offers over 275,000 MP3s, including many major artists. It is unfortunate, however, that this service that was well ahead of its time in terms of its view of the optimal way to compete with free, turned out to be too far ahead of its time for its own good.

[13] Listen.com and its Rhapsody service have been purchased by RealNetworks and is now a subsidiary of Real.

FasTrack or Gnutella network, could be controlled even if users could be sued. These networks are "self-organizing" and the intermediaries (like Kazaa and Grokster for FasTrack network or Morpheus, BearShare and LimeWire for the Gnutella network) claimed to be only distributors of software interfaces with the network. Significant questions were raised about the independent nature of the FasTrack network when in February of 2002, Kazaa cut off Morpheus' access to that network, leading Morpheus to subsequently move to the Gnutella network.[14] Yet, uncovering the means and nature of control of the FasTrack network has remained elusive and given the open source nature of the Gnutella network, there is diminishing hope of asserting control over it.[15]

Furthermore, law suits against the software distributors and services providing access to these decentralized networks have led to conflicting results. In the *Aimster*[16] case, the Seventh Circuit affirmed the district court's issuance of a preliminary injunction against that service, in part, because the defendant created a service which knowingly facilitated the unlawful trading of copyrighted works and "failed to produce any evidence that its service has ever been used for a noninfringing use, let alone evidence concerning the frequency of such uses."[17] On the other hand, in the *Grokster*[18] case, the district court held that the Grokster and Morpheus services did not have the requisite knowledge at the time that particular infringements were taking place to support a claim of contributory infringement and did not have the duty to control uses of the software that might have led to a finding of vicarious liability. While the latter case is currently being reviewed by the Ninth Circuit, at present, the ability to deter unlawful file trading by controlling the intermediaries does not appear to hold much promise for copyright owners. Even if Grokster or Morpheus were to be found liable, the P2P shell game is capable of further manifestations.

As a result of the inability to stop the primary intermediaries, the recording industry has been forced to take its legal struggles to the next level. Subpoenas were issued to Internet Service Providers (ISPs) under a provision of the DMCA seeking the identity of particular users of peer-to-peer networks. The identities of these users were sought in order to bring copyright infringement suits against them. In cases where the ISPs responded to the subpoenas by supplying the requested user information, the recording industry filed lawsuits against these individuals. In a number of cases, negotiated monetary settlements with users were reached, including a settlement for the reported sum of $2,000 with a twelve year old girl.[19] Despite the unfortunate screening process employed by the recording industry and the ensuing vilification of recording industry in the press, there was a justifiable purpose for these law suits. These lawsuits made people aware that the perceived veil of anonymity on the Internet could be pierced, particularly when anonymity was being abused to protect unlawful activity. It was much easier for people to boldly ignore the copyright law when they felt immune from prosecution, just as it is quite likely that tax compliance would decrease if all auditing ceased. While obviously the record industry could not sue everyone, a clear message was sent that the copyright laws were not simply a matter of personal choice or solely a question of private conscience. This message was reinforced with the specter of significant monetary liability.

While these subpoenas made many of the people engaged in unlawful file trading activity suddenly feel vulnerable, the success of this new approach was limited. First, there was heightened concern from legislators about potential lawsuits against many of our nation's teenagers and their families. Second, one major ISP vigorously challenged revealing the identities of its subscribers requested in the subpoenas. Verizon led a lengthy legal battle to oppose the legality and applicability of the subpoenas issued under a provision of the DMCA. Despite its initial loss in the district court, Verizon recently prevailed in the D.C. Circuit by convincing the court that the subpoena provision was not applicable to a "mere conduit" such a Verizon.[20]

This result in the D.C. Circuit unquestionably set back the record industry's ability to identify high-volume distributors of copyrighted works over P2P networks. Yet, without missing a beat, the recording industry

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[14] Roger Parloff, *The Real War over Piracy*, Fortune, October 27, 2003 at 148: http://www.fortune.com/fortune/technology/articles/0,15114,517663,00.html.

[15] *See also*, John Borland, *P2P companies say they can't filter*, CNET News.com, Jan. 28, 2004: http://news.com.com/2100-1038_3-5149720.html. Yet companies such as Audible Magic Corp. believe that filtering is feasible. *See*, http://www.audiblemagic.com/.

[16] *In re: Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) (*ELR* 25:5:9).

[17] *Id*. at 653.

[18] *MGM Studios, Inc. v. Grokster, Ltd*., 259 F.Supp.2d 1029 (C.D.Cal. 2003) (*ELR* 24:11:4), appeal argued, No. 03-55894 (9th Cir. Feb. 3, 2004).

[19] *See e.g.*, CNN, *12-year old settles music swap lawsuit*, Feb. 18, 2004: http://www.cnn.com/2003/TECH/internet/09/09/music.swap.settlement/.

[20] *Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc*., 351 F.3d 1229 (D.C. Cir. 2004) (*ELR* 25:11:11).

quickly filed a large number of "John Doe" suits against unidentified users in order to use the traditional discovery process in civil litigation to identify defendants.[21] The problem with this new strategy is that it takes more time. Since most courts require court approved discovery schedules to establish deadlines for various stages of discovery, court approval of the discovery process adds a temporary delay to the subpoena process. Additionally, it is uncertain how long ISPs retain information about their subscribers. By the time a subpoena is finally issued to an ISP under these John Doe suits, the window of opportunity for obtaining the identity of particular users may be lost.

Suggested Solutions to the P2P Problem

At present, two of the major fronts on unlawful, decentralized P2P file trading have met significant obstacles: major intermediary "services" have escaped secondary liability and the ability to identify infringing users on these networks has been constrained. Since most reasonable commentators agree that the trading of copyrighted works on peer-to-peer networks is generally unlawful activity, the question remains: what can be done to prevent or deter this activity, if not completely, at least to reasonably acceptable limits? Or if it cannot be prevented or deterred, is there a way to adequately compensate copyright owners for works distributed online?

Some have suggested the implementation of alternative compensation systems. For example, Professor William Fisher[22] and Professor Neil Netanel[23] have each proposed somewhat similar models for a "Tax and Royalty System" or "Noncommercial Use Levy" ("NUL") on various consumer devices and media, like DVD burners, CD burners, video recorders and their respective media, in order to compensate composers and copyright owners in a manner similar to that of collective rights organizations.[24]

William Fisher's approach suggests a tax on ISP access and on the technologies used to perform music, including a tax on hard drives and even computers. The revenues from these assessments would then be distributed to copyright owners in proportion to access to the particular works. In some ways, this may be seen as an extension of the Audio Home Recording Act to devices that were, at the time of the AHRA's enactment, not used for the distribution of music and were excluded from the definition of "digital audio recording devices" and digital "audio recording medium."[25] Unlike the AHRA, it is not limited to digital audio recordings and may be extended to other types of copyrighted works.

In the case of Neil Netanel's NUL which builds upon the Copyright Act's concepts of AHRA-type levies and compulsory licenses, the levy system is seen as a middle ground to the alternatives of "digital abandon" and "digital lock-up." The NUL would allow noncommercial reproduction, adaptation and distribution to works made available to the public (excluding works for which public access had not been authorized) and a Copyright Office arbitration panel could determine and adjust the rate for the levy (which could be different for various types of technologies or media, e.g., Internet use by broadband subscribers or DVD recorders).

While these proposals are thoughtful alternatives to the current system and contain similarities to some of the current compulsory licenses adopted in the copyright law in specific situations, they represent a significant across-the-board shift from the present negotiated rights model. Compulsory licenses have historically dealt with special situations rather than creating an across-the-board change in the normal exploitation of copyrighted works.

And, before we abandon our current system, are we confident that an alternative model will work to fulfill the purpose of copyright – to encourage creative authorship that will benefit the public? There are presently many criticisms of existing compulsory licenses and the rate-adjustment systems already in place. Are we at the point of market failure to the extent that such a radical shift is warranted? Are we sure that the advantages will outweigh the costs or consequences? These approaches are well worth carefully considering further if the market fails to adapt, but at present, movement toward implementation of such proposals appears risky and premature.

Lon Sobel's "Digital Retailer" model[26] is a response

[21] Katie Dean, *RIAA Strikes Again at Traders*, Wired.com, Jan. 21, 2003: http://www.wired.com/news/digiwood/0,1412,61989,00.html?tw=newsletter_topstories_html.

[22] William Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* (forthcoming, Stanford University Press, 2004) (Chapter 6: An Alternative Compensation System, is available online at: http://www.tfisher.org/).

[23] Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing*, 17 Harvard Journal of Law & Technology (forthcoming December 2003): http://www.utexas.edu/law/faculty/nnetanel/null.pdf.

[24] The author of this article apologizes for the gross oversimplification of all of the thoughtful proposals mentioned in this article and hopes that readers will examine all of the articles and proposals in their entirety. Where available online, I have included hyperlinks to facilitate first-hand review.

[25] 17 U.S.C. § 1001 et. seq., Pub. L. 102-563 (1992).

[26] Lionel S. Sobel, *DRM as an Enabler of Business Models: ISPs as Digital Retailers*, 18 Berkeley

to the levy and tax models, and to the general disfavor of compulsory licenses or levies as a market solution. He views the digital rights management and watermarking technologies that are legally protected under the DMCA as an existing means of resolving problems facing unauthorized distribution of copyrighted works online. By using ISPs (and in particular, the ISPs' "servers") as intermediaries in the distribution of DRM-protected copyrighted works, he believes that users can be efficiently charged for downloaded works at rates established by the copyright owners themselves. In this paradigm, the ISPs could function in an intermediary capacity similar to the phone companies' role in charging consumers for use of various services accessed through the telephone lines.

While the use of existing law to address the uncompensated P2P downloading warrants further examination, the viability of this particular intermediary model is questionable. First, while DRM could be applied to new works or newly distributed versions of existing works, it is unclear how this would model would resolve the redistribution of works that are not watermarked. For the music industry, a major component of its value lies not in new works, but in previously released libraries of musical sound recordings. Mr. Sobel believes that "fingerprinting," or the creation of a unique digital identification for every work sought to be protected, could provide a means of addressing this problem, but given possible variations in the fingerprint of a file (e.g., format conversion or encryption), it may be difficult to accomplish this. Nevertheless, giving this fingerprint theory the benefit of the doubt, the proposal faces a more serious obstacle. It requires ISPs to accede to become intermediaries for it to work, either voluntarily or perhaps (although not suggested in the article) by some change to limitations of liability provision of the DMCA contained in section 512, or alternatively through financial incentives, i.e., surcharges or percentages. In the current political climate, it seems highly unlikely that ISPs would voluntarily agree to this role or that Congress could or would impose such a requirement on ISPs. Financial incentives are possible, but would entail a drastic restructuring of current ISP operations. These substantial technological and political obstacles undermine the viability of the proposal. Yet aspects of the proposal's analysis highlight interesting advantages in the use of existing law to encourage a marketplace solution. Further consideration of key elements at the root of this proposal may be combined with more practical implementations to accomplish similar ends. In particular, the key elements to retain are: the potential to obtain compensation for the distribution of all works sought to be protected, the provision of copyright owner discretion in regards to price and control, and the use of existing legal principles to implement the proposal.[27] Can the market create an entity to adopt these features without requiring an entity, like ISPs, to conform to the plan?

Technology Law Journal 667 (2003): http://www.law.berkeley.edu/journals/btlj/articles/vol18/Sobel.stripped.pdf.

The Marketplace and P2P

Many of the remedial approaches suggested to resolve P2P distribution problems tend to assume that market inefficiencies that currently exist will continue to exist without structural changes to the system. But since the certainty of technological change is one of the few constants in the field of copyright law, an assumption that ignores incremental marketplace adaptation to the present legal, technological, and economic realities ignores history. In the past, market failure or market inefficiency has been resolved within the current legal system in a number of ways. The judicial expansion of the scope of fair use has been one means of acknowledging market failure.[28] Similarly, limited statutory changes to the Copyright Act have been enacted to adjust the balance of copyright in response to changes in technology. Yet, judicial and legislative intervention is a course of last resort. A precondition to seeking such intervention would seem to be clear evidence that marketplace resolution of the problem is unlikely under the current legal framework.

Does the DMCA and traditional copyright law provide legitimate entities with adequate tools to adapt, with time, to the reasonable expectation of users and the reasonable needs of copyright owners? The current market seems to suggest that it does. There is every reason to believe that some form of the "celestial jukebox"[29] will ultimately become available in the market. To a great extent, it already exists in the form of on-demand access to musical sound recordings through many legitimate subscription services. Many services provide access to all of the currently authorized works on

[27] Mr. Sobel notes other potential problems with the proposal in the article, e.g., spamming to increase royalties, intra-industry conflicts, privacy, pay-per-use concerns, and excessive rates. Since these are beyond the scope of this article and discussed within the proposal itself, these problems will not be discussed.

[28] Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Columbia Law Review 1600 (1982). Reprinted at 30 Journal of the Copyright Society 253 (1983).

[29] *See, e.g.*, Paul Goldstein, *Copyright's Highway: The Law and Lore of Copyright from Gutenburg to the Celestial Jukebox* (1994).

a subscription basis (and these on-demand models are increasingly prevalent for other types of works as well, e.g., motion pictures). The DMCA and its protection of technological controls has fostered the development and deployment of "on-demand" services. The problem is that on-demand access services do not appear to satisfy the reasonable expectations of all users. When strong consumer demand is unmet in the legitimate marketplace, it is not uncommon for illegitimate entrepreneurs to fill the void and supply this demand.

The reality is that users of copyrighted works are different. One size does not fill all in our society. The key to market success is not a monolithic celestial jukebox, but rather sufficient market diversity to satisfy the demand for many different types and uses of copyrighted works. The DMCA was not enacted in order to support the construction of a universal on-demand system, but rather to facilitate a diversity of "use-facilitating" business models. On-demand subscription access is only part of that equation.

Even though more market options exist for users than ever before, technology tends to expand user expectations for access and use of copyrighted works. Copyright owners have an incentive to meet these expectations, but the fear of uncontrolled copying tempers the desire to distribute a work and causes understandable hesitation on the part of copyright owners. Free access to a work on the Internet, through P2P systems or otherwise, can destroy the value of a work. As a result of this fact, copyright owners often seek greater control over access and distribution.

A copyright owner's interest in control may be more the result of uncontrolled marketplace copying than it is the mere availability of the legal authority to control. Copyright owners typically want to make their works available to the widest audience possible in order to maximize profits and to gain recognition. Intra-industry competition (e.g., publishers, studios, or labels promotes a diversity of options to users and undermines the marketability of restrictive models. There is little competitive advantage in locking up works in a manner that frustrates consumers, limits distribution, or minimizes access.

Thus, present reality would suggest that peer-to-peer trading and digital copying has the capacity to adversely affect "legitimate" and "reasonable" public access and distribution. Copyright owner fear of P2P can result in greater attempts to control or even "lock-up" works. Legitimate users' fears of excessive control by copyright owners may become a reality when widespread abuse of the legitimate system occurs. Fear on both sides of the issue tends to undermine the reasonable expectations of users and the reasonable needs of copyright owners.

Perceived self-interest too often dominates the market and results in copyright owners seeking to tighten control and users seeking to be free of any restraints. Technology becomes everyone's answer because it is both able to lock up (e.g., DRM) and to break through control (e.g., P2P). Can technology be used to both facilitate new uses and to protect copyright owners? Can a middle ground be achieved?

Technology can assist in safeguarding copyright owners interests and also offer the public a wider diversity of uses. As user expectations change with advances in technology, so will the nature of successful distribution models. Distribution models that minimize user limitations will invariably have competitive advantages over those that are unnecessarily restrictive. Since users are different, an efficient market will seek to both satisfy a diverse range of user options and the needs of copyright owners.

A Marketplace Solution

So how can an efficient marketplace operate in relation to the distribution of music? How can peer-to-peer distribution's effect on the value of works be minimized? By providing a greater variety of options and choices to consumers, by seeking to balance reasonable consumer expectations with reasonable copyright owner concerns for protection, and by offering value, quality and consistency that is not available through illegitimate services. The reasonable expectation of copyright owners has never been to completely eliminate all potentially infringing uses, but to minimize the harm that infringement might have on the market for a work. Our current legal and technological framework provide copyright owners with the means to minimize uncontrolled copying while at the same time expanding the user opportunities for legitimate uses of copyrighted works. The battle against illegitimate P2P distribution can not be won solely by legal or technological means. The success of legal and technological capabilities must be achieved in the marketplace. There must be effective competition with the illegitimate services.

The legitimate market for digital musical sound recordings is finally beginning to achieve an adequate degree of diversity and user choice. A growing number of sources now offer on-demand access. Some users' will seek this option. Satellite radio and digital music channels, such as XM Radio, Comcast Music Service and webcasting stations provide to another group of users in their homes, offices or car, depending on the particular service chosen. Some services have begun to offer burning music tracks directly onto recordable CDs. This will satisfy another group of users who desire owning hard copies of their selections to access in a variety of locations. Many legitimate options are now becoming available, but until recently, none have attempted to replicate the reasonable user habits of the user of the illegitimate services. None of the existing business models have effectively competed directly with free.

Apple has changed all of that. The Apple iTunes music service and the Apple iPod represent a significant benchmark in the battle against illegitimate peer-to-peer file trading. The iTunes service is a major departure from all of the previous distribution models for authorized digital music. Although it offers individual songs and complete collections (the equivalent of what is available on a CD) for download at prices equivalent to other services, it provides much more flexible user terms than has ever been offered on the legitimate market. In many ways, it represents the first market attempt to replicate the uses available to users through unauthorized services with two caveats: it charges for works and it incorporates obstacles for unreasonable re-distribution. To understand exactly why the service is unique, some details about its operation and terms of service are necessary.

First came the iPod. The iPod is a sleek, white and stainless steel, pocket-sized player with easy navigation controls, and a massive hard drive. The device's innovative simplicity understates its versatility and capacity. The packaging that the iPod comes in is, in itself, a work of art and contributes to the aura of the device.[30] While the first versions, which were introduced to the market in late 2001, ranged in size from 5 to 20 gigabytes, it is currently offered with a range of hard drive sizes up to 40 gigabytes. Apple's 40 GB player is marketed with a capacity of carrying (allegedly) up to twenty thousand individual songs. At a time when the users of unauthorized services had grown accustomed to acquiring a large quantity of music on their hard drives and the ability to customize play lists of a vast quantity of songs, the capacity of the iPod replicated what many users could store on their computers. It competed with this experience by allowing a user to place all those songs in a pocket, in a car, on a walk or in any room of the home or office. Although Apple was not alone in offering portable hard drive players, it created the better player. Many found the idea of carrying around an enormous music collection in their pocket an exciting prospect, but the iPod's appeal is also tied to its hype in the press, advertising campaigns and word of mouth. The popularity of the device was not only in its functionality, but its perception as a cool gadget.

At first, the iPod was only available for Apple operating systems, but eventually was offered in a Microsoft Windows compatible version. Similarly, iTunes, Apple's online music service, was only available for the Mac, and Windows iPod users could not purchase music through the iTunes music store. Toward the end of 2003, the iTunes music service was made available to Windows users.

Like many other music services, iTunes offered users the ability to purchase individual songs just as unauthorized services did, thus satisfying the long-time user desire to purchase parts of collections rather than bundled selections as copyright owners had been loathe to abandon. No longer did users have to buy unwanted songs in order to purchase the one or two songs that they really wanted on a CD. User preferences eventually affected distribution models. The price for these purchases on the iTunes service is ninety-nine cents per song or, a discounted price per song if an entire CD is purchased.

On registering to use the iTunes software, a user is informed of and asked to agree to the terms of service. To date, the iTunes music service provides the most flexible terms of any of the current online music distribution services. But it also provides protection from unreasonable redistribution. Downloaded music files are delivered in the Dolby Laboratories' Advanced Audio Coding (AAC) file format (an MPEG-4 specification and a proprietary format administered by Dolby via its independent subsidiary Via Licensing Corporation). This AAC file format supports digital rights management and all songs downloaded from the iTunes service are delivered as Protected AAC files (.m4p file extension as opposed to unprotected AAC files that bear the .m4a extension). Apple's DRM music protection scheme has been dubbed "FairPlay" by Apple.

Up to five "authorized" computers at a time may access Protected AAC files. The user has the ability to authorize and de-authorize computers, but the music can only be played on a maximum of five computers. This satisfies the needs of users with multiple computers and allows a user to access the songs on, for example, a desktop, a laptop, and another family member's computer. This reasonable accommodation for multiple computer users accepts the reality that most people do not want one digital copy of a work tethered to one machine. It also provides easy modification of which five machines are authorized to access the works, reducing problems faced by computer upgrades. In addition, if one of those computers is on a network, up to five users at a time can stream the songs from the purchased music library or play lists created from that library. These other network users cannot copy the music to their computer, cannot create play lists and cannot access the music when the host is turned off. Thus, iTunes allows members of a household, for instance, to listen to music that has been purchased and to "share" the access to the music purchased.

The iTunes software also allows music downloaded to a hard drive of a computer to then be both burned onto CDs (in the form of play lists) or to be loaded onto an iPod. Every time a CD is burned, a popup message warns that burning may only be performed for personal use.[31]

[30] For more on the iPod, *see*, Rob Walker, *The Guts of a New Machine*, New York Times Magazine, Nov. 30, 2003.

[31] There is some question on whether the purchase of a downloaded song is a "sale" or a "license" of the copy. *See e.g.*, Evan Hansen*, eBay mutes iTunes song auction*,

Although limitations on the number of times a play list can be burned are somewhat weak and do not technologically control use, the warnings and technological measures create speed-bumps on the road to unreasonable use. And unreasonable use is redirected with a number of flexible alternatives, such as the ability to load as many iPods as the user can afford to buy.

The iPod impedes the copying of files from the iPod to other computers by "hiding" files and the DRM in the Protected AAC files limits access of any files copied to authorized computers associated with those files. The protection is not impenetrable, but it provides obstacles to foster compliance with the reasonable terms of service that were accepted by the user. One of the primary obstacles to redistribution of files is that the name and Apple ID of the person who purchased the music are embedded in each purchased song. This fingerprinting discourages redistribution of songs, since if a song finds its way onto a peer-to-peer system, the songs can be traced back to the person who purchased the song.

While other services are beginning to offer more flexible terms, Apple has negotiated a new flexible standard unmatched by other legitimate services. Added to these features are additional uses in conjunction with Audible.com, a leading service in the downloadable ebook market and other features. The iPod/iTunes system has created a compelling new tool in the battle against unauthorized P2P distribution – a competitive service tied to a well-designed and versatile gadget. As of January, 2004, Apple reported sales of over 2 million iPods, making it the leading digital music player in the world. Apple has also just begun distributing its new "iPod mini" that will hold a 1,000 songs and which is smaller, lighter and cheaper that the regular iPods. Before sales began, Apple had already received over 100,000 orders for these new devices.[32] The iTunes store, which launched in April 2003 (but which was not available for Windows users until mid-October 2003)[33] has had a similarly strong showing, selling over a million songs in the first five-and-a-half-days of its existence and selling over 30 million songs as of January 5, 2004.

Despite this enormous success, naysayers abound. Inspection of the sales figures for the iPod and iTunes indicate that at present, with 2 million iPods in user's pockets and 30 million songs purchased through iTunes, only 15 legitimately purchased songs have been purchased per iPod. Similarly, some critics of Apple's hype have noted that to fill a 40 GB iPod, a person would have to spend up to $20,000 dollars to do so. These critics point out that since it is unlikely that a person will fill an iPod with legitimate downloads, but rather rely primarily on previously downloaded illegitimate copies or ripped music from CDs, this model is not truly compensating creators.[34] In addition, they state that since Apple's Steve Jobs was quoted as saying "there's no money in online music" and that Apple's success comes from selling iPods, not licensed music, the market for per-unit pricing of legitimate online music sales is inefficient and doomed to failure.

While these criticisms may ultimately prove true, they also must be put into perspective. They are criticisms primarily intended to undermine the proprietary DRM model in favor of some alternative,

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CNET News.com, Sept. 5, 2003: http://news.com.com/2100-1027_3-5071566.html?tag=fd_top, and Alorie Gilbert, *iTunes auction treads murky legal ground*, CNET News.com, Sept. 3, 2003: http://news.com.com/2100-1025_3-5071108.html.

Apple's "Terms of Sale" expressly state that "burning and exporting capabilities are solely an accommodation" to the user (for personal, noncommercial use) and do not constitute a grant or waiver of any rights of the copyright owners in works downloaded. Apple iTunes terms of service and sale may be viewed at: http://www.apple.com/support/itunes/authorization.html. Although Apple uses the term "sale," this would appear to apply only to the copy of the work downloaded to the hard drive of the user's computer. The further "reproduction" of the work onto another medium does not appear afford "ownership" status to the user, but rather a license for personal, noncommercial use (as indicated in the pop-up screen which appears and which must be agreed to before burning is allowed). Since the reproduction of the work appears to be a licensed copy of the work, the first sale doctrine would not apply to burned disks or to iPods loaded with music. The author expresses thanks to David Grossman for raising the question of "sale" in class.

32 Reuters, *IPod Mini Shrinks, Goes Pink*, Wired News, Feb. 17, 2004: http://www.wired.com/news/mac/0,2125,62320,00.html.

33 Ina Fried, *Apple to Launch iTunes for Windows*, CNET News.com, Oct. 9, 2003: http://news.com.com/2100-1027-5088849.html.

34 See, e.g., Andrew Orlowski, Why wireless will end 'piracy' and doom DRM and TCPA – Jim Griffin, The Register, Feb. 11, 2004: http://www.theregister.co.uk/2004/02/11/why_wireless_will_end_piracy/.

This criticism tends to assume impatience in the area of amassing a music collection and also ignores that one of the selling points of 20 and 40GB iPods is that they may also be used as portable hard drives for other types of non-music digital files. Similarly, expenditures of $20,000 dollars for collections of copyrighted works do not appear to be such an outrageous proposition when the amounts being spent by some consumers on DVDs are considered. *See*, Wilson Rothman, *DVD's? I Don't Rent. I Own.*, New York Times, Feb. 26, 2004: http://www.nytimes.com/2004/02/26/technology/circuits/26vide.html.

whether the current illegitimate model or an alternative pay-per-access, celestial jukebox model. The real question to ask is whether Apple's model should be given a chance to prove the critics wrong. As noted earlier, market failure may necessitate a move to alternate models, but reports of the market's demise have been greatly exaggerated. Home-based broadband and Napster appeared on the market in 1999, giving it almost a five-year head start on a competitive legitimate service compatible with Windows-based machines. Many users who want to use iTunes, have found that they have to upgrade their systems somewhat to do so, e.g., Windows XP, broadband, firewire or USB. It is reasonable to expect strong growth, since sales on iTunes have doubled in the first 4 months of availability to Windows' users. It is also likely that a larger percentage of the new iPod purchasers will be attracted by the availability of iTunes, whereas early iPod purchasers were more interested in the device itself. Apple's move toward cheaper iPods in coordination with the marketing of iTunes through prepaid cards to be sold at Target and other stores, cross advertising with Pepsi, and other strategies create enormous potential. No one said competing with free was easy, but Apple is at least giving it a shot and making money in the process. Apple's model represents a strong beginning for a legitimate market that, prior to Apple's innovative approach, did not exist in any real sense.

Apple may not be making money from iTunes, but does this prove market inefficiency or failure? Or, does this strategy reveal market ingenuity? Companies seldom do things that hurt their bottom line. Apple may not be profiting directly from iTunes, but it is profiting from leveraging iTunes. Giving one product away in order to promote another has been a practice in the marketplace for some time, e.g., Adobe's distribution of the Acrobat Reader in order to increase demand for the full version of Adobe Acrobat is but one example. Apple's application of this strategy in the early stages of the legitimate digital music market is a creative approach to a market with thin profit margins. Apple entered the market, despite the very thin margins, and devised a way to make it work for itself, for users, and for copyright owners.

While iPods may be partially filled with unauthorized downloads[35] or ripped CDs, it is fortunate that Apple and the recording industry kept their eyes on the ball – the goal of creating a reasonable means of changing illegitimate users into legitimate users. Apple's model represents a welcome acceptance of reality – that unauthorized downloaded music has already occurred (what's done is done), that ripping software exists, and that CD's can be ripped. Should the fact that people have illegally downloaded music stop them from now entering the legitimate system unless they abandon their illicit bounty? Can a competitive legitimate system deny users the ability to rip lawfully purchased CDs? Should either of these types of users be summarily excluded from the legitimate system? The Apple model accepts these users back into the fold and offers reasonable and appealing alternatives for the future. At the same time, it offers the legitimate system a potentially large increase in the number of new users who have not yet entered the digital music market by providing them with a popular gadget and a reasonably flexible service that will suit most of their needs.

As the iTunes model demonstrates, it does not make sense to alienate the very users that you seek to attract. Copyright owners are beginning to realize that allowing various private uses may be a means of preventing more harmful copying over the Internet. This *quid pro quo* may be seen in other areas as well, such as the broadcast flag or some ebook models, and appears to represent copyright owner willingness to give up some control in relation to private copies in order to prevent or discourage distribution over the Internet – activity which has a much more significant effect on the value of copyrighted works.

A critical test will be whether iTunes and other services will be able to obtain authorization for a more comprehensive library of works. Apple's claim to over 500,000 titles will need to be expanded to levels closer to the illegitimate market that boasts millions of titles. Even if premium prices must be paid to attract some artists into the legitimate digital market, there must be a legitimate offering available in order for the system to adequately lure users from reliance on the illegitimate market. It would be wise for copyright owners to facilitate negotiated agreements with innovative legitimate services, even at terms they are hesitant to embrace, if they wish to avoid solidifying the appeal of illegitimate uses and if they wish to avoid contributing to a standoff that may eventually lead to compulsory rates or levies.

Only time will tell whether Apple's strategy will work. The recording industry's effort to make illegitimate services less attractive, including suits against illegal services and infringing users of these services, spoofing,[36] and education, may continue to be

[35] iTunes allows users to "consolidate" the music libraries on their hard drive into the iTunes music folder. This "consolidation" feature can therefore pull into iTunes previously downloaded or ripped MP3 files. While this may be viewed as legitimizing improper activity, it might also be viewed as an amnesty to encourage future legitimate conduct.

[36] Spoofing is the activity of creating imitation files to be circulated on P2P services. These files can be empty or can contain anti-infringement advertisements, either of which in high enough numbers, reduce the efficiencies of infringing on P2P systems by requiring infringers to wade through vast amounts of unwanted material in order to find the desired copyrighted work. Spoofing is

necessary adjuncts to marketplace competition. These efforts demonstrate that there are "costs" for infringement and assist in the widespread transition to legitimate services. The filtering of unauthorized copyrighted material traded over P2P networks may also prove to be a workable means of decreasing the volume of unauthorized distribution.[37] Properly tailored congressional adjustment or clarification of the relevant factors to be considered for a determination of secondary liability may also play a role in the solution.[38] Competition and a diversity of options in the marketplace will also play a significant factor in luring users away from illegal acts and into the legitimate market. iTunes' competitors may also find an even better paradigm, but Apple's approach reveals a significant step that sets a new standard for the legitimate market. It is an innovative effort that deserves to be applauded for its flexible approach and deserves to be given a chance to work. Before considering fundamental changes to the negotiated system that has served this country quite well for many years, it would be wise to discover whether our current copyright system can adapt to effectively compete with free.

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an interesting alternative or adjunct to technological protection that is perfectly suited to foiling efficient infringement over P2P networks. Essentially, it attempts to make finding a copyrighted work as easy as finding a needle in a haystack. Recent advancements have been made in the creation of spoofed works on a massive scale. See, e.g., Katie Dean, Academics Patent P2P Spoofing, Wired News, May 8, 2004: http://www.wired.com/news/digiwood/0,1412,63384,00.html

[37] *See supra*, footnote 7.

[38] S. 2560, the INDUCE Act, is an attempt to adjust this determination by making it clear that if a business depends on infringement for its commercial viability, that fact will be a consideration for liability. Such a consideration would almost certainly result in liability for the P2P software or services that primarily exist to facilitate infringement.

INTERNATIONAL DEVELOPMENTS

Land & Environment Court of New South Wales revokes permit to film "Stealth" in Blue Mountains wilderness area, over objections of Australian Director-General of National Parks & Wildlife and Minister for Environment & Conservation, both of whom granted permit for shooting Columbia Pictures' movie

Next summer, Columbia Pictures will release a movie called "Stealth." Produced by Laura Ziskin and Mike Medavoy, and directed by Rob Cohen, "Stealth" is about artificial-intelligence pilots that are able to fly military jets – thus reducing human casualties – one of whom runs "amok" and begins killing people. The movie was shot on location in Australia, pursuant to film permits duly applied for and received from such government officials as the Director-General of National Parks & Wildlife and the Minister for Environment & Conservation.

Nevertheless, 58 days into the movie's 78-day shooting schedule, something happened that might reasonably have led Ziskin, Medavoy and Cohen to conclude that Australia's procedures for issuing location permits had itself run "amok." A judge of the Land & Environment Court of New South Wales set aside a permit issued by the Director-General and Minister to the onsite production company, AFG Talons Productions Pty Ltd. The permit had authorized the company to shoot the movie's final scene sequence at a site near Mount Hay in the Blue Mountains. The judge did so, even though he acknowledged that the evidence showed that the site "was crucial to [AFG Talon's] decision to shoot the film in New South Wales."

The judge's order was issued at the request of Blue Mountains Conservation Society, whose objections to the filming had been considered, but apparently rejected, by the Director-General and Minister, before they issued the permit. The site is a "wilderness area." And in court, the Society argued that filming "is unlawful within a wilderness area in a national park; the area in which the filming is to take place is a sensitive environment, being a hanging swamp and a transitional open forest; the impact will include the incidental destruction of native vegetation and the unintentional killing of the larvae of the endangered giant dragonfly; and there are said to be alternative sites which are not within a declared wilderness area."

Australia's National Parks & Wildlife Act gives the Director-General and Minister the authority to authorize the use of land within national parks. But that Act also provides that they "shall not" authorize the use of "land that is within a wilderness area." In addition, Australia's Wilderness Act requires wilderness areas to be managed to protect their "unmodified state," to preserve their ability to "evolve in the absence of significant human interference," and to permit "opportunities for solitude and appropriate self-reliant recreation."

According to the judge, the film permit granted by the Director-General and Minister violated the National Parks & Wildlife Act, because it authorized the use of a wilderness area, and because the use that it authorized – shooting a film – did not satisfy any of the purposes specified in the Wilderness Act. As a result, the judge concluded that the permit issued by the Director-General and Minister was "unlawful."

The Blue Mountains Conservation Society was represented by T.F. Robertson SC and L.M. Byrne (Barrister) and Ilona Miller of the Environmental Defender's Office Ltd (Solicitor). The Director-General and Minister were represented by I. G. Harrison SC and C. McElwain of the Department of Environment and Conservation (Solicitor). AGF Talon was represented by N. A. Hemmings QC and Allens Arthur Robinson (Solicitors).

Blue Mountains Conservation Society Inc. v. Director-General of National Parks and Wildlife, [2004] NSWLEC 196, available at www.lawlink.nsw.gov.au/lecjudgments/2004nswlec.nsf/d1efd3b3c2f68e05ca256736001f37be/2fbe6d7ac1a8d667ca256e850026e1e4?OpenDocument

Actor Jimmy Nail awarded £30,000 by British court in libel lawsuits against authors and publishers of defamatory biography and "News of the World" article, after publishers made "offers of amends" and published apologies pursuant to UK Defamation Act

Jimmy Nail has been awarded a total of £30,000 in a pair of lawsuits he filed against the authors and publishers of a defamatory biography titled *Nailed: The Biography of Jimmy Nail*, and an article about the book in the British tabloid *News of the World*. Nail is a well-known actor in the UK where he has appeared in movies and in the television series "Spender" and "Auf Wiedersehen Pet."

The amount awarded to Nail by Mr. Justice Eady was less than the £70,000 to £100,000 Nail hoped to recover. Nail's hopes may have been reasonable, because – as Justice Eady himself acknowledged – "the current conventional overall ceiling for damages" in libel lawsuits in the UK is £200,000 (just under $400,000, at current exchange rates). However, Nail's cases were not "conventional" libel cases.

The biography and *News of the World* article were false and defamatory. None of the defendants disputed that. Indeed, that's what made Nail's cases unconventional. Rather than dispute the defamatory nature of what they had written and published, the defendants made "offers of amends." Nail accepted their offers, and the defendants published apologies. All of this was done pursuant to a four-year-old – but thusfar little used – amendment to the UK Defamation Act.

Thus, the primary issue before Justice Eady was what effect the "offers of amends" and apologies should have on the amount of compensation awarded to Nail. Justice Eady explained that "The offer of amends regime provides . . . a process of conciliation. . . . [W]hen an offer has been made, and accepted, any claimant knows from that point on that he has effectively 'won.' He is to receive compensation and an apology or correction. In any proceedings which have to take place to resolve outstanding issues, there is unlikely to be any attack upon his character. The very adoption of the procedure has therefore a major deflationary effect upon the appropriate level of compensation. This is for two reasons. From the defendant's perspective he is behaving reasonably. He puts his hands up, and accepts that he has to make amends for his wrongdoing. As to the claimant, the stress of litigation has from that moment at least been significantly reduced."

After thoughtful consideration, Justice Eady determined that Nail should recover £7,500 on account of the biography and £22,500 on account of the article in *News of the World*.

The biography was published four and half years before Nail filed his lawsuit, so much of the damage the book may have done to Nail's reputation was barred by the statute of limitations. Only 4,500 copies were sold in all, and only 100 of those were sold within the one-year period of limitations before Nail filed his suit. Justice Eady thought "that the circumstances relating to [the biography's] publication and the timing of [Nail's libel] complaint are so unusual that they are unlikely to be replicated," and thus the Justice himself concluded that "the level of this particular award is hardly likely to provide a useful comparison in any other case."

The compensation to be awarded on account of the *News of the World* article was important, however. By the time *News of the World* published its article about the biography, the book was three and half years old – though the article, incorrectly, described it as "a bombshell new book." The article was prompted by the beginning of a new season of Nail's "Auf Wiedersehen Pet" television series. *News of the World* obtained a license from the biography's publisher to use material from the book. The passages the tabloid chose to use were those that made allegations about Nail's sexual exploits, those that made Nail seem "coarse," and those that portrayed him as arrogant and bullying towards those with whom he worked.

The reason the tabloid felt at liberty to use these passages – despite London's reputation for being the "libel capital of the world" – was that Nail had never complained about the book, let alone filed a libel lawsuit, when it was first published. Nail explained that he didn't, because his solicitors had advised him not too, apparently in the belief that if Nail ignored the book, it might "die" on its own, and that filing suit "would simply be counter-productive, since the book could be given more publicity than would otherwise be the case."

Justice Eady decided that compensation for the *News of the World* article would have been £45,000 *without* taking into account the "mitigating factors" that became relevant when the tabloid made an "offer of amends" and published an apology. The Justice concluded that those mitigating factors warranted "a reduction of 50%," and that is how he arrived at an award of £22,500.

Nail was represented by Jonathan Caplan QC and William Bennett (instructed by Schillings). The authors and publishers of the biography and *News of the World* were represented by Adrienne Page QC (instructed by Farrer & Co.)

Nail v. Jones, (2004) EWHC 647 (Q.B.), available at http://www.courtservice.gov.uk/judgmentsfiles/j2428/nail-v-news_group.htm

WASHINGTON MONITOR

"Puros Corridos Malandrines" is eligible for trademark registration for recorded music because it is not merely descriptive, even though one meaning of the Spanish phrase is "truly scandalous ballads," Trademark Trial & Appeal Board rules

Aaron Lopez Valdovinos sought to register "Puros Corridos Malandrines" as a trademark for "a series of phonographic records, cassettes and compact discs containing music." One meaning of that Spanish language phrase is "truly scandalous ballads." Indeed, the Spanish language record company Fonovisa says that it "has created, marketed and sold numerous ballads which are known as 'Corridos'. . . ." Apparently fearing consumer confusion between Valdovinos' "Puros Corridos Malandrines" recordings and its own "Corridos" records, Fonovisa opposed Valdonvinos' registration application.

Fonovisa's opposition was heard by the Trademark Trial & Appeal Board. The specific issue it had to decide was "whether the Spanish mark Puros Corridos Malandrines, when translated into English, is merely descriptive of a series of phonographic records, cassettes and compact discs containing music." The legal doctrine involved in the case is the "doctrine of foreign equivalents," which permits the Board to translate foreign-language marks into English, and then to determine whether the English translation is descriptive or generic. This is done, because descriptive and generic marks are not eligible for registration, or indeed, even for trademark protection.

In a short opinion marked "Not Citable as Precedent of the T.T.A.B.," the Board found that "Puros Corridos Malandrines" is not merely descriptive, and thus is eligible for registration. The Board came to this conclusion because the parties' experts agreed that the phrase has another meaning too: "Songs for the Good-for-Nothings."

This was relevant, the Board explained, because "a term is merely descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods [or services]. . . . Moreover, the immediate idea must be conveyed forthwith with 'one degree of particularity.'"

Since "Puros Corridos Malandrines" has two meanings when translated into English, it "simply fails to convey an immediate idea of any quality or characteristic of applicant's goods with the required 'one degree of particularity,'" the Board concluded.

Aaron Lopez Valdovinos was represented by Cheryl L. Hodgson. Fonovisa was represented by David A. Stall.

Fonovisa, Inc. v. Aaron Lopez Valdovinos, Opposition No. 91150547 (TTAB 2004), available at http://www.uspto.gov/web/offices/com/sol/foia/ttab/2eissues/2004/91150547.pdf

"Ulalena" is title of single theater production and thus not eligible for registration as service mark, even though different versions are presented in different venues, Trademark Trial & Appeal Board affirms

"Ulalena" is the title of a theatrical production about Hawaiian history, legend and music. It is presented as a full-fledged play in the Maui Myth & Magic Theater. But other, shorter, versions also have been performed elsewhere, including a radio station, an awards ceremony, and at sporting events.

According to the show's producer – a company with the strangely sterile name 3522806 Canada Inc. – the show's many versions make "Ulalena" eligible for service mark registration. But when the company applied to register the name with the U.S. Patent & Trademark Office, it was rebuffed. The trademark examining attorney (a PTO employee) denied the application, on the grounds that the mark was the title of a single creative work.

Trademark law does not permit registration of the titles of single works. (See, e.g., *ELR* 24:9:16). "Ulalena's" production company did not dispute the law. It did, however, dispute the examining attorney's conclusion that "Ulalena" is just a single work. In an appeal to the Trademark Trial & Appeal Board, the company argued that "Ulalena" identifies a "series" of "different" performances, rather than the re-showing of a single performance.

In an opinion marked "This decision is not citable as precedent of the TTAB," the Board agreed that "there apparently are different versions of the production because of the constraints caused by different venues where it may be shown, or by different time constraints." That, however, was not enough for the Board to rule in the company's favor. "The simple fact remains that

Ulalena is the title of a single theater production about Hawaiian cultures, traditions and history," the Board said. "Although the venue or length of performance may vary, each production would be regarded by consumers as the same."

For this reason, the Board concluded that "as the title of a single live theater production, [Ulalena] is unregistrable because it does not function as a service mark."

The production company was represented by Howard N. Aronson of Lackenbach Seigel. The Trademark Examining Attorney was Ira Goodsaid.

In re 3522806 Canada Inc., Serial No. 76394362 (TTAB 2004), available at www.uspto.gov/web/offices/com/sol/foia/ttab/other/2004/76394362.pdf

RECENT CASES

Supreme Court upholds preliminary injunction barring enforcement of Child Online Protection Act, pending trial on whether blocking and filtering software is less restrictive alternative to criminal penalties for websites containing material "harmful to minors"

Children need to be protected from websites containing harmful material. On that issue, there is pretty wide agreement. What people don't agree about, however, is how best to provide that protection. Congress decided, twice, to do so using criminal laws. Others say that computer technology – such as blocking and filtering software –is a more effective and less restrictive way to do so.

This disagreement is at the heart of a long-running legal battle over the constitutionality of the Child Online Protection Act. The Act, commonly referred to as "COPA," was enacted in response to a Supreme Court decision that the earlier Communications Decency Act – Congress' maiden effort at protecting children from harmful online material – overstepped constitutional bounds (*ELR* 19:2:7).

COPA makes it a crime to post to the web, for commercial purposes, material that is "harmful to minors." In an effort to bring the statute within the requirements of the First Amendment, Congress including a provision that allows web creators to avoid conviction, if they require credit card, adult access code, or other measures to restrict access by minors.

Web creators and public interest groups immediately challenged COPA on several constitutional grounds, with notable success at the pre-trial stage. A federal District Court granted a preliminary injunction that was affirmed on appeal (*ELR* 22:6:24). That injunction was reversed by the Supreme Court, when it first considered this case, but only because the Supreme Court disagreed with the specific ground on which the injunction had been based. The Supreme Court remanded the case to the Court of Appeals for its consideration of whether COPA may be unconstitutional on other grounds (*ELR* 24:3:14). The Court of Appeals then reaffirmed the preliminary injunction, on the grounds that it is not least restrictive means of accomplishing its goal.

The case went up to the Supreme Court again, but this time, the Supreme Court affirmed. In an opinion by Justice Anthony Kennedy, the Court agreed that it is likely that COPA does violate the First Amendment. It likely does, Justice Kennedy reasoned, because blocking and filtering software is less restrictive than criminal penalties, and may even be more effective. The reason it may be more effective is that COPA doesn't apply to websites located outside the United States, though minors can easily access them, while blocking and filtering software prevents minors from getting access to foreign as well as domestic sites.

Justice Kennedy acknowledged that blocking and filtering software isn't perfect. It blocks some sites that are not harmful, and fails to block others that are. The relative effectiveness of such software, as compared to COPA's criminal penalties, will be the issue to be litigated at trial. But until such a trial can be held, Justice Kennedy said, there are practical reasons for allowing the injunction against COPA's enforcement to remain in effect.

Christopher R. Harris of Latham & Watkins in New York City, along with several other lawyers, represented those who challenged COPA's constitutionality. The government was represented by Theodore B. Olson, the Solicitor General, in Washington D.C.

Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783, 2004 U.S.LEXIS 4762 (2004)

Appeals court affirms $9.5 million judgment against Disney and ABC Radio in breach of contract and trade secrets case filed by Children's Broadcasting Corp., following creation of Radio Disney network

The Walt Disney Company and its ABC Radio subsidiary will have to pay the Children's Broadcasting Corporation (CBC) $9.5 million, as a result of a judgment in a breach of contract and trade secrets case CBC won following the creation of the Radio Disney network. An appeals court has affirmed the judgment, in an opinion that rejected Disney's arguments that the testimony of CBC's expert did not support the judgment, and that the judge improperly included $2.5 million in prejudgment interest.

The origins of the lawsuit date back to the early 1990s when CBC created a radio network featuring programming for children age 12 and younger and their parents. In 1995 – before ABC was acquired by Disney –

CBC and ABC Radio entered into a contract by which ABC Radio agreed to provide CBC with advertising sales services. In order to enable ABC Radio to do so, CBC provided it with its advertiser list. ABC was then acquired by Disney, and ABC Radio terminated its agreement with CBC. The agreement permitted either party to terminate at will, so ABC Radio committed no breach by doing so. On the other hand, when Disney started its own Radio Disney network, Disney and ABC Radio allegedly used CBC's advertiser list, including the list's information about the rates paid by each of CBC's advertisers.

The judgment that has now been affirmed included $1.5 million in damages for ABC's breach of its advertising sales contract with CBC, and $8 million (with interest) for ABC's misappropriation of CBC's advertiser list.

Though $9.5 million is a very significant amount, it wasn't as much as CBC might have recovered. The case involved two jury trials. The first jury awarded CBC $20 million; but that award was set aside by the trial judge who granted ABC Radio and Disney's post-trial motion for judgment as a matter of law and their alternative motion for a new trial. That ruling, however, was reversed by the Court of Appeals which upheld the jury's conclusion that ABC Radio had breached its contract with respect to advertising sales and confidentiality, and that ABC Radio and Disney had misappropriated CBC's advertiser list. At the same time, though, the Court of Appeals remanded the case for a new trial on the extent of CBC's damages. (*ELR* 23:5:10)

That second trial resulted in a jury verdict in CBC's favor and the $9.5 million judgment which the Court of Appeals affirmed, in an opinion by Judge William Riley.

Disney didn't come away from the appeal completely empty-handed. CBC argued that it should have been awarded punitive damages and attorneys' fees, on top of the $9.5 million it was awarded. Judge Riley, however, affirmed the trial judge's decision not to do so.

CBC was represented by Thomas F. Cullen, Jr., in Washington D.C. Disney and ABC Radio were represented by Paul B. Klass in Minneapolis.

Children's Broadcasting Corp. v. Walt Disney Co., 357 F.3d 860, 2004 U.S.App.LEXIS 1075 (8th Cir. 2004)

Amazon.com wins dismissal of copyright infringement suit filed by producer of pirated "Manson" DVDs sold on Amazon website, because producer sent infringement notification letter to Amazon nine months before seller offered infringing DVDs for sale, so Amazon did not lose protection of DMCA's "safe harbor"

Robert Hendrickson is the producer of the movie "Manson." He has licensed his documentary for sale as videocassettes, but not as DVDs. As a result, whenever Hendrickson sees a DVD version of "Manson" offered for sale online, he knows it's a pirated copy. Apparently, there's a fairly active market in DVD versions of Hendrickson's movie, because DVDs of it have been offered for sale on eBay and Amazon, at least.

Hendrickson has notified eBay and Amazon that DVD versions of "Manson" are pirated, and he's filed contributory copyright infringement suits against both online services, because they've allowed DVD sales to continue, despite his notifications. Unfortunately for him, his notifications have not been adequate to enable him to prevail.

In a nutshell, the DMCA imposes copyright liability on internet service providers that permit their facilities to be used by infringers, despite knowledge of that use. But the DMCA also provides service providers immunity from liability, unless they have actual or constructive knowledge of the infringement or receive a written notice containing specific elements required by the DMCA itself. These immunity provisions are commonly referred to as the "safe harbor" provisions of the DMCA.

Federal District Judge Terry Hatter has dismissed Hendrickson's suit against Amazon.com, because the judge found that Hendrickson's notification to Amazon was not adequate to satisfy the specific elements required by the DMCA. The flaw in Hendrickson's notice was not so much with its content as in its timing.

Hendrickson's letter notified Amazon that "all" DVD copies of "Manson" infringe his copyright. That notice would have been sufficient, Judge Hatter thought, with respect to any "Manson" DVDs being offered for sale on Amazon, at the time Amazon received the notice. However, the infringing DVDs that triggered Hendrickson's lawsuit were not offered for sale on Amazon until nine months after Hendrickson sent his letter. And for that reason, Judge Hatter concluded the notification was not sufficient.

Judge Hatter reasoned that the language of the DMCA refers to infringing activity taking place at the time notification is provided – not later. And he observed that Congress intended to split responsibility for policing infringing activity between copyright owners and online service providers; it did not intend to impose that burden entirely on service providers.

Since the notification Hendrickson sent Amazon "was no longer viable" when infringing DVDs of "Manson" were offered for sale, Amazon was protected from liability by the DMCA's "safe harbor" provisions, the judge concluded. And for that reason, Judge Hatter granted Amazon's motion for summary judgment.

Hendrickson also lost his earlier case against eBay, because even though his notifications were timely, they didn't provide all of the information required by the DMCA (*ELR* 23:11:10).

Hendrickson represented himself. Amazon.com was represented by Allan E. Anderson of Ropers Majeski Kohn & Bentley in Los Angeles.

Hendrickson v. Amazon.com, Inc., 298 F.Supp.2d 914, 2003 U.S.Dist.LEXIS 24498 (C.D.Cal. 2003)

Flea market owner is liable to record companies for contributory and vicarious copyright infringement, as a result of vendors' sale of pirated and counterfeit recordings, federal District Court rules

Richard Sinnott is the owner of the Marysville Flea Market in California. His vendors pay him a fee in order to sell merchandise of various kinds. In return, Sinnott provides his vendors with security, utilities, restrooms and a clean environment. Most of the merchandise sold by Sinnott's vendors is perfectly legal. In fact, his security personnel patrol the grounds to make sure that no guns or alcohol are sold – or food or drink of any kind, which Sinnott himself reserves the right to sell for on-site consumption.

A few of Sinnott's vendors, however, have sold pirated or counterfeit music recordings. RIAA investigators have caught them doing so. Indeed, some vendors candidly admitted their recordings were infringing copies. The RIAA informed Sinnott of the infringing activities of those vendors. It even offered to train Sinnott's security personnel, for free, so they could easily detect infringing recordings. But Sinnott wasn't interested (apparently, because the RIAA didn't offer to *pay him* to *accept* its training).

After three years of attempts to get Sinnott to co-operate – including a half-dozen in-person visits and four letters – 23 record companies sued Sinnott for vicarious and contributory copyright infringement. And they've won. Federal District Judge Morrison England has granted the record companies' motion for summary judgment as to Sinnott's liability (which leaves only the issue of damages for trial).

Judge England held that Sinnott is liable for contributory infringement: because he had knowledge of the infringements being committed by his vendors, because RIAA investigators personally told him about it; and because Sinnott contributed to those infringements by providing support services for the infringers.

The judge also held that Sinnott is liable for vicarious infringement: because he had both the right and the ability to control his vendors (and did, if they tried to sell food or drink for on-site consumption); and because he benefited from the activities of the infringing vendors, because customers were drawn to the Flea Market by those activities and then bought food and drinks at the concession stands Sinnott operated.

The record companies were represented by Jeffrey G. Knowles of Coblentz Patch Duffy & Bass in San Francisco, by Russell J. Frackman of Mitchell Silberberg & Knupp in Los Angeles, and by Matthew J. Oppenheim of the RIAA in Washington D.C. Sinnott was represented by Mark Raymond Leonard of Davis & Leonard in Sacramento.

UMG Recordings, Inc. v. Sinnott, 300 F.Supp.2d 993, 2004 U.S.Dist.LEXIS 4469 (E.D.Cal. 2004)

Fine and attorneys' fee award totalling $105,000, for violation of preliminary injunction in Aimster P2P copyright case, is upheld on appeal

Violating federal court injunctions – even preliminary injunctions – can be an expensive thing to do. That's what one of the defendants in the Aimster P2P copyright infringement lawsuit has learned, as a result of his failure to comply with a preliminary injunction that required him to either block infringing uses of his service or shut it down.

The preliminary injunction was affirmed by the Court of Appeals, which agreed that the Aimster music swapping service is likely to be found to be a contributory infringer (*ELR* 25:5:9). The Supreme Court then declined to hear the case, by denying a petition for review filed by defendant John A. Deep (*ELR* 25:12:20).

Deep was among those enjoined. He claimed he was unable to block infringing uses of his service, but he admitted he did not shut it down, as ordered. As a result, federal District Judge Marvin Aspen fined Deep $5,000 and ordered him to pay more than $100,000 in attorneys' fees incurred by the music companies that filed the suit.

Deep appealed the fine and fee award too, again without success. In a short opinion (marked "Not to be cited"), the Court of Appeals, characterized Deep's arguments as "frivolous," and it affirmed both the fine and fee award.

In re Aimster Copyright Litigation, 86 Fed.Appx. 984, 2004 U.S.App.LEXIS 1449 (7th Cir. 2004)

Record companies awarded $1.9 million in copyright infringement suit against owner of convenience store that sold pirated CDs of companies' "most popular" recordings

Beker Enterprises, Inc., owns a convenience store and gas station in Florida, where it sold, among other things, pirated music CDs. There really wasn't any question that the CDs were pirated: they were made on recordable disks called "CD-Rs" and did not include the art work or insert cards that legitimate CDs always do.

The record companies sent Beker three separate demand letters, all of which it ignored. And when the record companies sued Becker for copyright infringement, it ignored the lawsuit too.

Despite Beker's failure to participate in the case, District Judge James Cohn was able to determine, largely from the physical characteristics of the CDs themselves, that Beker had "willfully" infringed the record companies' copyrights. As a result, the judge entered a default judgment against Beker for $35,000 in statutory damages for each of the 54 recordings whose copyrights it infringed, plus more than $15,000 for the record companies' attorneys' fees.

In all, the judgment comes to more than $1.9 million.

The record companies were represented by Karen L. Stetson of Broad & Cassel in Miami and by Matthew J. Oppenheim of the RIAA in Washington D.C. Beker Enterprises was represented by Zakieh S. Becker of Avon Park.

Arista Records, Inc. v. Beker Enterprises, Inc., 298 F.Supp.2d 1310, 2003 U.S.Dist.LEXIS 23658 (S.D.Fla. 2003)

Court refuses to dismiss libel lawsuit filed by NBA player Latrell Sprewell against New York Post and sportswriter Marc Berman, complaining of articles reporting that Sprewell injured his hand when he "took a swing" at a guest and delayed reporting the injury to his team

Back in the fall of 2002, the *New York Post* published a series of articles by sportswriter Marc Berman about a topic that must have seemed a natural: violent behavior by NBA player Latrell Sprewell who then played for the New York Knicks.

NBA fans and readers of these pages will recall that Sprewell was involved once before in a violent episode that resulted in his suspension by the NBA (*ELR* 23:11:12). As a result, when Sprewell later injured his hand when he allegedly "took a swing" at a guest on his yacht, and then allegedly delayed telling the Knicks about the injury, it's not surprising the *Post* reported the story.

Sprewell, however, denied the events that prompted the articles. And he responded by suing the newspaper and it sportswriter for libel, in state court in New York.

As newspapers and reporters often do when they're sued for libel, the *Post* and Berman responded with a motion to dismiss the case. They argued that Sprewell's pre-existing reputation for violence meant that their articles could not have injured his reputation. And they argued that the articles were not defamatory, in any event.

Judge Marcy Friedman denied their motion, however, thus permitting the case to proceed.

The judge concluded that readers' likely knowledge of the prior incident involving Sprewell's violent conduct made it more likely, not less, that the *Post*'s articles would damage Sprewell's reputation.

Judge Friedman also concluded that if the articles were untrue, they were defamatory, because they could be understood by readers to mean that Sprewell had committed the crime of attempted assault. What's more, since NBA players are required to follow team rules, the articles also could have injured Sprewell "in his . . . profession" by suggesting that he delayed reporting his injury in violation of a rule that requires players to promptly report their injuries.

Sprewell was represented by Paul J. Giacomo in New York City. The *Post* and Berman were represented by Slade R. Metcalf of Hogan & Hartson in New York City.

Sprewell v. NYP Holdings, Inc., 772 N.Y.S.2d 188, 2003 N.Y.Misc.LEXIS 1342 (Sup. 2003)

Arbitrator's decision ordering reinstatement of some – but not all – Major League Baseball umpires, after they rescinded their 1999 resignations, is upheld by appellate court

During the 1999 baseball season, Major League Baseball and its umpires got into a terrible dispute. In a nutshell, the dispute was whether Commissioner Bud Selig had violated Baseball's collective bargaining agreement with the Major League Umpires Association (the umpires' union) by attempting to implement a number of new policies. The question of whether those policies actually violated the collective bargaining agreement was never decided by a judge or arbitrator, because the umpires adopted a different strategy to make their objections known. Fifty-seven (out of 68) umpires submitted resignation letters, most – but not all – of which were accepted.

The umpires "resigned" for two reasons. First, their collective bargaining agreement contained a "no-strike" clause, so they couldn't go on strike to show their displeasure with Selig's new policies. Second, the resignation of the umpires would have obligated the American and National Leagues to pay the umpires some $15 million in severance compensation – something the umpires thought would force Major League Baseball to bargain about the new policies before they were put into effect.

However good the umpires' strategy may have looked on paper, it didn't work in fact. The American and National Leagues simply hired replacements. That in turn caused the umpires to attempt to rescind their resignations. Some umpires were permitted to do so, and they were reinstated. Others, however, were not, and that triggered grievances and an arbitration.

The arbitration involved two issues. The first was whether the dispute was subject to arbitration at all. The second was whether the decision not to reinstate some umpires was based on proper standards. The ultimate result was a split decision that satisfied neither side entirely. As a result, both sides challenged parts of the arbitrator's award. Neither side's challenge was successful. Federal District Judge Harvey Bartle confirmed the arbitrator's award completely (in an unpublished decision). And in an opinion by Judge Jane Roth, the Court of Appeals has affirmed, over the dissent of Judge Edward Becker.

The question of whether the dispute was subject to arbitration at all was surprisingly difficult. This was because the collective bargaining agreement provided for some disputes to be arbitrated, but gave the presidents of the American and National Leagues the "final" authority to make decisions about other disputes. It wasn't entirely clear whether the refusal to reinstate some umpires was a dispute of the first kind or the second. In the end, Judge Roth agreed that the arbitrator's decision – that arbitration was proper to resolve the dispute over reinstating umpires – was a decision that was "rationally derived" from the collective bargaining agreement. And thus Judge Roth affirmed that decision.

The question of whether proper standards had been used to decide not to reinstate some umpires also was surprisingly difficult. The collective bargaining agreement gave the presidents of the Leagues the authority to terminate umpires, provided terminations were based on the umpires' insufficient "merit and skill." Some umpires were not reinstated for reasons related to their "merit and skill." And the arbitrator upheld the League president's decision not to reinstate them.

However, other umpires were not reinstated because newly-hired replacements had left the League without enough jobs to reinstate all the umpires. The arbitrator decided that lack of jobs was unrelated to "merit and skill." And thus the arbitrator ordered the League to reinstate those umpires, with back pay.

Judge Roth affirmed both of the arbitrator's reinstatement rulings. They drew their "essence" from the collective bargaining agreement, the judge determined. And given the limited scope of judicial review of arbitration awards, "nothing more is required," Judge Roth concluded.

Judge Becker dissented. In his opinion, the dispute was never subject to arbitration "in the first place," because the umpires resigned – they were not "terminated."

The Major League Umpires Association was represented by Patrick C. Campbell, Jr., of Phillips & Campbell in Lima. The American & National Leagues and Major League Baseball were represented by Howard L. Ganz of Proskauer Rose in New York City and Steven R. Wall of Morgan Lewis & Bockius in Philadelphia.

Major League Umpires Association v. American League of Professional Baseball Clubs, 357 F.3d 272, 2004 U.S.App.LEXIS 2563 (3rd Cir. 2004)

Insurance company did not have duty to defend lawsuits alleging that trading card publisher Upper Deck violated RICO by selling sports card packages, some of which contained rare and valuable cards

Not every claim is insured. That, at least, is the message taught by a case filed by the Upper Deck Company against Federal Insurance Company. Upper Deck is a publisher of sports and entertainment trading cards, including cards licensed by Major League Baseball, the NFL, the NBA and the NHL. Federal Insurance had sold Upper Deck a commercial general liability insurance policy.

The dispute between Upper Deck and Federal Insurance was triggered by a series of lawsuits filed against Upper Deck (and the sports leagues) on behalf of trading card collectors. These lawsuits alleged that Upper Deck (and the leagues) violated the federal RICO statute, because Upper Deck sold card packages, some of which contained rare and therefore valuable cards called "chase cards" which were redeemable for cash prizes.

Upper Deck (and the leagues) eventually won those RICO cases, on their merits (*ELR* 22:8:21, 24:7:27).

In the meantime, though, Upper Deck had asked Federal Insurance to defend the cases, but the insurance company refused. As a result, Upper Deck sued Federal Insurance for breach of contract and declaratory relief.

In its suit, Upper Deck argued that its general liability policy provided it with coverage against claims for bodily injury; and it argued that although the collectors' lawsuits were "styled" as RICO lawsuits, they actually asserted claims for damages "for personal injury to children as a result of a gambling addiction."

In an opinion by Judge Margaret McKeown, the Court of Appeals has held that Federal Insurance did not have a duty to defend Upper Deck, because neither the allegations of the collectors' complaint, nor any extrinsic evidence available at the time Upper Deck asked to be defended, "could be construed as giving rise to a claim to bodily injury."

In a concurring opinion, Judge Myron Bright said (quoting the District Court's earlier opinion): "If . . . the insurer has a duty to defend in this case, it is hard to imagine a situation where the insurer's duty to defend would not be triggered. Although the duty to defend is extremely broad, it is not unlimited."

Upper Deck was represented by Gary W. Osborne of Osborne & Nesbitt in San Diego. Federal Insurance was represented by Peter Abrahams of Horvitz & Levy in Encino.

Upper Deck Co. v. Federal Insurance Co., 358 F.3d 608, 2004 U.S.App.LEXIS 308 (9th Cir. 2004)

Photograph of New Orleans' French Quarter on foggy morning does not infringe copyright to similar photograph, because they are not "substantially similar," federal District Court decides

Photographer Louis Sahuc has lost a copyright infringement lawsuit he filed against photographer Lee Tucker. Federal District Judge Jay Zainey has determined that Tucker's offending photograph, titled "Breaking Mist," is not substantially similar to Sahuc's photograph "Decatur Street Gate."

Both photographers are long-time fixtures in New Orleans. Sahuc has lived in that city for more than 25 years and owns the Photo Works gallery in the city's French Quarter. Tucker has worked as an artist and photographer around Jackson Square for more than 30 years.

Sahuc shot his "Decatur Street Gate" photograph in 1999, and he sells copies and posters of it in his gallery. In fact, Tucker acknowledged he had seen "Decatur Street Gate" in the gallery, and even had a poster of it in his possession, when he shot "Breaking Mist" in 2001.

Both photographs depict Jackson Square on a foggy morning, along with St. Louis Cathedral, the statue of Andrew Jackson, and banana leaves.

Judge Zainey characterized Sahuc's "Decatur Street Gate" as a "masterful work," and the judge acknowledged that the two photographs "depict similar ideas." On the other hand, Judge Zainey noted that Sahuc's copyright does not protect his ideas, nor does it protect the appearance of Jackson Square, St. Louis Cathedral, or the statue of Andrew Jackson.

What's more, there are differences between the two photographs. The lighting of Tucker's photograph differs from that of Sahuc's photograph, as does the placement of the subjects of the two works. St. Louis Cathedral is in the background in one photograph, but is accentuated in the other. Though both photographs depict foggy scenes, Tucker proved that he had taken other pictures of foggy scenes with the Cathedral in the background even before Sahuc shot "Decatur Street Gate."

For these reasons, Judge Zainey concluded that the two photographs are not substantially similar, and he therefore ruled in Tucker's favor and dismissed Sahuc's complaint.

Sahuc was represented by Robert Allan Vosbein of Adams & Reese in New Orleans. Tucker was represented by A. Gregory Grimsal of Gordon Arata McCollam Duplantis & Eagan in New Orleans.

Sahuc v. Tucker, 300 F.Supp.2d 461, 2004 U.S.Dist.LEXIS 1339 (E.D.La. 2004)

Release and waiver signed by injured race car driver was binding, despite provision of state constitution making assumption of risk a jury question "in all cases"

A judgment in favor of the Firebird Raceway, in a lawsuit filed by race car driver Charles Phelps, has been upheld by the Arizona Court of Appeals. In an opinion by Judge Susan Ehrlich, the appellate court held that Phelps' claims against the Raceway were barred by release and waiver agreements Phelps had signed, before the race in which he was badly burned when his car crashed into a wall.

Phelps' lawsuit against the Raceway was dismissed without a trial, in response to the Raceway's motion for summary judgment. The language of the release and waiver agreements did bar Phelps' lawsuit. But the Arizona constitution provides that "assumption of the risk" is a jury question "in all cases." Phelps argued that the agreements he had signed were nothing more than *express* assumptions of the risk, and thus his case should not have been dismissed without a jury trial.

Judge Ehrlich disagreed. She noted that the Arizona constitutional provision on which Phelps relied had never been applied to an express, contractual assumption of the risk. And she held that it does not apply, when an injured person has signed waiver and release agreements. As a result, the appellate court affirmed the dismissal of Phelps' lawsuit.

Phelps was represented by David L. Abney of Skousen Skousen Gulbrandsen & Patience in Mesa. Firebird Raceway was represented by Jay Fradkin of Jennings Strouss & Salmon in Phoenix.

Phelps v. Firebird Raceway, Inc., 83 P.3d 1090, 2004 Ariz.App.LEXIS 16 (Ariz.App. 2004)

Previously Reported:

Juries render verdicts. Two previously reported cases have resulted in jury verdicts:

- A jury concluded that the Steven Bochco television series "City of Angels" did not infringe the copyrights of screenwriters Jerome and Laurie Metcalf in screenplays they had written about an inner-city hospital with a mostly black staff. Early in the case, federal District Judge Robert Kelleher came to that same conclusion, and he dismissed the case in response to a defense motion for summary judgment. The Court of Appeals, however, reversed; it ruled (in a flawed opinion by the usually-adept Judge Alex Kozinski) that the Metcalfs were entitled to have a jury determine whether their scripts and "City of Angels" were substantially similar (*ELR* 24:6:11). The jury, it seems, agreed with Judge Kelleher's original, pre-trial, conclusion.
- A jury has awarded NHL player Tony Twist $15 million, according to news accounts, in his right of publicity lawsuit against the publisher of the comic book "Spawn" that featured a villainous character named "Tony Twist." The Missouri Supreme Court held that the comic book was not protected by the First Amendment and that its publisher may have used Twist's name to obtain commercial advantage Amendment (*ELR* 25:6:15). Thereafter, the United States Supreme Court denied the comic book publisher's petition for certiorari (*ELR* 25:12:20). That allowed the case to go to the trial that has resulted in the $15 million verdict in Twist's favor.

Cases settled. Two previously reported cases have been settled:

- The Walt Disney Company has settled claims that its ABC and ESPN subsidiaries infringed HyperTV's patents for simultaneous viewing of TV and websites. Disney disputed HyperTV's infringement claims. In fact, early in the case, those claims were dismissed entirely, in response to Disney's motion for summary judgment (*ELR* 24:5:18). However, the Court of Appeal reversed that ruling, on the grounds that the District Court had misconstrued a critical term in HyperTV's patents, and had improperly prevented HyperTV from arguing that Disney infringed its patents under the "doctrine of equivalents," whether or not Disney did so "literally" (*ELR* 25:9:13). Disney and HyperTV settled the case following the appellate court's ruling.
- Movie studios have settled two lawsuits with 321 Studios, a company that made and distributed software called "DVD Copy Plus" and "DVD X Copy" that enabled users to make copies of encrypted DVDs. In one case, the movie studios sued 321 Studios alleging that its software violated the anti-circumvention provisions of the DMCA. In the other case, 321 Studios sued the movie studios seeking a declaratory judgment that its software did not violate the law. In both cases, judges enjoined the sale of 321 Studios' software, on the grounds that the programs did violate the DMCA's anti-circumvention provisions, just as the movie studios contended (*ELR* 25:11:12). The software company has since gone out of business.

Supreme Court denies cert. The United States Supreme Court has denied petitions for certiorari in these previously reported cases: *Artistic Entertainment, Inc. v. City of Warner Robins*, 124 S.Ct. 2017, 2004 U.S.LEXIS 2766 (2004), in which a Court of Appeals upheld the constitutionality of an adult business ordinance (*ELR* 25:4:23); *Los Angeles News Service v. Reuters Television International*, 124 S.Ct. 2158, 2004 U.S.LEXIS 3401 (2004), in which the Court of Appeals affirmed that a news service was entitled to recover an infringers' "profits," but not the service's own "damages," from unauthorized broadcasts in Europe and Africa of its copyrighted videotapes of the L.A. riots (*ELR* 25:7:15); and *Bouchat v. Baltimore Ravens Football Club*, 124 S.Ct. 2171, 2004 U.S.LEXIS 3423 (2004), in which the Court of Appeals affirmed that an artist whose design was infringed by the Baltimore Ravens' logo was not entitled to recover any part of team's revenues from certain merchandise or from sources other than merchandise (*ELR* 25:9:12).

Rehearing ordered. The Ninth Circuit Court of Appeals has agreed to rehear, en banc, *Silvers v. Sony Pictures* in which a three-judge panel previously ruled that screenwriter Nancey Silvers may bring a lawsuit alleging that the copyright to the CBS movie "The Other Woman" was infringed by the Sony movie "Stepmom," even though Silvers wrote "The Other Woman" as a work-made-for-hire, because the production company assigned its infringement claim to Silvers after "Stepmom" was released (ELR 25:4:14). According to the court's order granting Sony's petition for a rehearing, the issues to be decided are these: "Under 17 U.S.C. § 501(b), is only the present owner of an exclusive right under a copyright entitled to sue for infringement? May a party possessing only an assignment of an accrued copyright-infringement claim sue for infringement?" Rehearing order available at: www.ca9.uscourts.gov/ca9/Documents.nsf/0/26604b492ab620e58825685d00537e33/$FILE/06-01-04a.pdf.

DEPARTMENTS

Entertainment Lawyer News:

Phil Hochberg opens sole practice. Phil Hochberg, longtime Washington sports, communications, and entertainment practitioner, has opened his sole practice in the Washington suburb of Rockville, MD. Hochberg had established a broad Washington practice, specializing in the representation of professional and collegiate sports leagues, conferences, and teams – among them, the National Football League, National Basketball Association, National Hockey League, NASCAR, PGA Tour, PGA, LPGA, Master's Tournament, Football Bowl Association, Division 1-A Athletic Directors Association, and individual teams – in regulatory matters, as well as legislation. Additionally, he has developed a practice before the Federal Communications Commission, specializing in cable television and broadcasting matters. He is the author or co-author of eight law review articles, including one cited by the Supreme Court in 1984 in *National Collegiate Athletic Association v. Bd. of Regents of the Univ. of Oklahoma*, as well as book chapters in LAW OF PROFESSIONAL AND AMATEUR SPORTS (Clark Boardman, 1988) and GOVERNMENT AND SPORT – THE PUBLIC POLICY ISSUES (Rowan & Allanheld, 1985). He co-chaired eleven seminars for the Practicing Law Institute and served from 1999-2002 as the Chair of the Sports Section of the Forum on Entertainment and Sports of the American Bar Association. He is a graduate of Syracuse University, the George Washington University Law School, and has a Master of Arts from The American University. As an avocation (tied in with his practice), he does public address announcing at sporting events and was the first baseball and last football announcer in the 36 year history of Washington's D.C./R.F.K Memorial Stadium. He spent 38 years with the Washington Redskins and is one of 39 persons – and the first non-player/coach/owner – to be honored by the team in its Hall of Fame/Ring of Stars at FedEx Field in Landover, MD.

Matt Oppenheim joins Jenner & Block as partner. One of the recording industry's most highly-regarded executives, Matt Oppenheim, has joined Jenner & Block as a partner. He will be a member of the firm's Entertainment and New Media Practice, in addition to working closely with its Intellectual Property and Technology Practice. Oppenheim was Senior Vice President, Business and Legal Affairs for the Washington, D.C.-based Recording Industry Association of America, where he oversaw a wide range of legal, strategic and technology matters. Foremost among his responsibilities at the RIAA was the development and implementation of strategies for the record industry's response to Internet piracy. In that capacity, Oppenheim has been the lead RIAA litigator in the record industry's Internet "file-sharing" cases involving Napster, Aimster, Grokster, AudioGalaxy and Verizon. He also has been one of those responsible for implementing the industry's current enforcement effort against individual infringers. Oppenheim also has been critical to the record industry in formulating a litigation response to physical piracy. He led the industry in its CD manufacturing plant litigation against Media Group (which resulted in a $136 million judgment), Cinram (which ended with a $10.1 million settlement), Pioneer (a $9.1 million settlement) and AmericDisc (a $9 million settlement). He has also been actively involved in overseeing a nationwide litigation program against rogue retailers as well as litigation against international piracy rings. Oppenheim has also been active on important strategic issues facing the recording industry, including acting as a spokesperson in the Secure Digital Music Initiative, a multi-industry effort that sought to develop an open framework for playing, storing and distributing digital music and helping to negotiate the standard for the new DVD-Audio format. In 1991, *The National Law Journal* described Oppenheim as a "music warrior for the industry." Before joining the RIAA in 1998, Oppenheim was an attorney with Proskauer Rose's Washington, D.C. office, where he was responsible for numerous technology and civil litigation matters affecting the telecommunications, entertainment and financial industries. He graduated from Cornell Law School in 1993.

Loeb & Loeb partner Barry Slotnick elected President of Copyright Society. Barry Slotnick, a partner in the New York office of Loeb & Loeb, has been elected President of the Copyright Society of the U.S.A. for a two-year term from 2004 to 2006. Slotnick advises clients on a broad range of issues and deals relating to copyrights, trademarks, and other forms of intellectual property, and has litigated numerous copyright infringement, trademark infringement and contract disputes. He has been Vice President of the Copyright Society since 2002. In addition, he serves on the editorial board of the *Journal of the Copyright*

Society of the U.S.A. He also is a member of the American Bar Association and serves on its Patent, Trademark and Copyright Committee, its Forum on the Entertainment and Sports Industries, and its Litigation Committee.

In the Law Reviews:

Codifying Copyright Comprehensibly by David Nimmer, 51 UCLA Law Review (2004)

Reducing Digital Copyright Infringement Without Restricting Innovation by Mark A. Lemley & R. Anthony Reese, May Stanford Law Review 1345 (2004)

The Berkeley Technology Law Journal has published Volume 19, Number 2 with the following articles:

Spam-Oy, What a Nuisance by Adam Mossoff, 19 Berkeley Technology Law Journal 625 (2004)

Against Immunity for Unilateral Refusals to Deal in Intellectual Property: Why Antitrust Law Should Not Distinguish Between IP and Other Property Rights by Simon Genevaz, 19 Berkeley Technology Law Journal 741 (2004)

How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing by Mark S. Nadel, 19 Berkeley Technology Law Journal 785 (2004)

Santa Clara Computer & High Technology Law Journal has published Volume 20, Number 4 with the following articles:

Classic Fair Use of Trademarks: Confusion About Defenses by David W. Barnes and Teresa A. Laky, 20 Santa Clara Computer & High Technology Law Journal 833 (2004)

Spam after Can-Spam: How Inconsistent Thinking Has Made a Hash Out of Unsolicited Commercial E-Mail Policy by Jeffrey D. Sullivan and Michael B. de Leeuw, 20 Santa Clara Computer & High Technology Law Journal 887 (2004)

Locking Up the Bridge on the Digital Divide: A Consideration of the Global Impact of the U.S. Anti-Circumvention Measures for the Participation of Developing Countries in the Digital Economy by Mia K. Garlick, 20 Santa Clara Computer & High Technology Law Journal 941 (2004)

Copyright, Derivative Works and Fixation: Is Galoob A Mirage or Does the Form(Gen) of the Alleged Derivative Work Matter? by Tyler T. Ochoa, 20 Santa Clara Computer & High Technology Law Journal 991 (2004)

Snipping Private Ryan: The Clean Flicks® Fight to Sanitize Movies by Nikki D. Pope, 20 Santa Clara Computer & High Technology Law Journal 1045 (2004)

Light In Custody: Documentary Films, the TEACH Act and the DMCA by Gretchen Stoeltje, 20 Santa Clara Computer & High Technology Law Journal 1075 (2004)

The Entertainment Law Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 15, Issue 5 with the following articles:

The Future Shape of the BBC: The Hutton Inquiry, Charter Review, and the Challenges Facing the BBC and the Government by Daniel Sandelson and Gavin Smith, 15 Entertainment Law Review 137 (2004) (for website, see above)

Reducing Uncertainty in Libel Law after Reynolds v Times Newspapers? Jameel and the Unfolding Defence of Qualified Privilege by Ian Cram, 15 Entertainment Law Review 147 (2004) (for website, see above)

How Image-conscious is English Law? by Felicity Robinson, 15 Entertainment Law Review 151 (2004) (for website, see above)

Hutton's Law for the Media-Was He Right? by Jonathan Coad, 15 Entertainment Law Review 157 (2004) (for website, see above)

Image Rights and the Effects of the Data Protection Act 1998 by Stephen Boyd and Rosemary Jay, 15 Entertainment Law Review 159 (2004) (for website, see above)

The European Intellectual Property Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 26, Issue 7 with the following articles:

Copyright and Freedom of Expression, Abuse of Rights and Standard Chicanery: American and Dutch Approaches by Herman Cohen Jehoram, 26 European Intellectual Property Review 275 (2004) (for website, see above)

Titles in Europe: Trade Names, Copyright Works or Title Marks? by Jan Klink, 26 European Intellectual Property Review 291 (2004) (for website, see above)

Digital Copyright Reform in New Zealand by John Smillie, 26 European Intellectual Property Review 302 (2004) (for website, see above)

Canada Defines "Originality" and Specifies the Limits of "Fair Dealing": CCH Canadian Ltd v Law Society of Upper Canada by James Tumbridge, 26 European Intellectual Property Review 318 (2004) (for website, see above)

Musical Musings: The Case for Rethinking Music Copyright Protection by J. Michael Keyes, 10 Michigan Telecommunications and Technology Law Review 407 (2004)

Geographical Indications v. Trademarks: The Lisbon Agreement: a Violation of TRIPS? by Philippe Zylberg, 11 University of Baltimore Intellectual Property Law Journal 1 (2002/2003)

Thoughts on Dastar from a Copyright Perspective: A Welcome Step Toward Respite for the Public Domain by Lynn McLain, 11 University of Baltimore Intellectual Property Law Journal 71 (2002/2003)

V Secret Catalogue, Inc. v. Moseley: Victor/Victoria: The Sixth Circuit Weighs in on the Schizophrenic Nature of Federal Trademark Dilution Act Adjudication by Susan Palmer-Putree, 11 University of Baltimore Intellectual Property Law Journal 117 (2002/2003)

Moseley v. V Secret Catalogue, Inc. by Dean Merritt, 11 University of Baltimore Intellectual Property Law Journal 121 (2002/2003)

The Right to Claim Authorship in U.S. Copyright and Trademarks Law by Jane C. Ginsburg, 41 Houston Law Review 263 (2004)

Marquette Sports Law Review has published Volume 14, Number 2 with the following articles:

Drugs in Sports and the Law-Moral Authority, Diversity and the Pursuit of Excellence by Hayden Opie, 14 Marquette Sports Law Review (2004)

May the Best Merchandise Win: The Law of Non-Trademark Uses of Sports Logos by Mark A. Kahn, 14 Marquette Sports Law Review (2004)

Student Athletes and the Buckley Amendment: Right to Privacy Does Not Include Right to Sue by Paul J. Batista, 14 Marquette Sports Law Review (2004)

A Game Plan to Conserve the Interscholastic Athletic Environment After LeBron James by Kevin P. Braig, 14 Marquette Sports Law Review (2004)

A Legal Commentary on the National Federation of High School Associations Track and Field Rules Relating to the Pole Vault by Russ VerSteeg, 14 Marquette Sports Law Review (2004)

Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing by Joan S. Howland, 14 Marquette Sports Law Review (2004)

Is Canada Overstepping Its Borders? The Alberta Province Tax Specifically Targets Professional Hockey Players in Order to Help Finance Its Professional Franchises by Alan Pogroszewski, 14 Marquette Sports Law Review (2004)

Football Play Scripts: A Potential Pitfall for Federal Copyright Law? by Brent C. Moberg, 14 Marquette Sports Law Review (2004)

Facility Issues in Major League Soccer: What Do Soccer Stadiums Have to Do with Antitrust Liability? by Thomas D. Stuck, 14 Marquette Sports Law Review (2004)

The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick? by Henry M. Abromson, 14 Marquette Sports Law Review (2004)

Recent Developments in Sports Law by Brent C. Moberg, 14 Marquette Sports Law Review (2004)

Book Review: The Business of Sports Agents by Ryan M. Rodenberg, 14 Marquette Sports Law Review (2004)

Keeping the Home Team at Home: Antitrust and Trademark Law as Weapons in the Fight Against Professional Sports Franchise Relocation by Don Nottingham, 75 University of Colorado Law Review (2004)

Staying Afloat in the Internet Stream: How to Keep Web Radio from Drowning in Digital Copyright Royalties by Emily D. Harwood, 56 Federal Communications Law Journal (2004) (published by Indiana University School of Law-Bloomington and the Federal Communications Bar Association)

Rationalizing the Allocative/Distributive Relationship in Copyright by Jeffrey L. Harrison, 32 Hofstra Law Review (2004)

The Escalating Copyright Wars by Peter K. Yu, 32 Hofstra Law Review (2004)

Unauthorized Pop-Up Advertising and the Copyright and Unfair Competition Implications by Michael A. Leon, 32 Hofstra Law Review (2004)

Educational Programs Calendar:

Digital Media Technology: Rights & Transactions, September 9-10, Crowne Plaza Beverly Hills Hotel, Los Angeles. Presented by Law Seminars International, the program highlights Opportunities and Challenges in Digital Media: Who Needs to Care about Digital Media and Why?: I'm a (fill in the blank: software/hardware/business/e-commerce/entertainment etc.) Lawyer or Executive; Digital Media Technology for the Technically Challenged; Where the Technology is Heading; Digital Media Business Models; The New Music Marketplace; The FCC's Jurisdiction Over Digital Media; Content Protection and DRM; Policing and Protecting Valuable Content in Digital Media; Licensing in a Digital World; Perspectives from Licensors and Licensees; Digital Media and Rights of Publicity; Politics and Third Party Principles of Digital Rights Transactions; Online Transactions for Content with End Users; Five Things Not to Do When Protecting Your Digital Media Through Litigation; Napster, Aimster, Grokster: The Future of Digital Copyright Law and Litigation; and Ethical Issues in Digital Media, Conflicts of Interest. For additional information, call (800) 854-8009 or (206) 567-4490 or e-mail registrar@lawseminars.com.

Consolidation, Courage, and Creativity: Facing Today's Business Challenges, Saturday, September 18, 2004, University of Southern California. USC Law School and the Beverly Hills Bar Association's 2004 Institute on Entertainment Law and Business will examine Changing and Evolving Forms of Distribution-Studio/Network; Changing and Evolving Forms of Distribution-Talent; Courage: Ethics in the Face of Consolidation and Integration; Guilds; Integration of the Medium and the Message: Advertising in the 21st Century; Negotiating the Record Deal in a Consolidated Environment: Choices and Compromises in the New World; Negotiating Today's Contracts-Film; Negotiating TV Writer/Producer Deals: Protecting the Client in a Vertically Integrated World; Overview of Public Policy. For additional information, contact IELB Registration/Continuing Legal Education, The Law School-University of Southern California, Los Angeles, CA 90089-0071 or FAX 213-740-9442.

American Bar Association Forum on the Entertainment and Sports Industries: 2004 Annual Meeting and Conference, October 7-9, Century Plaza Hotel, Los Angeles. The program presents a Law Students and New Lawyer Orientation to Entertainment and Sports Law: Your Questions Answered; Ethical Dilemmas Representing the High Profile Client; The Right of Attribution in the Wake of the Supreme Court's Decision in Dastar v. 20th Century Fox; Resolving Athlete Eligibility and Compensation Disputes in the Olympic, NCAA and Professional Sports World; Entertainment Law Litigation Review: Is There Really Any Law and Order?; Representing the League, Player and Team in Steroid Testing; Art in Film and Television; Legal Issues Surrounding Digital Distribution of Music/Emerging Business Models; Latin Media; Stage Musical to Film Musical: Deal Making after "Chicago"; Broadcast Issues in Sports; Alternate Distribution Models/Alternate Revenue Streams; International "Soft Money" in Film and TV Financing; The Increasingly Adversarial Relationships in Professional Sports; Developing, Exploiting and Managing Brand Values; The Economics and Ethics in Developing and Maintaining an Entertainment and Sports Practice; The Digital Future: Litigation, Legislation and Arbitration in the Digital Age; Product Placement in Film and Television: The New Revenue Model and the New Deals; Real Life Fact-tion: Memoirs, Romans á Clef, Privacy and the First Amendment; Intellectual Property in the Global Market Place; and Negotiating and Litigating Within Entertainment Mega-Conglomerates. For additional information, visit www.abanet.org/forums/entsports/home.html or call Dawn R. Holiday at (312) 988-5660 or e-mail: holidayd@abanet.org.

Legal and Business Aspects of Music, Film, and Interactive Entertainment: 14th Annual Entertainment Law Institute, October 15-16, Stephen F. Austin Hotel, Austin, Texas. Sponsored by the Texas Bar Continuing Legal Education and cosponsored by the Entertainment and Sports Law Section of the State Bar of Texas, the program delves into Distribution and Marketing Strategies for Indie Labels and Artists; What's Going on at Major Labels?; Electronic Record Companies-The New Frontier; Music Publishing Basics; Impact of Digital Technology and the Development of Digital Media; Performing Rights Organizations; Court Cases and Legislation: Year in Review; Mobile Entertainment; Game Development and the Future of Interactive Entertainment; Ethics; The Role of the City in Developing an Entertainment Industry; Acquiring the Screenplay; Securing an Actor; Acquiring the Music; The Film is in the Can: Now What?; and DVD Distribution Deals. For additional information, online at TexasBarCLE.com; phone 800-204-2222, ext. 1574; or mail State Bar of Texas, Professional Development, LB #972298, P.O. Box 972298, Dallas, TX 75397-2298.