Legal Affairs

But Do You Have the Right to License those Rights?

by Schuyler M. Moore*

Intangible rights – such as copyrights, trademarks, and rights of publicity – are commonly transferred by their owners to others by written contract. Sometimes those contracts specify whether or not the transferee may assign or license those rights to third parties. And when they do, the contract itself governs the transferee's right to assign or license its rights.

However, in a surprising number of instances, contracts are silent on this important point. What then? Does the transferee have the right to assign or license its rights, or not? The answer to this question is important to all concerned: the original owner, the transferee, and third parties who may want to acquire rights from the licensee. Though important, the answer is neither settled nor consistent with intuition.

Copyright

Under section 101 of the Copyright Act of 1976, a "transfer of copyright ownership" includes any assignment or exclusive license of any rights under copyright, "whether or not it is limited in time or place of effect." This rule is commonly referred to as the "bologna theory" of copyright; copyright is treated as a bologna that is infinitely divisible into smaller pieces. The owner of any piece of the bologna is treated as the proud owner of an interest in the copyright. Section 201(d)(2) of the Copyright Act goes on to buttress this conclusion by providing, "Any of the exclusive rights comprised in the copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately."

Until recently, most practitioners assumed that the "copyright ownership" inherent in an exclusive license carried with it all the normal incidents of ownership, including the right to freely sublicense or assign all or part of what was "owned" without permission of the licensor. However, the Ninth Circuit held otherwise in *Gardner v. Nike*.[1] In this case, Nike had licensed to Sony certain exclusive rights to a cartoon character called MC Teach in exchange for a royalty from Sony. The contract was silent on Sony's right to assign or sublicense its rights. Several years later, Sony assigned all of the licensed rights to Gardner in exchange for a royalty from Gardner, and Nike objected.

The court held that notwithstanding Sony's copyright "ownership" with respect to the licensed rights, Sony was *not* entitled to sublicense or assign those rights to any third party without the consent of Nike. The court came to this conclusion on the grounds that section 201(d)(2) of the Copyright Act (quoted above) goes on to state, "The owner of any particular exclusive right is entitled, to the extent of that right, to all of the *protections and remedies* accorded to the copyright owner by this title" (emphasis added). The court held that the reference to "protections and remedies" means that the owner of the exclusive rights is entitled *only* to the "protections and remedies" accorded to the copyright owner – not to any other rights – and that the "protections and remedies" do *not* include the right to sublicense or assign without permission of the licensor. The court then reached back to *Harris v. Emus Records Corp.*,[2] decided under the Copyright Act of 1909, which held that a licensee did not have the right to sublicense or assign the licensed rights unless the license specifically permitted it. Although the Copyright Act of 1909 did not treat the licensee of exclusive rights as owning an interest in the copyright, the court in *Gardner* held that the change on this issue in the Copyright Act of 1976 did not override *Harris*.[3] *Gardner* has been

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[1] 279 F.3d 774 (9th Cir. 2002).

[2] 734 F.2d 1329 (9th Cir. 1984).

[3] The court purported to ground its holding on the Copyright Act, not state law. However, the rights licensed were worldwide, and the Copyright Act only applies to exploitation in the United States. *Danjaq v. MGM/UA Communications, Co.*, 773 F.Supp. 194 (C.D. Cal. 1991); *DeBardossy v. Puski*, 763 F.Supp. 1239 (S.D.N.Y. 1991); *Zenger-Mill, Inc. v. Training Team GmbH*, 757 F.Supp. 1062 (N.D. Cal. 1991); *Subafilms Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994); *Yount v. Acuff Rose-Opryland*, 103 F.3d 830 (9th Cir. 1996). Thus, the court's holding as applied

strongly criticized for this holding, and *Nimmer on Copyright* argues that it should not be followed,[4] but for better or worse we must live with it for now, at least in the Ninth Circuit.

Both *Gardner* and *Harris* rely on two policy considerations for restricting sublicensing or assignment. One policy is to protect the licensor's right to receive royalties (the "Royalty Policy"), since the licensor might not be paid the amount to which it is entitled if the rights could be sublicensed or assigned without its consent. The other policy is to protect the licensor's ability to monitor use of the licensed rights (the "Control Policy").

It seems that the implication of either one of these two policies alone, without the other, would have been enough justification for the outcome in the cases, so it is likely that *Gardner* would preclude sublicensing or assignment without permission even if there were no impact on royalties owed to the licensor, such as when the licensor licenses the rights to the initial licensee for a fixed up-front payment.

Trademark

A number of cases have held that a licensee does not have the right to sublicense or assign rights under a trademark license unless the contract specifically permits it.[5] All of these cases rely on the duty of the licensor under trademark law to monitor use of the trademark – effectively the Control Policy on steroids. This rule applies even if no royalties are payable to the licensor, such as when the rights are granted for a fixed up-front payment.

Rights Under State Law

For intangible rights created by state law, the question of whether a licensee can sublicense or assign if the contract is silent on the point is a matter of state contract law. Unfortunately, the states have different rules for dealing with this question.

Some states, including California, permit the licensee to freely assign or sublicense unless the license specifically prohibits it.[6]

Other states, including New York, do not permit the licensee to sublicense or assign unless the license specifically permits it.[7] The states that follow this approach do so based on application of both the Control Policy and the Royalty Policy.

Many times, application of the Control Policy alone has been held sufficient to restrict sublicensing, even if no royalties are owed to the licensor.[8] If application of the Control Policy alone justifies this outcome, it seems equally likely that application of the Royalty Policy alone would justify this outcome, since the courts emphasize it equally. This assumption leads to some intriguing questions in states that restrict sublicensing and assignment by a licensee:

Assignment of All Rights. What if the owner of a right assigned all of the rights to an assignee in exchange for a royalty? Would the assignee be permitted to license or assign the rights without permission? At the extreme, the assignee could assign or license the rights to a third party for a fixed amount that precluded any royalty to the original owner. It seems quite possible that the Royalty Policy could apply here to prevent the assignee from licensing or assigning the rights without permission of the original owner if the contract was silent on the issue.

Assignment of Copyrights and Trademarks. If the Royalty Policy does apply to prevent an assignee that owes royalties to the assignor from licensing or assigning, this rule should apply with equal force to the outright assignment of a copyright or a trademark (although it is not common to assign a trademark for a royalty). In these cases, the assignor would no longer own any copyright or trademark rights, so the assignor's

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to rights outside the United States appears incorrect unless justified based on state contract law, discussed below.

4 *Nimmer on Copyright*, §10.02[B][4].

5 *Tap Publications, Inc. v. Chinese Yellow Pages (New York), Inc.*, 924 F.Supp. 212, 218 S.D.N.Y. (1996); *In Re Travelot Co.*, 286 B.R. 447, 455 (S.D.G.A. 2002); *Raufast S.A. v. Kicker's Pizzazz Ltd.*, 208 U.S.P.Q. 699 (E.D.N.Y. 1980); *Miller and CMJ Worldwide, Inc. v. Glenn Miller Productions*, 318 F.Supp.2d 923 (C.D. Cal. 2004).

6 *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc.*, 205 Cal. Rptr. 620 (Cal. Ct. App. 1984); *Farmland Irrigation Co. v. Doppelmaier*, 308 P.2d 732 (Cal. 1957); Cal. Civ. Code §1044 ("property of any kind may be transferred"). A recent federal district court case in California prohibited sublicensing of the right of publicity, but it was not clear what state law the court was applying. *Miller and CMJ Worldwide, Inc. v. Glenn Miller Productions*, 318 F.Supp.2d 923 (C.D. Cal. 2004).

7 *Paige v. Faure*, 229 N.Y. 114 (1920) (tire distributorship); *Arthur Murray, Inc. v. Riccirdi*, 10 N.Y.2d. 733 (1961) (franchise); *Miller and CMJ Worldwide, Inc. v. Glenn Miller Productions*, 318 F.Supp.2d 923 (C.D. Cal. 2004) (right of publicity, but it was unclear what state law the court was purporting to apply). Also see, *Nassau Hotel Company v. Barnett & Barse Corp.*, 147 N.Y.S. 283 (1914), aff'd., 212 N.Y. 568 (1915) (lease with percentage rent).

8 *Miller and CMJ Worldwide, Inc. v. Glenn Miller Productions*, 318 F.Supp.2d 923 (C.D. Cal. 2004). Also see *supra*, *Gardner v. Nike, Inc.*, 279 F.3d 774 (9th Cir. 2002) (prohibiting sublicense or assignment of rights under a copyright license based solely on the Control Policy) and the cases under "Trademark" discussed above.

rights should be purely a matter of state contract law.

Contractual Participation. What about the common situation where a film company grants a contractual participation in a film to an actor? Can the film company license or assign the film rights without permission of the actor if the contract is silent on the point? Again, at the extreme, the film company could sell the film rights to a third party for a fixed amount that precluded any payment to the actor. Under the Royalty Policy (as applied to the actor's participation), the film company might be precluded from doing so.

Ban on Unauthorized "Licensing"

In all cases where licensing is prohibited without permission, it becomes critical to determine what is – and what is not – a "license." However, this seemingly straightforward question involves complex, somewhat murky areas of the law that defy simple answers.

Generating revenue from any right requires numerous activities by third parties, and the relationship of these third parties with the owner of the right may be structured as that of employee, agent, independent contractor, or licensee. For example, in many cases it is possible to convert a license into an agency relationship. In addition, many relationships are not readily categorized. When a film company gives a film print to a theater in consideration for a percentage of the box office, is that a license? If the film company sells DVDs to a wholesaler, is that a license? What if the wholesaler also manufactures the DVDs?

The Implications in Bankruptcy

Generally speaking, under bankruptcy law, a debtor in bankruptcy is not permitted to assume and assign any "executory contracts" absent the consent of the contract counterparty if "applicable law" makes the contract non-assignable.[9] According to some circuits, this rule applies not only if the debtor attempts to assign the executory contract to a third party, but even if the debtor reorganizes and just wants to retain the benefits of the contract for itself.[10]

While various courts have relied upon no fewer than three definitions of "executory contract," almost without exception the courts treat intellectual property licenses as executory contracts. Thus, in sharp contrast to most of bankruptcy law, which is intended to protect the debtor's estate, this provision may result in the debtor losing its rights as a licensee of intellectual property if the licenses are non-assignable under "applicable law."

As discussed above, applicable law may prohibit the assignment of the licensee's interest in a license to it of a copyright, trademark, or other intangible right without the consent of the licensor (and absent a provision in the license permitting assignment). Thus, if a licensee declares bankruptcy and the licensor withholds its consent, the licensee may lose its right to assign or assume licenses to it from third parties – and possibly even to rights that have been assigned outright to it if it owes royalties back. Remarkably, this applies even if the licensee has previously paid the full amount owed under the license, such as a fixed up-front payment.[11] The contract can expressly override the outcome set forth above, but to do so, the contract should expressly permit both assignment and sublicensing to a third party and assumption by the licensee if it declares bankruptcy.[12]

The Moral

The simple moral of the story is that any party that might find itself caught in this web – *e.g.*, licensees, assignees that owe royalties back, and film companies agreeing to pay an actor a participation – should insist that the contract have a clause that expressly permits sublicensing or assignment. In fact, based on the bankruptcy case law discussed above, a licensee or assignee should insist that the contract expressly permit assumption and assignment under Bankruptcy Code section 365 if the licensee or assignee declares bankruptcy, particularly if all or a substantial part of the consideration is paid up front. Conversely, the other party to the contract could just stay silent on the issue and let the default rule snare the other side.

Forewarned is forearmed.

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9 Bankruptcy Code Section 365(c)(1).

10 *See*, *e.g.*, *In re Sunterra Corporation*, 361 F.3d 257 (4th Cir. 2004).

11 *Id.*

12 *Id.*

IN THE NEWS

Sampling is copyright infringement, even if copied portion is *de minimis* and resulting work is not substantially similar to sampled recording, federal appeals court rules in case complaining that sound track of movie "I Got the Hook Up" includes recording that sampled "Get Off Your Ass and Jam"

"Get a license or do not sample." That is the blunt advice offered by Judge Ralph Guy in a precedent-setting opinion he wrote for the federal Court of Appeals in a copyright infringement case filed by Westbound Records. Westbound alleges (apparently without contradiction) that the sound track of the movie "I Got the Hook Up" includes the rap recording "100 Miles and Runnin'" which sampled the recording "Get Off Your Ass and Jam." Westbound owns the sound recording copyright to "Get Off Your Ass and Jam," but Westport wasn't asked for and did not issue a license to the company that produced the movie, No Limit Films.

Westbound's sister company, Bridgeport Music, is the music publishing company that owns the copyright to the musical *composition* "Get Off Your Ass and Jam." Bridgeport did grant a synchronization license that authorized No Limit Films to use the *composition* in its movie. As a result, the District Court granted No Limit's motion for summary judgment with respect to Bridgeport's infringement claim – a ruling from which Bridgeport did not appeal.

Although the synchronization license that No Limit got from Bridgeport did not cover Westbound's sound recording copyright, the District Court also granted No Limit's motion for summary judgment as to Westbound's claim. The District Court did so on the grounds that the portion of the "Get Off" recording copied by No Limit was "de minimis" and thus did not infringe Westbound's sound recording copyright (*ELR* 24:11:12). From that ruling, Westport did appeal, successfully.

On appeal, Westport made the bold argument that in sampling cases, where the defendant doesn't dispute that it sampled a copyrighted sound recording, "substantial similarity" is not necessary for a finding of infringement, and even *de minimis* copying amounts to infringement. Judge Guy's opinion said "We agree," and for that reason, the Court of Appeals has reversed the summary judgment No Limit had won.

Of course, "substantial similarity" *is* required to find infringement of musical *compositions*, and *de minimis* copying does not result in substantial similarity. Judge Guy was quite aware that he was adopting a different infringement standard for sound recordings, and he said so. "The music industry, as well as the courts, are best served if something approximating a bright-line test can be established," he explained. Judge Guy noted that this case is just one of 800 sampling cases that Westbound and Bridgeport have filed, thus making "the value of a principled bright-line rule . . . apparent." But "considerations of judicial economy are not what drives this opinion," Judge Guy hastened to add.

Instead, Judge Guy said the appellate court's conclusion is based on the language of the Copyright Act which specifically gives sound recording copyright owners the exclusive right to rearrange, remix or otherwise alter their recordings. "We do not see this as stifling creativity in any significant way," the judge explained, for three reasons: if someone wants to copy a "riff" from a recording, they are free to do so by making a new recording in a studio; market forces will keep sampling license fees "within bounds," because those fees cannot – as a practical matter – exceed the cost of making a new recording; and "sampling is never accidental."

Westport Records was represented by Richard S. Busch of King & Ballow in Nashville. No Limit Films was represented by Robert L. Sullivan of Loeb & Loeb in Nashville.

Editor's note: The notion that a different infringement test – one that does not require a showing of "substantial similarity" – should be used for sound recordings than for musical compositions (and all other works) is unprecedented. It is an argument that has been made in law review articles, several of which are cited and quoted in the opinion's footnotes; and it is an argument that was made by Al and Bob Kohn in *Kohn on Music Licensing*, from which Judge Guy quoted at length. On the other hand, *Nimmer on Copyright* argues that sampling cases should be evaluated using the same infringement standard as other cases – an argument not mentioned by Judge Guy. No Limit Films has filed a petition for rehearing en banc, supported by a friend of the court brief from the RIAA, so this case may not be over yet.

Bridgeport Music, Inc. v. Dimension Films, Case No. 02-6521 (6th Cir., Sept. 7, 2004), available at http://pacer.ca6.uscourts.gov/opinions.pdf/04a0297p-06.pdf

Anti-bootlegging statute is unconstitutional, federal District Court rules in opinion dismissing indictment of record store owner who was accused of selling unauthorized recordings of live performances

Jean Martignon owns Midnight Records, a retail store on 23rd Street in Manhattan, from which he has been selling rock 'n roll, blues and R&B recordings for 23 years. Some of the records he has sold were "bootlegs" – unauthorized recordings of live musical performances – or so the United States government recently alleged, in an indictment charging Martignon with violating the federal anti-bootlegging statute. Whether or not Martignon actually did sell bootlegs may never be proved, because federal District Judge Harold Baer has just dismissed the indictment entirely, without a trial. The judge did so on the grounds that the federal anti-bootlegging statute is unconstitutional.

Bootlegging has long been a crime in many states, as a matter of state statute. The federal anti-bootlegging statute is more recent, dating back only to 1994, when it was passed by Congress as a small part of an international trade statute the U.S. had to enact in order to join the World Trade Organization. Intellectual property protection for live performances was required by one part of the WTO treaty – the part commonly referred to as "TRIPs."

The anti-bootlegging provisions of the 1994 federal statute were brief and failed to answer several questions. (See, e.g., "Bootleggers Beware: Copyright Law Now Protects Live Musical Performers, but Leaves Many Questions Unanswered," by Lionel S. Sobel, *ELR* 17:2:6.) Among the unanswered questions were whether Congress had the constitutional power to protect *live* performances, because the Copyright Clause of the Constitution requires that works be fixed in a tangible medium in order to be protected by copyright; and whether Congress had the constitutional power to protect live performances *perpetually*, as the anti-bootlegging statute did, because the Copyright Clause authorizes protection only for "limited" times.

In the decade that has passed since the statute was enacted, its constitutionality has been considered by a court only once. In *United States v. Moghadam*, the 11th Circuit Court of Appeals upheld the statute's constitutionality, and the conviction of an admitted bootlegger, in an opinion that ruled that even if Congress did not have the power to ban bootlegging under the Copyright Clause of the Constitution, Congress did have that power under the Commerce Clause (*ELR* 21:5:11).

Judge Baer sits in the Southern District of New York, in the 2nd Circuit, so in ruling on the constitutionality of Martignon's indictment, Judge Baer wasn't bound by the 11th Circuit's *Moghadam* opinion. In a scholarly opinion (which credits the "substantial" research and drafting assistance of his summer interns), Judge Baer concluded that the anti-bootlegging statute is a "copyright" statute that must comply with the Copyright Clause of the Constitution; and that Congress did not have the power to enact the anti-bootlegging statute under the Copyright Clause, because the statute violates the Constitution's requirement that protected works be fixed and be protected only for limited times.

Next, Judge Baer concluded that Congress could not rely on the Commerce Clause to protect live performances for unlimited times, because Congress may not rely on the Commerce Clause to enact copyright-like legislation that conflicts with express limitations imposed by the Copyright Clause.

Finally, Judge Baer held that even if Congress could rely on the Commerce Clause to enact copyright-like legislation, it could not do so to enact a statute that is "fundamentally inconsistent" with the Copyright Clause's "prohibition on perpetual" protection.

Editor's note: If Judge Baer is correct that Congress could not rely on the Commerce Clause at all to enact the anti-bootlegging statute, then the statute is dead, and the only question that remains is whether the United States may rely on state anti-bootlegging statutes to satisfy its obligations as a WTO member. If, however, a higher court decides that Congress may rely on the Commerce Clause to enact anti-bootlegging legislation, so long as it is not fundamentally inconsistent with the Copyright Clause's ban on perpetual protection, Congress simply needs to re-enact the statute with duration limits – such as the life of the performer plus 70 years, or 95 years from the performance – on the protection it provides.

United States v. Martignon, Case No. 03 Cr. 1287 (S.D.N.Y., Sept. 24, 2004), available at http://www.lessig.org/blog/archives/martignon-smaller.pdf

Model's right of publicity claim was preempted by copyright law, where she signed contract authorizing use of her photo, even though objected-to use occurred after contract expired, 7th Circuit Court of Appeals holds; but right of publicity claims of roller coaster riders were not preempted where they were photographed without their consent, District Court in 7th Circuit rules

Not long ago, June Toney and Dean and Rhonda Leto filed separate right of publicity lawsuits in state court in Illinois. Toney and the Letos both asserted that their rights under the Illinois Right of Publicity Act had been violated, as a result of commercial uses of photographs depicting their likenesses. The defendants removed both cases to the federal District Court in Chicago, where they both (but separately) argued that Toney's and the Letos' claims were preempted by federal copyright law. At that point, the two cases took significantly different turns.

Toney's case was dismissed, on the grounds that her Illinois Right of Publicity Act claim was preempted by federal copyright law; and that ruling has just been affirmed by 7th Circuit Court of Appeals. The Letos' case, on the other hand, was remanded by the federal District Court to state court, on the grounds that their Illinois Right of Publicity Act claim was not preempted by federal copyright law.

The question now for entertainment lawyers is whether some important fact distinguishes the two cases, so both were correctly decided, or whether instead one of two cases was decided incorrectly, and if so which one?

June Toney is a professional model. In 1995 she posed for a photograph for a hair product called Ultra Sheen Supreme. At the time her photo was taken, Toney authorized the company that makes Ultra Sheen to use the photo, but only until November 2000. Nevertheless, after November 2000 came and went, the company continued to use Toney's photo, thus prompting her right of publicity lawsuit.

In an opinion by Judge Michael Kanne, the Court of Appeals affirmed the dismissal of Toney's lawsuit, saying that it was preempted by section 301 of the Copyright Act. That section preempts state law claims if the subject matter of the claim is covered by copyright law, and if the right sought to be enforced under state law is "equivalent" to any of the rights protected by copyright.

Back in 1986, in *Baltimore Orioles v. Major League Baseball Players Ass'n*, the 7th Circuit had held that the likenesses of those depicted in photographs are within the subject matter of copyright, and that publicity rights are equivalent to those protected by copyright (*ELR* 8:11:7). Judge Kanne acknowledged that the *Baltimore Orioles* opinion has been criticized in *Nimmer on Copyright*. But Toney didn't ask the Court of Appeals to reconsider its *Orioles* opinion. For this reason, Judge Kanne explained, the *Baltimore Orioles* decision meant that Toney's likeness was within the subject matter of copyright, the rights she asserted against Ultra Sheen's manufacturer were equivalent to those of copyright, and therefore her right of publicity claim was preempted.

Dean and Rhonda Leto were photographed – without their consent, they allege – while riding an amusement park roller coaster. Their photograph then was used on the side of RCA television boxes, also without their consent. When RCA moved to dismiss the Letos' lawsuit on preemption grounds, Judge Kanne's opinion in June Toney's case had been issued just days before, and seemed – to RCA at least – to be squarely on point in its favor.

Federal District Judge James Moran thought otherwise, though, and thus granted the Letos' motion to remand their case to state court. Judge Moran noted that in order for something to be within the subject matter of copyright, it must be fixed in a tangible medium. And in order for it to be fixed – as the Copyright Act defines fixation – it must be fixed "by or under authority of the author." In the *Baltimore Orioles* case, baseball games were fixed under the authority of the players; and in June Toney's case, her photograph was fixed under her authority. The Letos' case was different, Judge Moran reasoned, because their photo had not been taken under their authority (they alleged). That meant that the photo of the Letos was not within the subject matter of copyright, and their right of publicity claim was not preempted, Judge Moran concluded.

Editor's note: Because Judge Moran is a District Court Judge who sits in the 7th Circuit, he was not at liberty to say that the *Baltimore Orioles* opinion and Judge Kanne's decision in the *Toney* case are wrong; so he did a very nice job of distinguishing them, on their facts. *Baltimore Orioles* was wrong however, and *Toney* should be considered to be nothing more than a mechanical application of the doctrine of *stare decisis*, with the result that one wrong decision simply begot another. Courts in other states and Circuits have held that copyright does not preempt publicity rights (*ELR* 2:9:3, 21:12:13, 23:10:19) – though the 7th Circuit is not the only court to get it wrong (*ELR* 19:5:15). The reason that copyright does not preempt the right of publicity is that the two rights are owned by two different people: the copyright by the photographer; the right of publicity by the subject of the photo. The *Orioles* and *Toney* decisions suggest that photographers automatically acquire their subjects' publicity rights simply by taking photos of them. Photographers can of course do that, by entering into agreements with their subjects. But it doesn't – or at least shouldn't – happen automatically. Moreover, when photographers and their subjects do enter into right of publicity agreements, the only rights photographers acquire are those given them by the agreement. So, in the *Toney* case, when Ultra Sheen's manufacturer acquired a license to Toney's publicity rights through November 2000, that's all it acquired; and when December 2000 rolled around, Ultra Sheen's maker no longer had the right to exploit Toney's publicity rights. Her lawsuit should not have been dismissed, and certainly not on preemption grounds.

Toney v. L'Oreal U.S.A. Inc., Case No. 03-2184 (7th Cir., Sept. 21, 2004), available at http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=03-2184.PDF; *Leto v. RCA Corp.*, Case No. 04 C 4514 (N.D.Ill., Sept. 27, 2004), available at http://www.jurisnotes.com/Cases/leto4514.pdf

WASHINGTON MONITOR

FCC proposes $550,000 fine for CBS broadcast of Janet Jackson's bare breast during Super Bowl halftime show; Emmis Communications settles FCC indecency proceedings involving "Mancow's Morning Madness" and other radio programs; but FCC denies complaints that episodes of "Will and Grace" and "Buffy the Vampire Slayer" were indecent

The Federal Communications Commission has been especially busy as of late, resolving matters of alleged "indecency." In four separate proceedings, it has:

- notified Viacom that it is "apparently liable" for $550,000 on account of CBS's broadcast of Janet Jackson's bare breast during this year's Super Bowl halftime show,
- settled indecency proceedings with Emmis Communications that were triggered by statements made during "Mancow's Morning Madness," "Bitch Radio" and other radio programs,
- and ruled that episodes of "Will and Grace" and "Buffy the Vampire Slayer" were not indecent.

Viacom Super Bowl broadcast

Janet Jackson and Justin Timberlake have earned themselves a place in broadcasting history. As a result of their duet during the halftime show of this year's Super Bowl game – a performance broadcast by the CBS television network – the FCC has notified Viacom, the network's owner, that the Commission proposes to fine it $550,000. If upheld, this will be the largest fine in FCC history.

Jackson and Timberlake's offending behavior came at the end of their performance of "Rock Your Body," a song whose lyrics include the phrase, "Hurry up cause you're taking too long . . . better have you naked by the end of this song." As readers of these pages – and hundreds of millions others – are no doubt aware by now, immediately after singing that lyric, Timberlake reached in front of Jackson, pulled off the right portion of her bustier, and thereby exposed her almost-naked right breast. Jackson wore a metal nipple ring under her bustier, but her breast was otherwise bare.

This and other aspects of the Super Bowl halftime show triggered 542,000 complaints to the FCC. Some complained about the costume worn by Kid Rock (a poncho apparently made from the U.S. flag), about the content of some of the commercials, and about "crude," "lewd" and "sexually explicit" lyrics and dance steps of halftime performers. The FCC, however, focused on Jackson's bare breast, saying that although Kid Rock's costume and some commercials may have been "troubling" or "offensive" to some viewers, neither the costume nor the commercials were "indecent."

Jackson's breast, however, was "indecent," because, in the FCC's opinion, CBS's broadcast of it satisfied the law's two-part test for indecent broadcasts: the broadcast (1) depicted sexual activity (2) in a patently offensive way.

The FCC apparently concluded it was obvious that Jackson and Timberlake's performance depicted sexual activity, because it offered no explanation for why that was so, other than to say it involved "partial nudity." The Commission did explain why the performance was patently offensive, applying its three-part test for that element. Though the bare-breast portion of the broadcast lasted just 19/32 of a second, the FCC found that it was: (a) explicit; (b) "dwelled" on sexual activity; and (c) was used to titillate or shock the audience.

Under current law, the maximum fine the FCC may assess for indecency is $27,500 per station per broadcast. Viacom itself owns 20 CBS network stations, and the FCC has proposed to fine Viacom the maximum amount for each of its stations, which is why the total fine comes to $550,000. Other CBS affiliates are independently owned, and though they too broadcast Jackson and Timberlake's performance, the FCC did not propose to fine those stations.

As a matter of procedure, unless Viacom voluntarily pays the fine or negotiates a settlement with the FCC, Viacom may seek a cancellation or reduction of the fine from the FCC itself, and may appeal it to the federal courts.

Emmis Communications radio programs

Emmis Communications and the FCC have settled three pending indecency proceedings, triggered by broadcasts of "Mancow's Morning Madness," "Bitch Radio" and other radio programs (*ELR* 26:1:7). Emmis has agreed to make a $300,000 "voluntary contribution" to the United States Treasury. The company also has agreed to implement a Compliance Plan designed to prevent future violations of the FCC's indecency regulations.

The Compliance Plan – which is identical to one recently agreed to by Clear Channel Communications (*ELR* 26:1:7) – requires Emmis to conduct training sessions on obscenity and indecency for all on-air talent and other employees who make programming decisions. If Emmis receives any more Notices of Apparent Liability, employees involved in airing the offending material will be suspended, will be required to undergo "remedial training" on the FCC's indecency regulations, and if allowed to return to the air following remedial training, will have their broadcasts delayed for as much as five minutes so a "program monitor" can interrupt them if their content "crosses the line." Finally, if Emmis is found to have aired an obscene or indecent program that results in future enforcement action against the company, "the offending employees will be terminated without delay."

"Will and Grace" and "Buffy the Vampire Slayer"

Despite the results in the Viacom and Emmis matters, the FCC doesn't see "indecency" wherever it is asked to look. In two separate proceedings, viewers filed complaints with the Commission asserting that episodes of "Will and Grace" and "Buffy the Vampire Slayer" were indecent, but the FCC disagreed.

The offending "Will and Grace" episode was aired in March 2003. According to Americans for Decency, the episode included a scene in which "[a] woman photographer passionately kissed [a] woman author and then humped her (what she called a 'dry hump')." The FCC denied this complaint, on two grounds. First, it said that it was not clear that the material complained about actually depicted "sexual activities." And second, even if it did, the scene was not sufficiently "explicit or graphic" to be "patently offensive."

A "Buffy and the Vampire" episode that aired in November 2001 prompted the Parents Television Council to complain about a scene that "depicted the characters Buffy and Spike fighting one another before engaging in what is alleged in the complaint to be sexual intercourse." The FCC acknowledged that the scene showed "Buffy kissing and straddling Spike shortly after fighting him." But the Commission denied the complaint, because it concluded that the scene was not "sufficiently graphic or explicit to be deemed indecent."

Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXSVIII Halftime Show, FCC 04-209 (Aug. 31, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-209A1.pdf; *Emmis Communications Corp.*, FCC 04-199 (Aug. 10, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-199A1.pdf; *KSAZ License, Inc.*, FCC 04-197 ("Will and Grace"), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-197A1.pdf; *Complaint Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy and the Vampire Slayer" on November 20, 2001*, FCC 04-196, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-196A1.pdf

RECENT CASES

Rod Stewart entitled to trial about whether force majeure provision of contract with concert promoter entitled him to reschedule concert he had to cancel for medical reasons, Court of Appeals holds in opinion reversing summary judgment that awarded promoter $2 million refund of advance

Rio Properties is best-known for operating a hotel and casino in Las Vegas, but it also promotes rock concerts. In fact, it once paid Rod Stewart a $2 million advance to appear in a concert that had to be cancelled – or at least rescheduled – when Stewart was diagnosed with, and had to be treated for, thyroid cancer.

When Stewart refused to return the advance, Rio sued him for breach of contract and unjust enrichment, seeking a refund of the $2 million advance. At first, it won. That is, federal District Judge Larry Hicks granted Rio's motion for summary judgment. But the case isn't over quite yet.

In a "Memorandum" opinion marked "may not be cited," the Court of Appeals has held that Stewart is entitled to a trial on the issue of whether a force majeure provision in the contract between Stewart and Rio allowed the singer to reschedule the concert without refunding the advance.

The contract provided that if either party's performance became impossible as a result of "any . . . cause beyond such party's reasonable control . . . there shall be no claim for damages by either party . . . and the performance shall be rescheduled to a mutually agreeable time." Rio conceded that Stewart's medical condition was beyond his control, and unrefuted evidence established that his performance on the date originally scheduled for the concert was impossible due to his illness.

Apparently, the dispute between Rio and Stewart revolved around a separate clause that provided that if Stewart were unable to perform one particular concert because of illness, that concert would be cancelled. To resolve this dispute, Stewart offered extrinsic evidence relating to the force majeure clause, and what he said was the inapplicability of the other clause. But Judge Hicks refused to admit that evidence.

The Court of Appeals reversed the judgment in favor of Rio, because it held that Judge Hicks had "abused [his] discretion in refusing to admit Stewart's extrinsic evidence."

Rio Properties was represented by Kristina Pickering of Morris & Pickering in Las Vegas. Rod Stewart was represented by Louis R. Miller of Christensen Miller Fink Jacobs Glaser Weil & Shapiro in Los Angeles.

Rio Properties v. Armstrong Hirsch Jackoway, 94 Fed.Appx. 519, 2004 U.S.App.LEXIS 5958 (9th Cir. 2004)

Former writers' assistant for "Friends" is entitled to trial on claim of sexual harassment, based on things that writer-producers said and did during writing sessions, but defendants may assert "creative necessity" at trial, California appellate court rules

The long-running television series "Friends" is now gone, insofar as new episodes are concerned; but the aftermath of old episodes remains – not just in reruns, but in the courts as well. A former writers' assistant named Amaani Lyle has won the right to a trial on her claim that she was sexually (and racially) harassed, during the four months it was her job to transcribe the banter of the show's writer-producers as they brainstormed the series' gags, dialogue and story lines.

Warner Bros. Television – the company that produced "Friends" – and writer-producers Adam Chase, Gregory Malins and Andrew Reich asserted that "Friends" was "a show about the lives of young sexually active adults," and thus their banter and behavior during writing sessions was a "creative necessity." A California trial court agreed, and dismissed Lyle's lawsuit in response to a defense motion for summary judgment. The trial court even awarded Warner Bros. and the writer-producers their costs and attorneys fees of more than $435,000 on the grounds that Lyle's claims were "frivolous, unreasonable and without foundation."

On appeal, however, Lyle did better. In an opinion by Justice Earl Johnson, the California Court of Appeal reversed the dismissal of Lyle's harassment claims, as well as the award of costs and fees, and has remanded the case to the trial court for a trial.

Justice Johnson rejected Warner Bros.' argument that in order to prevail on her sexual harassment claim, Lyle would have to show that the allegedly harassing conduct was directed at her personally – something she apparently did not claim, and in any event was denied by the writer-producers. Justice Johnson said that Lyle did not have to be a "direct victim"; it would be enough if she proved "that she personally witnessed the harassing conduct and that it was in her immediate work environment." What's more, said the Justice, Warner Bros. and the writer-producers could be held liable, even if they did not realize their conduct was offensive and did not intend to harass Lyle.

Justice Johnson described the statements and conduct of the show's writer-producers – some of which they admitted – and concluded that the evidence was sufficient for a reasonable jury to find the "writers' room on 'Friends' was a hostile or offensive work environment for a woman."

Warner Bros. also argued that "Because 'Friends' deals with sexual matters, intimate body parts and risqué humor, the writers of the show are required to have frank sexual discussions and tell colorful jokes and stories (and even make expressive gestures) as part of the creative process. . . ." Justice Johnson observed that this "argument appears to be unique in the annals of sexual harassment litigation." And he ruled that "'creative necessity' is not an affirmative defense to a cause of action for sexual harassment. . . ." On the other hand, Justice Johnson also ruled that "creative necessity" is a factor that a jury can consider in deciding whether the writers' conduct created a hostile work environment.

Justice Johnson explained these seemingly contradictory rulings by saying that "to the extent defendants can establish [that their statements and behavior] was within 'the scope of necessary job performance' and not engaged in for purely personal gratification or out of meanness or bigotry or other personal motives, defendants may be able to show their conduct should not be viewed as harassment." The question of whether their statements and behavior "created a hostile environment for Lyle is one to be determined by the jury," the Justice concluded.

Lyle was represented by Mark Weidmann in Los Angeles. Warner Bros. and its co-defendants were represented by Adam Levin in Los Angeles.

Lyle v. Warner Bros. Television Productions, 12 Cal.Rptr.3d 511, 2004 Cal.App.LEXIS 579 (Cal.App. 2004)

Copyright infringement suit against Brandy was properly dismissed, because writers of unreleased remix of R&B song "Get Naked" failed to show that Brandy had access to their song or that it was strikingly similar to Brandy's ballad "Tomorrow," federal appeals court affirms

Alan "Pepper" Raum and Anthony Sanders wrote and recorded a remix of a rap/R&B song titled "Get Naked," which – however good it may have been – was never released to the public. They may have sent a copy (along with other materials) to Lava Records, a subsidiary of Atlantic Recording, but they couldn't prove they did. The reason this mattered is that two years after Raum and Sanders wrote their song, Atlantic recording artist Brandy released an album featuring her ballad "Tomorrow." And "Tomorrow" and the "Get Naked" remix contain similar elements.

These similarities prompted Raum and Sanders to file a copyright infringement suit against Brandy and her record company – a lawsuit they have lost. A federal district judge did conclude that a reasonable jury could find that 65 seconds of "Tomorrow" and "Get Naked" are "substantially similar." But that was not enough for Raum and Sanders to defeat Brandy and Atlantic's motion for summary judgment.

It wasn't, because Raum and Sanders failed to show that Brandy had access to their song. In an opinion by Judge John Rogers, marked "Not Recommended for Full-Text Publication," the Court of Appeals affirmed the dismissal of Raum and Sanders' lawsuit, because their evidence that Brandy and Atlantic had access to their song was mere speculation and conjecture and focused on "hypothetical situations."

What's more, although "striking similarities" may have offset evidence of access, Judge Rogers agreed with the district court that in this case, the similarities between the two songs were not "striking."

Without evidence of access, and without striking similarities, Raum and Sanders' case was "insufficient . . . to withstand a summary judgment motion," Judge Rogers held.

Raum and Sanders were represented by Albert A. Giuliani and John J. Spellacy in Cleveland. Brandy and Atlantic were represented by Deborah A. Coleman of Hahn Loeser & Parks, and by Melissa M. Eckhause of Baker & Hostetler in Cleveland.

Raum v. Norwood, 93 Fed.Appx. 693, 2004 U.S.App.LEXIS 3592 (6th Cir. 2004)

Vocalists who backed James Brown on pre-1978 recordings are not entitled to accountings from Brown or his record company, because there was no fiduciary relationship among them, federal appellate court affirms

Bobby Byrd and Vickie Anderson were background vocalists who recorded with James Brown before 1978. Almost a quarter century later, Byrd and Anderson sued Brown and his record company, UMG Recordings, alleging they were owed additional money, apparently because Brown received royalties and they didn't.

Byrd and Anderson's lawsuit didn't get far. It was dismissed, without trial, by federal District Judge Jed Rakoff, who ruled that their claims were barred by the statute of limitations or the doctrine of laches.

On appeal, Byrd and Anderson did no better. In a "Summary Order" marked "May Not be Cited as Precedential Authority," the Court of Appeals affirmed – without explanation – Judge Rakoff's conclusion that their case was barred by the statute of limitations or laches.

However, Byrd and Anderson also urged the appellate court to reverse the dismissal of their case, arguing that they were entitled to an accounting – a legal theory that they apparently thought would survive the passage of time. This argument failed too. The appellate court ruled that "their claim for an accounting cannot stand because they have not established the existence of a fiduciary relationship between themselves and [Brown or UMG]." And "a fiduciary relationship is essential for a cause of action . . . for an accounting. . . ."

Byrd and Anderson were represented by Carl I. Kaminsky in New York City. Brown was represented by Leon Friedman in New York City. UMG Recordings was represented by Andrew H. Bart of Pryor Cashman Sherman & Flynn in New York City.

Byrd v. Brown, 94 Fed.Appx. 1, 2004 U.S.App.LEXIS 4903 (2nd Cir. 2004)

Mattel's "Barbie" copyright includes doll's eyes, nose and mouth, even if they are "standard or common features," Court of Appeals rules, in infringement case in which Mattel complains that Radio City "Rockettes" doll was copied from Barbie

To celebrate the millennium, Radio City created a doll called "Rockettes 2000." Its face looked a lot like the face of Mattel's "Barbie" doll, though "Rockettes 2000" was not part of the Barbie line. Some people say that imitation is the sincerest form of flattery. But Mattel was not flattered.

In fact, Mattel was angered by Radio City's apparent imitation – angered enough to file a copyright infringement lawsuit against Radio City (and the company that actually manufactured the offending dolls on Radio City's behalf). Radio City (and its co-defendants) took exception to the allegation they were infringers, and successfully filed a motion for summary judgment. Federal District Judge Jed Rakoff assumed that Radio City had copied its Rockettes' dolls' eyes, nose and mouth from Barbie. But Judge Rakoff granted Radio City's motion, nonetheless.

Judge Rakoff did so, because he concluded that Mattel's copyright to Barbie did not cover Barbie's eyes, nose and mouth. Those were "standard or common features," and as such, unprotected by copyright, the judge concluded. Once Judge Rakoff excluded those features from consideration, he found that Rockettes and Barbie were not substantially similar.

That, however, was not the end of the matter. Mattel appealed, successfully. In an opinion by Judge Pierre Leval, the Court of Appeals has held that "The proposition that standard or common features are not protected is inconsistent with copyright law." All that is necessary for copyright protection, Judge Leval explained, is that the work be "independently created" and have "some minimal degree of creativity."

Applying that principle to Mattel's claim, the judge observed that "There are innumerable ways of making upturned noses, bow lips, and widely spaced eyes." Thus, even if many dolls have just those features, "it would not follow that each such doll – assuming it was independently created and not copied from others – would not enjoy protection from copying."

Mattel had offered "uncontradicted evidence" that it had independently created Barbie's face, and Judge Leval said there was no reason to doubt that Barbie's face satisfied the "minimal creativity" requirement too. As a result, Mattel was entitled to claim copyright protection for Barbie's facial features.

This doesn't necessarily mean that Mattel will win the case eventually. Judge Leval noted that "The protection that flows from such a copyright is, of course, quite limited." Other companies – including Radio City – are entitled to make dolls with an "upturned nose, bow lips, and widely spaced eyes," even if they take the idea for such a face from Mattel. What they can't do is copy "Mattel's particularized expression." Judge Leval said he had no view as to whether Radio City did that. So he remanded the case to the lower court, "for further proceedings" on that factual issue.

Mattel was represented by William Dunnegan of Perkins & Dunnegan in New York City. Radio City and its co-defendants were represented by Michael Aschen of Abelman Frayne & Schwab in New York City.

Mattel, Inc. v. Goldberger Doll Manufacturing Co., 365 F.3d 133, 2004 U.S.App.LEXIS 7377 (2nd Cir. 2004)

ASCAP not required to grant public performance licenses to Musak and DMX Music for catalogs of particular music publishers, federal "rate court" decides

ASCAP is not required to grant public performance licenses to Musak and DMX Music covering just the catalogs of particular music publishers. Federal District Judge William Conner has so held, in a proceeding initiated by ASCAP under the consent decree that governs relations between ASCAP and music users.

Musak and DMX are background music services which for years have obtained blanket licenses from ASCAP, covering ASCAP's entire repertory. Though ASCAP represents some 160,000 songwriters and music publishers, and licenses several million songs, ASCAP doesn't represent all songwriters and publishers. BMI and SESAC represent many as well. As a result, in order to provide all of the music their customers want, Musak and DMX need licenses from BMI and SESAC, as well as from ASCAP.

All of these blanket license share an important feature: the fees payable by Musak and DMX do not vary with the amount (or popularity) of the songs they perform. And therein lies the rub, insofar as Musak and DMX are concerned.

Musak and DMX would like to obtain public performance licenses from directly from some music publishers –bypassing ASCAP entirely, even with respect to publishers that are ASCAP members. And then Musak and DMX would like to obtain blanket-like licenses from ASCAP, covering the songs of only those ASCAP-member publishers from which direct licenses were not obtained. This type of license would be called a "carve-out" license, because the license – and the license fee – would reflect the fact that Musak and DMX have "carved out" the songs of some publishers, by licensing them directly.

ASCAP, of course, would prefer not to grant such a license; and in negotiations with Musak and DMX (that have been dragging on since 1999 when their last licenses expired), ASCAP has taken the position that it is not legally required to issue such a license. Musak and DMX took the position that they are entitled to such a license, at least since 2001 when the current ASCAP consent decree became effective (*ELR* 22:4:6, 23:4:19).

The 2001 consent decree says nothing about "carve-out" licenses. But it does require ASCAP to issue "per-segment" licenses to background music services – without defining what "per-segment" means.

Musak and DMX argued to Judge Conner that an individual publisher's catalog is a "segment," and thus they are entitled to an ASCAP license covering particular publishers' catalogs. Judge Conner, however, agreed with ASCAP that a publisher's catalog is not a "segment," because the word "segment" refers to a portion of a licensee's music *performances*, not to a portion of ASCAP's repertory.

On the other hand, Judge Conner also ruled that the license fees agreed to by individual publishers – in cases where Musak and DMX obtain public performance licenses directly from publishers – may and will be taken into account by the rate court in determining whether the blanket license fee sought by ASCAP is "reasonable," as required by the consent decree.

ASCAP was represented by Carol A. Witschel and I. Fred Koenigsberg of White & Case and by Richard H. Reimer of ASCAP, in New York City. Musak and DMX were represented by R. Bruce Rich of Weil Gotshal & Manges in New York City.

United States v. American Society of Composers Authors and Publishers, 309 F.Supp.2d 566, 2004 U.S.Dist.LEXIS 4615 (S.D.N.Y. 2004)

Copyright Office properly rejected claims filed by MGM and Universal Studios for cable and satellite TV royalties, because claims were mailed using postage meters, did not have U.S. Postal Service date stamps showing they were mailed in July, and arrived after the deadline, federal District Court rules

The devil (it is said) is in the details. Lots of lawsuits prove that is so – none more dramatically than two cases filed by MGM and Universal Studios against Register of Copyrights Marybeth Peters, the head of the U.S. Copyright Office. The issue in these separate but similar cases was whether MGM and Universal filed their claims for cable and satellite TV royalties for the year 2000, on time. (The royalties in question are those paid by cable TV systems and satellite TV operators in connection with their retransmission of over-the-air television broadcasts of copyrighted programs and movies.)

The Copyright Office rejected the studios' filings as "untimely" for what seemed (to the studios at least) as a trivial reason. Copyright Office regulations require cable and satellite royalty claims to be filed during the month of July (for the preceding calendar year). Copyright owners may do this in a few different ways: by hand delivering their claims to the Copyright Office by July 31st; by mailing their claims so they are delivered to the Copyright Office by July 31st; or by mailing their claims to the Copyright Office with a U.S. Postal Service postmark showing they were mailed during July, even if they don't actually arrive at the Copyright Office until later.

However, Copyright Office regulations specifically provide that postage meter post marks – such as those affixed by Pitney-Bowes machines – showing a July postmark are not sufficient, if the claim arrives after July. MGM and Universal mailed their claims on July 30th, but used Pitney-Bowes machines to affix postage; and those claims didn't arrive at the Copyright Office until August the 2nd or 3rd.

MGM and Universal both attempted to establish that their claims had been mailed in July, by submitting elaborate (and uncontradicted) affidavits, including affidavits from the U.S. Postal Service itself, establishing that their claims were mailed in July, that their Pitney-Bowes meters could not be backdated, and that in order for their claims to have arrived at the Copyright Office in Washington D.C. by August 2nd or 3rd, they would have had to have been mailed in July.

When their claims were nevertheless rejected, MGM and Universal filed lawsuits alleging that the Copyright Office had violated the Copyright Act and the Administrative Procedure Act and had denied them their Constitutional right to due process of law.

In separate but similar opinions, federal District Judge Rosemary Collyer has disagreed. She held that the studios' claims had not been filed on time, and that the Copyright Office had violated neither the Administrative Procedure Act nor the Constitution by rejecting them.

Universal Studios was represented by Randolph D. Moss of Wilmer Cutler Pickering in Washington D.C. MGM was represented by David Evan Kendall of Williams & Connolly in Washington D.C. The Copyright Office was represented by James J. Gilligan of the U.S. Department of Justice in Washington D.C.

Universal Studios v. Peters, 308 F.Supp.2d 1, 2004 U.S.Dist.LEXIS 4787 (D.D.C. 2004); *Metro-Goldwyn-Mayer Studios v. Peters*, 309 F.Supp.2d 48, 2004 U.S.Dist.LEXIS 5399 (D.D.C. 2004)

California appellate court reduces legal malpractice judgment won by Michael Viner and Deborah Raffin, as a result of their lawyer's negligence in connection with sale of their stock in Dove Audio, from $13 million to $516,000, because Viner and Raffin did not prove that "but for" lawyer's negligence, they would have made better deal

For most plaintiffs, in most cases, a judgment in their favor of more than a half-million dollars would be a significant victory. That is not so, however, in a legal malpractice case filed Michael Viner and his wife Deborah Raffin Viner against their former lawyers.

The Viners used to own Dove Audio, a successful, independent audio book publishing company. In 1997, they sold Dove Audio to Media Equities International in a transaction that imposed continuing obligations on the Viners and on Media Equities, even after the deal closed. The Viners were represented in that transaction by Charles A. Sweet of Williams & Connolly.

Unfortunately for all concerned, a post-closing dispute arose between the Viners and Media Equities, the outcome of which displeased the Viners. They concluded that the unfavorable outcome was the result of Sweet's negligent, which is why they sued him and his firm for malpractice. The jury apparently agreed with the Viners, because the jury awarded them a verdict of more than $13 million.

On appeal, the Court of Appeal upheld more than $8 million of the award, in a decision that was notable for the legal standard it applied in affirming Sweet's negligence. In a *litigation* malpractice case against a *trial lawyer*, a former client is required to prove that "but for" the lawyer's negligence, the outcome of the litigation would have been more favorable. The appellate court held, however, that this test was "not appropriate" in "transactional malpractice" actions. Instead, the appellate court held that *transactional* malpractice cases should be governed by ordinary negligence and causation principles, and that it is not necessary for former clients to prove that their attorneys' malpractice is the sole cause of their injuries (*ELR* 23:10:17).

Sweet and his law firm appealed again, this time with considerable success. The California Supreme Court ruled that even in transactional malpractice actions, the former client must prove that "but for" the alleged malpractice, it is more likely than not the client would have obtained a more favorable result. The Supreme Court then remanded the case to the Court of Appeal, so it could reconsider the case under that standard.

The Court of Appeal has done so, and has concluded that the Viners failed to meet the required standard with respect to all but $515,760 of their claims. In a fact-specific analysis, Justice Dennis Perluss concluded that the Viners failed to show that Sweet's negligence was the cause of most of the financial harm the jury found they suffered. Justice Perluss also concluded that the Viners could have introduced whatever evidence of causation they had at trial, and thus he ruled they were not entitled to a new trial. As a result, the appellate court modified the judgment by reducing the damage award to $515,760. Justice Earl Johnson dissented. He would have remanded the case to the Superior Court for a retrial.

The Viners were represented by Patricia L. Glaser of Christensen Miller Fink Jacobs Glasser Weil & Shapiro in Los Angeles. Sweet and Williams & Connolly were represented by Dennis C. Brown of Munger Tolles & Olson in Los Angeles.

Viner v. Sweet, 12 Cal.Rptr.3d 533, 2004 Cal.App.LEXIS 600 (Cal.App. 2004)

Court of Appeals stays preliminary injunction that prohibited website from exhibiting nude images of television news anchor Catherine Bosley who was videotaped while participating in wet t-shirt contest while on vacation in Florida

Catherine Bosley used to be a television news anchor in Youngstown, Ohio. Her job made her a "regional celebrity." Then Bosley went on vacation and did something that made her a nationwide – perhaps worldwide – celebrity. She participated in a wet t-shirt contest in a Florida nightclub, and stripped completely nude, right in front of a video camera. In short order, the tape and still images taken from it, appeared on the internet.

As a result, she said, she was asked to resign from her news job. She did, and she did something else too: she filed a right of publicity lawsuit against a website operator and others who were selling DVDs and videos of her performance.

At first, Bosley's lawsuit was successful. Federal District Judge James Gwin granted her motion for a preliminary injunction. But her success didn't last long. Three weeks after it was issued, the Court of Appeals stayed the injunction, pending a decision on the merits of the defendants' appeal.

Bosley's lawsuit raises several significant issues which were dealt with quite carefully by Judge Gwin.

The judge ruled that Bosley was likely to succeed on the merits of her right of publicity claim, under common law and under the statutes of Florida and Ohio. She was, he explained, because she asserted that the defendants sold "images of her performance" and also used those images to promote their sale of "other sexually-related goods." The judge found that these uses were for a "commercial purpose."

Although there is a "public affairs exception" to the right of publicity, Judge Gwin ruled that the exception did not apply to the defendants' uses of Bosley's image, because those uses had nothing to do with news or public affairs.

The judge also rejected the defendants' First Amendment defense, saying that because the defendants' uses of Bosley's image did not have "artistic expression" or "significant editorial comments," her case was different from other cases that had recognized a First Amendment defense to right of publicity claims. He held that an injunction would not be an unconstitutional prior restraint, because that doctrine is not applicable to commercial speech or where "proprietary interests are at stake, such as infringements of copyright or trademark."

Finally, Judge Gwin was not persuaded that Bosley had consented to the use of her image – at least not in a way that would preclude her claim. The defendants showed that Bosley stripped naked within feet of the "relatively large" camera that was used to tape her performance, and that she was looking directly into the camera's lens as she did so. The defendants argued that this amounted to implied consent. But Judge Gwin ruled that implied consent is not a defense under Florida law, because that state's statute requires "express written or oral consent."

These are the reasons Judge Gwin issued a preliminary injunction. But in a short, unpublished order, the Court of Appeals stayed the injunction. It did so, it said, because it there is a "strong likelihood . . . that the . . . preliminary injunction is a prior restraint on speech in violation of the First Amendment."

Bosley was represented by Mark S. Colucci in Youngstown. The defendants were represented by Lisa S. DelGrosso of Brouse McDowell in Akron, Ronald S. Kopp of Roetzel & Andress in Akron, and Derek A. Newman of Newman & Newman in Seattle.

Bosley v. Wildwett.com, 310 F.Supp.2d 914, 2004 U.S.Dist.LEXIS 5124 (N.D.Ohio 2004), stayed pending decision on appeal, 2004 U.S.App.LEXIS 11028 (6th Cir. 2004)

Gennifer Flowers' defamation claims against James Carville, George Stephanopoulos and Little Brown, complaining about statements made in book and on television, are dismissed at last

A dozen years after the 1992 Presidential campaign, a lawsuit triggered by statements made during and shortly after the campaign is finally winding down. The lawsuit in question was filed by Gennifer Flowers in response to statements made about her by James Carville and George Stephanopoulos on television and in a book published by Little Brown & Company.

Political buffs may recall that during that long-ago campaign, Flowers asserted that she had an affair with President Clinton, back when he was Governor of Arkansas. To prove her assertion, she played a tape recording of what she said was a telephone conversation between the two of them. But reports aired on CNN and KCBS suggested the tape may have been edited. Carville and Stephanopoulos – both of whom supported Clinton's election – then asserted that it had been edited, citing those reports.

Flowers' lawsuit has yielded five published opinions, without ever getting beyond the pre-trial law-and-motion stage. The first four dealt with the legal adequacy of the allegations of Flowers' often-amended complaint (*ELR* 22:9:20, 24:10:13, 25:7:19, 25:12:19). Those opinions resulted in the dismissal of some, though not all, of Flowers' claims, including some claims directed at Hillary Clinton. But those four opinions left intact defamation claims against Carville, Stephanopoulos and Little Brown.

Now, finally, federal District Judge Philip Pro has dismissed those claims too. In response to a defense motion for summary judgment, Judge Pro has ruled that the evidence offered by Flowers was not sufficient to allow a jury to find that Carville and Stephanopoulos made their offending statements with knowledge those statements were false or with reckless disregard of the possibility they were false.

Little Brown's lawyers had vetted Stephanopoulos' book *All Too Human*, so Flowers argued that Little Brown would have been aware that the book did not include language from the CNN and KCBS reports "qualifying" the suggestion that Flowers' tape had been edited. Nevertheless, Judge Pro held, "this is not sufficient for a reasonable jury to find . . . that Little Brown either knew that Stephanopoulos' statement in *All Too Human* was false or recklessly disregarded obvious warning signs that it was false."

Flowers was represented by John Lukens of Bell Lukens Marshall & Kent in Las Vegas and Larry Klayman of Judicial Watch in Washington D.C. Carville, Stephanopoulos and Little Brown were represented by Andrew P. Gordon of McDonald Carano Wilson in Las Vegas, and Paul R. Hejmanowksi of Lionel Sawyer & Collins in Las Vegas.

Flowers v. Carville, 310 F.Supp.2d 1157, 2004 U.S.Dist.LEXIS 5170 (D.Nev. 2004)

City of Aguada's cancellation of performance of Broadway musical "Naked Boys Singing" in Municipal Arts Center violated First Amendment, federal District Court rules

The City of Aguada, Puerto Rico, ran afoul of the First Amendment, when it cancelled scheduled performances of "Naked Boys Singing" in Aguada's Municipal Arts Center. Federal District Judge Hector Laffitee has so ruled, in an opinion that denied the City's motion to set aside an injunction that had already been issued, barring the City from interfering with the performance of the Broadway musical by Producciones Gran Escenario.

Producciones had reserved three dates for its performances, and had paid the City half the lease fee in advance. Nevertheless, a month and a half before the scheduled dates, the City sent Producciones a letter saying the musical was cancelled due to "last moment reasons . . of much weight." Though its reasons were not stated in that letter, the City later explained to Judge Laffitee that the Municipal Arts Center was "for the enjoyment of all the members of the family," thus implying that the show's nudity made it incompatible with the Center's purpose.

As a legal matter, the City argued that the Center is not a public forum, and thus the City's decision to cancel the show did not violate Producciones' constitutional rights. Judge Laffitee was not persuaded, factually or legally.

Factually, the evidence showed that the ordinance that regulated the Center's use provided that minors could not be ushers for "adults-only show[s]," thus demonstrating that adults-only shows were contemplated and consistent with the Center's anticipated uses.

Legally, Judge Laffitee ruled that the Center is a public forum, and that even if weren't, it is unlikely the City's cancellation of the show would "pass the lower constitutional threshold accorded to [nonpublic] forums." The judge concluded that City officials had "attempt[ed] to suppress [Producciones'] artistic expression because of their discomfort with the content of the show" – something they could not do under the First Amendment, because "Naked Boys Singing" is not obscene (the City didn't claim it was) and "has been performed in cities throughout the United States and around the world. . . ."

Producciones Gran Escenario was represented by Roberto O. Maldonado-Nieves in San Juan. The City of Aguada was represented by Heriberto Guivas-Lorenzo of Pedro Ortiz Alvarez Law Offices in Ponce.

Producciones Gran Escenario, Inc. v. Ruiz, 310 F.Supp.2d 440, 2004 U.S.Dist.LEXIS 5333 (D. Puerto Rico 2004)

"March Madness" is protectable trademark that was infringed by operator of website whose domain name "marchmadness.com" was registered in bad faith, federal District Court rules after trial

The domain name "Marchmadness.com" is now registered to an employee of the NCAA, apparently on behalf of the March Madness Athletic Association, a company formed by the NCAA and the Illinois High School Association to manage the "March Madness" phrase. That was not so, originally. Earlier, the "Marchmadness.com" domain name was registered to Netfire, Inc., a company that purchased it from the man who originally registered it without the consent of the March Madness Athletic Association.

Netfire used the "Marchmadness.com" domain name for a website of its own, from which it provided information about the NCAA's annual basketball tournament, and for which it attempted to sell advertising. Netfire was neither associated with nor licensed by the March Madness Athletic Association. As a result, the Association sued Netfire for trademark infringement and cybersquatting.

Both sides were so confident in their opposing positions that both made motions for summary judgment, without success. Federal District Judge Jerry Buchmeyer denied both motions, ruling that a trial was necessary to determine whether "March Madness" had become generic (as Netfire claimed) or is protected (as the Association claimed). The judge also ruled that a trial was necessary to determine whether the domain name had been registered in bad faith, so that Netfire was a cybersquatter (as the Association claimed) or was registered in good faith (as Netfire claimed). (*ELR* 23:10:20)

In due course, Judge Buchmeyer conducted a week-long bench trial, from which the Association emerged the victor. In a lengthy and factually detailed decision, the judge held that "March Madness" had acquired secondary meaning and is therefore a protected mark. He determined that it was likely sports fans would be confused by Netfire's use of a domain name that was identical to the Association's trademark. And he held that Netfire's use of the domain name was an infringing rather than fair use.

Judge Buchmeyer also found that Netfire had acted in bad faith, and thus was liable for cybersquatting under the Anti-Cybersquatting Consumer Protection Act.

As a result, the judge ordered Netfire to cease using the term "March madness" for any commercial purpose. And the judge ordered the "Marchmadness.com" domain name transferred to the Association.

The March Madness Athletic Association was represented by Douglas N. Masters of Pattishall McAuliffe Newbury Hilliard & Geraldson in Chicago. Netfire was represented by R. Brent Cooper of Cooper & Scully in Dallas.

March Madness Athletic Association v. Netfire, Inc., 310 F.Supp.2d 786, 2004 U.S.Dist.LEXIS 14941 (N.D.Tex. 2003)

Dismissal of We Media's trademark suit against cable and satellite channel "WE: Women's Entertainment" is affirmed on appeal

The cable and satellite TV channel known as "WE: Women's Entertainment" has defeated, once again, a trademark dilution and infringement lawsuit filed against it by We Media, Inc., a publishing and media company that serves the disabled community. In a "Summary Order" marked "May Not be Cited as Precedential Authority," the Court of Appeals has affirmed the dismissal of We Media's lawsuit, in response to a motion for summary judgment filed by Cablevision Systems, the owner of WE: Women's Entertainment.

We Media owns registered trademarks in the words "WE" and "WeMedia" for magazine, online and other services, and has for a number of years. In 2000, the "Romance Classics" cable channel was renamed "WE: Women's Entertainment," and its owner – a company also known as "WE: Women's Entertainment" – attempted to register its name as a trademark. The Patent and Trademark Office declined to do so, however, saying that it was too similar to We Media's marks.

Nevertheless, the appellate court agreed that although the two marks "are quite similar," and although We Media took some steps to "bridge the gap" from its business to cable television, the "WE" mark is not very strong, the companies' markets are not the same, there has been very little actual confusion, and the companies' consumers are sophisticated. For these reasons, the Court of Appeals affirmed the dismissal of We Media's claims for injunctive relief.

The appellate court also affirmed the dismissal of We Media's claims for money damages, because it did not show actual consumer confusion or intentional deception – at least one of which must be shown to recover damages.

We Media was represented by Arthur M. Lieberman of Lieberman & Nowak in New York City. WE: Women's Entertainment was represented by James W. Dabney of Pennie & Edmonds in New York City.

We Media, Inc. v. Cablevision Systems Corp., 94 Fed.Appx. 29, 2004 U.S.App.LEXIS 7379 (2nd Cir. 2004)

Schools not liable for injuries suffered by college baseball player or high school football player, Indiana and Nebraska courts rule, in separate but similar cases

Injuries are the inevitable byproduct of certain sports, including baseball and football. The question is whether anyone is legally liable for these injuries, and if so, who. By coincidence, this very question is one that was answered by the Indiana Court of Appeals and the Nebraska Supreme Court, in two separate but similar cases decided just 10 days apart.

The Indiana case was filed by a Tri-State University baseball player who was injured during a team drill when he was struck in the eye by a ball thrown by a teammate. The trial court dismissed the injured player's lawsuit; and the Indiana Court of Appeals affirmed. In an opinion by Judge Margret Robb, the appellate court held that those involved in university sporting events have a duty to avoid reckless and malicious behavior and not to intentionally injure anyone, but they don't have a duty to exercise "reasonable care." What's more, Judge Robb ruled, participants do not have a duty to refrain from conduct that is inherent and foreseeable in the play of the game. Under these standards, neither the injured player's coaches nor his teammate were liable, Judge Robb affirmed.

The Nebraska case was filed by an injured Cedar Bluffs High School football player who, after suffering a head injury during a game, was allowed to reenter the game and participate in contact drills later in the week. The player's complaint was dismissed by the trial court, following a trial; and that ruling was affirmed by the Nebraska Supreme Court. Justice Lindsey Miller-Lerman held that high school coaches are required to act as would a "reasonably prudent person holding a state teaching certificate with a coaching endorsement." The Justice reviewed the evidence introduce at trial and concluded that it supported the trial judge's finding that the coaches' evaluation of the player's condition, and their decision to allow him to reenter the game and then practice later in the week, were decisions that would have been made by a reasonable, state-endorsed football coach under similar circumstances.

In the Indiana case, the injured baseball player was represented by John D. Boren of Boren Oliver & Coffey in Martinsville; and Tri-State University and its co-defendants were represented by Donna H. Fisher of Smith Fisher Maas & Howard in Indianapolis. In the Nebraska case, the injured football player was represented by Larry C. Johnson of Johnson & Welch in Fremont; and Cedar Bluffs High School was represented by Stephen S. Gealy of Baylor Evnen Curtiss Grimit & Witt in Lincoln.

Geiersbach v. Frieje, 807 N.E.2d 114, 2004 Ind.App.LEXIS 757 (Ind.App. 2004); *Cerny v. Cedar Bluffs Junior/Senior Public School*, 679 N.W.2d 198, 2004 Neb.LEXIS 80 (Neb. 2004)

Previously Reported:

Decisions published. Opinions in these previously reported cases have been published: *Republic of Austria v. Altmann*, 124 S.Ct. 2240, 2004 U.S.LEXIS 4030 (2004) (*ELR* 26:1:10); *Ellison v. Robertson*, 357 F.3d 1072, 2004 U.S.App.LEXIS 2074 (9th Cir. 2004) (*ELR* 25:10:9); *Cottrill v. Spears*, 87 Fed.Appx. 803, 2004 U.S.App.LEXIS 1440 (3rd Cir. 2004) (*ELR* 25:11:16); *Paramount Pictures v. RePlayTV*, 298 F.Supp.2d 921, 2004 U.S.Dist.LEXIS 790 (C.D.Cal. 2004) (*ELR* 25:10:10); *DVD Copy Control Association v. Bunner*, 10 Cal.Rptr.3d 185, 2004 Cal.App.LEXIS 234 (*ELR* 25:11:13); *Evans v. Famous Music Corp.*, 775 N.Y.S. 757, 807 N.E.2d 869, 2004 N.Y.LEXIS 261 (N.Y. 2004) (*ELR* 25:11:14); *Golan v. Ashcroft*, 310 F.Supp.2d 1215, 2004 U.S.Dist.LEXIS 11059 (D.Colo. 2004).

Amended dissent published. In *Elvis Presley Enterprises v. Passport Video*, Judge John Noonan dissented – in unusually blunt language – from the majority's opinion affirming a preliminary injunction barring distribution of an Elvis Presley video documentary. The majority upheld the District Court's conclusion that the producer's unlicensed use of copyrighted television clips, photos and music was not a "fair use." Three months later, Judge Noonan filed an "Amended Dissent" that now has been published. *Elvis Presley Enterprises v. Passport Video*, 357 F.3d 896, 2004 U.S.App.LEXIS 26863 (9th Cir. 2004). However, the amendment does not require revision of the way in which Judge Noonan's dissenting opinion was reported in these pages originally (*ELR* 25:7:13).

DEPARTMENTS

Entertainment Lawyer News:

Dean Garfield named VP and Director of Antipiracy Legal Affairs at MPAA. Dean Garfield has joined the Motion Picture Association of America as Vice President and Director of Antipiracy Legal Affairs. He previously was Vice President of Legal Affairs at the Recording Industry Association of America. Garfield is a graduate of NYU School of Law and began his legal career as a litigator in the New York office of Kaye Scholer.

Kathleen Leo appointed General Counsel at United Media. Kathleen Leo has been appointed General Counsel of United Media, the licensing and syndication company that represents such properties as "Peanuts," "Dilbert," "The World of Beatrix Potter," "Paddington Bear," "Raggedy Ann & Andy," and the television series "Jakers!" and "Arthur." Leo will oversee all aspects of the company's legal affairs including contract negotiation, trademark registration, and litigation, as well as the work done by United Media's outside counsel. She joins United Media from Primedia Inc., where she was responsible for negotiating and advising on corporate transactions and commercial contracts, and providing advice on securities laws and corporate governance matters. Prior to Primedia, she was counsel to Warner-Lambert and a corporate associate at Dewey Ballantine.

Scott Edelman to lead pro bono efforts of Gibson Dunn & Crutcher. Gibson Dunn & Crutcher has named partner Scott Edelman to the firm's newly-created position of Pro Bono Coordinator. Edelman is Co-Chair of the firm's Entertainment Practice Group. His entertainment and intellectual property practice covers a wide range of issues, including antitrust, intellectual property and profit participation in the motion picture, television and music industries. He recently won $106 million in compensatory and punitive damages for German film distributor Intertainment AG in a federal jury trial against movie producer Franchise Pictures over inflated film budgets. Edelman also serves on the boards of Bet Tzedek Legal Services (of which he is a past president) and KCET Public Television.

Elena Occhipinti joins La Polt Law. Elena Occhipinti has joined Dina LaPolt's two-year old boutique entertainment law firm LaPolt Law P.C. in West Hollywood. Occhipinti was a student at Chicago's Franklin Fine Arts Academy and has studied the performing arts for most of her academic career. After graduating from the University of North Carolina Chapel Hill with a Bachelor of Arts in Philosophy, she earned a Juris Doctorate degree from Loyola Law School in Los Angeles. Her involvement with her brother's hip hop band, "Bad News Jones," has given her a "hands-on" understanding of the countless trials and tribulations of being in a band. Prior to joining LaPolt Law, Occhipinti was in-house counsel for a real estate investment and development firm in Santa Monica.

In the Law Reviews:

Journalism, Libel Law and a Reputation Tarnished: A Dialogue with Richard Jewell and His Attorney L. Lin Wood by Clay Calvert and Robert D. Richards, 35/1 McGeorge Law Review, University of the Pacific (2004)

McGeorge Law Review: University of the Pacific has published a Symposium entitled: A Conversation and Colloquia Concerning "Who Owns Your Digital Creations?" with the following articles:

Litigation as a Tool Against Digital Piracy by Grace J. Bergen, 35/2 McGeorge Law Review (2004)

On the Ownership of Academic Presentations: The Evolution of California Education Code Sections 66450-66452 by Charles P. Nash, 35/2 McGeorge Law Review (2004)

The Virtual Professorship: Intellectual Property Ownership of Academic Work in a Digital Era by Jed Scully, 35/2 McGeorge Law Review (2004)

Feet of Clay: How the Right of Publicity Exception Undermines Copyright Act Preemption by P. Stephen Fardy, 12 Texas Intellectual Property Law Journal 443 (2004)

The Entertainment Law Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 15, Issue 6 with the following articles:

The Sale and Leaseback of British Feature Films by Lars Kaplik, 15 Entertainment Law Review 169 (2004) (for website, see above)

Defamation and the Internet: Where Are We Now and Where Are We Going? Part I: Where Are We Now? by Tim Ludbrook, 15 Entertainment Law Review 173 (2004) (for website, see above)

New Louisiana State Tax Incentives for Film Production by Bianca Bezdek, 15 Entertainment Law Review 182 (2004) (for website, see above)

France: Tax Credits for Film Production (Finance Act 2004) by Nicholas Dalton, 15 Entertainment Law Review 185 (2004) (for website, see above)

Jurisdiction and Governing Law: The Battle for the Apple by Emma Malcolm, 15 Entertainment Law Review 191 (2004) (for website, see above)

The European Intellectual Property Review, www.sweetandmaxwell.co.uk, has published Volume 26, Issue 8 with the following articles:

No Marks for Hitler: A Radical Reappraisal of Trade Mark Use and Political Sensitivity by Jeremy Phillips and Hannah Simons, 26 European Intellectual Property Review 327 (2004) (for website, see above)

Viral Contracts or Unenforceable Documents? Contractual Validity of Copyleft Licenses by Andres Guadamuz Gonzalez, 26 European Intellectual Property Review 331 (2004) (for website, see above)

Barbie's Life in Plastic: It's Fantastic for First Amendment Protection-Or Is It? Mattel, Inc. v. MCA Records, Inc., by Bryan M. Gallo, 29 University of Dayton Law Review 405 (2004)

Standard of Originality for Protection of Works and Fair Dealing Defence Re-examined by Barry Sookman, 10/5 Computer and Telecommunications Law Review 101 (2004) (www.sweetandmaxwell.co.uk)

Copyright and Information Theory: Toward and Alternative Model of "Authorship" by Alan L. Durham, 2004 Brigham Young University Law Review 69 (2004)

Technological Creativity and Moral Rights: A Comparative Perspective by Ian Eagles and Louise Longdin, 12 International Journal of Law and Information Technology 209 (2004) (www.ijlit.oupjournals.org)

Trademark: Victoria's Dirty Little Secret: A Revealing Look at What the Federal Trademark Dilution Act is Trying to Conceal by Natalie J. McNeal, 56 Oklahoma Law Review (2003)

Copyright World, www.ipworldonline.com, has published Issue 142 with the following articles:

Performers' Anxiety: New Zealand's Review of the Performance Rights Regime by Earl Gray and Jacky Morris, 142 Copyright World 10 (2004) (for website, see above)

Digital Dangers: U.S. Department of Justice's New Intellectual Property Task Force Efforts to Combat Copyright Theft by David Israelite, 142 Copyright World 11 (2004) (for website, see above)

Mattel, Inc. v. Simba Toys in the UK, 142 Copyright World 12 (2004) (for website, see above)

Stone Dead: Joint Authorship of the Hit Play Stones in His Pockets by Les Christy, 142 Copyright World 17 (2004) (for website, see above)

Has Copyright Hit the Wall? European Lawmakers and the Courts Examine How Copyrights Are Used to Exercise Power in the Market by Trevor Cook, 142 Copyright World 20 (2004) (for website, see above)

Fair Play? British Music Rights and the US Position on Copyright by Florian Koempel, 142 Copyright World 23 (2004) (for website, see above)

Educational Programs Calendar:

"The Art of the Deal: Hollywood Style": Los Angeles County Bar Association annual seminar, November 13, 2004 from 8:30 am to 2:00 pm, at Hotel Bel-Air. Confirmed speakers to date include Jay L. Cooper, Greenberg Traurig, LLP; Louis M. Meisinger, Sheppard Mullin Richter & Hampton, LLP; Beth Roberts, Executive Vice President Business Affairs, NBC Universal Television Group; Jeanne Newman, Hansen, Jacobson, Teller, Hoberman, Newman, Warren, Sloane & Richman LLP; Lawrence J. Ulman, Gibson, Dunn & Crutcher; Eric Weissman, Weissman, Wolff, Bergman, Coleman, Gordin & Evall LLP; and Robert J. Dowling, Editor in Chief of the Hollywood Reporter as the keynote speaker. Current information on the seminar can be obtained at www.lacba.org/symposium04.