

# Film-Related Provisions of the 2004 Tax Act

by Schuyler M. Moore\*

## I. 100% Deduction of the Cost of Qualified Audio-Visual Works

**A. In General.** The 2004 tax act (the “Act”) showered gifts on the film industry, but none is more striking than new IRC Section 181, which permits a 100% write-off (the “Film Deduction”) for the cost of certain audio-visual works, regardless of what media they are destined for (e.g., theatrical, television, DVD, etc.), referred to herein as “Qualified Audio-Visual Works.” While it is manna from heaven for the film industry, Section 181 requires a vivid imagination to decipher its meaning – it makes “napkin deals” look good in comparison.

**B. Requirements for Qualified Audio-Visual Work.** There are a number of requirements in order for an audio-visual work to be a Qualified Audio-Visual Work, outlined below:

**1. Limitation on Aggregate Cost.** The aggregate cost of the audio-visual work (“Film Costs”) cannot exceed \$15 million (or \$20 million in certain cases, discussed below). The test is all or nothing; if the Film Costs exceed \$15 million, you lose – you don’t get to deduct the first \$15 million. Based on the legislative history, it appears that in the case of a television series, the \$15 million test applies separately to each episode.

Many taxpayers will assume that the standard budget used for financing purposes applies for purposes of the \$15 million test. However, it appears that Film Costs include all direct and indirect costs of producing the audio-visual work that would normally be required to be capitalized under IRC Section 263A, including,

without limitation, (a) development costs, (b) an allocation of general and administrative costs based on the portion of those expenses relating to production activities, (c) depreciation of property used in production, and, in most cases, (d) financing costs. This issue is discussed in Section 5.01 of my treatise *Taxation of the Entertainment Industry* (referred to herein as the “Treatise”). Section 263A requires capitalization of these expenses that are incurred by either the taxpayer or any parties that are related to the taxpayer.<sup>1</sup> Thus, Film Costs will include costs that are not normally included in the budget. On the other hand, there may be items in the budget that are not included in Film Costs, such as “overhead fees” or “producer fees” that are merely amounts retained by the production company (although they might be included if they are paid to another party, even an affiliate). If transaction costs are incurred in connection with a tax shelter financing transaction using the Film Deduction, it may be possible to treat those costs as part of Film Costs that are entitled to be deducted.

Although Section 181 is not clear on the issue, it appears logical to exclude deferrals, participations and residuals for purposes of calculating Film Costs for purposes of the \$15 million ceiling. Otherwise, a successful film could be disqualified retroactively.

The \$15 million ceiling is increased to \$20 million if the Film Costs are “significantly incurred” in certain designated low-income communities. It is risky to rely on the \$20 million ceiling for two reasons: First, it is not clear what percentage is “significant.” Second, the test compares the costs incurred in the low-income communities to the *total* Film Costs, not just to the total costs of principal photography. In most cases, the costs of shooting in a particular area will be dwarfed by other Film Costs, including editing, pre-production, financing, etc.

**2. U.S. Costs.** Seventy-five percent of the total compensation relating to the audio-visual work (“Total Compensation”) must be paid for services performed in the United States by actors, directors, producers, and production personnel (“U.S. Production Compensation”). There is no requirement that the

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<sup>1</sup> Reg. 1.263A-1(j)(1)(i) (applying the rules of Section 482).

individuals be U.S. citizens or residents. The definition of the United States does not include its possessions, such as Puerto Rico. For both Total Compensation and U.S. Production Compensation, deferments, participations, and residuals are excluded.

Only compensation relating to *production* is included in U.S. Production Compensation, and it appears likely that the intent of Section 181 is to also apply this limit to Total Compensation. For example, it appears that a payment to a *writer* (i.e., a non-production cost) would not be included in Total Compensation. Otherwise, a large payment to a U.S. writer might disqualify a film, which would be anomalous.

**3. Television Series.** For television series, only the first forty-four episodes can be Qualified Audio-Visual Works.

**4. Commencement of Principal Photography.** Principal photography must commence after October 22, 2004 and prior to January 1, 2009.

**5. Content of Work.** The audio-visual work cannot include a “depiction of actual sexually explicit conduct.” Other than this one limit, there are no other limits as to content.<sup>2</sup>

### C. Costs Subject to Film Deduction

**1. Film Costs.** It appears that the Film Deduction applies, at a minimum, to all Film Costs, discussed above, so it is not limited to U.S. Production Compensation or even to production costs. For example, it would appear to apply to the entire cost of producing Monday Night Football, including the cost of acquiring the underlying rights.

**2. Development Costs.** One important question is the treatment of Film Costs incurred prior to commencement of principal photography, such as development and pre-production costs. There are two possible approaches to dealing with these costs, and it is not clear which is correct: One approach is to capitalize them and to permit a deduction only upon commencement of principal photography on the basis that this is the date that a Qualified Audio-Visual Work comes into being. The other approach is to permit the deduction of these expenses as incurred if they were reasonably thought to be incurred for a future Qualified Audio-Visual Work.

**3. Contingent Payments.** Although Section 181 is ambiguous on the issue, it appears that the Film Deduction *does* apply to deferments, participations, and residuals paid with respect to a Qualified Audio-Visual

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<sup>2</sup> An earlier draft of Section 181 had contained certain limitations (referred to in the Senate Report), such as precluding reality programs from qualifying, but these limitations were dropped from the final bill.

Work, even if they are excluded from Film Costs for purposes of calculating the \$15 million/\$20 million ceiling. It would seem odd to require capitalization of these costs if all other costs of the film were deductible.

### D. Film Deduction Limited to Owner

**1. Must be Owner While Film Costs are Incurred.** Based on the legislative history and a bit of interpolation, it appears that only the *owner* of the Qualified Audio-Visual Work that pays the Film Costs can take the Film Deduction. It does not appear that a payment to *purchase* or *license* all or some of the rights to a Qualified Audio-Visual Work that has already been produced will qualify for the Film Deduction. For example, if a film company acquires rights to a Qualified Audio-Visual Work *upon delivery*, such as pursuant to a negative pick-up or pre-sale, the payment is probably not deductible. It appears possible for the owner of only limited rights during production to be entitled to the Film Deduction, such as when a film company pays a portion of Film Costs in exchange for a grant of limited distribution rights that vests prior to the time the relevant Film Costs are incurred. Thus, there could be multiple owners each entitled to deduct their contribution to Film Costs.

**2. Subcontracting Production.** There is no requirement that the owner be the actual producer of the Qualified Audio-Visual Work; the owner should still be entitled to the Film Deduction even if it pays an independent film production company to physically produce the film, as long as the rights are not transferred to the production company during production (as often occurs for financing and guild reasons).

**3. Production Services.** If the production entity does not own any rights, and is merely rendering production services, then it could deduct 100% of the costs of production, even under prior law, since it does not own any asset to capitalize those costs to.<sup>3</sup> In this case, however, the entity paying the production entity for production services would not be entitled to the Film Deduction until payment is made to the production entity,<sup>4</sup> and the production entity would generally have to use the accrual method and pay tax on any deferred payments,<sup>5</sup> so there is no mismatching opportunity, as there is under Section 181 (as discussed below).

**E. Election.** The taxpayer is required to make a binding election to deduct the Film Deduction in lieu of normal income forecast amortization with respect to each particular Qualified Audio-Visual Work. The legislative history suggests that the IRS should liberally permit the fact of simply deducting the Film Deduction on a tax

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<sup>3</sup> Reg. 1-263(a)-4(b)(3)(iii).

<sup>4</sup> Section 404(d).

<sup>5</sup> Section 448.

return to be treated as an election, without requiring any special form.

**F. Other Tax Provisions.** More important than what *is* written in Section 181 is what is *not* written, since taxpayers must consider all the other provisions and doctrines of existing tax law, some of which are discussed below.

**1. Alternative Minimum Tax.** For individuals, as long as the production activity constitutes a trade or business, the Film Deduction will be deductible for purposes of calculating the alternative minimum tax.<sup>6</sup> It thus becomes critical to determine – whether the particular production activity constitutes a trade or business. Although there is substantial conflicting law on this question,<sup>7</sup> it is likely that production activities, alone, even prior to the receipt of income, will be treated as a trade or business,<sup>8</sup> so the Film Deduction should not subject individuals to the alternative minimum tax.

For corporations, if the Film Deduction is deductible for purposes of calculating “earnings and profits,” the deduction will not subject them to the alternative minimum tax.<sup>9</sup> Since the Act did not create any special rules for treatment of the Film Deduction in calculating earnings and profits, it appears that the Film Deduction is deductible for purposes of calculating earnings and profits and thus should not trigger the alternative minimum tax for corporate taxpayers.<sup>10</sup>

**2. Passive Loss Rules.** If the production activity constitutes a trade or business, as seems likely to be the case, the Film Deduction will be subject to the passive loss rules with respect to certain taxpayers, including individuals and personal service corporations.<sup>11</sup> C corporations that are more than 50% owned by five or fewer individuals (“Closely Held Corporations”), and that are not personal service corporations, cannot use passive losses to shelter investment income but can use passive losses against other income. The passive loss rules do not apply to non-Closely Held Corporations.

Individuals and personal service corporations that do not “materially participate” in the activity can only

deduct passive losses, including the Film Deduction, to the extent of “passive income,” which generally is limited to income from real estate and from passive interests in businesses held by pass-through entities. Passive income also includes income from the Qualified Audio-Visual Work. If the Film Deduction is restricted under the passive loss rules, the excess carries forward and may be deducted against all ordinary income when it is “freed up” by future passive income, including gain from the sale of the Qualified Audio-Visual Work. This is so even if this gain is long-term capital gain (discussed below). Thus, the taxpayer would be able to deduct the Film Deduction against ordinary income and would still be entitled to long-term capital gain treatment on the sale proceeds.

**3. At-Risk Rules.** For individuals and Closely Held Corporations, the Film Deduction will also be subject to the at-risk rules. Under the at-risk rules, the taxpayer may only take a deduction for direct investment and borrowed amounts for which the taxpayer has ultimate direct recourse liability. For example, if any portion of the Film Deduction is funded with debt, the taxpayer must have ultimate liability for that debt directly to the lender, without a right to reimbursement from any third party. Such a liability will be included in the “at-risk” amount even if the risk is ameliorated with future license payments from a creditworthy licensee.

**4. Deferral of Income.** The benefit of the Film Deduction will be magnified if income from the Qualified Audio-Visual Work can be deferred. One way income could be deferred is with an installment sale of the Qualified Audio-Visual Work if it does not constitute inventory. This approach would permit the seller to defer gain while permitting the buyer an immediate stepped-up basis for purposes of calculating the buyer’s available depreciation or amortization. This approach effectively permits mismatching of the seller’s income and the buyer’s deduction.

Under the installment sale rules, an additional annual interest charge is imposed on the deferred tax liability attributable to the portion of the installment sale in excess of \$5 million. The \$5 million test is applied at the individual owner level in the case of a pass-through entity.<sup>12</sup>

If an installment sale cannot be used, it may be possible to interpose a licensee that is indifferent to the income that would otherwise be taxable (e.g., income from pre-sales), such as a licensee with NOLs or that is in a tax-free jurisdiction outside the U.S.

**5. Long-Term Capital Gain.** Most remarkably, the Film Deduction is not treated as amortization or depreciation. Thus, it should not be subject to recapture at ordinary income rates. This means

<sup>6</sup> Sections 56(b)(1)(A)(i), 67(b), 63(d)(1), and 62(a)(1).

<sup>7</sup> See *Treatise*, Section 5.03[A][2].

<sup>8</sup> *U.S. v. Manor Care, Inc.*, 490 F.Supp. 355 (D.Md. 1980) (preopening activities for a nursing home were a trade or business); *Blitzer v. U.S.*, 684 F.2d 874 (Ct. Cl. 1982) (construction of rental real property constituted a trade or business).

<sup>9</sup> Section 56(g)(4)(C)(i).

<sup>10</sup> Compare Section 312(k)(3)(B), requiring the deduction under Section 179 to be amortized over five years for purposes of calculating earnings and profits.

<sup>11</sup> Section 469. See *Treatise*, Section 9.08.

<sup>12</sup> IRS Notice 88-2, 1988-1 C.B. 387.

that if the Qualified Audio-Visual Work is sold after being held for one year, and if it does not constitute inventory, the entire gain, including the gain attributable to the Film Deduction, will be taxed at a maximum federal rate of 15% applicable to long-term capital gains for individuals. This is a remarkable benefit that effectively converts ordinary income into long-term capital gain. There is no special capital gain rate for C corporations, so there is a tremendous incentive to partially finance films by effectively transferring this benefit from film companies that are C corporations to pass-through entities held by individuals.

To qualify for long-term capital gain treatment, the property must be "held" for one year.<sup>13</sup> In order for 100% of the gain to qualify for long-term capital gain treatment, the Qualified Audio-Visual Work needs to be held for one year from the date of completion (probably of the answer print).<sup>14</sup> As mentioned above, it is critical that the Qualified Audio-Visual Work not constitute inventory. If the ultimate sale is made pursuant to a contract entered into prior to production, the Qualified Audio-Visual Work may be treated as inventory.<sup>15</sup> It is also critical that the transaction constitute a "sale" for tax purposes.<sup>16</sup>

**6. Case Law Limitations.** Tax shelters based on the Film Deduction need to comply with limitations imposed by case law, including: (a) the taxpayer may need a profit motive<sup>17</sup> and (b) the transaction must not be vulnerable to being recast based on the doctrine of substance over form in a manner that would eliminate the tax benefits.<sup>18</sup>

**7. Summary.** In summary, the homerun is to finance a film on a leveraged basis that complies with the at-risk rules using a pass-through entity with investors that can either immediately deduct the Film Deduction against passive income or that do not mind postponing the deduction until a sale. The Qualified Audio-Visual Work could then be held for one year after completion and sold, generating long-term capital gain subject to the 15% maximum federal capital gain rate. If the investors were able to deduct the Film Deduction against prior passive income, the sale could be made on the installment method, further postponing the gain while

permitting the buyer immediate basis for its own deductions.

## II. Deducting Residuals and Participations

**A. In General.** Effective for films placed in service<sup>19</sup> after October 22, 2004, the Act permits taxpayers to elect, on a film-by-film basis, to irrevocably adopt one of two approaches with respect to the deduction of participations and residuals for that film.<sup>20</sup> Under one approach, the taxpayer may elect to increase the adjusted tax basis of the film by the amount of participations and residuals that the taxpayer ultimately may owe based on its estimate of the income from the film during the first ten years after the film is placed in service. This choice effectively codifies the *Transamerica*<sup>21</sup> case. Alternatively, the taxpayer may elect to deduct the participations and residuals when paid. In most cases, it would seem that this later election would be preferable, particularly if there were substantial participations payable in the early years of a film's release.

**B. Definition of Participations and Residuals.** Participations and residuals are defined as amounts that "by contract vary with the amount of income earned in connection with" the film. It appears that deferrals payable out of gross receipts are included within this definition, and even box office bonuses may be included, since the statute does not say whom the "income" has to be earned by, and in any event box office gross typically impacts the income earned by whoever has to pay the participations. If deferrals are included, it creates an incredible opportunity to accelerate deductions by converting talent salaries (which would normally be capitalized) into equivalent deferrals payable out of 100% of gross receipts (which would now be fully deductible when paid). It also appears that contingent payments owed to licensors would qualify as "participations" under this definition, so it may be possible to accelerate the deduction of advances or minimum guaranties by converting them into payments out of 100% of gross receipts.

## III. Income Forecast Amortization Based on Gross Income

The Act states that in calculating income forecast amortization for films placed in service<sup>22</sup> after October 22, 2004, the calculation will be based on the taxpayer's gross income from the film.<sup>23</sup> Prior to the Act, the IRS

<sup>13</sup> Section 1222(3).

<sup>14</sup> Cf., Rev. Rul. 62-140, 1960-2 C.B. 181 and Rev. Rul. 75-534, 1975-524 C.B. 342 (completion of construction of real property).

<sup>15</sup> See *Treatise*, Section 2.05.

<sup>16</sup> See *Treatise*, Section 2.02.

<sup>17</sup> See *Treatise*, Section 9.02. However, it is not at all clear that the Film Deduction requires a profit motive, because Section 181 flatly permits the deduction without any trade or business or investment requirement.

<sup>18</sup> See *Treatise*, Section 9.03.

<sup>19</sup> See *Treatise*, Section 5.03[a][1].

<sup>20</sup> New IRC Section 167(g)(7).

<sup>21</sup> *Transamerica Corp. v. U.S.*, 999 F.2d 1362 (9th Cir. 1993). See *Treatise*, Section 5.03[g].

<sup>22</sup> See *Treatise*, Section 5.03[a][1].

<sup>23</sup> New Section 167(g)(5)(E).

and the courts required the calculation to be made based on *net* income,<sup>24</sup> which had the effect of substantially delaying the amortization of film costs because theatrical distribution expenses reduced or eliminated early net income.

#### IV. Partial Exclusion of Income for Films Produced in the U.S.

**A. In General.** The Act provides for an exclusion of a percentage of worldwide net income attributable to audio-visual works if at least 50% of the total compensation relating to production of the audio-visual work is compensation for services performed in the United States.<sup>25</sup> The exclusion is 3% in 2005 and 2006, 6% from 2007 through 2009, and 9% thereafter. In no event may the exclusion exceed 50% of the total W-2 wages paid by the taxpayer during the applicable tax year. The exclusion also applies for purposes of the alternative minimum tax.

**B. Type of Audio-Visual Works.** The exclusion applies regardless of the medium of intended exploitation (such as theatrical, television, or DVD). Films will not qualify for this benefit if the film includes “visual depictions of actual sexually explicit conduct.” Other than this restriction, there are no limits on content

or type of production. For example, even Monday Night Football qualifies.

**C. Income Exclusion Limited to Owner.** The exclusion only applies to films “produced by the taxpayer,” and it appears based on analogous case law that whoever is the owner of the film during production will be treated as the producer, even if it pays an independent film production company to physically produce the film, as long as the rights are not transferred to the production company during production.<sup>26</sup> Thus, this issue is analogous to the requirement of ownership for the Film Deduction, discussed above.

**D. Allocations.** The remarkably complex aspect of the Act, which is left to the IRS to figure out, is how to allocate all the expenses of the taxpayer for purposes of calculating the net income from the audio-visual work for purposes of the exclusion. It goes far beyond determining what costs should be capitalized to the film,<sup>27</sup> since it will now require allocations that never before had to be made for tax purposes, such as allocations of indirect expenses relating to distribution activities. It is a safe bet that film companies will not use the same allocations that they use in calculating third-party participations, or there may not be much net income left to exclude.

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<sup>24</sup> See *Treatise*, Section 5.03[C][1]

<sup>25</sup> New Section 199. The exclusion is somewhat awkwardly worded as a “deduction” of a portion of net income, but the practical effect is the same as a partial exclusion since it cannot be used to create a carryforward net operating loss.

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<sup>26</sup> Reg. 1.263A-2(a)(1)(ii)(A); *Suzy’s Zoo v. Commissioner*, 273 F.2d 875 (9th Cir. 2001).

<sup>27</sup> See *Treatise*, Section 5.01.

## NEW LEGISLATION AND REGULATIONS

### **Pennsylvania enacts film production tax credit**

The state of Pennsylvania is hoping to increase film production within its borders. And it's using a new and unique tax credit as a lure.

The credit is available to producers of "feature films, television series and television shows of 15 minutes or more in length, intended for a national audience." (The credit is not available for certain types of productions, including: news or current events programs, weather or market reports, "public programming," talk or game shows, sports events, industrial films or productions featuring "sexual . . . performances.")

To qualify for the credit, 60% of a production's total production expenses must be incurred in Pennsylvania. To claim the credit, an application must be submitted to the Pennsylvania Department of Revenue. If the Department approves the application, the credit amounts to 20% of the amount spent in Pennsylvania on production for such things as salaries, construction, operations, editing, photography, sound synchronization, lighting, wardrobe and accessories, and the cost of rental of facilities and equipment (but not marketing or advertising costs).

Technically, 20% is the most the credit might be, because the Department of Revenue is not permitted to approve more than \$10 million in credits in any single year. To be certain the Department limits the credits it approves to no more than that amount, applications must be submitted by February 15th, and the Department will notify applicants of the credits that have been approved by August 15th. If applications seeking more than \$10 million are submitted in a single year, the Department will allocate a total of \$10 million in credits proportionately among all of that year's applicants.

The Pennsylvania Film Production Credit is just that – a "credit" against state taxes that a production company otherwise would be obligated to pay to Pennsylvania. The state will not be issuing cash refunds, though if the full amount of the credit isn't used (because the credit exceeds the taxes owed by the production company), the unused portion of the credit may be "carried forward" and used over as many as three years.

Moreover, the production company may sell its credit (or even just part of it) to another company that pays taxes in Pennsylvania (with the approval of the Pennsylvania Department of Community and Economic Development). The purchaser of a credit may use it to

offset up to 50% of its state tax for the year of the purchase, but the purchaser may not carry forward any unused part of the credit.

*Pennsylvania House Bill No. 147*, amending the Pennsylvania Tax Reform Code of 1971 by adding Article XVII, Sections 1701-C et seq., authorizing a film production tax credit, available at <http://www2.legis.state.pa.us/WU01/LI/BI/BT/2003/0/HB0147P4323.pdf>

### **California makes it a crime to disseminate recordings, movies, TV programs and electronic games over the Internet, without disclosing sender's email address and titles of disseminated works**

The state of California has enacted a statute that makes it a crime to disseminate entertainment – whose copyrights are owned by others – over the Internet, without disclosing the sender's email address as well as the titles of the disseminated works. The purpose of the new law is to discourage Internet piracy. It does so by supplementing the rights granted to creators by the federal Copyright Act.

Though the California law itself does not prohibit piracy, it requires those who engage in online piracy to reveal their own email addresses and the titles of the works they are pirating – thereby making it easier for copyright owners to detect the infringement of their works and to identify infringers.

By imposing its disclosure requirements on those who "electronically disseminate" entertainment, the act applies to all forms of Internet transmission including email and instant message attachments, website downloads, and peer-to-peer distribution. The statute does not apply, though, to transmissions among family members or over home networks.

The penalty for violating the statute's requirements is serious. Adults may be punished by fines of as much as \$2,500, or as much as a year in jail, or both. Minors may be punished by fines of as much as \$250 for a first or second offense, and as much as \$1,000 or a year in jail or both for third and subsequent offenses.

The statute, though new, is patterned after an old and similar statutes, commonly known as "true name and address" statutes that are on the books in California and elsewhere, that require those who distribute tapes, CDs,

videos and DVDs to affix their names and addresses to the products they distribute (*ELR* 10:8:16, 12:5:21, 13:6:12, 16:4:24, 16:5:32).

The new Internet piracy statute was introduced by state Senator Kevin Murray.

*California Senate Bill No. 1506*, rewriting section 653aa of the California Penal Code, relating to Internet piracy, available at [http://www.leginfo.ca.gov/pub/bill/sen/sb\\_1501-1550/sb\\_1506\\_bill\\_20040921\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/bill/sen/sb_1501-1550/sb_1506_bill_20040921_chaptered.pdf)

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## INTERNATIONAL DEVELOPMENTS

### **Court of Arbitration for Sport rejects protest of Korean gymnast who contended that scoring error deprived him of Olympic gold medal that was awarded instead to American Paul Hamm**

American gymnast Paul Hamm had to compete, twice, for the gold medal in the 2004 Olympic Men's Individual All-round event. He competed once in Athens, Greece, during the Olympics itself; and he competed a second time in Lausanne, Switzerland, during an arbitration conducted by the Court of Arbitration for Sport. Hamm won both times, thereby securing himself a place in the annals of Olympic sports and of sports law.

To win the gold medal the first time, Hamm narrowly outscored Korean gymnast Yang Tae Young. However, according to Yang, an error was made in calculating his score on the parallel bars. The error understated Yang's score by a tenth of point, which he argued was enough to deprive him of the gold medal he otherwise would have won.

The error alleged by Yang was not an error of judgment. Rather, in the All-round, each competitor begins with a "start value," from which judges may deduct points, based on the gymnast's performance. The "start value" however is determined during, not before, the performance, based in part on the difficulty of the elements performed. Yang's start value was 9.9, but based on the difficulty of the elements he performed, it should have been 10.0.

Yang's performance was recorded on videotape, and no one seems to have disputed that Yang should have had a start of value of 10. What was disputed was what could or should have been done about the error, once it was reported. Though there was disagreement about when the error was reported, even the Koreans acknowledged they disputed Yang's start value after the competition was completed. That made all the difference, when the matter got to the Court of Arbitration for Sport.

In an opinion by British Barrister Michael J. Beloff, German lawyer Dirk-Reiner Martens, and Kenyan Barrister Sharad Rao, the Court of Arbitration decided that the Koreans reported the error too late. "There is no doubt that a mechanism exists for reversing judging errors," the arbitrators acknowledged; but "any appeal must be dealt with during, not after a competition."

The arbitrators explained that this was so, because "This interpretation [of the rules of the International Gymnastics Federation] conforms with the natural expectation of both participants, spectators and the public at large that at the close of a competition in any sport, gymnastics included, the identity of the winner should be known, and not subject to alteration thereafter save where exceptionally, for example, the purported winner is proved to have failed a drug test and so been disqualified."

The arbitrators ruled that "any protest to be effective within the ambit of [International Gymnastic Federation] rules had to be made before the end of the competition," and Koreans' protest was too late because it "was made after the competition ended."

Even if the protest had not been late, the arbitrators may have been unwilling to overrule the onsite officials anyway. "The extent to which, if at all, [the Court of Arbitration for Sport] can interfere with an official's decision is not wholly clear," they said. "An absolute refusal to recognize such a decision as justiciable and to designate the field of play as 'a domain into which the King's writ does not seek to run' . . . would recognize that there are areas of human activity which elude the grasp of the law, and where the solution to disputes is better found, if at all, by agreement. It would contribute to finality. It would uphold, critically, the authority of the umpire, judge or referee, whose power to control competition, already eroded by the growing use of technology such as video replays, would be fatally undermined if every decision taken could be judicially reviewed. And, to the extent that the matter is capable of analysis in conventional legal terms, it could rest on the premise that any contract that the player has made in entering into a competition is that he or she should have the benefit of honest 'field of play' decisions, not necessarily correct ones." Nevertheless, the arbitrators acknowledged that "Sports law does not . . . have a policy of complete abstention." But, they added, "Courts may interfere only if an official's field of play decision is tainted by fraud or arbitrariness or corruption."

Although the question of whether Yang would have been the gold medalist was not a factor in the outcome, the arbitrators noted that he may not have been, even if he had been given a start value of 10 for his parallel bars performance. "After the parallel bars there was one more apparatus on which the competitors had to perform ie the high bar. We have no means of knowing how Yang would have reacted had he concluded the competition in this apparatus as the points leader rather than in third



position. He might have risen to the occasion; he might have frozen (his marks on the high bar were in fact below expectation); and speculation is inappropriate. So it needs to be clearly stated that while the error may have cost Yang a gold medal, it did not necessarily do so.”

Yang was represented by Allen & Overy in Hong Kong. The International Gymnastics Federation was represented by Sara Ellen Hübscher in Lyss, Switzerland, and André Gossin in Moutier, Switzerland. Paul Hamm was represented by Kelly C. Crabb of Morrison & Foerster in Los Angeles. The United States Olympic Committee was represented by Mark S. Levinstein of Williams & Connolly in Washington D.C.

*Yang Tae Young v. International Gymnastics Federation*, CAS 2004/A/704 (Oct. 2004), available at <http://www.tas-cas.org/en/juris/frmjur.htm>

### **British tabloid invaded privacy of Naomi Campbell by reporting her treatment for drug addiction, UK House of Lords rules in 3-to-2 opinion reinstating £3500 judgment in super-model’s favor**

As judgments go, £3500 (less than \$7000) isn’t much, even in the United Kingdom, where judgments tend to be smaller than they are in the United States. It certainly won’t change the lifestyle of supermodel Naomi Campbell, to whom the judgment was awarded. But the judgment is significant, nonetheless, because it was reinstated by the House of Lords (the UK’s highest court) in a 3-to-2 opinion that holds that British law does indeed include a right of privacy. In fact, all five of the judges – four Lords and a Baroness – agreed that British law protects the right of privacy. They split only on the question of whether Campbell’s privacy rights were outweighed by her adversary’s right to free expression.

Campbell’s adversary was the publisher of the *Mirror*, a British tabloid newspaper that published an article and photos that reported she was attending Narcotics Anonymous meetings to treat her addiction to drugs. Unlike the United States, “there is no overarching, all-embracing cause of action for ‘invasion of privacy’” in the UK. But Campbell sued the *Mirror* nonetheless for “breach of confidence.”

At one time in British legal history, a successful “breach of confidence” claim required the existence of an actual confidential relationship between the person whose privacy was invaded and the person who invaded it. (Campbell herself had won such a case a couple of years before, when she sued her former personal assistant for disclosing to the *News of the World* that Campbell had had an affair with actor Joseph Fiennes. (*ELR* 24:4:4))

Now, though, British law “imposes a ‘duty of

confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.” This change in the law is due, at least in part, to the adoption of the European Convention on Human Rights, article 8 of which requires “respect for private and family life.” The European Convention isn’t entirely one-sided, however. Its article 10 also guarantees “freedom of expression.”

Because of the natural tension between these two articles of the European Convention, Campbell’s lawsuit against the *Mirror* was not easily decided. The *Mirror* claimed a right to publish its article and photos, because Campbell had earlier said that many other models use drugs but she does not. Thus, when Campbell’s statements turned out to be false, the *Mirror* concluded her drug addiction was newsworthy.

To decide the case, the information published by the *Mirror* was divided into five categories: “(1) the fact of Miss Campbell’s drug addiction; (2) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at Narcotics Anonymous; (4) the details of the treatment – how long she had been attending meetings, how often she went, how she was treated within the sessions themselves, the extent of her commitment, and the nature of her entrance on the specific occasion; and (5) the visual portrayal of her leaving a specific meeting with other addicts.”

All five categories of information were deemed to be “confidential.” But because Campbell had denied using drugs (while asserting that other models do), even Campbell acknowledged that the *Mirror* was privileged to publish the information in the first two categories. The case was about the *Mirror*’s publication of the last three categories.

Campbell won the first round of the case, when a trial court judge ruled in her favor and awarded her £3500. The *Mirror* won the second round, when the Court of Appeals ruled in its favor, “allowed the appeal” and “discharged” the trial judge’s order. Campbell then won the third and final round, when the House of Lords split 3-to-2 in her favor, and “restored” the trial judge’s award.

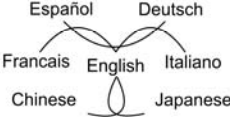
In separately written opinions, Lord Hope of Craighead, Baroness Hale of Richmond, and Lord Carswell agreed that the *Mirror* should not have revealed that Campbell was attending Narcotics Anonymous meetings or the details of her treatment, nor should it have published photos of her leaving a meeting with other addicts.

For Lord Hope and Baroness Hale, publication of the photos seems to have tipped the balance in Campbell’s favor. Lord Hope specifically said that “Had it not been for the publication of the photographs, and looking to the text only, I would have been inclined to regard the balance between these rights [of privacy and freedom of expression] as about even.” Baroness Hale said “There was no need” to publish photos showing

Campbell going or coming from a Narcotics Anonymous meeting, because even without the photos, the *Mirror's* editor acknowledged that the article “would have been a front page story.”

*Campbell v. MGN Limited*, [2004] UKHL 22, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040506/campbe-1.htm>

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## RECENT CASES

### **CBS miniseries “Blonde” about Marilyn Monroe is not substantially similar to play “Marilyn Dances,” and thus did not infringe play’s copyright, federal District Court rules**

The CBS miniseries “Blonde” was based on Joyce Carol Oates’ book *Blonde* about Marilyn Monroe. The miniseries was not based on, nor was it substantially similar to, a play about Marilyn Monroe titled “Marilyn Dances: Happy Birthday Mr. President.” Nor did the miniseries copy anything protectible from the play “My Aretha.”

All of this can be reported with confidence, because federal District Judge Richard Roberts so ruled, in a copyright and trademark infringement lawsuit filed against CBS (and others) by the author of the two plays, a fellow named David L. Whitehead.

Based on Judge Roberts’ detailed synopses of the miniseries and the plays, there was less similarity among them than usually exists in plagiarism cases. No doubt for that reason, the judge concluded that CBS’s miniseries and Whitehead’s plays “are very different in total concept and feel,” in part because “Marilyn Dances” is whimsical while “Blonde” is a drama. What’s more, the judge found, Whitehead’s assertion that the miniseries copied his writing style was “wholly meritless” as a matter of fact. But even if the two works did share the same style, it wouldn’t have helped Whitehead’s case, because “style alone cannot support a copyright claim.”

Whitehead’s play about Monroe and CBS’s miniseries did portray some of the same facts. But “no one may claim copyright protection for facts,” Judge Roberts ruled. And short phrases in the miniseries that were similar to phrases in Whitehead’s play “My Aretha” did not support his copyright claim either, because the “phrases serve different purposes in the works and have a basis in fact.”

Judge Roberts also rejected Whitehead’s trademark claim. He explained that although titles of plays have qualified for trademark protection, such protection “does not extend to the corpus of the . . . the play. . . .”

For these reasons, the judge granted CBS’s motion for summary.

*Editor’s note:* This is not the first time David L. Whitehead has appeared in these pages. Several years ago, in an infringement lawsuit against Paramount and Disney, Whitehead alleged that his autobiography, *Brains, Sex, & Racism in the C.I.A.*, was the basis for at

least a half-dozen movies including “Mission: Impossible” and “Bad Company.” Judge Paul Friedman found otherwise, and dismissed that case too, in an opinion that warned Whitehead that if other cases then pending in Judge Friedman’s court were as “lacking in merit” as that case, he “may very well award attorneys fees” to those Whitehead had sued in those other cases (*ELR* 21:7:8). Judge Roberts has written nothing, yet, about whether he may award CBS the attorneys fees it incurred in the successful defense of this case.

Whitehead represented himself. CBS and its co-defendants were represented by Paul R. Taskier of Dickstein Shapiro Morin & Oshinsky in Washington D.C. and by Jason Christopher Chipman of Hogan & Hartson in Washington D.C.

*Whitehead v. CBS/Viacom, Inc.*, 315 F.Supp.2d 1, 2004 U.S.Dist.LEXIS 6184 (D.D.C. 2004)

### **NFL eligibility rule barring players who graduated from high school less than three football seasons earlier is exempt from federal antitrust law, so Ohio State sophomore Maurice Clarett was not eligible for NFL draft, federal appellate court rules**

The National Football League is playing its 2004 season without the services of former Ohio State running back Maurice Clarett. Clarett led the Buckeyes to an undefeated season in 2002, as a freshman. And the fact that he was a *freshman* that year is exactly why he isn’t playing in the NFL this year. To be eligible to play in the NFL, players must be out of high school for three football seasons, and Clarett isn’t, quite yet.

All of this came to the attention of federal judges, because Clarett sued the NFL in an effort to become eligible for the April 2004 draft. His lawsuit alleged that the NFL’s eligibility rule violates federal antitrust law, because it’s an agreement among potential employers – NFL teams – to boycott certain players.

Early in the case, Clarett was as successful in the courtroom as he had been on the football field. Federal District Judge Shira Scheindlin entered a summary judgment in his favor and denied the NFL’s request to stay (pending its appeal) her order that Clarett was eligible for the draft (*ELR* 25:9:4, 25:11:27). Judge Scheindlin’s opinions were persuasive, not the least

because Clarett had a strong Circuit Court precedent in his favor – *Mackey v. National Football League* – and Judge Scheindlin applied *Mackey*'s teachings with bold confidence.

Nevertheless, Clarett's victory surprised many observers for two reasons. First, the *Mackey* case was decided in 1976 by the *Eighth* Circuit Court of Appeals, while Judge Scheindlin sits in the Southern District Court of New York which is in the *Second* Circuit. Second, in the years that followed *Mackey*, the Second Circuit itself decided three similar cases – *Wood v. National Basketball Association* (ELR 8:12:12), *National Basketball Association v. Williams* (ELR 16:11:15), and *Caldwell v. American Basketball Association* (ELR 17:12:9) – all of which differed with *Mackey* on an issue of critical importance to Clarett.

That critical issue was whether eligibility rules adopted by professional sports leagues are exempt from antitrust laws, and if so, under what circumstances. All four earlier decisions agreed that eligibility rules *may* be exempt from antitrust laws, under a doctrine known as the "labor exemption," if the leagues' players are represented by a players association for collective bargaining purposes. But the Eighth Circuit's *Mackey* decision held the exemption is applicable only under circumstances that are more difficult for leagues to satisfy than those required by the Second Circuit's *Wood*, *Williams* and *Caldwell* decisions.

Thus, when the National Football League appealed from Judge Scheindlin's order in favor of Clarett, the NFL had "local" law in its favor; and it won. In an opinion by Judge Sonia Sotomayor, the Second Circuit held that the NFL's eligibility rule is exempt from antitrust law, for three reasons.

First, Judge Sotomayor ruled that the eligibility rule is a mandatory subject for collective bargaining. Second, the fact that the rule is a "hardship" on players who are not yet members of the NFL Players Association did not make the rule "impermissible." And third, it did not matter that the rule wasn't actually bargained about during negotiations that resulted in the current collective bargaining agreement; all that matters is that the rule would have been bargained about, if either the NFL or the Players Association had raised it, because it is a mandatory subject for bargaining.

Since the eligibility rule is exempt from antitrust law, Judge Sotomayor did not have to consider whether it otherwise would have violated antitrust law; and she didn't.

The Court of Appeals has since denied Clarett's petition seeking a rehearing *en banc* (by all of its members).

Clarett was represented by Alan C. Milstein of Sherman Silverstein Kohl Rose & Podolsky in Pennsauken N.J. The National Football League was represented by Gregg H. Levy of Covington & Burling in Washington D.C.

*Editor's note:* One of the interesting issues raised by this case is how it (or a similar case) would come out, if it were litigated in a Circuit *other than* the Eighth or the Second. In other words, is there a split among the circuits on the circumstances under which the labor exemption applies? Judge Sotomayor thought that though there once may have been a split, there is no longer, because of the Supreme Court's 1996 decision in *Brown v. Pro Football* (ELR 18:2:3), which she interpreted as adopting labor exemption standards that are the same as those in the Second Circuit. *Brown* certainly can be read that way, though even Judge Sotomayor acknowledged that the Supreme Court "expressed some reservations" about the "broader" version of the exemption used by the lower court in that case. A second interesting issue raised by this case is whether the labor exemption would protect an established league from antitrust liability, if (for example) a collectively-bargained for reserve clause made it impossible for a new competing league to hire veteran players. Judge Sotomayor suggested that under those circumstances, the labor exemption would not protect an established league from an antitrust suit filed by a competing league.

*Clarett v. National Football League*, 369 F.3d 124, 2004 U.S.App.LEXIS 10171 (2nd Cir. 2004)

### **Songwriter's heirs are entitled to statutory damages of \$100,000 (or more) for each of two willfully infringed songs, but not for each of 16 albums on which those songs were recorded, federal appellate court affirms**

Sonolux Records infringed the copyrights to two songs written by the late Puerto Rican composer Guillermo Venegas-Lloveras. It did so by releasing the songs on 16 separate albums recorded by several different artists, apparently without mechanical licenses. A lawsuit was the eventual result, filed by Venegas-Lloveras' heirs, who now own the songs' copyrights.

Though the lawsuit was not surprising, Sonolux's response was. It defaulted. And a \$1.6 million default judgment was thereafter entered against the record company. The federal district judge was satisfied that Sonolux had infringed the songs' copyrights "willfully," which meant that under Copyright Act section 504(c), the judge could award "statutory damages" (rather than actual damages or profits). The judge decided to award the heirs \$100,000 (the Act authorizes as much as \$150,000) for each of the 16 albums on which the songs appeared, which brought the total judgment to \$1.6 million.

That finally got Sonolux's attention. It filed a motion to set aside the default and to reduce the amount of the judgment. The record company was partially

successful. A different district judge denied the record company's motion to set aside the default, but he did reduce the judgment from \$1.6 million to \$200,000. In an opinion by Judge Sandra Lynch, the Court of Appeals has affirmed the district judge's decision to reduce the judgment.

Judge Lynch explained that section 504(c) of the Copyright Act authorizes statutory damages for each *infringed* work, rather than for each *infringing* work. When the \$1.6 million judgment was entered, its amount was based on \$100,000 for each *infringing* work – namely each infringing album – and that was not correct. When the judgment was later reduced to \$200,000, its amount was based on \$100,000 for each *infringed* work – namely, each song. The second approach was correct, Judge Lynch held.

However, instead of simply affirming the \$200,000 judgment, Judge Lynch remanded the case to the district judge, so the amount of the judgment could be determined one more time. Judge Lynch did this, because she noted that the Copyright Act authorizes statutory damages of \$150,000 for each infringed work – not merely the \$100,000 the district judge had awarded. Judge Lynch concluded that if the district judge originally thought the heirs should receive \$1.6 million, he may want to award them \$150,000 for each infringed song, which would bring the judgment to \$300,000 – much less of course than \$1.6 million, but noticeably more than \$200,000.

The songwriters' heirs were represented by Heath W. Hoglund. Sonolux Records was represented by David M. Rogero.

*Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 2004 U.S.App.LEXIS 11090 (1st Cir. 2004)

**Lawyer disqualified from continuing to represent Blix Street Records in suit over right to distribute early Eva Cassidy album, over objections of Cassidy's parents who were lawyer's clients too when lawsuit was filed, but now want to settle case even though Blix Street does not**

Recording artist Eva Cassidy died of cancer in 1996, at age 33, almost two years before Blix Street Records released her platinum-selling album "Songbird." Sadly, Cassidy never knew she had a recording deal with Blix Street, because it was her parents who made that deal after she died.

The contract between Blix Street and Cassidy's parents gave the record company the exclusive right to release Cassidy's recordings. So it wasn't surprising that when another record company named Q & W Music released a very early Cassidy recording, Blix Street and the Cassidys sued Q & W, in federal court in Maryland.

It wasn't even surprising that Blix Street and the Cassidys were represented by the same lawyer – Don Engel of the Los Angeles firm of Engel & Engel.

The album that prompted the lawsuit was one that Eva Cassidy made when she was a member of a short-lived group called "Method Actor." The case didn't go as well as Engel's clients probably hoped, for reasons that may not have been obvious when the suit was first filed. It turned out that Method Actor's song writer and guitarist had obtained Eva Cassidy's written consent to release the album. Moreover, as a joint author of the album, he had the right to license its release by Q & W, even without the consent of Cassidy's parents; and that's exactly what he did.

This at least is what federal District Judge Benson Legg determined, when he denied a motion filed by Blix Street and the Cassidys seeking a preliminary injunction that would have barred Q & W from continuing to distribute the "Method Actor" album. In an unpublished order, Judge Legg simply required Q & W to affix stickers to the album, indicating it was not an Eva Cassidy solo album; and B & W did so.

Thereafter, the Cassidys decided to settle the case – something Blix Street was unwilling to do. As a result, the Cassidys retained a different lawyer, and Engel withdrew as their lawyer, but Engel continued to represent Blix Street. Six weeks after Engel withdrew as their lawyer, the Cassidys filed a motion to disqualify him from continuing to represent Blix Street. And Judge Legg has granted their motion.

Judge Legg explained that Maryland's Rules of Professional Conduct prohibit Engel from continuing to represent any of his former clients in the case if the dispute between Blix Street and the Cassidys is material, concerns the rights at issue in the case, and was not waived.

According to Judge Legg, Engel himself acknowledged the dispute was "major, vigorous and vitriolic," and that it involved the rights claimed by Method Actor's songwriter and guitarist.

Engel did argue that the Cassidys had waived their objection to his continued representation of Blix Street. But Judge Legg concluded that the facts simply did not show such a waiver – not expressly, or by delay. Because the Cassidys had not waived their objection, Judge Legg disqualified Engel and his law firm from continuing to represent Blix Street in the case.

Blix Street was represented by Donald S. Engel of Engel and Engel in Los Angeles. The Cassidys were represented by James Nolan and Stephen Andrew Oberg of Council Baradel Kosmerl & Nolan in Annapolis. Q & W Music was represented by Ronald B. Rubin of Rubin and Rubin in Rockville, and Margaret A. Lange of Perkins Smith and Cohen in Boston.

*Cassidy v. Lourim*, 311 F.Supp.2d 456, 2004 U.S.Dist.LEXIS 5634 (D.Md. 2004)

**Clear Channel Communications settles case filed by Denver rock concert promoter, alleging Clear Channel threatened artists with loss of air play and promotional assistance unless their concerts were promoted by Clear Channel itself, after federal District Court denied Clear Channel's motion to dismiss attempted monopolization and business interference claims**

Less than a decade ago, Clear Channel Communications was just a medium sized broadcaster, with 43 radio stations and 16 television stations in its stable. Then, Congress passed the Telecommunications Act of 1996, which eliminated the cap on the number of radio stations a single company could own nationwide and substantially increased the number they could own within a single city (*ELR* 17:11:14). As a result of this change in the law, Clear Channel now owns 1200 radio stations – 10% of all radio stations in America – including eight stations in Denver. Clear Channel also got into the business of promoting rock concerts in Denver and elsewhere.

Clear Channel's remarkable growth has triggered some criticism, not the least of which was from Nobody in Particular Presents, Inc., a Denver rock concert promoter sometimes referred to by its acronym "NIPP." In a lawsuit filed by NIPP in federal court in Colorado, NIPP accused Clear Channel of violating federal and state antitrust law, and interfering with NIPP's business. Clear Channel did this, NIPP alleged, by threatening artists that unless they allowed Clear Channel itself to promote their concerts, Clear Channel radio stations would no longer play their recordings and wouldn't broadcast anything about their upcoming concerts. According to NIPP, artists responded to these threats by selecting Clear Channel to promote their concerts, rather than NIPP.

Clear Channel and NIPP settled the case, shortly before it was scheduled to go to trial, though not before both sides and Judge Edward Nottingham did a great deal of legal work. Clear Channel filed a motion for summary judgment, much of which Judge Nottingham denied. In a 72-page opinion that recites facts in detail and methodically analyzes the law, the judge ruled that NIPP had produced sufficient evidence to entitle it to a trial on several claims and issues.

Among other things, Judge Nottingham held: that Clear Channel could be held liable for the actions of its separately incorporated broadcasting subsidiaries; that the relevant market for assessing NIPP's monopolization claims was the market for rock concerts (rather than live music concerts generally, as Clear Channel had argued); and that NIPP had offered evidence (sufficient to require

a trial) that Clear Channel had "tied" radio air play and promotional support to artists' choice of Clear Channel as their concert promoter.

Judge Nottingham ruled in Clear Channel's favor on some issues. He held, for example, that although Clear Channel controlled more than 50% of the Denver rock concert market, that was not sufficient to find it has a monopoly in that market. On the other hand, the judge also ruled that NIPP had offered sufficient evidence to require a trial on whether Clear Channel had *attempted* to monopolize the Denver rock concert market.

Similarly, Judge Nottingham granted Clear Channel's motion for summary judgment on NIPP's claim for tortious interference with NIPP's contracts with artists. The judge did so, because NIPP had not offered evidence showing that Clear Channel *knew* about any contracts between NIPP and artists who then chose to have Clear Channel promote their concerts. On the other hand, the judge held that NIPP had offered sufficient evidence to go to trial on its claim that Clear Channel had interfered with NIPP's *prospective business relations* with artists.

Judge Nottingham also dismissed NIPP's claim that Clear Channel had violated the Colorado Consumer Protection Act by injuring NIPP's reputation among artists and record labels. The judge held that there was no evidence that artists or labels had changed their opinions of NIPP, or decided not to do business with it, as a result of anything Clear Channel may have said.

NIPP was represented by John Allen Francis of Davis Graham & Stubbs in Denver. Clear Channel was represented by Sean Patrick Costello of Jones Day Reaves & Pogue in Cleveland.

*Nobody in Particular Presents v. Clear Channel Communications*, 311 F.Supp.2d 1048, 2004 U.S. Dist. LEXIS 5665 (D.Colo. 2004)

**Universal Studios and its exclusive homevideo distributors must defend antitrust lawsuit filed by Universal's former distributors**

As a general rule, manufacturers are free "to exercise . . . independent discretion" about those with whom they do business. The Supreme Court itself said so, as long ago as 1919 (in *United States v. Colgate*). This means that manufacturers may choose which companies distribute their goods and which do not, and even may change their minds from time to time, if they like. What's more, it seems that copyright owners ought to be specially privileged to decide who distributes their works, because the Copyright Act itself explicitly gives copyright owners the exclusive right to distribute their works and to authorize others to do so.

Nevertheless, there are exceptions to the general rule. Over time, claims alleging those exceptions have been hotly litigated in the copyright industries, in cases involving disputes between movie studios and exhibitors (*ELR* 14:10:5), television production companies and broadcasters (*ELR* 8:9:8), book publishers and retail stores (*ELR* 23:5:16), and record companies and retail stores (*ELR* 7:5:20).

Now, in a lawsuit that is similar to those earlier cases, Universal Studios has been sued, along with its current home video distributors, Ingram Entertainment and Video Products Distributors. The lawsuit was filed by Flash Electronics and East Texas Distributing which used to distribute Universal videos and DVDs, but don't any longer. In fact, the lawsuit was prompted by Universal's decision to discontinue using Flash and East Texas, and to make Ingram and Video Products the studio's exclusive distributors.

The complaint filed by Flash and East Texas alleged several types of claims, the legal sufficiency of which Universal, Ingram and Video Products challenged with a motion to dismiss. Universal and its co-defendants were partially successful, but not completely so. Federal District Judge Raymond Dearie refused to dismiss many of Flash and East Texas's claims, so Universal, Ingram and Video Products will have to defend themselves against those, in further legal proceedings.

The motion filed by Universal and its co-defendants asked Judge Dearie to assess the adequacy of the allegations of Flash and East Texas's complaint, not the evidence. The motion, in other words, was not a motion for summary judgment. As a result, the ruling tells readers nothing about what actually happened in the case or its likely outcome, and very little if anything that would be useful in guiding other companies' actions in the future. Rather, Judge Dearie's opinion is a lesson on how to draft an antitrust complaint.

Judge Dearie concluded that the complaint, as drafted, adequately alleged that Universal, Ingram and Video Products violated the Sherman Act's ban on agreements in restraint of trade – an allegation that will be measured later in the case under the rule of reason. The judge also concluded that the complaint adequately alleged a claim that Universal had discriminated among its distributors in price, in violation of the Robinson Patman Act.

Universal, Ingram and Video Products didn't come away completely empty-handed, though. Judge Dearie agreed with them that Flash and East Texas failed to allege a *per se* antitrust claim. And the judge dismissed their monopoly claim, because neither Ingram nor Video Products has sufficient market power to have a monopoly, and the judge rejected the allegation that together they have a "shared monopoly."

Flash Electronics and East Texas Distributing were represented by Frederic B. Goodman of Marin Goodman in New York City. Universal was represented by Stuart

N. Senator of Munger Tolles & Olson in Los Angeles. Ingram was represented by James K. Leader of Leader & Berkin in New York City and John Calendar of Howrey Simon Arnold & White in Washington D.C. Video Products was represented by Robert Alan Johnson of Akin Gump Strauss Hauer & Feld in New York City.

*Flash Electronics v. Universal Music & Video Distribution*, 312 F.Supp.2d 379, 2004 U.S.Dist.LEXIS 6018 (E.D.N.Y. 2004)

### **Penguin Putnam wins reversal of judgment that its book of Dorothy Parker poems infringes compilation copyright to Stuart Silverstein's book of previously uncollected Dorothy Parker poems; Court of Appeals questions whether Silverstein's selection of poems was sufficiently "creative" to be protected by copyright, and rules that any interest Silverstein may have is too "slight" to be protected by injunction**

Penguin Putnam has won the reversal of a judgment and an injunction entered against it in a copyright infringement lawsuit filed by Stuart Y. Silverstein, the editor of the book *Not Much Fun: The Lost Poems of Dorothy Parker*.

Silverstein's book consists of 122 poems, all but two of which were published, individually, in magazines and newspapers while Parker was alive, but did *not* appear in four volumes of her collected poetry that were published before her death in 1967. Silverstein not only located, selected and arranged these 122 poems, he also published *Not Much Fun* himself – after he and Penguin were unable to agree on whether Penguin should publish them as part of a larger volume of all of Parker's poems (as Penguin wanted to do) or as a separate volume by themselves (as Silverstein wanted).

A few years after Silverstein published *Not Much Fun*, Penguin did publish a compilation of all of Parker's poems, including 121 of the 122 that appeared in Silverstein's book. What's more, the evidence showed that a Penguin editor had photocopied Silverstein's book, cut the poems apart with a scissors, and then pasted them into Penguin's manuscript, changing only the order in which they appeared. Silverstein had given them a "subjective" arrangement, while Penguin published them chronologically.

Silverstein didn't claim a copyright in Parker's poems themselves. But he did register a compilation copyright in his selection and arrangement of the poems he published. Armed with that copyright, Silverstein sued Penguin Putnam for infringement, and won. In an unpublished opinion, federal District Judge John Keenan

granted Silverstein's motion for summary judgment and issued an injunction that barred Penguin from continuing to publish its compilation and required Penguin to recall all existing copies.

Penguin appealed, successfully. In an opinion by Judge Dennis Jacobs, the appellate court reviewed the process by which Silverstein had selected Parker's previously uncollected poems, and concluded that "material questions of fact exist as to whether Silverstein exercised creativity in selecting the works for his compilation" – "questions [that] must be answered before the creativity, if any, in his selection process can be assessed." This has to be done, because the compilation copyright Silverstein claims is valid only if his selection of Parker's poems was "creative."

Silverstein also said he made 600 copy edits to the poems he published, changing punctuation, capitalization, indentation and titling – all of which Penguin copied. But Judge Jacobs said "There is a question as to whether copy editing changes of this kind are sufficiently creative to merit copyright protection." Even if they are, the judge held that Silverstein is estopped from claiming infringement based on those changes, because his book didn't indicate those changes had been made, and instead implied that the poems appeared in the form in which they were first published.

Finally, Judge Jacobs held that even if Silverstein has a copyright interest in his book, that interest is "so slight that it cannot properly be enforced by . . . injunction."

Silverstein was represented by Mark A. Rabinowitz of Neal Gerber & Eisenberg in Chicago. Penguin Putnam was represented by Richard Dannay of Cowan Liebowitz & Latman in New York City.

*Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 2004 U.S.App.LEXIS 9006 (2nd Cir. 2004)

### **Gibson Guitar's registered trademark for design of "Les Paul single cutaway guitar" is infringed by design of Paul Reed Smith Guitars' "Singlecut" guitar, federal District Court decides**

Gibson Guitar has won a significant victory against a competitor, in a dispute over the design of a guitar that has been a mainstay of Gibson's business for more than 50 years. At issue in the case is Gibson's "Les Paul single cutaway guitar" – a design so important to Gibson that the guitar manufacturer registered it as a trademark in 1999.

Gibson's Les Paul single cutaway guitar is a traditionally shaped guitar, the body of which has been modified by cutting away the section where the fingerboard meets the body. Paul Reed Smith began

selling its similarly-shaped "Singlecut" guitar in the year 2000, apparently in response to a request from a retail store following a dispute between Gibson and guitar retailers and distributors.

Gibson responded to Paul Reed Smith's "Singlecut" with a trademark infringement lawsuit, which thus far has been successful. In a lengthy and factually detailed opinion, federal District Judge William Haynes has ruled that Gibson's trademark is valid, because although it was "descriptive" at first, it has acquired secondary meaning, and because the design of its Les Paul guitar is not functional. Moreover, Judge Haynes has held that the design of Paul Reed Smith's "Singlecut" guitar infringes Gibson's trademark, because the "Singlecut" design is likely to cause confusion.

For these reasons, Judge Haynes has granted Gibson's motion for summary judgment establishing Paul Reed Smith's liability. All that remains in the case is the issue of damages.

Gibson Guitar was represented by Edward D. Lanquist, Jr., of Wadley & Patterson in Nashville. Paul Reed Smith Guitars was represented by Alan Dale Johnson of Willis & Knight in Nashville.

*Gibson Guitar Corp. v. Paul Reed Smith Guitars*, 311 F.Supp.2d 690, 2004 U.S.Dist.LEXIS 18210 (M.D.Tenn. 2004)

### **Defamatory article in legal newspapers, reporting that lawyer had been sanctioned by federal court, were protected by "fair reporting privilege," because articles were substantially accurate, Connecticut appellate rules in opinion affirming dismissal of lawyer's defamation lawsuit against newspapers and reporter**

Publicity is generally a good thing for attorneys, so mentions in articles in periodicals like the *New York Law Journal* and the *Connecticut Law Tribune* would be prized, under most circumstances. But not all. In fact, an attorney named Nancy Burton was so displeased with articles about her in those two newspapers that she sued their corporate parent, American Lawyer Media, Inc., and the reporter that wrote the articles. Burton's lawsuit, filed in state court in Connecticut, alleged claims for defamation, invasion of privacy, and infliction of emotional distress.

Burton's lawsuit was prompted by articles that reported that Burton had been sanctioned by a judge of the federal District Court in the Southern District of New York, as indeed she had. According to Burton's lawsuit, the articles contained falsehoods and misrepresentations. And in fact, they may have, because American Lawyer



and the reporter “conceded that defamatory matter was published.”

On the other hand, most of the statements that Burton complained about were “direct quotations from the decision” of the District Court explaining why it had sanctioned Burton. And the articles as a whole were “fairly derived from the [federal judge’s] decision.” That at least is what the Connecticut trial judge found, when he dismissed Burton’s lawsuit in response to a motion for summary judgment filed by American Lawyer and its reporter.

The Appellate Court of Connecticut has affirmed, ruling that American Lawyer and its reporter were protected from liability by the “fair reporting privilege.” Writing for the appellate court, Judge Alexandra DiPentima agreed with the lower court that the articles were substantially accurate; and Judge DiPentima held that this is all the “fair reporting privilege” requires.

Judge DiPentima rejected Burton’s argument that the lower court should have looked beyond the articles and the federal court’s opinion. And the judge also rejected Burton’s argument that the reporter should have reviewed the federal court file or contacted her before writing the articles.

Burton represented herself. American Lawyer Media and its reporter were represented by Lorin L. Reisner of Debevoise & Plimpton in New York City.

*Editor’s note:* This opinion is obviously of great (and personal) interest to the *Entertainment Law Reporter*, because most *ELR* articles are based solely on the contents of written judicial decisions – even articles reporting on lawyer malpractice and other painful cases. This opinion also is of interest to docudrama producers (and others), because they too often base their scripts on facts reported in judicial decisions, without independently vetting those decisions by reviewing courthouse files or interviewing involved parties. This opinion confirms that those in the entertainment industry may rely on facts in judicial opinions, so long as those facts are accurately portrayed.

*Burton v. American Lawyer Media, Inc.*, 847 A.2d 1115, 2004 Conn.App.LEXIS 222 (Conn.App. 2004)

### **Performing arts center may not exclude disabled patron’s service dog, even though it barked on previous occasions, and even if bark was disruptive, if bark was for benefit of disabled owner, Court of Appeals affirms in Americans with Disabilities Act lawsuit**

The California Center for the Arts may not exclude a disabled patron’s service dog, a federal Court of Appeals has ruled – not even if the dog barked disruptively on previous occasions, if the dog barked for the benefit of

its disabled owner. In an opinion by Judge Harry Pregerson, the Court of Appeals affirmed that such an order was authorized by the Americans with Disabilities Act, because it was “reasonable and necessary” and would not “fundamentally alter” the nature of the services provided by the Center.

The appellate court’s ruling was issued in a case filed by Kathleen Lentini, a wheelchair bound quadriplegic whose service dog is a small black ShihTzu/Poodle named Jazz. On two separate occasions in 1998, while Lentini was attending performances at the Center, Jazz “yipped” during intermission when other patrons approached Lentini. Both times, when Lentini assured Jazz it was “okay,” the dog made no further sounds. And no patrons complained.

Nevertheless, when Lentini sought to attend a 1999 performance at the Center, she was told she could not bring Jazz inside. When the Center’s house manager threatened to have her arrested, she left, and filed a lawsuit. Following a bench trial, federal District Judge Napoleon Jones ruled in her favor. It is that ruling the Court of Appeals has affirmed.

The appellate court also affirmed a money judgment against the Center for \$7,000, and an additional \$5,000 judgment against the house manager individually, under the California Unruh Act.

Lentini was represented by Amy B. Vandeveld in San Diego. The California Center for the Arts was represented by Michael Hogan of Hogan Guiney Dick in San Diego.

*Lentini v. California Center for the Arts*, 370 F.3d 837, 2004 U.S.App.LEXIS 10442 (9th Cir. 2004)

### **Settlement of class action ADA lawsuit filed by deaf and hard of hearing movie patrons is approved; AMC and Loews Cineplex to provide facilities for viewing “closed” captioned movies; court rejects objections by some class members that settlement should have required theaters to exhibit “open” captioned movies**

Federal District Judge Gladys Kessler has approved the settlement of a class action Americans with Disabilities Act lawsuit filed against AMC and Loews Cineplex by deaf and hard of hearing movie patrons. The settlement is noteworthy for two reasons.

First, it provides the deaf and hard of hearing with significant access to first-run movies. Indeed, Judge Kessler said the settlement “will set the standard for what other communities . . . should be offering to all those who love what is a quintessentially American art form.”

Second, Judge Kessler approved the settlement even though many class members objected that it does not do enough. The objectors complained that the settlement allows AMC and Loews to use “closed” captioning technology, rather than the “open” captioning technology which the objectors preferred.

“Open” captions are “burned” onto a film’s print, like subtitles, and are visible to everyone in the movie theater. “Closed” captions, by contrast, are recorded on a computer disk, separate from the movie itself. As a movie is displayed on a theater’s screen, closed captions are sent from the disk to an LED data panel on the back wall of the theater. Patrons are able to read the captions using portable, transparent acrylic panels that reflect the captions from the LED panel. The transparent acrylic panels are placed in cup holders and make the captions appear to be superimposed on or beneath the movie screen. Because of this difference in technology, open captions are more easily read than closed captions.

AMC and Loews agreed to settle the case, after Judge Kessler had earlier rejected their argument that the Americans with Disabilities Act did not require them to provide patrons with any form of captioning (*ELR* 25:2:15). The non-objecting class members agreed to the settlement, because it requires AMC and Loews to install six closed-caption LED panels in their Washington, D.C., theaters within one year and another six within the next year, and to provide ten reflector panels for each LED panel. In addition, AMC and Loews agreed to advertise the availability of their closed-captioned equipment in newspaper and website movie listings, and to install closed-caption equipment in each mid-sized auditorium they build.

Judge Kessler approved the settlement, despite the objections of class members who wanted AMC and Loews to provide open captioned movies, for an important legal reason. In all likelihood, the Americans with Disabilities Act does not require theaters to offer open captioned movies. The ADA’s legislative history explicitly says that “[o]pen-captioning . . . of feature films playing in movie theaters is not required by this legislation.” At least one earlier case held that the ADA does not require open captioning. No prior case had ever ordered theaters to provide open captioning. And even the Department of Justice has never required theaters to provide open captioning.

The judge said she was “very sympathetic to the strong feelings of class members who criticize the [settlement] because it does not offer them the open captioning that would make their movie-going experience as fully enjoyable as it is for those who are not deaf or hard of hearing.” But, she added, the objectors were “really” seeking “total victory” and that is “simply not what a settlement provides.”

The plaintiffs were represented by Thomas J. Simeone of Simeone & Miller in Washington D.C. AMC and Loews were represented by David K. Monroe of

Galland Kharasch Greenberg Fellman & Swirsky in Washington D.C.

*Ball v. AMC Entertainment, Inc.*, 315 F.Supp.2d 120, 2004 U.S. Dist. LEXIS 25250 (D.D.C. 2004)

### **Email from University of Illinois Chancellor directing faculty and students not to contact prospective student athletes violated First Amendment rights of those who wanted to advise prospective student athletes about controversy over University’s use of Indian chief mascot, Court of Appeals affirms**

Ever since 1926, the mascot of the University of Illinois has been “Chief Illiniwek.” The “Chief” rallied Illinois fans at athletic events for decades, dressed in Indian costume, without controversy. But in 1975, opposition to the “Chief” developed at the University of Illinois – just as it did at Stanford, St. John’s, Miami of Ohio and Eastern Michigan, all of which also had Indian names for their teams or mascots, earlier in their histories.

Stanford changed its team name from the “Indians” to the “Cardinals”; and the other schools made similar changes too. But the University of Illinois resisted student and faculty demands that it change its mascot’s name. So like Florida State and the University of North Dakota, whose teams still are named the “Seminoles” and the “Fighting Sioux,” the University of Illinois’ mascot still is “Chief Illiniwek.”

Eventually, a group of Illinois students and faculty decided to contact prospective student athletes to inform them of the on-campus controversy over the University’s use of an Indian chief as its mascot. This displeased the University’s Chancellor, for at least one reason and probably two. First, the Chancellor no doubt feared that those contacts would cause some student athletes to select other schools instead of the University of Illinois. Second, because the University of Illinois once was sanctioned by the NCAA for violating NCAA recruiting rules, the Chancellor was definitely concerned that those contacts too would violate NCAA rules that limit the extent to which members may communicate with prospective student athletes.

As a result of this second concern, the Chancellor sent a directive by email to faculty and students, warning them not to contact prospective student athletes without the “express authorization” of the University’s Athletic Director. Those who received the email responded with a lawsuit alleging that the Chancellor’s directive violated their First Amendment free speech rights. Federal District Judge Michael Mihm agreed. First, Judge Mihm restrained the Chancellor from enforcing his directive

(*ELR* 23:5:19). Then, Judge Mihm granted the plaintiffs' motion for summary judgment (*ELR* 24:5:17).

Though the Chancellor rescinded his directive, he appealed nonetheless, without success. In an opinion by Judge Terence Evans (for a 2-1 majority), the Court of Appeals has affirmed the judgment. "The free-speech interest of the plaintiffs – members of a major public university community – in questioning what they see as blatant racial stereotyping [as a result of the University's use of "Chief Illiniwek" as its mascot] is substantial," Judge Evans found. "That interest is not outweighed by fear that an athletic association [the NCAA] might not approve of what they say," he held. "For these reasons, we conclude that the district court correctly found that plaintiffs' free-speech rights were infringed by the [Chancellor's] directive."

Judge Daniel Manion dissented.

The faculty and students were represented by Harvey Grossman of the Roger Baldwin Foundation of the ACLU in Chicago. The Chancellor was represented by Timothy S. Bishop of Mayer Brown Rowe & Man in Chicago.

*Crue v. Aiken*, 370 F.3d 668, 2004 U.S.App.LEXIS 10623 (7th Cir. 2004)

### **Boston Red Sox had no duty to warn patron of danger of being hit by foul ball, Massachusetts Appeals Court affirms**

Jane Costa was severely injured by a foul ball hit into the stands at Fenway Park, just 10 minutes after she arrived to watch a game between the Boston Red Sox and the Detroit Tigers. She was seated in the upper box section, along the first base line behind the Red Sox dugout. Though Fenway has netting that protects more than 2500 seats, the area where Costa was seated is not protected. Nor were there signs in Costa's area warning patrons of the danger of foul balls.

Costa was not a baseball fan. She had been to just one prior game, years before when she was only eight years old. And testified that she didn't know there was a risk she could be hit by a foul ball, if she sat where she did. Seeking compensation for her injury, Costa sued the Red Sox, alleging that it was negligent in failing to warn her of the danger of being hit by a foul ball.

In support of her case, Costa offered evidence that her injury was not unique. Data from the 1990s showed that Fenway Park patrons were injured by foul balls, badly enough to require medical treatment, more than three dozen times a year. Nevertheless, a Massachusetts trial court dismissed her lawsuit, in response to the Red Sox' motion for summary judgment.

On appeal, Costa did no better. Justice Cynthia Cohen noted that the earliest foul ball injury cases in

Massachusetts held that spectators assumed the risk of injury, if they knew and appreciated the danger. Justice Cohen acknowledged that the assumption of risk doctrine was abolished in Massachusetts by legislation in 1974, so Costa was legally presumed to ignorant of the danger of being hurt by a foul ball.

Nevertheless, Justice Cohen held that the Red Sox had no duty to warn Costa of the danger, because "as a matter of law, [the danger of being hit by a foul ball] was sufficiently obvious that the [Red Sox] reasonably could conclude that a person of ordinary intelligence would perceive the risk and need no additional warning." For this reason, Justice Cohen affirmed the dismissal of Costa's case.

Costa was represented by James R. Burke in Boston. The Red Sox were represented by Douglas L. Fox in Worcester.

*Costa v. Boston Red Sox Baseball Club*, 809 N.E.2d 1090, 2004 Mass.App.LEXIS 639 (Mass.App. 2004)

### **College wrestling association does not have standing to challenge legality of U.S. Department of Education's "Policy Interpretation" and "Clarification" of Title IX ban on sex discrimination in athletic programs, federal appellate court affirms**

The National Wrestling Coaches Association has lost the second round of its match with the U.S. Department of Education. In an opinion by Judge Harry Edwards, a federal Court of Appeals has held that the Association does not have standing to challenge the Department's "1979 Policy Interpretation" and "1996 Clarification" of Title IX's ban on sex discrimination in collegiate athletic programs.

In so ruling, the appellate court affirmed a District Court decision that came to the same conclusion, and therefore dismissed the Association's lawsuit against the Department (*ELR* 25:5:17). This means that the Association has now lost the first two rounds of its match. But unlike most sporting events, the Association's lawsuit will not be decided on a "best two-out-of-three" basis. Instead, this lawsuit could go three rounds, and will be won by whichever side wins the last round.

The Department of Education is the government agency responsible for enforcing Title IX's ban on sex discrimination in programs run by federally-funded schools, including athletic programs. According to the National Wrestling Coaches Association, the Department's "1979 Policy Interpretation" and "1996 Clarification" violate the Constitution, the Administrative Procedure Act, Title IX itself, and the Department's original 1975 regulations (which explained

how Title IX should be applied to athletic programs).

According to the Association, federally funded colleges and universities have eliminated or reduced the size of their men's wrestling programs, in an effort to comply with the "Policy Interpretation" and the "Clarification."

Judge Edwards ruled that the Association does not have standing to pursue its lawsuit, for two reasons. First, he noted that colleges and universities independently made decisions to eliminate or reduce their men's wrestling programs, and that even if those decisions amounted to actual injury to the Association and its members, the Association failed to show how winning its case would eliminate that injury. The judge explained that the Association did not challenge Title IX itself, or the Department's original 1975 regulations. Those unchallenged laws require schools to take gender equity into account in structuring their athletic programs. Thus, said the judge, even if the "1979 Policy Interpretation" and "1996 Clarification" were struck down in response to the Association's suit, there was no showing that colleges and universities would restore or preserve their men's wrestling programs.

Second, Judge Edwards held that even if the Association did have standing, its claims would be barred by the Administrative Procedure Act. This is so, because Title IX can be enforced by private lawsuits, so the Association may sue colleges and universities directly.

Court of Appeals Judge Stephen Williams dissented. Despite Judge Williams' dissent, the Court of Appeals denied the Association's petition for a rehearing by the full court. But a third round remains possible, because the Association may still petition for Supreme Court review.

The National Wrestling Coaches Association was represented by Lawrence J. Joseph of McKenna Long & Aldridge in Washington D.C. The Department of Education was represented by Thomas M. Bondy of the U.S. Department of Justice in Washington D.C.

*National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930, 2004 U.S.App.LEXIS 9426 (D.C.Cir. 2004), petition for rehearing denied, 2004 U.S. App. LEXIS 21004 (D.C.Cir. 2004)

## Previously Reported:

**California Supreme Court to review sexual harassment claim of "Friends" writers' assistant.** The California Supreme Court has agreed to consider whether the use of "sexually coarse and vulgar language" by the writers of the television series "Friends" can constitute "sex harassment" under California law. The case arose in a case in which Amaani Lyle, a former writers' assistant for the show, alleged that she was sexually harassed by things the writers said – not to her, but during writing sessions in which she was present and working. Initially, Lyle's case was dismissed by a trial court. But the Court of Appeal reversed in an opinion that held that Lyle is entitled to trial on her sexual harassment claim, based on things that writers said and did during those writing sessions (*ELR* 26:4:12). The California Supreme Court also will consider whether imposing liability under California law, based on things that were said by the show's writers during writing sessions, would infringe upon their free speech rights under the First Amendment or the state Constitution. (Under California law, the Supreme Court's order granting Warner Brothers' petition for review automatically vacates the Court of Appeal opinion, so it will not be published in the bound volume of the California reports.) Warner Brothers and the show's writers were represented by Adam Levin of Mitchell Silberberg & Knupp in Los Angeles. Lyle was represented by Mark Weidmann in Los Angeles. *Lyle v. Warner Brothers Television Production*, 94 P.3d 476, 2004 Cal.LEXIS \_\_\_\_ (Cal. 2004)

## DEPARTMENTS

### Book Notes:

#### **Patenting Art & Entertainment: New Strategies for Protecting Creative Ideas, by Gregory Aharonian and Richard Stim**

The notion advanced by the title of this new book – that art and entertainment can be *patented* – will amaze most entertainment lawyers (and upset many). For us, art and entertainment live in the world of *copyright* law. We acknowledge, of course, that the titles of some works of entertainment may be eligible for *trademark* protection. But patent protection for art and entertainment!? Never, most of us would think. Patents are the realm of inventions – tangible devices, mostly, though lately (and with controversy) business methods too. But not art, music, movies, performances or the like.

The views of most entertainment lawyers on this subject are as amazing to Greg Aharonian, the co-author of *Patenting Art & Entertainment: New Strategies for Protecting Creative Ideas*, as his contrary views are to us. Aharonian is a forensic patent consultant, the publisher of the Internet Patent News Service, and a creative author in his own right (see this issue's "Law & Lawyers, As Entertainment" section, below). The book's other co-author is Richard Stim, a San Francisco-based IP lawyer and the author of other several other books including *Music Law: How to Run Your Band's Business*.

To prove entertainment lawyers wrong – or at least bait us into argument – Aharonian and Stim have put their views in writing. Their newly-published book shows that art and entertainment are being patented already. And, in case they can't persuade entertainment lawyers to it give a try, their book also shows readers how to do it, in language so clear and enjoyable to read, it can be understood by creators (i.e., clients) themselves, even if they aren't lawyers.

The book begins with a brief introduction explaining what an "invention" and "patent" are, and what characteristics an invention must have in order to be eligible for patent protection. Then, for the benefit of skeptics and the curious, the book takes a romp through the annals of the Patent Office, with a series of short, readable descriptions of the many art and entertainment patents that have been issued (or are awaiting Patent Office action) so far. Among them: an invention by director Steven Spielberg for a method "and apparatus" for recording voice annotations to a movie script; a

music-playing condom(!); and a do-it-yourself storytelling book. And these are just the "utility" patents. More examples are offered that are protected by "design" patents – an area of the law that bears substantial similarity to copyright law, but is little-used by entertainment lawyers (or anyone else) because of the time and expense necessary to get design patents, and their short shelf life once obtained.

The book then compares patent law with copyright and trademark law, with a view towards helping readers decide which form of protection may be best for their particular creations. And the book's final chapters explain how to apply for a patent, should readers decide to take a stab at doing so themselves.

*Patenting Art & Entertainment: New Strategies for Protecting Creative Ideas* is published by Nolo, and is available (the list price is \$39.99; the street price is less) in bookstores, from Amazon.com, and directly from Nolo at [www.nolo.com](http://www.nolo.com).

#### **Music, Money, and Success: The Insider's Guide to Making Money in the Music Industry (Fourth Edition), by Jeffrey Brabec and Todd Brabec**

*Music, Money, and Success* bills itself as an "Insider's Guide to Making Money in the Music Industry." The "Insiders" in question are the book's co-authors: Jeffrey and Todd Brabec. Jeffrey is Vice President of Business Affairs for Chrysalis Music, and his brother Todd is Executive Vice President of ASCAP.

The book is now in its Fourth Edition – proof, if any were needed, that the volume has been a huge success for its authors and its publisher, Schirmer Trade Books. But nonfiction books get to be hugely successful, only if they are hugely valuable for their readers too.

Those not familiar with the book's earlier incarnations may wonder what kind of readers have found it valuable. Its informal title, attractive and colorful soft cover, and especially its retail price – only \$24.95 – all suggest that it's intended for musicians. Indeed, one chapter is titled "Breaking into the Business." But the book is really for lawyers, despite its modest price and easy-to-read style.

What makes the book remarkable and so valuable to lawyers is that it's peppered with financial detail and illustrative computations. It's one thing to know that movie, television and video producers need licenses from music publishers and record companies to use recorded

songs in the soundtracks of their productions. That conclusion flows purely from copyright law, and is something any lawyer would know just by looking at the Copyright Act.

It's quite another thing to know how much money publishers and record companies can reasonably expect to be paid for their rights. That critical financial detail is not revealed in the Copyright Act or in advance sheets. But it's the sort of thing the Brabecs reveal throughout *Music, Money, and Success*.

All of this praise, and more, was heaped on *Music, Money, and Success* in a review in these pages of an earlier edition of the book (*ELR* 22:12:19). The newly-published Fourth Edition plows new ground, and reveals new details such as: new mechanical license rates for CDs and Internet downloads and streams; new sections on video game and ringtone licenses; and new song use examples from television programs like "American Dreams," "Everybody Loves Raymond," "Will & Grace," and "CSI," and from movies such as "Lord of the Rings," "Gangs of New York," "Pirates of the Caribbean" and "Die Another Day."

That's what's new in the Fourth Edition. But for readers who are themselves new to the music business, the Fourth Edition includes more traditional topics too: music publishing; copublishing and administration; recording agreements; and movie, TV, commercial and Broadway public performance licenses. It even explains foreign music rights and royalties. And it includes sample contracts, for the benefit of readers drafting or revising their own.

*Music, Money, and Success* is available at Borders, Barnes & Noble, and Amazon.com, and may be ordered directly from its publisher, Schirmer Trade Books, by calling 800-431-7174.

## Entertainment Lawyer News:

**Robert Jay Bernstein opens office in NYC.** Robert Jay Bernstein has opened his own law office on Madison Avenue in New York City. He has practiced intellectual property law and litigation for 24 years, counseling entertainment and media clients on copyright and trademark matters, trade secrets, trade dress and unfair competition, rights of publicity and privacy, contracts and licensing. Bernstein has co-authored the *New York Law Journal* "Copyright Law" column for more than 15 years, and lectures frequently on copyright law and litigation. He is an Honorary Trustee and a member of the Executive Committee of The Copyright Society of the USA, of which he was President from 2000 to 2004. He also is a member of the Committee on Copyright and Literary Property of the Association of the Bar of the City of New York, and was Chairman of the Copyright Law Committee and a member of the board of directors of the American Intellectual Property Association.

Before opening his own office, he was a partner in Cowan Liebowitz & Latman for 20 years, a litigation associate at Fried Frank Harris Shriver & Jacobson, and a law clerk for Judge Richard P. Matsch in the U.S. District Court of the District of Colorado. He graduated with honors from both the University of Michigan Law School and Princeton University.

**Casey Del Casino joins Nashville firm Waller Lansden Dortch & Davis.** Waller Lansden Dortch & Davis has named F. Casey Del Casino as a member of the firm. Del Casino will continue to practice intellectual property law. Previously, he was a solo practitioner in Nashville representing artists, record companies, songwriters, publishers, managers, producers and entertainment executives. Before establishing his own practice, Del Casino was a partner in the Nashville office of the Sukin-Rush Law Group. Del Casino is a member of the American, Tennessee, New York and Nashville Bar Associations, The National Academy of Recording Arts and Sciences, The Copyright Society of the U.S.A., The Copyright Society of the South, The Gospel Music Association, and Leadership Music. He received his Bachelor of Arts degree, magna cum laude, from Ithaca College in 1976 and his J.D. degree from Vanderbilt University School of Law in 1988. Prior to practicing law, he was a music publisher in New York for nine years, working with such artists as ABBA, Quincy Jones, Todd Rundgren and Foghat.

**Guylyn Cummins joins Sheppard Mullin Richter & Hampton in San Diego.** Guylyn Cummins has joined the San Diego office of Sheppard Mullin Richter & Hampton as a partner in its Entertainment & Media Group. Cummins has spent her entire career working in media law and joins Sheppard Mullin from Gray Cary Ware & Freidenrich, where she practiced for 20 years. Cummins represents media clients in litigation relating to First Amendment issues, including access issues, libel and advertising content, and trademark and copyright fair use. Cummins' clients include McGraw-Hill, Copley Press, Clear Channel Communications, The San Diego Daily Transcript, The Tribune Company, The New York Times, Court TV and the North County Times. Guylyn also represents major television networks and affiliates in San Diego, as well as the San Diego Union-Tribune, when these entities have press issues in the San Diego market. She is a magna cum laude graduate of the University of San Diego School of Law, earned an M.A. with honors from University of Southern California, and earned a bachelor's degree with high distinction from University of Nebraska. Both her undergraduate and graduate degrees are in Journalism. Cummins is on the governing board of the American Bar Association Forum of Communications Law, co-chair of ABA Forum and the National Association of Broadcasters Annual Legal Seminar, and adjunct professor of Media Law at California Western School of Law.

## Law & Lawyers, As Entertainment

### Waiting for Opradot - A Parody in Two Acts.

Samuel Beckett's *Waiting for Godot* – a play featuring two men who talk about nothing while waiting for the unknown “Godot” – is much acclaimed and has been performed in many theatres. Beckett asked that women not be permitted to appear in productions of his play, reportedly because “they don't have prostates.” The Beckett Estate has enforced this request using the moral rights provisions of European copyright laws. In 1992, a French court ruled that a director violated Beckett's moral right by staging *Waiting for Godot* with two women as the leads, contrary to Beckett's stage directions (see T.G.I. Paris, 3e ch., Oct. 15, 1992, 155 *Revue Int'l du Droit d'Auteur* 1993, 225). And earlier this year, the *New York Times* reported that a German theater has been barred from staging *Waiting for Godot* with women in two key roles. Gerhard Hess, the manager of a theater in Wilhelmshaven in Lower Saxony, where the play was to have opened in January, was ordered not to stage the play by Beckett's German publishers, S. Fischer Verlag, and will not be able to do so until the play's copyright expires in 2059. Greg Aharonian, a consultant and book author (see the *Book Notes* section of this issue, above) in the field of copyright and patent law, found all of this “ridiculous,” and availed himself of one of copyright law's other options: writing a parody – a ridicule of an existing work. What better way, he thought, to ridicule Godot than to write a sexual parody where most of the characters are women, and where most of the men have their prostates “infringed.” So that's what Aharonian did. His parody can be read at [www.waiting-for-opradot.com](http://www.waiting-for-opradot.com).

**Legal Holiday.** New York City lawyer Lawrence Savell – who describes his practice as including “an entertainment law component” – is a songwriter and recording artist in his own right. His latest CD, “Legal Holiday,” reflects the University of Michigan Law School graduate's “strong personal belief that lawyers' zealous representation of clients and furtherance of the public good can be only enhanced by a healthy willingness to poke fun at ourselves appropriately on occasion.” One of those occasions, apparently, is the year-end holidays – as reflected by the title of this year's CD and its 1998 predecessor, “The Lawyer's Holiday Humor Album.” Both are available to be sampled and purchased at [www.LawTunes.com](http://www.LawTunes.com).

### In the Law Reviews:

Entertainment, Publishing and the Arts Handbook, 2004-2005 Edition, edited by Robert Thorne, has been published by Thomson West, with the following articles:

*Berne Goes to the Movies: Moral Rights Equivalents Come to the Fore in United States Film Industry Litigation* by Corey Field, 2004-2005 Entertainment, Publishing and the Arts Handbook 3 (2004) (for publisher, see above)

*Copyright Reigns – Supreme: Notes on Dastar Corp. v. Twentieth Century Fox Film Corp.* by David A. Gerber, 2004-2005 Entertainment, Publishing and the Arts Handbook 11 (2004) (for publisher, see above)

*Infringement Center Stage* by Owen J. Sloane, 2004-2005 Entertainment, Publishing and the Arts Handbook 17 (2004) (for publisher, see above)

*RIAA Lawsuit Pundits Downright Inane and Dangerous* by Owen J. Sloane, 2004-2005 Entertainment, Publishing and the Arts Handbook 23 (2004) (for publisher, see above)

*Gone Phishing. The Latest Scam on the Internet* by Zack Zeiler, 2004-2005 Entertainment, Publishing and the Arts Handbook 37 (2004) (for publisher, see above)

*Virtual Kiddie Porn: A Real Crime?-An Analysis of THE PROTECT ACT* by Joseph J. Beard, 2004-2005 Entertainment, Publishing and the Arts Handbook 43 (2004) (for publisher, see above)

*The Right of Publicity's “Enforcer”:* A Critique of the Missouri Supreme Court's Decision in *Doe v. TCI Cablevision* by Alifya Vasi, 2004-2005 Entertainment, Publishing and the Arts Handbook 57 (2004) (for publisher, see above)

*The Application of Prior Restraints Upon the Fictitious Portrayal of High-Profile Defendants in Television's Popular Crime-Drama Genre* by Lindsay Dunn, 2004-2005 Entertainment, Publishing and the Arts Handbook 75 (2004) (for publisher, see above)

*The Ultimate “Reality T.V.” Program: Is There a Legitimate Interest in Televising Executions or Is It Just Sensationalism?* by Juan Fernando Kish, 2004-2005 Entertainment, Publishing and the Arts Handbook 99 (2004) (for publisher, see above)

*The NEW Music Industry – Where Is It Going and What Is It Going to Look Like?! WE WANT MORE IN '04!* by Dina LaPolt, 2004-2005 Entertainment, Publishing and the Arts Handbook 123 (2004) (for publisher, see above)

*The Benefits of Producing American Film and Television in Canada* by Joe Sisto, 2004-2005 Entertainment, Publishing and the Arts Handbook 135 (2004) (for publisher, see above)

*Entertainment Law Ethics* by Kenneth J. Abdo and Professor Jack P. Sahl, 2004-2005 Entertainment, Publishing and the Arts Handbook 149 (2004) (for publisher, see above)

*“How to Practice Like a Tax and Corporate Lawyer Without Really Trying.” An Attorney’s Primer of Tax and Business Planning for the Entertainment or Sports Client* by Michael Charles Fizzer and Sunny Nassim, 2004-2005 Entertainment, Publishing and the Arts Handbook 177 (2004) (for publisher, see above)

*Korean Court Upholds California Arbitration Award* by Gerald Phillips, 2004-2005 Entertainment, Publishing and the Arts Handbook 187 (2004) (for publisher, see above)

*The Minor’s Right to Choose?* by Sunny S. Nassim and Michael Charles Fizzer, 2004-2005 Entertainment, Publishing and the Arts Handbook 191 (2004) (for publisher, see above)

Comm/Ent, Hastings Communications and Entertainment Law Journal, has published Volume 26, Number 2 with the following articles:

*Are You Still Settling for Cable? A Case for Broader Application of the FCC’s Over-the-Air Reception Devices Rule* by LaVonda N. Reed-Huff, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal 179 (2004)

*Play It Again, Sam: Webcasters’ Sound Recording Complement as an Unconstitutional Restraint on Free Speech* by Amanda S. Reid, 26 Comm/Ent, Hastings Communications and Entertainment Law Journal 317 (2004)

Entertainment and Sports Lawyer, the publication of the ABA Forum on the Entertainment and Sports Industries, American Bar Association, 321 N. Clark Street, Chicago, IL 60610-4714, has published Volume 22, Number 2 with the following articles:

*The Correlation Between Team Payroll and Competitive Performance in the Professional Sports Leagues* by Ralph C. Anzivino, 22 Entertainment and Sports Lawyer 1 (2004) (for address, see above)

*Licensing Music on the Internet* by Cydney A. Tune, 22 Entertainment and Sports Lawyer 1 (2004) (for address, see above)

*Music in the Crucible: A Year in Review* by Michael A. Einhorn, 22 Entertainment and Sports Lawyer 1 (2004) (for address, see above)

*The Economics of Developing and Maintaining an Entertainment Law Practice* by Kenneth J. Abdo, 2e Entertainment and Sports Lawyer 2 (2004) (for address, see above)

*Proposal for a New National Hockey League Economic Structure and Collective Bargaining Agreement* by Jodi Cramer, 22 Entertainment and Sports Lawyer 3 (2004) (for address, see above)

Entertainment Law Review, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 15, Issue 7, with the following articles:

*Tiptoeing Along the Catwalk Between Articles 8 and 10 : Naomi Campbell v. Mirror Group Newspapers Limited* by Timothy Pinto, 15 Entertainment Law Review 199 (2004) (for website, see above)

*Defamation and the Internet: Where Are We Now and Where Are We Going? Part II: Where Are We Going?* by Tim Ludbrook, 15 Entertainment Law Review 203 (2004) (for website, see above)

*What a Lovely Bunch of Coconuts! A Comparison Between Louisiana and the United Kingdom with Regards to the Appropriation of Personality* by Angela Adrian, 15 Entertainment Law Review 212 (2004) (for website, see above)

*Reversionary Interest* by Matthew Pryke, 15 Entertainment Law Review 227 (2004) (for website, see above)

The Columbia Journal of Law & the Arts has published Volume 27, Number 4 with the following articles:

*Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts* by June M. Besek, 27 The Columbia Journal of Law & the Arts 385 (2004)

*Who Owns “The First Rough Draft of History?”: Reconsidering Copyright in News* by Eric B. Easton, 27 The Columbia Journal of Law & the Arts 521 (2004)

*The “Dirt” on Digital “Sanitizing”: Droit Moral, Artistic Integrity and the Directors Guild of America v. Clean Flicks et al* by Eric B. Hiatt, 30 Rutgers Computer and Technology Law Journal 375 (2004)

*Fan Websites’ Use of Trademarks in Their Domain Names: Fair or Foul?* by Joshua I. Sherman, 30 Rutgers Computer and Technology Law Journal 399 (2004)

Fordham Intellectual Property, Media & Entertainment Law Journal has published Volume 14, Number 4 with



the following articles:

*Trademark Dilution: Moseley and Beyond* by symposium panelists Barton Beebe, Cecelia Dempsey, Marie Driscoll, Hugh Hansen, and Susan Proff, 14 Fordham Intellectual Property, Media & Entertainment Law Journal 849 (2004)

*Public Appropriation of Private Rights: Pursuing Internet Copyright Violators* by symposium panelists Sonia Katyal, Michael Carlinsky, Justin Hughes and Rebecca Tushnet, 14 Fordham Intellectual Property, Media and Entertainment Law Journal 893 (2004)

*The New Campaign Against Counterfeiting and Piracy* by symposium panelists Bernard Korman, Barbara Kolsun, Heather McDonald and Darren Pogoda, 14 Fordham Intellectual Property, Media and Entertainment Law Journal 955 (2004)

*The End of Software Piracy in Eastern Europe? A Positive Outlook with International Help* by Alina M. Collisson, 14 Fordham Intellectual Property, Media & Entertainment Law Journal 1005 (2004)

*Cyber Crime and Punishment: Filtering Out Internet Felons* by Jessica Habib, 14 Fordham Intellectual Property, Media and Entertainment Law Journal 1051 (2004)

*Genericness Doctrine Need Not Apply: Employing Generic Comain Names in Cyberspace* by C. Kim Le, 14 Fordham Intellectual Property, Media and Entertainment Law Journal 1093 (2004)

*Senators, Congressman, Please Heed the Call: Ensuring the Advancement of Digital Technology Through the Twenty-First Century* by Andrew Sparkler, 14 Fordham Intellectual Property, Media and Entertainment Law Journal 1137 (2004)

DePaul-Lawyers Committee for the Arts Journal of Art and Entertainment Law has published Volume 14, Number 1 as a special edition on Art and War 2004 with the following articles:

*The Failure to Protect Cultural Property in Wartime* by David Keane, 14 DePaul-LCA Journal of Art and Entertainment Law 1 (2004)

*Six Klimts, a Picasso & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art* by David Wissbroecker, 14 DePaul-LCA Journal of Art and Entertainment Law 39 (2004)

*Casualties of War: The Destruction of Iraq's Cultural Heritage As a Result of U.S. Action During and After the*

*1991 Gulf War* by Marion Forsyth, 14 DePaul-LCA Journal of Art and Entertainment Law 73 (2004)

*The Art of War: The Protection of Cultural Property During the "Siege" of Sarajevo (1992-95)* by Megan Kossiakoff, 14 DePaul-LCA Journal of Art and Entertainment Law 109 (2004)

*With the First Pick in the 2004 NFL Draft, the San Diego Chargers Select...?: A Rule of Reason Analysis of What the National Football League Should Have Argued in Regards to a Challenge of Its Special Draft Eligibility Rules under Section 1 of the Sherman Act* by Justin Mann Ganderson, University of Miami Business Law Review 1 (2004)

*SAG and AFTRA: The Case for Merger of the Entertainment Unions* by Dr. Sharlene A. McEvoy and William Windom, University of Miami Business Law Review 59 (2004)

The Journal of Legal Aspects of Sports, published by the National Sports Law Institute, Marquette University School of Law, [www.law.marquette.edu](http://www.law.marquette.edu) has issued Volume 14, Number 2 with the following articles:

*Artists and Athletes: Balancing the First Amendment and the Right of Publicity in Sport Celebrity Portraits* by John McMillen and Rebecca Atkinson, 14 Journal of Legal Aspects of Sport (2004) (for website, see above)

*The Application of Title III of the ADA to Sport Web Sites* by John Grady and Jane Boyd Ohlin, 14 Journal of Legal Aspects of Sport (2004) (for website, see above)

*National Football League Ticket Transfer Policies: Legal and Policy Issues* by James T. Reese, Mark S. Nagel and Richard M. Southall, 14 Journal of Legal Aspects of Sport (2004) (for website, see above)

*An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers "Take" the Gold in Greece?* by Stephen McKelvey and John Grady, 14 Journal of Legal Aspects of Sport (2004) (for website, see above)

*Book Review: Getting in the Game: Inside Baseball's Winter Meetings* by William S. Miller, 14 Journal of Legal Aspects of Sport (2004) (for website, see above)

Communication Law and Policy, published by Lawrence Erlbaum Associates, Inc., [www.leaonline.com](http://www.leaonline.com), has issued Volume 9, Number 4 as a special issue examining *New York Times Co. v. Sullivan* Forty Years Later: Retrospective, Perspective, Prospective with the following articles:

*“Lies, Lies, Lies”*: *The Origins of New York Times Co. v. Sullivan* by Kermit L. Hall, 9 Communication Law and Policy 387 (2004) (for website, see above)

*New York Times Co. v. Sullivan: A First Amendment Lawyer’s Retrospective* by Robert M. O’Neil, 9 Communication Law and Policy 423 (2004) (for website, see above)

*No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence* by Gregory C. Lisby, 9 Communication Law and Policy 433 (2004) (for website, see above)

*The Ad That Changed Libel Law: Judicial Realism and Social Activism in New York Times Co. v. Sullivan* by Susan Dente Ross and R. Kenton Bird, 9 Communications Law and Policy 489 (2004) (for website, see above)

*From Sullivan to Nike: Will the Noble Purpose of the Landmark Free Speech Case Be Subverted to Immunize False Advertising?* by Robert L. Kerr, 9 Communications Law and Policy 525 (2004) (for website, see above)

*A Key Influence on the Doctrine of Actual Malice: Justice William Brennan’s Judicial Philosophy at Work in Changing the Law of Seditious Libel* by Carlo A. Pedrioli, 9 Communication Law and Policy 567 (2004) (for website, see above)

The European Intellectual Property Review, published by Sweet and Maxwell, [www.sweetandmaxwell.co.uk](http://www.sweetandmaxwell.co.uk), has issued Volume 26, Issues 9 and 10, with the following articles:

*Trade Marks: The Confusion of “Use”* by James Tumbridge, 26/9 European Intellectual Property Review 431 (2004) (for website, see above)

*Book Review: The Law of Passing-Off: Unfair Competition by Misrepresentation* written by Christopher Wadlow, reviewed by David Rogers, 26/9 European Intellectual Property Review 435 (2004) (for website, see above)

*Book Review: Trade Mark Law: A Practical Anatomy* written by Jeremy Phillips, reviewed by David Stone, 26/9 European Intellectual Property Review 435 (2004) (for website, see above)

*Joint Authorship and Infringement by “Altered Copying”*: *Some Lessons from the Stones in his Pocket Case* by Les Christy, 26/10 European Intellectual Property Review 472 (2004) (for website, see above)

*Book Review: vPrivacy and the Press*, written by Joshua Rozenberg, reviewed by Dr. Ian Walden, 26/10 European Intellectual Property Review 476 (2004) (for website, see above)

*Book Review: The Law of Photography and Digital Images* written by Christina Michalos, reviewed by Ronan Deazley, 26/10 European Intellectual Property Review 476 (2004) (for website, see above)

*Stop Mucking Up Copyright Law: A Proposal for a Federal Common Law of Contract* by Llewellyn Joseph Gibbons, 35 Rutgers Law Journal 959 (2004)

*Personality Rights – A Civil Law Concept* by Adrian Popovici, 50 Loyola of Los Angeles Law Review 349 (2004)

*Suing the Media: Supporting the First Amendment: The Paradox of Neville Johnson and the Battle for Privacy* by Robert D. Richards and Clay Calvert, 67 Albany Law Review 1097 (2004)

*Caught in the Web of the Internet: The Application of the Americans with Disabilities Act to Online Businesses* by Charles D. Mockbee IV, 28 Southern Illinois University Law Journal 533 (2004)

*Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge* by Chidi Oguamanam, 11 Indiana Journal of Global Legal Studies 135 (2004)

*Licensing at the Crossroads of Antitrust and Intellectual Property: Choosing the Right Road* by Yee Wah Chin and Kathryn E. Walsh, 21 The Computer & Internet Lawyer 8 (2004) (edited by Arnold & Porter, published by Aspen Publishers)

*Conducting an Intellectual Property Due Diligence Investigation* by J. Michael Martinez de Andino, Rodger L. Tate and Tyler Maddry, 16 Intellectual Property & Technology Law Journal 1 (2004) (edited by Weil, Gotshal & Manges, published by Aspen Publishers)

*Implied Warranty Against Infringement U.C.C. §2-312 (3)*, 16 Intellectual Property & Technology Law Journal 7 (2004) (edited by Weil, Gotshal & Manges, published by Aspen Publishers)

*Dutch Copyright Act Does Not Prohibit Destruction of Works*, 16 Intellectual Property & Technology Law Journal 20 (2004) (for publisher, see above)

*Videogame Consoles Not Covered by Spanish Law*, 16 Intellectual Property & Technology Law Journal 21 (2004) (for publisher, see above)

*Canada Announces Plans to Implement WIPO Treaties*, 16 Intellectual Property & Technology Law Journal 21 (2004) (for publisher, see above)

*Italian Anti-Piracy Law Includes Prison Term*, 16 Intellectual Property & Technology Law Journal 22 (2004) (for publisher, see above)

*The Wide World of Sports is Getting Wider: A Look at Drafting Foreign Players into U.S. Professional Sports* by Heather E. Morrow, 26 Houston Journal of International Law 649 (2004)

*Stadium Construction for Professional Sports: Reversing the Inequities Through Tax Incentives* by Zachary A. Phelps, 18 St. John's Journal of Legal Commentary 981 (2004)

*Diluting the Commercial Speech Doctrine: "Noncommercial Use" and the Federal Trademark Dilution Act* by Patrick D. Curran, 71 The University of Chicago Law Review 1077 (2004)

*The Worst Seats in the House: Stadium-Style Movie Theaters and the Americans with Disabilities Act* by Felicia H. Ellsworth, 71 The University of Chicago Law Review 1109 (2004)

*Return of the Guilds: A Reflection on the Domestic and International Implications of Eldred v. Ashcroft* by Russell J. Anderson, Jr., 12 University of Baltimore Intellectual Property Law Journal 49 (2003)

*An Effective Personal Jurisdiction Doctrine for the Internet* by Carlos J.R. Salvado, 12 University of Baltimore Intellectual Property Law Journal 75 (2003)

*The Temporary Transfer – An Analysis of Loan Deals*, 11 Sports Law Administration and Practice 1 (2004) ([www.informalaw.com](http://www.informalaw.com))

*Sport, Celebrity and Scandal: To What Extent Does the Law Protect the Private Lives of Sportsmen and Women?*, 11 Sports Law Administration and Practice 8 (2004) (for website, see above)

*Letter from America: National Football League Fights Back to Preserve Eligibility Rules*, 11 Sports Law Administration and Practice 12 (2004) (for website, see above)

*Postcard from Australia: Betting Regulations – Duty of Care Issues, Contract Matters and Sports IP*, 11 Sports Law Administration and Practice 14 (2004) (for website, see above)

## **Educational Programs Calendar:**

**American Bar Association Forum on Communications Law 10<sup>th</sup> Annual Conference**, January 13-15, 2005, Boca Raton Resort & Club, Boca Raton, Florida. The program highlights workshops on Hot Issues in Newsgathering; Hot Issues in Ethics; Hot Issues in Libel and Privacy; Hot Issues on the Internet; How to Diversify the Media Bar; How to Avoid Burnout; and How to Build a Litigation Coalition; plus sessions on *Richmond Newspapers v. Virginia*, 25 Years Later: Is There a Presumption of Access to Terrorism and Celebrity Cases?; Election 2004: How Did the Media Perform?; Luncheon Speech by the President of the American Bar Association; *Milkovich v. Lorain Journal*, 15 Years Later: Has the Supreme Court Been Overruled?; and Journalism Jeopardy. For additional information, contact the ABA Forum on Communications Law, MS 18.2, 321 N. Clark St., Chicago, IL 60610-4714, online at [www.abanet.org/forums/communication/home.html](http://www.abanet.org/forums/communication/home.html); or FAX 312-988-5677.

**Representing Your Local Broadcaster: 24<sup>th</sup> Annual Legal Forum**, Sunday, April 17, 2005, The Bellagio, Las Vegas, Nevada. The program is sponsored by the American Bar Association Forum on Communications Law, the National Association of Broadcasters, and the Federal Communications Bar Association. For additional information, contact the ABA Forum staff Teresa Ucock at 312-988-5658 or e-mail [tucok@staff.abanet.org](mailto:tucok@staff.abanet.org).