NEW LEGISLATION AND REGULATIONS

Congress authorizes appointment of full-time Copyright Royalty Judges to make decisions concerning statutory license rates and royalty allocations

In the closing moments of the 108th Congress, the legislature turned its attention to copyright matters. Though it was unable to decide what to do about controversial bills involving online piracy or digital movie editing, Congress did do something very important. It authorized the appointment of full-time Copyright Royalty Judges. This is the first time in the history of the United States that specialized *judges* have been authorized to do anything related to copyright law (unlike federal tax law, which has long had specialized trial judges, and patent law which for years has had specialized appellate judges).

The tasks that Congress has assigned to the new Copyright Royalty Judges are not new. They will determine the royalty rates that are to be paid by those who use copyrighted works pursuant to statutory licenses (sometimes referred to as "compulsory licenses") that permit users to:

1. record musical compositions (the "compulsory mechanical license");
2. make "ephemeral" copies and transmit some types of digital performances of music recordings;
3. use non-dramatic music and works of visual art in public TV and radio broadcasts;
4. publicly perform music on jukeboxes;
5. retransmit television broadcasts by cable and satellite TV; and
6. duplicate digital music recordings, noncommercially, by consumers.

The fifth and sixth of these statutory licenses (for cable and satellite TV retransmissions, and for consumer duplication of digital music recordings) require "licensees" to pay statutory royalties in lump sums to the Copyright Office, rather than to individual copyright owners directly; so Copyright Royalty Judges also will decide how those royalties are to be allocated among copyright owners entitled to receive them.

Beginning in 1978, these functions were performed by members of what was then known as a "Copyright Royalty Tribunal." In the beginning, this Tribunal had five full-time members, though later, Congress reduced its size to three full-time members.

Dissatisfaction with the Copyright Royalty Tribunal prompted Congress to replace it entirely, in 1993, with a process that relied on temporary arbitration panels appointed, ad hoc, for each royalty matter that required a decision (*ELR* 15:11:28). These panels were called "CARPs," which was an acronym for "Copyright Arbitration Royalty Panels." They were administered by, and reported their findings and recommendations to, the Register of Copyrights who in turn made recommendations to the Librarian of Congress who then made final decisions. CARPs and their rulings were not received any better than the Copyright Royalty Tribunal they replaced. Critics complained that: CARP decisions were unpredictable and inconsistent; appointed arbitrators lacked necessary expertise and frequently reflected either a ''content'' or ''user'' bias; and the CARP process was unnecessarily expensive. Congress responded to these complaints by passing the new "Copyright Royalty and Distribution Reform Act of 2004." The Act directs the Librarian of Congress to appoint three full-time Copyright Royalty Judges, each of whom must be an attorney with at least seven years of legal experience. One of the three will be appointed Chief Copyright Royalty Judge – a position that requires at least five years of "experience in adjudications, arbitrations, or court trials." One of the other two must have "significant knowledge of copyright law," and the third must have "significant knowledge of economics." All three judges must be "free of any financial conflict of interest."

Copyright Royalty Judges will not enjoy life-long tenure, as do federal District and Court of Appeals judges. Instead, Copyright Royalty Judges are administrative law judges, appointed for terms of six years (except two of the first three, who will be appointed to terms of just four and two years). The first Copyright Royalty Judges will be appointed by the Librarian of Congress, some time during the first few months of 2005.

Copyright Royalty and Distribution Reform Act of 2004, amending Chapter 8 of the U.S. Copyright Act, 17 U.S.C. sections 801-805, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h1417enr.txt.pdf; *H.R. 108-408* (108th Cong., 2nd Sess. 2004), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr408.108.pdf

RECENT CASES

Lawsuit alleging that Mariah Carey's "Thank God I Found You" infringes copyright to "One of Those Love Songs" should not have been dismissed without trial, Court of Appeals decides, because musicologist's conclusion that songs are "substantially similar" raised issue for jury to decide

Songwriters Seth Swirksy and Warryn Campbell will get their "day in court," after all. They allege that Mariah Carey's song "Thank God I Found You" infringes the copyright to their song "One of Those Love Songs." And in support of that allegation, they offered the expert opinion of UCLA Professor Robert Walser, who concluded that the choruses of the two songs are indeed "substantially similar."

Professor Walser's opinion was not, at first, sufficient to get Swirsky and Campbell's claims before a jury, because District Judge Christina Snyder ruled that the professor's analysis was not correct, and that some of the allegedly copied portions of "One of Those Love Songs" were not, in any event, protected by copyright. Judge Snyder made these rulings in response to a motion for summary judgment filed by Carey (and her co-defendants), in an opinion that dismissed Swirsky and Campbell's case completely (*ELR* 24:11:12).

The Court of Appeals, however, has reversed Judge Snyder, and has remanded the case for trial. In an opinion by Judge William Canby, the appellate court ruled that Professor Walser's methodology was correct, and that Judge Snyder had erred in ruling that parts of "One of Those Love Songs" were not protected by copyright.

Judge Canby's opinion for the Court of Appeals is based on a sophisticated analysis of music theory (as was Judge Snyder's earlier opinion). Judge Canby held that Professor Walser had adequately explained why he concluded that certain notes were more important to his analysis than others.

Judge Canby also faulted Judge Snyder for basing her conclusion on a measure-by-measure comparison of note sequences (which showed the two songs were different), without considering harmony, tempo and key – something Judge Snyder did because those elements of music are not protected by copyright. Judge Canby reasoned that this was a mistake, because "to disregard chord progression, key, tempo, rhythm, and genre is to ignore the fact that a substantial similarity can be found in a combination of elements, even if those elements are individually unprotected."

Judge Canby also disagreed with Judge Snyder's conclusion that one part of "One of Those Love Songs" was an unprotected musical *scene a faire*, because it was similar to "He's a Jolly Good Fellow." Said Judge Canby, "a musical measure cannot be 'common-place' by definition if it is shared by only two songs." What's more, Judge Canby concluded that another part of "One of Those Love Songs" may be protected by copyright, even though it's only seven notes long.

Swirsky and Campbell were represented by Jonathan D. Freund of Freund & Brackey in Beverly Hills. Carey and her co-defendants were represented by Robert M. Dudnik of Mitchell Silberberg & Knupp in Los Angeles.

Editor's note: In one respect, this opinion repeats a mistake of copyright law, often made in the Ninth Circuit. It's difficult to tell, from the text of the opinion, whether this mistake influenced the ultimate result; but it may have. Early in his opinion, Judge Canby recites that because direct evidence of copying is rarely available, Swirsky and Campbell could show that Carey copied their song by showing she had access to it and that Carey's song was "substantially similar" to protected elements of their song. Judge Canby then said, "Where a high degree of access is shown, we require a lower standard of proof of substantial similarity." For summary judgment purposes, Carey had conceded she had a "high degree of access" to their song, and Judge Canby therefore opined that Swirsky and Campbell's "burden of proof of substantial similarity is thus commensurately lowered." The mistake thus made was this: Copyright infringement requires proof of *actual copying* resulting in *substantial similarity*. The rule that a high degree of access requires less substantial similarity is true *only* to prove *actual copying*. Actual copying, by itself, is not infringement, however. "Substantial similarity" must be proved too – and the degree of substantial similarity that is necessary to prove *infringement* is *not* reduced even by admitted copying. In other words, the phrase "substantial similarity" means one thing when *copying* is at issue, and something else entirely when *infringement* is at issue. This of course is very confusing – the Ninth Circuit is often confused by it – so in other circuits, judges wisely use the phrase "probative similarity" in connection with *copying*, and have reserved "substantial similarity" for use in connection with *infringement* (*ELR* 14:11:6).

Judge Canby should have said that Carey's admission of a "high degree of access" meant that less "probative similarity" was necessary to prove she actually copied Swirsky and Campbell's song. But a full measure of "substantial similarity" was still necessary to prove that she *infringed* their copyright. What Judge Canby doesn't reveal is whether the appellate court concluded that Professor Walser's opinion was sufficient to require a jury trial on the question of whether the two songs share a *full measure* of "substantially similarity" or whether the professor's opinion merely was adequate to require a trial on the question of whether the two songs share only a *reduced measure* of what should have been called "probative similarity" rather than "substantial similarity." If the former, the outcome was the same as it would have been, even if this mistake had not been made. If the latter, then the outcome was different, and wrong, because of this mistake.

Swirsky v. Carey, 376 F.3d 841, 2004 U.S.App.LEXIS 14251 (9th Cir. 2004)

Theme song for James Bond movie "The World Is Not Enough" was not copied from "This Game We Play," but infringement claim was not objectively unreasonable so attorneys fees should not have been awarded to MGM, appellate court rules

The theme song for the James Bond movie "The World Is Not Enough" was written by composer David Arnold and lyricist Don Black. By coincidence, the song – also titled "The World Is Not Enough" – shares an identical four-note sequence with a song titled "This Game We Play" written by Frank Fogerty and Nathan Crow. Believing that their four-note sequence was copied, Fogerty and Crow filed a copyright infringement lawsuit against MGM.

Fogerty and Crow weren't strangers to MGM. In February 1999 – nine months before MGM released "The World Is Not Enough" – Crow delivered a recording of "This Game We Play" to MGM Executive Vice President Michael Sandoval who listened to it, liked it, and told Crow he would consider it for "The Thomas Crown Affair."

Nevertheless, it can be reported with confidence that the four-note sequence appears in both songs by "coincidence," because MGM proved that Arnold and Black finished "The World Is Not Enough" before Crow brought "This Game Is Not Enough" to Sandoval. Indeed, in yet another coincidence, a demo recording of "The World Is Not Enough" was delivered to Sandoval on the very same day he met with Crow and listened to his song.

MGM proved that "The World Is Not Enough" was independently created with declarations from several witnesses and with documents proving the dates on which things were done and delivered. MGM's proof, though, was submitted in a successful motion for summary judgment, not at a trial.

On appeal, Fogerty and Crow argued the motion should not have been granted, because they were entitled to a jury trial to test the credibility of MGM's witnesses and to emphasize certain inconsistencies in MGM's evidence. Fogerty and Crow also appealed the District Court's decision to award MGM some $90,000 in attorneys fees and costs, for its successful defense of what the court characterized as an "objectively unreasonable" claim.

The Court of Appeals affirmed the summary judgment in MGM's favor. In an opinion by Judge Jeffrey Sutton, the appellate court held that Fogerty and Crow were not entitled to a trial, simply in the hopes that a jury might disbelieve the unrebutted testimony of MGM's witnesses. Moreover, although Judge Sutton acknowledged some inconsistencies in MGM's declarations, none of them called into question the central fact that "The World Is Not Enough" was finished and submitted to MGM before Sandoval received "This Game We Play."

Fogerty and Crow did better on their appeal of the award of attorneys fees to MGM. On that issue, Judge Sutton disagreed with the District Court's conclusion that their infringement claim was "objectively unreasonable" at the time it was made or while discovery was being conducted. Though the claim was not successful, Fogerty and Crow had reason to file their suit, and they properly conducted discovery testing MGM's defense that "The World Is Not Enough" was independently created, the judge said. For that reason, the appellate court reversed the fee award.

Fogerty and Crow were represented by W. Gary Blackburn of Blackburn & McCune in Nashville, and Adam Siegler in Beverly Hills. MGM was represented by Timothy L. Warnock of Bowen Riley Warnock & Jacobson in Nashville.

Fogerty v. MGM Group Holdings Corp., 379 F.3d 348, 2004 U.S.App.LEXIS 15901 (6th Cir. 2004)

Record companies defeat motion to quash subpoena to Internet service provider, seeking identities of subscribers sued as "Does" in P2P copyright infringement suit; subscribers have no First Amendment right to remain anonymous, federal District Court decides

Those who use P2P networks to upload and download copyrighted music recordings do not have a First Amendment right to remain anonymous, federal District Judge Denny Chin has ruled. As a result, Judge Chin ordered Cablevision to respond to a subpoena served on it, as the Internet service provider for 40 suspected P2P users who have been sued for copyright infringement by 17 record companies.

Using a publicly available database and information gleaned from the P2P service "Fast Track," the record companies were able to determine that Cablevision is the ISP for those believed to be using "Fast Track" to upload and download copyrighted recordings. But in order to determine the names and addresses of "Fast Track" users, the record companies had to sue them as "Does" and then serve a subpoena on Cablevision seeking that information.

One of those sued as "Jane Doe" made a motion to quash the subpoena, arguing that it violates her First Amendment right to engage in anonymous speech.

Judge Chin acknowledged that the First Amendment does protect anonymous speech. And he agreed with "Jane Doe" that uploading and downloading copyrighted recordings "qualifies as speech entitled to First Amendment protection." Significantly, however, Judge Chin added, "That protection . . . is limited, and is subject to other considerations."

To evaluate the record companies' subpoena to Cablevision, the judge said that the First Amendment interests of "Jane Doe" must be balanced against the record companies' "need for disclosure." When Judge Chin did that, he concluded that the record companies' needs were weightier.

The judge identified five record company interests that lead to his conclusion: (1) the record companies had made a "concrete showing" of copyright infringement; (2) the subpoena was specific; (3) there were no other ways for the record companies to determine the identities of Cablevision's subscribers; (4) the subpoenaed information was central to the record companies' case, because without it, they could not serve the complaints they had filed; and (5) Cablevision subscribers "have little expectation of privacy in downloading and distributing copyrighted songs without permission," because Cablevision's own subscriber agreement informs subscribers that they may not transmit copyrighted material without authorization, and that Cablevision has the right to disclose subpoenaed information.

The record companies were represented by J. Christopher Jensen of Cowan Liebowitz & Latman in New York City, and by Thomas J. Perrelli of Jenner & Block in Washington D.C. "Jane Doe" was represented by Louis P. Pittocco in Greenwich.

Sony Music Entertainment v. Does 1-40, 326 F.Supp.2d 556, 2004 U.S.Dist.LEXIS 14122 (S.D.N.Y. 2004)

Appeals court affirms denial of preliminary injunction sought by PlayMakers sports agency that would have barred ESPN from using "Playmakers" as title for television series about professional football players

ESPN has defeated, again, a request for a preliminary injunction sought by a sports agency whose name and registered trademark is "PlayMakers." Had it been granted, the injunction would have barred the network from using "Playmakers" as the title for its television series about professional football players. In an opinion by Judge Harry Pregerson, the Court of Appeals has affirmed a District Court ruling that denied the sports agency's motion for an injunction (*ELR* 26:1:13).

The ESPN series showed football players using steroids and illegal drugs, womanizing, and being discriminatory. NFL players and coaches criticized the series, so it wasn't surprising that the sports agency was concerned that the series would tarnish any positive association football players otherwise would have with the agency's name. Nevertheless, the District Court refused to consider the agency's "tarnishment" complaint, on the grounds that "tarnishment" is not an element of a traditional trademark infringement claim. (The agency didn't file a separate "dilution" claim for which "tarnishment" would be relevant, because its mark, though registered, was not "famous," as required for dilution claims.)

On appeal, Judge Pregerson agreed that tarnishment "is not itself a factor to be considered in determining whether consumer confusion is likely."

Judge Pregerson also agreed with the District Court that the agency's "prospective clients are not likely to be confused" "despite the marks' similarities," because of "the commonness of the term 'playmaker,' the remoteness of the parties' lines of business, the differences in their choices of marketing channels, and the degree of care professional and aspiring professional athletes are likely to exercise before choosing an agent. . . ."

PlayMakers was represented by O. Yale Lewis, Jr., of Hendricks & Lewis in Seattle. ESPN was represented by Robert L. Raskopf of White & Case in New York City, and by Stokes Lawrence in Seattle.

PlayMakers LLC v. ESPN, Inc., 376 F.3d 894, 2004 U.S.App.LEXIS 14607 (9th Cir. 2004)

Movie producer David Kronemyer was not a third-party beneficiary of completion guaranty agreement for "My Big Fat Greek Wedding," so appeals court affirms dismissal of his suit against Motion Picture Bond Company, alleging that it breached agreement by failing to credit him as executive producer

Movie producer David Kronemyer didn't receive a creative credit of any kind on "My Big Fat Greek Wedding," even though he at least had something to do with getting the movie made. Indeed, he signed two production or financing contracts, as a representative of one of the contracting parties. And according to Kronemyer, he should have been credited as one the movie's executive producers.

Because he wasn't, Kronemyer sued the movie's completion guarantor – The Motion Picture Bond Company – alleging that it breached its duty to deliver a "completed" film. Kronemyer's lawsuit didn't get far. It was dismissed by federal District Judge Terry Hatter for failing to state a claim. And in a short Memorandum opinion (marked "not appropriate for publication and may not be cited"), the Court of Appeals has affirmed.

Unfortunately, because the opinion is so short, it doesn't reveal why Kronemyer asserted it was The Motion Picture Bond Company's duty to give him an executive producer credit. Instead, the appellate court simply held that Kronemyer was not a third-party beneficiary of the completion guaranty agreement the bond company had signed, because that agreement did not reveal any "intent to confer a benefit on Kronemyer." Neither did two other agreements the company had signed.

As a result, the appeals court said, the fact that "the contracts, if carried out according to their terms, might inure to his benefit, is insufficient to entitled him to demand [their] enforcement."

Kronemyer was represented by himself and Rein Evans & Sestanovich in Los Angeles. The Motion Picture Bond Company was represented by Edward M. Kubec of Liner Yankelevitz in Los Angeles.

Kronemyer v. Motion Picture Bond Co., 102 Fed.Appx. 536, 2004 U.S.App.LEXIS 11948 (9th Cir. 2004)

Exclusive four-year agreement between boxer Antwun Echols and boxing promoter Banner Promotions is enforceable, even though agreement does not specify amount Echols is to be paid, because he received signing bonus and Banner must make "bona fide" offers, appellate court rules

An agreement between boxer Antwun Echols and boxing promoter Banner Promotions, giving Banner the exclusive right to promote Echols' fights for four years, is enforceable, even though the agreement does not specify the amount Echols is to be paid, an appellate court has ruled.

As a general rule, a contract is not enforceable if a material and essential provision is indefinite. Applying that rule, a trial court had ruled that because the agreement between Echols and Banner does not specify how much Echols was to be paid for each fight, the agreement was too indefinite to be enforced.

Appeals court Judge Max Rosenn agreed with result; but he was in the minority. In an opinion by Judge Marjorie Rendell, a 2-to-1 majority of the appeals court held that the agreement is enforceable.

Judge Rendell noted that Echols had received a $30,000 signing bonus when he entered into the agreement with Banner; and she noted that the agreement requires Banner to make three "bona fide" offers to Echols during each year of the agreement. The agreement did not require Echols to agree to fight for the purses offered by Banner. But Banner could not offer token purses, without violating its obligations to make "bona fide" offers. Thus Echols had received consideration for entering into the exclusive agreement; and Banner could not avoid its contractual obligations to promote fights for Echols, without risking a claim by Echols for "rescission and possibly money damages."

Insofar as Judge Rendell was concerned, the material terms of the agreement were certain. "Echols must continue to deal only with Banner and . . . Banner must continue to secure bouts for and to promote Echols for as long as the Agreement lasts," the judge said.

Echols was represented by Robert A. Burke of Blank Rome in Philadelphia, and by Lamont Jones in Los Angeles. Banner was represented by George A. Bochetto of Bochetto & Lentz in Philadelphia, and by Harry P. Marquis in Las Vegas.

Echols v. Pelullo, 377 F.3d 272, 2004 U.S.App.LEXIS 15775 (3rd Cir. 2004)

Dismissal of $30 million idea-submission case against Michael Eisner, Michael Ovitz and Disney is affirmed by federal appeals court

Back in 1993, while Michael Ovitz was still the chairman of Creative Artists Agency, a fellow named Terry Terrell submitted "several proposals for creative projects" to CAA. Among those proposals was one for an outer-space Christmas movie starring Terrell's daughter, another for an updated version of Cinderella starring his daughter and son, and a situation comedy titled "Serendipity" which Terrell described as "'Home Improvement' meets 'Seinfeld' from a child's perspective."

Nothing immediately came of those proposals. But Terrell believes that Disney used them, without his permission, to create its 1994 movie "The Santa Clause," its 1997 TV movie "Cinderella," and the 2001 Miramax film "Serendipity." What's more, Terrell believes that his submissions were used by Ovitz "as leverage to become the President and Chief Operating Office of Disney."

These beliefs were alleged in a complaint Terrell filed against Disney, Eisner and Ovitz in federal court in New York City – a complaint that sought $30 million in damages and a portion of the severance package Ovitz received when he left the company.

Terrell's case didn't get far. It was dismissed, for failing to state a recognized legal claim, by District Judge Richard Casey. And in a "Summary Order" marked "may not be cited as precedential authority," the Court of Appeals has affirmed.

The appeals court affirmed the dismissal of Terrell's RICO claim because his complaint did not allege a "predicate act." It affirmed the dismissal of his misappropriation claims because they are preempted by the Copyright Act. And it affirmed Terrell's claims that he is entitled to part of Ovitz's severance, and that Disney, Eisner and Ovitz "acted with oppression, fraud and malice," because those claims did not offer "any legal theory of recovery."

Terrell represented himself, pro se. Disney, Eisner and Ovitz were represented by Robert P. Lobue of Patterson Belknap Webb & Tyler in New York City.

Terrell v. Eisner, 104 Fed.Appx. 210, 2004 U.S.App.LEXIS 14370 (2nd Cir. 2004)

Marketing agent for toy inventor loses idea-submission case against Hasbro, because agent failed to refute Hasbro's evidence that its water gun was independently created

Hasbro has defeated an idea-submission claim filed against it by the marketing agent for the inventor of a water gun called the "Water Rat." According to Gary Ahlert, who does business as Creative Group Marketing, his client's water gun was copied by the second-generation version of Hasbro's "Super Soaker."

Hasbro acknowledged it met with Ahlert and saw his client's "Water Rat" a year before its own water gun was designed. But Hasbro said that its water gun was designed by an independent company named Professional Prototypes, and that Hasbro had not given Professional Prototypes any information about the "Water Rat."

Hasbro made these assertions in a motion for summary judgment, which has been granted by federal District Judge Joseph Irenas. The judge held that under New Jersey's idea-submission law, Ahlert had to prove that he submitted an idea to Hasbro in confidence with the intention of being paid for it, and that Hasbro "misappropriated" the idea and "employed" it in connection with its own activities.

Judge Irenas agreed with Ahlert that he submitted an idea to Hasbro in confidence. That much was shown by a submission agreement Hasbro itself had asked Ahlert to sign. However, the judge said that Ahlert had not shown that Hasbro "misappropriated" or "employed" the water gun idea.

Ahlert argued that Hasbro misappropriated the idea by giving it to Professional Prototypes. But Hasbro denied doing to, and the judge said Ahlert had not shown otherwise.

Ahlert also failed to show that Hasbro "employed" the idea, because he failed to refute Hasbro's evidence that Professional Prototypes had independently created its water gun design. Professional Prototypes' design work was done after Ahlert had met with Hasbro. But the judge reasoned that "it is not inconceivable that with over a year's effort, a professional toy developer [Professional Prototypes] could independently arrive at a technology that a recreational inventor [Ahlert's client] assembled in his garage."

Judge Irenas therefore granted Hasbro's motion for summary judgment.

Ahlert was represented by Barry W. Horowitz of Horowitz Greener & Stengel in Monroe Township. Hasbro was represented by Gary Rosen and Patrick Madamba, Jr., in Philadelphia.

Ahlert v. Hasbro, Inc., 325 F.Supp.2d 509, 2004 U.S.Dist.LEXIS 13252 (D.N.J. 2004)

NBA player Allen Iverson defeats claim that he misappropriated idea to use "The Answer" as nickname and merchandising slogan, because idea was "freely offered" by "surrogate father" who suffered no competitive loss from Iverson's use of idea

NBA player Allen Iverson is known to his fans as "The Answer" – a nickname he adopted while playing in a summer basketball league, even before he was drafted by the Philadelphia 76ers. "The Answer" also is the slogan that Reebok uses on sportswear and sneakers it sells, pursuant to a merchandising agreement between Iverson and the company.

Jamil Blackmon says he is Iverson's "surrogate father" and he claims it was his idea that Iverson should use "The Answer" as a nickname and merchandising slogan, and that he disclosed this idea to Iverson years ago. What's more, Blackmon claims that Iverson has acknowledged the idea was Blackmon's, and has promised to pay him for it, many times.

Blackmon made these claims in an idea-submission lawsuit he filed against Iverson. The lawsuit alleged causes of action for misappropriation of the idea, for breach of contract, and for unjust enrichment. Whatever the truth of Blackmon's assertion that "The Answer" was his idea, Blackmon's lawsuit has failed. Federal District Judge Mary McLaughlin dismissed it (in a recently-published opinion).

Judge McLaughlin held that under Pennsylvania law, Blackmon's idea misappropriation required him to show that he suffered "a loss of competitive advantage or [was] otherwise . . . injured in his business." Blackmon did allege that he suffered a loss when Iverson failed to pay him for the use of his idea. But the judge said that was not enough. "The loss must be independent of a defendant's failure to pay," she explained, because ". . . it must be the taking of the idea itself that causes . . . a competitive or other harm," and this happens "only when the defendant's use of the idea . . . causes . . . detriment separate from the misappropriation."

Blackmon's breach of contract claim failed as well, because he suggested that Iverson use "The Answer" *before* Iverson agreed to pay for the idea. Even though Iverson later agreed to pay for it, "the disclosure of 'The Answer' idea had already occurred and was, therefore, past consideration insufficient to create a binding contract." For the same reason, Blackmon fared no better with his unjust enrichment claim. Blackmon "cannot make out a claim that [Iverson] was unjustly enriched by the use of a nickname that [Blackmon] freely offered," the judge ruled.

Blackmon was represented by Frederick A. Tecce of McShea Tecce in Philadelphia. Iverson was represented by Joseph J. Serritella of Pepper Hamilton & Scheetz in Philadelphia.

Blackmon v. Iverson, 324 F.Supp.2d 602, 2003 U.S.Dist.LEXIS 6614 (E.D.Pa. 2003)

Basketball coach Nolan Richardson loses race discrimination lawsuit against University of Arkansas

Nolan Richardson was the enormously successful head coach at the University of Arkansas basketball team from 1985 to 2002. His Razorback teams went to NCAA post-season tournaments in 13 of his 17 seasons. Better still, they made it to the "Sweet Sixteen" twice, to the "Elite Eight" once, to the "Final Four" three times, and to the title championship game twice. In 1994, the Razorbacks won the National Championship.

Richardson's accomplishments were remarkable for these and other reasons, not the least of which was that when he was hired in 1985, he was the first African-American ever to serve as a University of Arkansas head coach. When his Razorback coaching career came to an abrupt end in 2002, Richardson's race was still a central factor, he believed and alleged in a discrimination lawsuit he filed against the University and its officials, including athletic director Frank Broyles.

According to Richardson, the University terminated him on account of his race in violation of Title VII of the Civil Rights Act, and because he spoke out on matters of race in violation of his First Amendment free speech rights. During an 18-day bench trial before federal District Judge Roy Wilson, Richardson offered evidence that the University had treated its head football coach, Houston Nutt, differently and better, and with evidence of racial remarks Broyles had made to sportswriters.

Judge Wilson was persuaded by much of Richardson's evidence and by many of the legal arguments made on his behalf. When all was said and done, however, the judge did not agree that Richardson had been terminated because of his race or his race-related public comments.

The judge found that Richardson had met his burden of establishing a *prima facie* case of race discrimination under Title VII, by proving that he was an African-American and had met the University's legitimate expectations but was fired nonetheless. This shifted the burden to the University to offer a legitimate nondiscriminatory reason for firing Richardson.

Judge Wilson found the University satisfied its burden by proving that at a press conference held the day before it decided to fire him, Richardson had told reporters that "If they go ahead and pay me my money, they can take the job tomorrow." The judge agreed with the University that this comment showed Richardson had lost interest and lacked commitment to the University, had undermined public confidence and support for the program, and had a negative impact on recruiting for all of the University's teams.

This shifted the burden back to Richardson to prove that the University's reason for firing him was untrue and simply a pretext, and that his race was the real reason it fired him. Richardson failed to persuade Judge Wilson that this was so, for factual reasons the judge reviewed in detail.

In order to prevail on his separate First Amendment claim, Richardson had to prove that he was terminated because of comments he made on matters of "public interest or concern." Richardson failed to do this, because the judge found he was terminated as a result of his statement that the University "can take the job tomorrow" if it paid him his money. This statement was "purely job-related" speech rather than speech about a matter of public concern, Judge Wilson concluded.

As a result, the judge dismissed Richardson's case, and ordered each party to bear its own expenses and attorneys fees.

Richardson was represented by John W. Walker in Little Rock. The University of Arkansas was represented by Philip E. Kaplan of Kaplan Brewer & Maxey in Little Rock. The Razorback Foundation was represented by Shannon L. Poore of Ball & Mourton in Fayetteville.

Richardson v. Sugg, 325 F.Supp.2d 919, 2004 U.S.Dist.LEXIS 13324 (E.D.Ark. 2004)

Licensees of Baltimore Ravens' logo are bound by earlier finding in separate case against Ravens that logo is infringing, but artist who created logo is bound by earlier finding that infringing logo generated no revenues, and artist may not seek statutory damages against licensees

Security guard and amateur artist Frederick Bouchat won a remarkable copyright battle against the NFL's Baltimore Ravens, when he persuaded a jury that NFL Properties copied a design he had submitted to the Ravens when it created the Ravens' logo. The judgment that Bouchat's copyright was infringed was affirmed on appeal (*ELR* 22:10:16, 23:3:10). But he didn't recover any damages from the Ravens (*ELR* 25:9:12, 26:2:26). Nor did he recover any damages against 350 or so licensees of the Ravens logo who Bouchat later sued in two additional and separate lawsuits.

In his separate lawsuits against the licensees, Bouchat did win an important – though ultimately academic – legal point. Judge Joseph Garbis agreed with the artist that the licensees were bound by the finding, in Bouchat's earlier case against the Ravens, that the Ravens' logo did infringe Bouchat's copyright in a logo he had designed for the team.

The doctrine of "collateral estoppel" barred the licensees from re-litigating the infringement issue, even though they were not parties to the earlier case against the Ravens. Judge Garbis explained that although litigants are not usually bound by decisions in cases to which they were not parties, if they are "in privity" with a party to the earlier case, they may be bound. They were bound here, because the licensees were "virtually represented" in the earlier case by their licensor – NFL Properties – which was a party to that case.

On the other hand, the "collateral estoppel" doctrine also barred Bouchat from re-litigating the finding in the earlier case that none of the Ravens' revenues were attributable to the team's use of its infringing logo.

Perhaps anticipating that he might be bound by that earlier finding, Bouchat also sought statutory damages in the cases he filed against the licensees. Judge Garbis, however, ruled that Bouchat could not seek statutory damages against the licensees. The judge held that because Bouchat chose not to seek statutory damages in the earlier case, he was precluded from doing so in his later cases against the licensees.

What's more, the judge said, even if Bouchat were not barred from seeking statutory damages against the licensees for that reason, he would be barred from doing so because the licensees' infringements took place before he registered his copyright.

Finally, the judge noted that even if Bouchat weren't barred from seeking statutory damages, the most he could recover would be $30,000 in total. Bouchat sought to recover $30,000 per licensee, which would have totaled $10.5 million.

The Copyright Act allows statutory damages of up to $30,000 for "all infringements involved in the action." Though Bouchat filed two cases against licensees, and could have filed 350 – one against each licensee individually – Judge Bouchat said (in a footnote) that he would have treated all claims that could have been made in a single case as "the action." "Otherwise," the judge reasoned, "a Plaintiff could multiply statutory damage awards through the device of filing separate lawsuits against joint infringers."

Bouchat was represented by Howard J. Schulman of Shulman & Kaufman in Baltimore. Licensees were represented by Marc E. Ackerman of White & Case in New York City, William D. Coston of Venable in Washington D.C., Royal William Craig in Baltimore, and Michael B. MacWilliams of Venable in Baltimore.

Bouchat v. Champion Products, Inc., 327 F.Supp.2d 537, 2003 U.S.Dist.LEXIS 25877 (D.Md. 2003)

Pittsburgh Steelers defeat lawsuit alleging that some buyers of "stadium builder licenses" were over-charged for assigned seats in Heinz Field, because more expensive seating sections were larger than depicted in sales brochure diagram

Football games aren't over until the last moment of the fourth quarter. And lawsuits aren't over until the highest court has ruled. So it was with a lawsuit filed by season ticket holders against the Pittsburgh Steelers. Like an exciting football game, the lead changed back and forth. But in the end, the Supreme Court of Pennsylvania ruled in favor of the Steelers, and dismissed the lawsuit completely.

The lawsuit was filed by fans who were dissatisfied with the location of their seats in Heinz Field, the Steeler's new stadium. Their dissatisfaction erupted into a full-blown lawsuit, because when the team decided it needed a new home to replace Three Rivers Stadium, it financed a portion of the construction of Heinz Field by selling "stadium builder licenses." The licenses entitled holders to later buy season tickets, and they cost $250 to $2,700 each, depending on where in Heinz Field buyers wanted their seats to be. The brochure that offered "stadium builder licenses" for sale included diagrams of Heinz Field, indicating where each section of seats would be located, when construction was completed.

However, when the stadium was completed and season tickets were sold to holders of stadium builder licenses, some sections were larger than had been shown in the sales brochure. As a result, some fans who paid for seats they thought would be between the 20 yard lines actually were assigned seats closer to the end zones. And other fans were assigned seats higher in the stadium and farther from the field than the diagrams in the sales brochure had indicated. These were the fans who sued the team.

The Steelers scored first when a Pennsylvania trial court dismissed the case. Then, however, the season ticket holders took the lead, when an appellate court reversed (*ELR* 24:8:9). The Steelers regained the lead at the end, when the Supreme Court reversed the appellate court and ruled that the trial court had been right in the first place.

In an opinion by Justice Russell Nigro, the Supreme Court held that the sales brochure containing the stadium diagram was not part of the "stadium builder license" – and thus could not be considered under the parole evidence rule – because the license itself contained an "integration clause" that stated it was "the entire agreement of the parties." Because the season ticket holders' breach of contract claim was based on the diagram in the sales brochure, that claim failed.

The season ticket holders also asserted a claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law. That law requires consumers to show they "justifiably relied" on misrepresentations. Justice Nigro held that the season ticket holders could not make that showing, because the license said it was "the entire agreement of the parties."

The season ticket holders were represented by William James Helzlsouer in Dravosburg. The Steelers were represented by Charles B. Gibbons in Pittsburgh; and the Sports & Exhibition Authority was represented by James F. Glunt in Pittsburgh.

Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 2004 Pa.LEXIS 1606 (Pa. 2004)

New York appellate court dismisses lawsuit alleging talk-show host Maury Povich was liable for rape, by man claiming to be his limo driver, of 14-year old guest on episode about "out-of-control teens"

Maury Povich has defeated a claim that he was responsible for the injuries suffered by a 14-year-old girl who was guest on an episode of "The Maury Povich Show" about "out-of-control teens," when she was raped by a show employee. In order to succeed, however, Povich had to take the case to the Appellate Division of the New York Supreme Court.

According to the allegations of the girl's complaint, while the girl was watching the taping of other guests, a man who claimed to be "Maury's limo driver" introduced himself, and later persuaded her to sneak away from her mother and grandmother for a tour of the town, during which he raped her. The complaint asserted several legal claims, including those for negligent care of the girl, negligent hiring of the limo driver, and infliction of emotional distress.

A trial court dismissed some, but not all, of the case, in response to Povich's pre-trial motion. Two claims survived that motion: one for negligent care of the girl herself; and another for negligent hiring and retention of the limo driver. (*ELR* 25:11:22) But in an opinion by Justice Eugene Nardelli, the Appellate Division ruled that these claims should have been dismissed, and it did so.

Justice Nardelli emphasized that the girl had completed the taping of the episode of the show, and had been released into the custody of her mother and grandmother, before the limo driver persuaded her to sneak away from the hotel where the three women were staying, and prior to the alleged rape. The justice ruled that Povich no longer had any duty to the girl, once she was safely back in the care of her mother and grandmother.

Justice Nardelli acknowledged that employers are sometimes held liable for torts committed by employees, on the theory that the employees were negligently hired and retained. Those cases, though, require proof that the employer knew or should have known the employee was likely to cause injury to others. In this case, Justice Nardelli observed that the girl's complaint didn't even allege that Povich knew or should have known his limo driver was likely to rape the girl.

The Appellate Division affirmed the trial court's dismissal of the girl's claims for negligent infliction of emotional distress and negligence "per se."

The girl was represented by Robert A. Burstein of Rand Rosenzweig Smith Radley Gordon & Burstein in New York City. Maury Povich and his co-defendants were represented by Lanny A. Breuer of Covington & Burling in Washington D.C.

Sheila C. v. Povich, 781 N.Y.S.2d 342, 2004 N.Y.App.Div. 10396 (App.Div. 2004)

No likelihood of consumer confusion between new music record label "sTRANGEmUSIC" and hip-hop label "Strange Music," so court denies request for preliminary injunction

Peter Grant is a composer and performer. He also owns his own record company named "sTRANGEmUSIC." Grant composes, performs and records a genre called "new music" which he defines as music from "the classical tradition." It isn't, in other words, hip-hop music. This matters, because Grant complains that some music fans mistakenly believe that he does perform hip-hop music, because hip-hop artist Tech N9NE runs a record company known as "Strange Music."

Grant began using "sTRANGEmUSIC" before Tech N9NE began using "Strange Music," so Grant filed a trademark infringement suit seeking an injunction against Tech N9NE's continued use of "Strange Music." Since Tech N9NE has been much more successful than Grant, Grant's lawsuit alleged "reverse confusion."

Federal District Judge Kevin Castel agreed that Grant's "sTRANGEmUSIC" is a protectible mark, even without proof of secondary meaning, because it is "suggestive" rather than "descriptive."

On the other hand, the judge did a multi-factor analysis of the likelihood of consumer confusion, and he came to the conclusion there is "none."

Judge Castel also rejected Grant's New York state law anti-dilution claim, because in order to prevail with that claim, a mark must be distinctive. Grant's mark was not, however, because the judge found that "sTRANGEmUSIC" is a weak mark and has not acquired secondary meaning.

Grant was represented by Barry R. Fertel of Gersten Savage Kaplowitz Wolf & Marcus in New York City. Tech N9NE was represented by Robert L. Sherman of Paul Hastings Janofsky & Walker in New York City.

Strange Music, Inc. v. Strange Music, Inc., 326 F.Supp.2d 481, 2004 U.S.Dist.LEXIS 12323 (S.D.N.Y. 2004)

Digable Planets' right of publicity and other claims, triggered by Target Stores' use of group's signature song "Rebirth of Slick (Cool Like Dat)" in ad campaign, are dismissed as to television commercials, but not as to advertising and signage in stores

In 2003, Target Stores built a national, multimedia advertising campaign around Digable Planets' signature song "Rebirth of Slick (Cool Like Dat)." The campaign included television commercials that featured the 1993 recording itself, and advertising and signs in stores that featured slogans – such as "Jeans Like That" and "Shoes Like That" – that were altered versions of the song's title and lyrics.

The Target campaign was popular and may have had something to do with recent talk about the hip-hop group's reuniting. But Target apparently failed to get permission from the group's members, Ishmael Butler, Maryann Vieira and Craig Irving. The predictable result: a lawsuit, alleging claims under California right of publicity, contract, and unfair competition law, and under the federal Lanham Act. Target responded with a motion to dismiss much of the case. And that motion has been granted in part – but only in part.

Federal District Judge Consuelo Marshall ruled that the group's right of publicity and unfair competition claims are preempted by the Copyright Act, with respect to Target's use of the recording in the television commercial; and thus the judge dismissed those claims. But Judge Marshall ruled that the group's right of publicity and unfair competition claims were not preempted with respect to Target's use of altered lyrics in advertising and on signs in stores, so she refused to dismiss those claims.

Judge Marshall also dismissed the group's Lanham Act claim with respect to Target's use of the recording in television commercials. Lanham Act claims are not "preempted" by copyright law. But the judge dismissed it nonetheless, because she concluded the claim was an "unwarranted extension into an area already protected by copyright law." On the other hand, the judge denied Target's motion to dismiss the Lanham Act claim with respect to Target's use of altered lyrics in advertising and on signs in stores, because it was based on "possible consumer confusion" about whether the group sponsored the advertised products; and that "differs from a copyright claim," the judge concluded.

Digable Planets' members were represented by Joseph D. Schleimer and Kenneth D. Freundlich of Schleimer & Freundlich in Beverly Hills. Target was represented by David F. McDowell and Douglas L. Hendricks of Morrison & Foerster in Los Angeles and San Francisco.

Butler v. Target Corp., 323 F.Supp.2d 1052, 2004 U.S.Dist.LEXIS 12829 (C.D.Cal. 2004)

Court refuses radio station owner's plea to reduce jury award of $1.2 million to SESAC on account of broadcasts of SESAC songs without public performance license

A federal judge has refused to set aside a jury verdict in favor of SESAC against the corporate owner of two Pittsburgh radio stations and its president, on account of the stations' unlicensed broadcasts of SESAC songs. The verdict came to more than $1.2 million in statutory damages and included awards for willful copyright infringement as to some songs.

The judge's ruling was in response to a post-trial motion by station owner WPNT, Inc., and its president Saul Frischling, for a new trial on damages or a reduction in the amount of the verdict.

In a recently-published opinion denying their motion, Judge Robert Cindrich noted that WPNT had asked the jury to decide on a separate award for each infringed song – and the jury did, over the objections of SESAC which wanted the jury to return a lump sum verdict. "It is certainly possible that the [WPNT's] strategy resulted in a larger verdict than might have been if there had been just one finding on damages." But the verdict was not excessive, the judge ruled.

Judge Cindrich explained that the verdict "was somewhere below the middle range of the statutory range of damages." WPNT did not claim that the jury had been improperly instructed. Nor did it claim that the jury considered inadmissible evidence. Under those circumstances, the judge concluded that there was no reason for him to interfere with the jury's decision, or with Congress' prerogative "to prescribe the range of punishment . . . appropriate to accomplish the statutory goal" of deterring copyright infringement.

SESAC was represented by Gray A. Rosen in Philadelphia. WPNT was represented by Richard J. Antonelli of Littler Mendelson in Pittsburgh.

SESAC, Inc. v. WPNT, Inc., 327 F.Supp.2d 531 (W.D.Pa. 2003)

In determining ASCAP blanket license fee to be paid by background music services, rate court will consider fees agreed to by music publishers that previously entered into direct licenses with Muzak and DMX, but once blanket fee is determined, it will not be reduced to reflect direct licenses entered into during term of blanket license, federal "rate court" decides

Muzak and DMX Music have had ASCAP blanket licenses for years, authorizing the two background music services and their clients to publicly perform musical compositions whose copyrights are owned by ASCAP members. Now, Muzak and DMX are attempting a new licensing strategy. They want to get direct licenses from *some* music publishers, and blanket-like licenses from ASCAP for music owned by the others.

ASCAP, of course, is not keen on this "divide and conquer" strategy, and "rate court" Judge William Conner has been asked to rule on specific aspects of the new type of license that Muzak and DMX have sought. In an earlier proceeding, Judge Conner agreed with Muzak and DMX that in setting a blanket license fee, the license fees previously agreed to by individual publishers – in cases where Muzak and DMX obtain public performance licenses directly from publishers – may and will be taken into account, in determining whether the blanket license fee sought by ASCAP is "reasonable," as required by the consent decree (*ELR* 26:4:15).

Muzak and DMX then made an additional request (in a motion for clarification of Judge Conner's earlier order). They asked that when the blanket license fee is eventually set by the rate court, it be a "flexible" or adjustable fee – one that would be reduced to take into account any direct licenses Muzak and DMX might enter into with publishers, during the blanket license term.

Muzak and DMX made this request, because they do not expect to be able to negotiate direct licenses with all publishers that may be willing to do so, *before* the rate court sets a blanket license fee. Thus, Muzak and DMX argued that if the blanket license fee could not be reduced during its term, they would have to pay double for music directly licensed: once to ASCAP as part of its blanket license; and a second time to publishers that directly license their music during the blanket license term.

Judge Conner acknowledged Muzak and DMX's "concern . . . that not requiring a fee structure that provides for credits or discounts as a result of their ongoing entries into direct licensing relationships will lead them into the 'double payment trap'. . . ." But the judge denied their request, nonetheless. He did so, because "the blanket licensing arrangement that [ASCAP] and [Muzak and DMX] will ultimately enter into as a result of this proceeding need not be long-term." The judge observed that Muzak and DMX "will remain free to negotiate direct licensing arrangements with composers and publishers during that time, and may of course avoid the 'double payment trap' by entering into such arrangements to take effect at a future date" – something Muzak has done before.

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

United States v. American Society of Composers Authors and Publishers, 323 F.Supp.2d 588, 2004 U.S.Dist.LEXIS 13218 (S.D.N.Y. 2004)

Appellate court affirms dismissal of infringement claims against co-owners of copyright to Ice-T's "99 Problems" that allegedly sampled from "Get Off Your Ass and Jam" whose copyright is owned by Bridgeport Music, because Bridgeport failed to show that Universal-Polygram issued license for or received royalties from "99 Problems" and failed to properly serve complaint on Ammo Dump or Carrumba Music

Universal-Polygram, Ammo Dump Music and Carrumba Music are the co-owners of the copyright to "99 Problems," a musical composition co-written (and recorded) by Iced T in 1993. This got the three publishers sued for infringement, in 2001, by Bridgeport Music which claims that "99 Problems" sampled from "Get Off Your Ass and Jam," a song written by George Clinton, Jr., whose copyright Bridgeport now owns.

Bridgeport's lawsuit has not been successful. It was dismissed by the District Court as to each of the three defendants, and the Court of Appeals has affirmed.

Bridgeport's infringement claim against Universal-Polygram failed, because Bridgeport didn't show that Universal-Polygram granted any licenses for the use of "99 Problems," during the three years that preceded the filing of Bridgeport's lawsuit. Indeed, Universal-Polygram was able to show that it didn't issue a mechanical license for the song, because Iced-T recorded the song, and Priority Records released that recording, years before Universal-Polygram ever acquired the song's copyright. What's more, Universal-Polygram never received any mechanical royalties from the song, and didn't receive performance royalties for public performances during the period of limitations.

Bridgeport's claim against Ammo Dump Music failed, because Bridgeport attempted to serve its complaint against Ammo Dump by serving it on Warner/Chappell Music as Ammo Dump's "managing agent." Warner/Chappell does issue certain kinds of licenses on Ammo Dump's behalf. But Warner/Chappell denied it had authority to accept service for Ammo Dump; and Bridgeport failed to prove that Warner/Chappell was Ammo Dump's "managing agent."

Bridgeport's complaint against Carrumba Music was served on an accounting firm used by Carrumba "to perform routine bookkeeping functions." But the accounting firm was not authorized to accept service of process on Carrumba's behalf. And Bridgeport did not show that Carrumba's usual place of business or mailing address was the same as the accounting firm's.

Bridgeport didn't come away from the appeal completely empty-handed. The District Court awarded Universal-Polygram some $83,000 in attorneys fees and costs, as the successful party. Judge Guy, however, vacated that award. He held that Bridgeport's claim was "objectively reasonable," and thus he remanded the case to the District Court for reconsideration of whether Universal-Polygram should be awarded its fees and costs anyway.

Bridgeport was represented by Richard S. Busch of King & Ballow in Nashville. Universal-Polygram, Ammo Dump and Carrumba Music were represented by Philip M. Kirkpatrick of Stewart Estes & Donnell in Nashville, and Russell J. Frackman of Mitchell Silberberg & Knupp in Los Angeles.

Editor's note: The significance of the fact that Universal-Polygram did not receive royalties from "99 Problems" was not decided by Judge Guy. The District Court had ruled that the mere receipt of royalties, during the period of limitations as a result of a license issued outside the limitations period, is not an infringement. But Judge Guy specifically stated that he had not reached or decided that issue.

Bridgeport Music, Inc. v. Rhyme Syndicate Music, 376 F.3d 615, 2004 U.S.App.LEXIS 15141 (6th Cir. 2004)

IMG Worldwide unable to compel arbitration of claims made against it by consultant to IMG's client Arnold Palmer Enterprises, because IMG was not a party to arbitration agreement between consultant and Palmer

IMG Worldwide will have to defend itself in *court* against claims made against it by a consultant to IMG's client Arnold Palmer Enterprises. IMG wanted those claims to be decided in an arbitration, rather than in court, and for a while, it looked as though they would be.

An Ohio trial court granted IMG's motion to compel arbitration, relying on an arbitration clause in the agreement between I Sports and Palmer.

However, the Court of Appeals of Ohio has reversed. In an opinion by Judge Sean Gallagher, it held that since IMG was not itself a signatory to the agreement that contained the arbitration clause – only I Sports and Palmer signed that agreement – IMG could not compel arbitration.

Judge Gallagher acknowledged that some cases have held that, under some circumstances, non-signatories may claim the benefit of, or be bound by, arbitration agreements. However, Judge Gallagher held that none of those circumstances existed in this case.

Judge Anthony Calabrese dissented. He concluded that IMG should have been able to compel I Sports to arbitrate its claims, because IMG was Palmer's agent, and because Judge Calabrese would have ruled that I Sports was estopped from refusing to arbitrate.

I Sports was represented by David F. Aggers of Aggers Joseph & Cheverine in Pepper Pike, Ohio. IMG was represented by Joseph A. Castrodale of Ulmer & Berne in Cleveland.

I Sports v. IMG Worldwide, Inc., 813 N.E.2d 4, 2004 OhioApp.LEXIS 3631 (Ohio App. 2004)

Washington state statute prohibiting sale of violent video games to minors is declared unconstitutional by federal District Court

Once again, the efforts of lawmakers to prevent the sale of violent video games to minors have come to naught. The Video Software Dealers Association has successfully challenged the constitutionality of a Washington state statute designed to do just that. Federal District Judge Robert Lasnik has held that the statute violates the First Amendment, because it failed to pass muster under the "strict scrutiny" standard applicable to content-based speech restrictions, and because it was unconstitutionally vague.

Judge Lasnik noted that this was just one of many similar cases that have "erupted across the country as state and local governments have attempted to regulate the dissemination of violent games to children." More importantly, the judge also noted that thus far "no such regulation has passed constitutional muster." (For other failures involving: criminal laws, see, *ELR* 25:3:13, 23:4:13, 14:10:5; and civil tort claims, see, 24:7:18, 24:4:10, 24:3:12).

The judge had no difficulty concluding that video games are "speech." They "involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative . . ." he explained. Moreover, although he agreed with the government that the "Graphic depictions of depraved acts of violence . . . in [a game like] Grand Theft Auto: Vice City, fall well within the more general definition of obscenity," the type of "obscenity" that is not protected by the First Amendment is not the "general" kind – it's only the kind that deals with sex in the particular way the Supreme Court has defined unprotected obscenity.

Judge Lasnik seemed uneasy with the thought that the Constitution may prevent legislatures from ever being able to regulate violent video games. He observed that games probably can be regulated, constitutionally, if they contain sexually explicit images, and they may be able to be regulated if they contain violent images that appeal to the prurient interest of minors. The Washington statute at issue in this case, however, did not focus on those characteristics. As a result, Judge Lasnik enjoined the state from enforcing it.

The Video Software Dealers Association was represented by Darren H. Lubetzky of Jenner & Block in Washington D.C., and David J. Burman of Perkins Coie in Seattle. Washington state officials were represented by Noel Reynolds Treat of the King County Prosecuting Attorney's Office in Seattle.

Video Software Dealers Association v. Maleng, 325 F.Supp.2d 1180, 2004 U.S.Dist.LEXIS 13533 (W.D.Wash. 2004)

Shipment of books from France to United States was sufficient to give United States courts subject matter jurisdiction over copyright infringement suit, Court of Appeals affirms

United States federal courts have subject matter jurisdiction to decide copyright lawsuits complaining about the importation into the U.S. from other countries of infringing materials. A federal Court of Appeals has so ruled, in an infringement suit filed by "self-discovery" author and teacher Harry Palmer against a former student named Eldon Braun.

Palmer alleged and proved – to the satisfaction of a federal District Court in Florida – that after Palmer and Braun had a "falling-out," Braun wrote teaching materials that infringed the copyright to Palmer's.

What made the case interesting was the fact that although Braun began writing his infringing materials while living in the United States, he finished them while living in Paris. What's more, he marketed his infringing materials using a website, and actually shipped them from France to customers in the United States. On appeal, Braun argued that the District Court did not have subject matter jurisdiction to rule on the case, because the United States Copyright Act does not cover acts that occur outside the U.S.

In this respect, Braun was correct. (See, e.g., *ELR* 16:5:10 and 17:4:3) But the Court of Appeals did not agree that all of Braun's infringing acts took place in France. In a "per curiam" opinion, the appeals court noted that the U.S. Copyright Act gives copyright owners the exclusive right to import their works into the U.S. By shipping books from France to customers in the U.S., Braun had "imported" those books into the U.S., the appeals court said. And that gave the District Court subject matter jurisdiction over the case.

Braun also challenged, on appeal, the District Court's personal jurisdiction over him and its conclusion that Florida was the proper venue for the case. But because Braun had appeared in the case without contesting personal jurisdiction or service of process on him there, the appeals court rejected these arguments.

The appeals court therefore affirmed the judgment against Braun.

Palmer was represented by Penny R. Phillips in Altamonte Springs. Braun was represented by William S. Graessle in Jacksonville.

Editor's note: One issue that was not thoroughly explored by the appeals court was whether Braun was really the one who "imported" his books into the U.S., or whether he was an "exporter" and his customers were "importers." The question, in other words, is whether this case really stands for the proposition that those in other countries who export infringing copyrighted works *from their own countries* by shipping them *to* customers *in the U.S.* have committed infringements under the United States Copyright Act, as is necessary to give U.S. courts "subject matter" jurisdiction. Even if the answer to that question is "no," the outcome of this case may not have been different, because Braun did do other things in the United States: he wrote part of the infringing materials here; and his website was maintained on a server in the United States. The U.S. Copyright Act also gives copyright owners the exclusive right to "authorize" the importation of their works. And Braun's use of a U.S.-based marketing website could have been characterized as an act in the U.S. by which he "authorized" his customers to import the books into the U.S. That would have given the District Court subject matter jurisdiction too.

Palmer v. Braun, 376 F.3d 1254, 2004 U.S.App.LEXIS 14332 (11th Cir. 2004)

United States court did not have personal jurisdiction over French organizations that won court order in France requiring Yahoo to block access by French users to sites that auction Nazi merchandise, Court of Appeals rules

Some years ago, Yahoo lost a lawsuit filed against it in France by two French organizations known (in English) as the League Against Racism & Anti-Semitism, and the French Union of Jewish Students. The two organizations objected to Nazi merchandise being auctioned by Yahoo users from websites hosted on Yahoo's servers in the United States.

French law makes the mere display of Nazi merchandise a crime in that country, so Yahoo's site in France displays no Nazi materials. But, because the Internet makes websites accessible worldwide, regardless of where those websites are hosted, French residents are easily able to access the Nazi auction websites on Yahoo's servers, even though those servers are in the United States rather than France.

The French court ordered Yahoo to block access by French users to any websites that auction Nazi merchandise, apologize for Nazism, or contest the reality of Nazi crimes. Moreover, the French court decreed that if Yahoo failed to do so by February 2002, it would be subject to fines of 100,000 Francs (about $14,000) a day (*ELR* 22:8:5).

The French court prohibited the collection of the fines from Yahoo's French subsidiary, and Yahoo has no other assets in that country. But Yahoo was concerned that the organizations would allow the fines to pile up, and then seek to collect them in a legal proceeding in the United States. Hoping to head that off, Yahoo filed suit against the two French organizations in federal court in California, arguing that any attempt to collect the French judgment in the U.S. would violate Yahoo's First Amendment free speech rights. Federal District Judge Jeremy Fogel agreed, and ruled that the order of French court could not be enforced in a U.S. court (*ELR* 23:7:6).

Though the case raised important questions concerning the First Amendment rights of Americans abroad, the most hotly-litigated issue before Judge Fogel was whether he had personal jurisdiction over the two French organizations. Judge Fogel found that he did. But the organizations appealed, and the Court of Appeals held that he didn't.

In a 2-to-1 opinion by Judge Warren Ferguson, the appellate court noted that Yahoo conceded that the District Court did not have *general* jurisdiction over the French organizations, because neither of them has any presence in the United States. Judge Ferguson ruled that the District Court didn't have *specific* jurisdiction either.

The organizations' had done certain things in the United States. They sent cease-and-desist letters to

Yahoo's office in California, used the U.S. Marshal to serve process in the French case, and asked the French court to order Yahoo to remove content from its California-based server. But those things, Judge Ferguson ruled, were not sufficient to give the District Court specific personal jurisdiction.

Judge Melvin Brunetti dissented. In his opinion, the two organizations had sufficiently directed their activities towards Yahoo in California to give the District Court personal jurisdiction over them.

Yahoo was represented by Neil S. Jahss and Robert C. Vanderet of O'Melveny & Myers in Los Angeles. The two French organizations were represented by Richard A. Jones of Coudert Brothers in San Jose.

Editor's note: The question of whether the French judgment is enforceable in the United States was not addressed by Judge Ferguson, though Yahoo may win the case eventually, on First Amendment grounds. In order for the two French organizations to enforce their French judgment they will have to file a proceeding in an American court. They haven't attempted to enforce the judgment yet. But if and when they do, Judge Ferguson observed that they will subject themselves to the jurisdiction of the American court. And at that time, the merits of Yahoo's First Amendment defense will be the central issue in the case. What's more, there is precedent suggesting that Yahoo has good reason to suppose that it will then prevail (*ELR* 20:1:18).

Yahoo! Inc. v. La Ligue Contre Le Racisme, 379 F.3d 1120, 2004 U.S.App.LEXIS 17869 (9th Cir. 2004)

Michigan High School Athletic Association violated Equal Protection rights of female athletes by scheduling girls' sports to be played during non-traditional or inferior seasons, federal appellate court affirms

The Michigan High School Athletic Association discriminated against girls by scheduling their volleyball, basketball, soccer and tennis games, and their swimming and diving meets, during non-traditional seasons for those sports – while the boys games and meets were scheduled during those sports' traditional seasons. The Association did schedule girls' golf during the spring, which is its traditional season. But in Michigan, the fall is a superior season for golf. And since the fall is when the boys play golf in Michigan, the Association discriminated against girls who play golf as well.

Federal District Judge Richard Enslen so ruled, following an eight-day trial, in a lawsuit filed by Communities for Equity on behalf of Michigan's female high school athletes (*ELR* 24:1:14). In an opinion by Judge Ronald Gilman, the Court of Appeals has affirmed that ruling.

The District Judge concluded that the Association's scheduling practices violated the Equal Protection Clause of the 14th Amendment, Title IX, and Michigan's own Civil Rights Act. The Court of Appeals based its conclusion on the Equal Protection clause alone, and thus didn't reach the Title IX or state-law issues.

Judge Gilman easily concluded that the Association was a "state actor," thus making its activities subject to the 14th Amendment. And he agreed with the District Court that the Association's justifications for its scheduling practices were not "exceedingly persuasive," as they had to be to satisfy the "heightened standard" for review of gender-based classifications.

Communities for Equity was represented by H. Rhett Pinsky of Pinsky Smith Fayette & Hulswit in Grand Rapids, and by Kristen Gallee of Equity Legal in Alexandria. The Michigan High School Athletic Association was represented by Edmund J. Sikorski, Jr., of Ann Arbor, and by William M. Azkoul of Azkoul & Azkoul in Grand Rapids.

Communities for Equity v. Michigan High School Athletic Association, 377 F.3d 504, 2004 U.S.App.LEXIS 15437 (6th Cir. 2004)

Previously Reported:

Supreme Court grants cert. The United States Supreme Court has granted certiorari in *MGM Studios v. Grokster, Ltd*., 2004 U.S.LEXIS 8173, 2004 WL 2289054 (2004), in which the Ninth Circuit Court of Appeals affirmed a ruling that Grokster and Morpheus are not vicariously or contributorily liable for copyright infringements committed by P2P users (*ELR* 26:3:4) (see also "Opinions published" below).

Supreme Court denies cert. The United States Supreme Court has denied petitions for certiorari in three previously reported cases: *DeCarlo v. Archie Comic Publications*, 50 S.Ct. 50, 2004 U.S.LEXIS 5582 (2004), in which the Second Circuit Court of Appeals affirmed – in an unpublished order, and "for substantially the reasons stated in the . . . opinion issued by the District Court – a decision that Archie Comics owns copyrights to "Josie," "Sabrina" and "Cheryl Blossom," rather than artist Daniel DeCarlo, because they were works made for hire or DeCarlo assigned their copyrights to Archie (*ELR* 25:6:16); *Morris Communications Co. v. PGA Tour, Inc.*, 125 S.Ct. 87, 2004 U.S.LEXIS 6257 (2004), in which the Court of Appeals held that a PGA rule that prohibits the sale of real-time golf scores made available at tournament media centers does not violate the antitrust laws, because the PGA has a valid business justification for its rule (*ELR* 26:3:15); *Recording Industry Association of America v. Verizon Internet Services*, 125 S.Ct. 309, 2004 U.S.LEXIS 6700 , *Verizon Internet*

Services v. Recording Industry Association of America, 125 S.Ct. 347, 2004 U.S.LEXIS 6701 (2004), in which the Court of Appeals held that the subpoena provision of the DMCA does not require ISPs to provide names of subscribers to copyright owners, when infringing material is stored on subscribers' own computers rather than on ISPs' servers (*ELR* 25:11:11); and *Murray Hill Publications v. Twentieth Century Fox Film Corp*., 125 S.Ct. 432, 2004 U.S.LEXIS 7168 (2004), which held that Fox's movie "Jingle All The Way" did not infringe the copyright to a script titled "Could This Be Christmas," because the similarities that remained, after filtering out elements that existed in a treatment Fox acquired before the script was submitted, were not sufficient for a jury to find "substantial similarity" (*ELR* 26:3:11).

.

Opinions published. These previously reported cases have now been published: *Luck's Music Library v. Ashcroft*, 321 F.Supp.2d 107, 2004 U.S.Dist.LEXIS 10626 (D.D.C. 2004) (*ELR* 26:1:10); *Metro-Goldwyn-Mayer Studios v. Grokster Ltd.*, 380 F.3d 1154, 2004 U.S.App.LEXIS 17471 (9th Cir. 2004) (*ELR* 26:3:4).

Pre-trial rulings issued in Gibson Guitar case. After ruling that Gibson Guitar's registered trademark for the design of its "Les Paul single cutaway guitar" is infringed by the design of Paul Reed Smith Guitars' "Singlecut" guitar (*ELR* 26:5:19), the primary issue remaining for trial was how much in damages Gibson is entitled to recover. Both parties then filed pre-trial motions, in response to which Judge William Haynes has issued rulings that favor Gibson. The judge has granted Gibson's motion to exclude the testimony of Paul Reed Smith's expert, because the expert's report did not address the issue of damages. The judge also denied Smith's motion for a jury trial. Finally, Judge Gibson issued an injunction barring Smith from continuing to make or sell its "Singlecut" guitar. *Gibson Guitar Corp. v. Paul Reed Guitars*, 325 F.Supp.2d 841, 2004 U.S.Dist.LEXIS 14541 (M.D.Tenn. 2004).

DEPARTMENTS

Book Note:

Promises to Keep: Technology, Law, and the Future of Entertainment, by William W. Fisher III

Piracy has been a problem for the entertainment industry, almost from its very start. In the beginning, however, "pirates" were bad guys – people who chose to be pirates, rather than to sell drugs or rob liquor stores. Nevertheless, piracy used to be a manageable problem for the entertainment industry, because pirated copies were poorer in quality than legitimate product, because the equipment necessary to make pirated copies on a large scale was expensive, and because pirated goods were physical and could be tracked back to their distributors.

Three things happened, in the last decade or so, to change all that. First, entertainment has been digitized – or easily can be – so copies (including copies of copies) are as good as originals. Second, the Internet allows cheap, easy and worldwide distribution of digital entertainment. Third, file compression technology makes it possible to compress records and movies into files that are small enough so that anyone can send and receive them using nothing more than an ordinary computer and an inexpensive Internet connection. Indeed, CD and DVD burners are now so cheap that ordinary people – not just bad guys – can make music CDs and movie DVDs in their own homes (or dorm rooms) – and ordinary people do.

Many of the developments now being reported in the *Entertainment Law Reporter* are the result of entertainment industry efforts to stop unauthorized duplication and distribution of their products, over the unabashed objections of those who do it and those who provide them with the software, equipment and Internet service they need to do it. This conflict has been the subject of much academic attention and debate, the published results of which have been noted in the "In the Law Reviews" section of this publication. Now, Harvard Law School Professor William ("Terry") Fisher has put his views in print, in a newly-published book titled *Promises to Keep: Technology, Law and the Future of Entertainment*.

Professor Fisher's book is interesting on two levels. Its first three chapters are smoothly-written descriptions of digital technologies, the way in which the music and movie industries operated before digital technology upset those operations, and the lawsuits and Copyright Act amendments that ensued. Those chapters are a fascinating recap, even for readers who already know where the story is heading.

The next three chapters analyze three alternative ways to deal with technology's impact on entertainment. The first is the approach likely to be favored by the industry, as suggested by the chapter's title: "Taking Property Rights Seriously." The second is to treat entertainment industry like a public utility, whose creations would have to be licensed to users at "rates" set by law. The third is what Professor Fisher believes is "the best of the possible solutions to the crisis: an administrative compensation system that would provide an alternative to the increasingly creaky copyright regime."

As a concept, Professor Fisher's favored solution is not radical. He has called his proposal "An Alternative Compensation System," but it's simply another of what used to be called "compulsory licenses" and now are called "statutory licenses." In *concept*, an alternative compensation system might even be acceptable to entertainment industry.

On the other hand, Professor Fisher's particular proposal demonstrates the wisdom of whoever first said "the Devil is in the details." Though Professor Fisher has given a great deal of thought to the details he proposes, it is unlikely to win support from the industry or from Congress. He would amend the Copyright Act to eliminate most of the exclusives right to reproduce, transmit and use movies and recorded music; and he would compensate creators with funds raised by a "tax" on the sale of services and equipment used by consumers to get and play digital entertainment.

This one-sentence description of Professor Fisher's proposal does not do it justice. That's why he wrote an entire book to explain why it's necessary and why he believes his proposal is "the best." Those who care about the future of the entertainment industry will find that time spent reading the book will be well-rewarded and – because it is so well-written – pleasurable, even if readers don't agree with the book's conclusions.

Promises to Keep: Technology, Law, and the Future of Entertainment is published by Stanford University Press ($29.95).

In the Law Reviews:

The UCLA Entertainment Law Review has published Volume 11, Issue 1 with the following articles:

Amicus Brief of Michael Crichton et al. in McFarlane v. Twist by Eugene Volokh, 11 UCLA Entertainment Law Review (2004)

What's So Funny About Parody? by Schuyler Moore, 11 UCLA Entertainment Law Review (2004)

The Role of Novelty in a California Idea Submission Case by William O. Knox, 11 UCLA Entertainment Law Review (2004)

Who Has the Right to Edit a Movie?: An Analysis of Hollywood's Efforts to Stop Companies from Cleaning Up Their Works of Art by Michael Kurzer, 11 UCLA Entertainment Law Review (2004)

"You Can't Sing Without the Bling": The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System by Josh Norek, 11 UCLA Entertainment Law Review (2004)

Grasping for Air: Revised Article 9 and Intellectual Property in an Electronic World by Jennifer Sarnelli, 11 UCLA Entertainment Law Review (2004)

The Price of Celebrity: Valuing the Right of Publicity in Calculating Compensatory Damages by Matthew Savare, 11 UCLA Entertainment Law Review (2004)

Comm/Ent: Hastings Communications and Entertainment Law Journal, has published Volume 27, Number 1 with the following articles:

Sharing and Stealing by Jessica Litman, 27 Comm/Ent, Hastings Communications and Entertainment Law Journal 1 (2004)

Redefining the "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment by Jisuk Woo, 27 Comm/Ent, Hastings Communications and Entertainment Law Journal 51 (2004)

Picking Up the Pieces of Grokster: A New Approach to File Sharing by Tom Graves, 27 Comm/Ent, Hastings Communications and Entertainment Law Journal 137 (2004)

Can the Right of Publicity Afford Free Speech? A New Right of Publicity Test for First Amendment Cases by Jason K. Levine, 27 Comm/Ent, Hastings Communications and Entertainment Law Journal 171 (2004)

The United States-Australia Free Trade Agreement - The Intellectual Property Chapter by Christopher Arup, 15 Australian Intellectual Property Journal 205 (2004) (published by Lawbook Co. Ltd., 44-50 Waterloo Road, N. Ryde NSW 2113 Australia)

A Doctrine Under Pressure: The Need for Rationalisation of the Doctrine of Authorisation of Infringement of Copyright in Australia by Sydney Birchall, 15 Australian Intellectual Property Journal 227 (2004) (for publisher, see above)

MGM v. Grokster: A Ruling That Has Disappointed the Music and Film Sectors as They Look to the Law for Additional Tools in the Fight Against Fileswapping by Warren Shiell, 144 Copyright World 10 (2004) (www.ipworldonline.com)

A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the "Governor's Veto" for Gaming on "After-Acquired Lands" by Brian P. McClatchey, 37 University of Michigan Journal of Law Reform 1227 (2004)

Educational Programs Calendar:

I'm A Lawyer, Help Me Out Here!: Key Issues in Entertainment and Media Law, Thursday, January 27, 2005, 3p.m.-7:15 p.m., Southwestern Law School, Los Angeles. Sponsored by the Donald E. Biederman Entertainment & Media Law Institute and the Media Law Resource Center, the program targets The Real Deal: What You Need to Know About the Business of Reality; When Imitation Isn't Flattering: Dealing with Idea Submission Claims; Don't Be a Stooge: The Ever-Changing Right of Publicity; and On the Road: The Ethical Perils of Multi-Jurisdictional Practice. For further information, contact Tamara Moore of Southwestern University Law School, Donald E. Biederman Institute, 675 S. Westmoreland Ave., Los Angeles, CA 90005, call 213-738-6602 or online at institute@swlaw.edu.

2005 Association of National Advertisers Advertising Law and Business Affairs Conference, January 26-27, Marriott East Hotel, New York. This first Legal Affairs conference will provide an Overview and Introduction: Setting the Stage for Day One; Legislative Overview: State and Federal Developments; Tying in with Others: Sponsorships and Co-Promotions; Contract Negotiation and Drafting: Concurrent Breakout Sessions; Negotiating and Drafting Agreements with Advertising Agencies; Children's Advertising and Self Regulation; Negotiating and Drafting Agreements with Celebrity Talent; In House Counsel-Maximizing Your Protection Under the Attorney-Client Privilege and Work Product Doctrine; Internet, Wireless, and SMS Marketing; The Creative

Side of Advertising; 2005 Federal Trade Commission Agenda; Challenges in Global Advertising-Global Advertising Lawyers Alliance; a Regulatory Panel from State Attorney General Offices; Branded Entertainment; and Developments in Privacy and Publicity. For additional information, call 212-697-5950 or contact the Association of National Advertisers, Inc. Attention: Registration Coordinator, 708 Third Avenue, New York, NY 10017.

Winning At All Costs: Today's Addiction: A Conference on Sports Law & Ethics, February 9-11, Palmer House Hilton, Chicago, Illinois. Sponsored by Valparaiso School of Law, the program examines BALCO: The Prosecution's Case and the Defense's Case; AAA-CAS with athletes' attorneys and USADA representatives; Professional Leagues; luncheon speaker Bob Costas; Professional League Sports; College Sports; the Olympic Movement; The University of Colorado (A Case Study); Why Do We Have a Crisis of Ethics in Sports? Ethical Problems and Solutions. For additional information, contact Valparaiso University School of Law, Conference on Sports Law & Ethics, c/o Cindy Martin, 656 S. Greenwich, Valparaiso, IN 46383, FAX 219-465-7808, call 877-825-7652, or register on-line at www.valpo.edu/law/sportsconf/.

Cable Television Law 2005: Competition in Video, Internet & Telephony, February 14-15 in New York City, March 7-8 in San Francisco and Live Webcast, www.pli.edu on March 7-8. This Practising Law Institute program will cover Video Competition between Cable Incumbents, DBS, and Overbuilders; Bundling Strategies and Counter-Strategies; City Cable Telecommunications Regulation; Non-affiliated Internet Service Providers Attempts to Gain Access to Cable Modem and DSL Services; Court Decisions on Cable Franchise Fees; FCC Reviewof Cable Carriage of Digital TV Broadcast Channels; Retransmission Consent vs. Must-Carry Negotiations; FCC on "Effective Competition;" Privacy, Copyright and Internet Access over Cable Modems and the FCC and "Voice Over Internet." For additional information, call (800) 260-4PLI or online at www.pli.edu.

The Gaming Law Minefield: 9th Annual Institute, February 17-18, Green Valley Ranch Resort and Spa, Las Vegas, NV. Co-sponsored by the American Bar Association Criminal Justice Section and the William S. Boyd School of Law, University of Las Vegas, Las Vegas, Nevada, the program will take a comprehensive look at Today's Hot Issues: Regulators' Panel; Land for Tribal Gaming: To Shop or Not to Shop; Casinos as Cops: Managing the Compliance Function; Do Casinos Have Free Speech Rights? Advertising and Political Contributions; IGRA's 17th Birthday: Time for Changes?; What is Gambling?; and Carvings Up the Pie: State Revenue Sharing and Tribal Casinos. For addition information, go online at http://www.abanet.org/cle/programs/n05glm1.html or call 800-285-2221.

Counseling Clients in the Entertainment Industry 2005, March 30-April 1 in New York City and Live Webcast, www.pli,edu, March 30-April 1. Registration is for one, two or three days of the program, sponsored by the Practising Law Institute. Day one will delve into Television, the Computer & Video Game Industry; Ethics and Hot topics in Entertainment Law: Recent Court Decisions. Day two will focus on Film and Theater and Day three, the Music Publishing and Sound Recordings Business. For additional information, call (800) 260-4PLI or online at www.pli.edu.

Representing Your Local Broadcaster: 24th 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 Ucok at 312-988-5658 or e-mail tucok@staff.abanet.org.

International Trademark Association 127th Annual Meeting, May 14-18, San Diego Convention Center, San Diego. Among the many sessions, the keynote address by CMG Worldwide Chairman and CEO Mark A. Roesler will highlight Navigating Intellectual Property Rights for Celebrities. Other panels will examine That's Entertainment: Trademarks in Popular Culture; Product Placement and Misplacement-The Good, the Bad and the Ugly; Sports Marketing-The Real Dream Team; Toy, Entertainment and Sports Industries Breakout-Marketing to Children; Character Licensing and Co-Branding; Use (and Misuse) of Third-Party Trademarks and Trade Dress; Celebrity Endorsements-Pros and Cons; Merchandising and Co-Promotion and the Movies; and Negotiating Licensing and Sponsorship Agreements Workshop. For additional information, contact www.inta.org/sandiego.

Advanced Seminar on Copyright Law 2005, May 23-24, New York City. Sponsored by the Practising Law Institute, the program will examine How to Deal with Copyright Ownership and Transfer Issues; How to Draft Licensing Agreements; the Important Issues in Copyright Litigation; Intersection of Entertainment Law and Copyright; Intersection of Trademark Law and Copyright; Intersection of Right of Publicity and Copyright; and Music and Movies on the Internet. For additional information, call (800) 260-4PLI or online at www.pli.edu.