NEW LEGISLATION AND REGULATIONS

Congress authorizes ClearPlay-style technology to sanitize movies for private home viewing; also makes it a federal crime to camcord movies in theaters; and authorizes Copyright Office to "preregister" certain works so that remedies available for registered works are available if they are infringed before they are released

Congress has amended federal law in ways intended, for the most part, to benefit those in the entertainment industry. One change though was opposed by the industry, especially by motion picture directors. The amendments were bundled together in a multi-part bill called the "Family Entertainment and Copyright Act of 2005."

The three most significant parts of the bill: authorize technology to "sanitize" movies for private home viewing; make it a federal crime to camcord movies in theaters; and authorize the Copyright Office to "preregister" certain works so that remedies that are available only to registered works also will be available to the owners of the copyrights to these works even if they are infringed before they are released. (Two other sections of the bill are technical amendments.)

Movie sanitizing technologies

The movie sanitizing part of the bill has been given its own title: the "Family Movie Act of 2005." It was prompted by a still-pending dispute and lawsuit between directors (and movie studios) and several companies that make and sell home video versions of movies from which they have deleted scenes and sounds, or software and DVD players that automatically skip and mute scenes.

The Family Movie Act amends the Copyright Act so that no infringement occurs when "limited portions of audio or video content of a motion picture" are made "imperceptible" during "private home viewing," if "no fixed copy of the altered version of the motion picture is created."

The Family Movie Act also amends the Trademark Act, to eliminate potential liability under it, if viewers are given "clear and conspicuous notice" that the movie they are watching "is altered from the performance intended by the director or copyright holder of the motion picture."

The activities and technology blessed by this provision are those used by a Utah-based company known as ClearPlay. Indeed, the legislative history of the Family Movie Act states that "the bill is specifically designed to legalize ClearPlay technology."

ClearPlay's technology consists of software that instructs specially-designed DVD players to fast forward through certain scenes and to mute certain sounds. There are separate software programs for each movie ClearPlay has edited. But ClearPlay's technology does not physically alter users' DVDs, nor does it make copies of DVDs. ClearPlay's product can be thought of as a computer-driven fast-forward button that leaves DVDs intact, in exactly the condition they were in when customers first bought or rented them from video stores.

ClearPlay's competitors – including a company known as Clean Flicks – use a different technique to sanitize movies. They copy movie videos to a computer, edit the computer-based copy, and then rerecord the edited version back to videotape. These companies purchase an authorized copy of each movie they edit for each edited copy they sell. At least some companies actually deliver two videos to their customers – the authorized version and the edited version – for each movie those customers buy. For this reason, those companies argue that they aren't causing any financial harm to studios.

Nevertheless, the Family Movie Act's requirement that "no fixed copy of the altered version of the motion picture [be] created" makes it clear that the technique used by Clean Flicks and ClearPlay's other competitors is not blessed by the Act. The legislative history of the Act even states that "The [House Judiciary] Committee is aware of services and companies that create fixed derivative copies of motion pictures and believes that such practices are illegal under the Copyright Act."

Camcording ban

The part of the Act that bans camcording in movie theaters has been given its own title too: the "Artists' Rights and Theft Prevention Act of 2005" or the "ART Act." This part of the bill was prompted by the activities of pirates who attend pre-opening screenings or first-weekend showings of new movies, and who record those movies using small digital camcorders. The camcorded copies are then sold to those who convert them to DVDs for sale on the street for a few dollars per copy. According to the MPAA, this "misuse of camcorders is a significant factor in the estimated $3.5 billion in annual losses the movie industry suffers because of hard-goods piracy." Worse yet, camcorded versions are posted on the Internet and made available to millions of users to download over peer-to-peer networks. MPAA studies conclude that camcorded versions of movies in theatrical release account for more than 90% of the first copies of motion pictures illegally distributed on the Internet.

The ART Act is a federal version of similar state laws enacted in California (*ELR* 25:6:13) and elsewhere. However, the new ART Act specifically states that it does not preempt state laws. Instead, it complements state laws, so that both are available to the movie industry.

Even before the passage of the ART Act, it was an infringement of copyright to camcord movies. The ART Act, however, does one thing the Copyright Act by itself does not. The ART Act gives theater owners and their employees the authority to reasonably detain those who they reasonably believe are camcording a movie; and the Act gives them immunity from civil or criminal actions that arise out of doing so. In other words, the ART Act gives theater owners and their employees protection against liability for helping to enforce the ban on camcording, so there is reason to suppose the law will be enforced even though FBI agents will not be assigned to movie theater duty.

Preregistration of certain works

The Copyright Act has long harbored a strange and certainly unintended anomaly. Registration of copyrights is not – and never has been – a prerequisite for copyright protection. But, for a variety of good reasons, the government would like copyright owners to register their copyrights. So, as an incentive to get copyright owners to do that, the Copyright Act gives owners valuable remedies – attorneys' fees and statutory damages – if, but only if, they register their copyrights *before* those copyrights are infringed.

Ordinarily, this works well enough, because most works are registered shortly after they are released to the public, and most infringed works are infringed after that. However, some types of works are vulnerable to infringement even before they are publicly released, and thus before they are registered. When that has happened, copyright owners were not entitled to recover attorneys' fees or statutory damages.

The Family Entertainment and Copyright Act of 2005 will fix that anomaly, at least in part. It authorizes the Copyright Office to determine which types of works have been vulnerable to pre-release infringement. And it authorizes the Copyright Office to "preregister" those works before they are released. Then, if a preregistered work is infringed before it is released, its copyright owner will be entitled to the same remedies it would have been entitled to, if the work had been registered before the infringement occurred.

Family Entertainment and Copyright Act of 2005, S.167 (109th Cong., 1st Sess. 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s167enr.txt.pdf; and *House Report 109-33* (H.R. 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr033p1.109.pdf

WASHINGTON MONITOR

Actors may take tax deductions for all acting expenses only if their annual income from all sources – not just from acting – is less than $16,000, U.S. Tax Court rules in case brought by actor Jack Forbes

Actor Jack Forbes didn't have a very good year in 2000. His income from acting was just $13,435 that year. What's more, his acting expenses came to $17,878. So Forbes lost more than $4,000 from acting.

Fortunately for Forbes, acting isn't his sole source of income. By day, he's a lawyer (using his real name Jack A. Fleischli). In 2000, his income from lawyering was more than $16,000. How much more is not a matter of public record, but it was enough more that when Forbes prepared his federal income tax return for the year 2000, he deducted the full amount of his acting expenses.

Even the IRS acknowledges that Forbes could have deducted some of his acting expenses as "unreimbursed employee expenses." But those kinds of expenses are deductible only if and to the extent they exceed 2% of their income, for most people. Forbes deducted *all* of his acting expenses, including the part that did *not* exceed 2% of his income.

Forbes did this because a subsection of the Internal Revenue Code does allow "performing artists" to deduct all of their performing-related expenses, if – but only if – their gross income is less than $16,000.

Forbes contended that this deduction is available to performing artists whose income from *performing* is less than $16,000, and that income from other sources does not count towards the $16,000. Apparently, this was not a frivolous reading of the Internal Revenue Code. Indeed, the IRS itself allowed Forbes to deduct all his acting expenses for 1999 (after reviewing his tax return), even though his total income for that year was greater than $16,000. But when the IRS reviewed Forbes' tax return for 2000, it changed its mind, and billed him for an additional $5,580 in taxes.

Forbes took the case to the United States Tax Court, where he lost. In an opinion by Judge John Colvin, the Tax Court ruled that performing artists are entitled to deduct all their expenses only if their total income, from all sources, is less than $16,000.

Judge Colvin was less persuaded than Forbes was by the IRS's treatment of Forbes' 1999 tax return. The judge said that the IRS simply "is not bound" to allow deductions in later years that it allowed in earlier years.

Judge Colvin also rejected Forbes' argument that it would be unconstitutional to limit the "performing artists" deduction to artists who earn less than $16,000 from all sources. Forbes based this argument on a section of tax law that allows teachers to deduct $250 in teaching expenses, regardless of how much they earn, and on the fact that Congress has never adjusted the $16,000 limit despite inflation. The judge found that it was rational for Congress to treat performing artists differently than teachers. And Judge Colvin said that no law requires Congress to make adjustments for inflation.

Forbes represented himself. The IRS was represented by John D. Faucher.

Fleischli v. Commissioner of Internal Revenue, 123 T.C. No. 3 (2004), available at http://www.ustaxcourt.gov/InOpHistoric/JackFleischli.TC.WPD.pdf

Trademark examiner's refusal to register "The Baseball Channel" is reversed by Trademark Trial and Appeal Board, because mark is suggestive rather than merely descriptive of Major League Baseball Properties' service of "production and distribution of programming"

"The Baseball Channel." What *immediate idea* comes to mind? The answer matters, because it affected whether the phrase could be registered as a trademark.

Major League Baseball Properties filed applications with the United States Patent and Trademark Office to register two trademarks: "The Baseball Channel" and "MLB TV The Baseball Channel," both for "producing and distributing programming for others in the nature of baseball games . . . through broadcast media including television."

The Trademark Office examining attorney refused to register the marks, on the grounds that "The Baseball Channel" was merely descriptive of MLB's services. MLB appealed to the Trademark Trial and Appeal Board, with success.

For a mark to be *descriptive* of goods and services, it must "forthwith convey an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services . . . with a degree of particularity." The examining attorney thought "The Baseball Channel . . . may be used to describe a television channel about the game of baseball or featuring baseball games," and "the eventual broadcasting of programs under the term is merely descriptive of the intended purpose or function of the program production and distribution services recited. . . ."

On the other hand, MLB argued "The Baseball Channel" is not descriptive because it does not immediately convey anything about MLB's production and distribution services through television. And MLB argued "The Baseball Channel" is merely *suggestive* of its services because the terms only suggest MLB's services "are like a conduit of baseball-related information. . . ."

In an opinion marked "Not Citable as Precedent, the Trademark Trial and Appeal Board found there was not enough evidence to show the mark was merely descriptive. The Board determined that the term "Baseball" is descriptive of services in the nature of baseball games and the term "Channel" is descriptive of television broadcasting services.

But, the Board noted that MLB's services were for "production and distribution of programming" and "Channel" is not descriptive for "production and distribution of programming" services. "Specifically what the 'The Baseball Channel' describes about the services of producing and distributing programming is ambiguous and unclear." Since all doubts must be resolved in favor of applicants, the Board reversed the examiner's refusal to register the marks.

Major League Baseball Properties was represented by Mary L. Kelvin of Liebowitz & Latman in New York City. The Trademark Examiner was represented by Scott Baldwin of the United States Trademark Office. *(SG)*

In re Major League Baseball Properties, Inc., TTAB No. 78183355 (2005), available at www.uspto.gov/web/offices/com/sol/foia/ttab/2eissues/2005/78183355.pdf

INTERNATIONAL DEVELOPMENTS

Fox News and NFL Network approved for digital distribution in Canada by Canadian Radio-television and Telecommunications Commission

Fox News and the NFL Network have been approved for digital distribution in Canada by the Canadian Radio-television and Telecommunications Commission. The Commission's approval was in response to a request from the Canadian Cable Telecommunications Association, whose members are now able to add the two American channels to the lineups that Canadian cable systems are permitted to offer their Canadian subscribers.

Without Commission approval, Fox News and the NFL Network could not be carried by cable or satellite systems in Canada, because Canadian law prohibits the showing of non-Canadian channels that compete, even "partially," with Canadian specialty or pay television services.

The request of the Canadian Cable Telecommunications Association was supported by hundreds of individual viewers as well as organizations representing viewers' interests including, in the case of Fox News, Focus on Family and B'Nai Brith Canada.

Fox News' supporters candidly indicated their desire to have access "to viewpoints that take into account the political stance of the conservative movement." Opponents too candidly indicated they objected "to the content of the service," saying that "Fox News "presents a biased, conservative viewpoint supportive of Republican interests," and said that the Commission should not allow Fox News to be shown in Canada because of its "conservative ideological slant."

Indeed, more than two dozen objectors said that if the Commission permitted Fox News to be shown, the channel should be subject to the same conditions the Commission had earlier applied to the showing of Al Jazeera in Canada – conditions which were imposed out of concern that Al Jazeera's programming might be "abusive" or "expose people to hatred or contempt" based on their race, ethnic origin or sex.

Fox News also drew objections – for more business related reasons – from the Canadian Association of Broadcasters whose members operate over-the-air broadcast stations that compete for viewers with cable channels.

To decide whether Fox News should be permitted to be shown, the Commission compared Fox's service with Canadian specialty and pay services "in a similar genre, such as CBC Newsworld and CTV Newsnet." The Commission concluded that the services were different, because Fox News carries a lot of talk and opinion programming which the Canadian services do not, while the Canadian services carry a lot of Canadian news which Fox News does not. As a result, the Commission concluded that Fox News does not compete with Canadian program services. And it concluded that there was no reason to suppose that Fox News required Al Jazeera-like conditions.

The NFL Network was supported by Canadians who "live and breathe the sport of football." Because it focuses on NFL news and NFL game related programming, the Commission concluded that it does not compete with Canadian sports services that "offer a broader range of sports coverage appealing to a broader audience."

Revised lists of eligible satellite services, Broadcasting Public Notice CRTC 2004-88 (2004), available at http://www.crtc.gc.ca/archive/ENG/Notices/2004/pb2004-88.htm

Spike TV retains approval for digital distribution in Canada, despite changes to its prior Nashville Network format

After Viacom acquired what used to be known as "TNN: The Nashville Network," the company changed the network's programming format and name. It's new name is "Spike TV." Those changes prompted at least two legal proceedings, one before an American court and the other before an agency of the Canadian government.

The American court proceeding was a high-profile lawsuit filed by director Spike Lee who objected to that network's then-new name was too similar to his own. Lee was awarded a preliminary injunction, and then the case was settled (*ELR* 25:3:4), which is why the network is still named "Spike TV."

The proceeding before the Canadian government agency received less public attention, in the United States at least. It did, however, attract the active involvement of more than two hundred Canadian television viewers, broadcasters, distributors and industry associations. The proceeding was prompted by the Canadian Association of Broadcasters whose members used the network's change in format to seek an order that would have barred Canadian cable and satellite systems from providing Spike TV to their subscribers.

The CAB was able to ask for such an order, because Canadian law prohibits the showing of non-Canadian channels that compete with Canadian specialty or pay television services. Indeed, in order for Canadian cable and satellite services to be able to carry non-Canadian channels, they must get approval from the Canadian Radio-television and Telecommunications Commission – just as they recently did to carry Fox News and the NFL Network (*ELR* 26:11:8).

Back in 1984, when Spike TV was still "TNN: The Nashville Network," the Canadian Radio-television and Telecommunications Commission approved TNN for digital distribution in Canada. But when Viacom changed the network's name and format, that approval was put in jeopardy. The CAB argued that Spike TV does compete with several Canadian specialty services, especially Canada's "Men TV," but also Canadian travel, health and sports services.

The Commission agreed with the CAB that Spike TV and Men TV both target men from 18 to 49, but it concluded that they don't compete. "Spike TV is . . . directed to American middle class working men whereas Men TV is 'directed to men who are urban professionals . . . offer[ing] programming . . . from a Canadian men's perspective.'" What's more, the Commission observed that the "bulk" of Spike TV's programming was devoted to drama, while Men TV shows little drama and instead shows information and instructional programming and situation comedies.

The Commission also concluded that Spike TV does not compete with Canada's own travel, health, science or space networks. And it concluded that Spike TV does not compete with Canadian sports services.

For these reasons, the Commission approved Spike TV for digital distribution in Canada.

Distribution of Spike TV, Broadcasting Public Notice CRTC 2005-9 (2005), available at http://www.crtc.gc.ca/archive/ENG/Notices/2005/pb2005-9.htm

RECENT CASES

Songwriter Jim Weatherly may proceed with royalties lawsuit against Universal Music, despite delayed audit, because publisher's alleged misrepresentations effectively tolled limitations period, California appeals court rules

Getting royalty payments doesn't mean you'll be treated like royalty. So it was with a royalty agreement between songwriter Jim Weatherly and Universal Music Publishing Group. Weatherly alleged that Universal not only treated him poorly by withholding royalties, but intentionally misled him as well.

In 1974, Weatherly entered into an Exclusive Songwriter's and Composer's Agreement with a music publisher whose rights Universal Music later acquired. The agreement entitled Weatherly to 50% of all money received by Universal from foreign uses of his song. Weatherly received royalty payments and statements twice a year. The agreement also allowed Weatherly to inspect Universal Music's records, with one caveat: the agreement required him to report any discrepancies found in his statements within one year or be barred from filing suit.

In 2001, Weatherly audited Universal Music's books and found that Universal reported only 75% of the money it received from abroad, rather than 100%. Weatherly alleged that he didn't know that Universal was under-reporting foreign royalties, because in the "Rcvd" column of Weatherly's statements, most but not all of the entries were "100.00." Thus, Weatherly asserted that Universal had misled him into thinking his 50% share was being calculated on 100% of foreign collections. When the audit revealed that Universal was paying royalties on just 75% of foreign income, Weatherly filed suit alleging breach of contract (and other claims).

On the merits, Universal told Weatherly's auditor that the other 25% of foreign income was retained by foreign subpublishers, and that Universal was in fact paying royalties on 100% of the income that actually arrived in the United States.

At first, Weatherly's case didn't get as far as the merits. Superior Court Judge Malcolm Mackey granted Universal's motion for summary judgment, because Weatherly had an opportunity to audit Universal's books at any time under the agreement but did not do so until 2001 – more than a year after the objected-to statements were sent. Judge Mackey held that the contractual limitations period in the agreement barred Weatherly's lawsuit and thus dismissed his case.

Weatherly appealed and fared much better the second time around. In an opinion by California Court of Appeal Justice Candace Cooper, the appellate court reversed. Justice Cooper reasoned that since Universal misled Weatherly about the royalty payments, the limitations period did not expire. Justice Cooper explained that a "defendant cannot hinder the plaintiff's discovery through misrepresentations and then fault the plaintiff for failing to investigate." Furthermore, Justice Cooper added that "a plaintiff, prevented from discovery, should not suffer and a defendant should not profit from the plaintiff's ignorance."

Weatherly was represented by Anthony Kornarens of Spellberg & Kornarens in Santa Monica. Universal Music was represented by Russell Frackman, Jeffrey Goldman, and Nicole Harris of Mitchell Silberberg & Knupp in Los Angeles. *(KH)*

Weatherly v. Universal Music Publishing Group, 125 Cal.App.4th 913, 23 Cal.Rptr.3d 157, 2004 Cal.App. LEXIS 2309 (Cal.App. 2004)

Federal court grants $310,000 default judgment to Warner Bros. in copyright infringement case against Academy member who distributed screeners of "The Last Samurai" and "Mystic River" to person who made them available to others on the Internet

Academy of Motion Picture Arts and Sciences member Carmine Caridi agreed in writing not to circulate Academy screeners of "The Last Samurai" and "Mystic River" which he received from Warner Bros. But he gave them to a fellow named Russell Sprague anyway, and Sprague made them available to others on the Internet. Soon after, Warner Bros. sued Caridi and Sprague for copyright infringement, seeking a permanent injunction as well as damages, attorney fees and costs.

Sprague agreed to plead guilty to various violations of federal criminal law. But Caridi failed to respond to Warner's complaint at all, so the studio filed a request for entry of default judgment against Caridi. District Judge Stephen Wilson granted Warner's motion.

Judge Wilson noted that "[f]ailure to grant the motion would clearly prejudice Warner Bros.," because "Caridi's failure to respond has already delayed the case for ten months, during which time Caridi may have continued to infringe upon Warner Bros.'s copyrights." The merits of Warner's substantive claim were clear also, said the judge, since Sprague had "already pled guilty to criminal charges arising out of the conduct complained of here."

In establishing the sufficiency of Warner Bros. complaint, the judge noted that the company "alleged both ownership of a valid copyright and copying of constituent elements by Caridi." While Judge Wilson noted that the amount of actual monetary damage caused by Caridi is unclear, the judge still was able to conclude that the amount at stake was significant, because under Warner's willful infringement claim, the company was "entitled to receive enhanced statutory damages in an amount not to exceed $150,000 per film."

As to the possibility of a dispute concerning material facts, the judge noted a default judgment was favored because "as a result of the entry of default, there is no possibility of a dispute concerning the material facts." Judge Wilson further said there was no chance that Caridi's default was due to an excusable neglect, since months had passed since Caridi received notice of the complaint and default was entered.

While the judge conceded that the policy favoring decisions on the merits of the case favored Caridi, this did not clear Caridi, since this factor alone was not enough and Caridi's failure to make any appearance whatsoever made it difficult for the judge to "imagine how the case could be resolved on the merits."

The default judgment granted, Judge Wilson next had to come up with appropriate remedies. The judge granted Warner's prayer for a permanent injunction, saying, "due to Caridi's non-appearance, there is a threat of continuing violations." Warner Bros. also asked for the maximum enhanced statutory damages of $150,000 for each of the two films, and the judge granted this request, saying: "[g]iven such egregious conduct – which Caridi compounded by failing to proffer any defense or participate in discovery or engage in settlement negotiations – an award of the statutory maximum . . . is warranted here." The judge also awarded Warner Bros. $9,600 in attorney fees.

Warner Bros. was represented by Andrew M. White of White O'Connor Curry & Avanzado in Los Angeles. *(AMF)*

Warner Bros. Entertainment v. Caridi, 346 F.Supp.2d 1068, 2004 U.S.Dist.LEXIS 23740 (C.D.Cal. 2004)

Federal court in Puerto Rico grants summary judgment to situation comedy TV producer in copyright infringement case against former cast member who produced similar situation comedy for different station

Actor Emmanuel "Sunshine" Logrono appeared for two years in TMTV's "20 Pisos de Historia," a Puerto Rican situation comedy set in a condominium. Then Logrono and other actors moved to a different television station and appeared in a similar show called "El Condominio." When TMTV caught wind of the new show, it sued Mass Productions, through which Logrono produced "El Condominio," as well as Logrono himself, for copyright infringement. Soon after, TMTV moved for summary judgment on the issues of "authorship" of its show and its claim that "El Condominio" was an unauthorized derivative work. The court sided with TMTV.

Federal District Judge Raymond Acosta concluded that "20 Pisos de Historia" was a copyrightable work because the show was original and fixed in a tangible medium of expression. "Thus, regarding the threshold issue of copyrightability of '20 Pisos de Historia', we hold that it would be disingenuous to argue that the program, with all its thematic, plot, characters, character interaction, setting, decorative, costume, music, pace, lighting, scenographic and other multiple expressive elements, does not constitute an original work fixated in an audiovisual medium."

As to the show's authorship, the judge began by noting that it's "axiomatic that for copyright purposes the author of a work entitled to copyright protection is the person who first translates an idea into a fixed, tangible expression." While Logrono claimed that he had a hand in the program's authorship, the judge disagreed. Logrono said that "he wrote an outline or storyline of the first scripts at the [original] brainstorming session" and that he took the first three scripts penned by writers Miguel Morales and Roberto Jimenez and "re-wrote [them] before reformatting them" on "a special computer program . . . used to generate script lines[.]"

As to the first assertion, Judge Acosta noted that Morales and Jimenez denied Logrono's claims and, even if Logrono did create such an outline, it didn't matter, since that would only "constitute ideas and it is a basic tenet of copyright law that only fixed and original expression of ideas are protected, not the ideas themselves." As to Logrono's supposed rewriting of the scripts during his computer formatting session, the judge noted that a "cursory examination of the scripts as written by Morales and Jimenez when compared to the respective reformatted versions and the audiovisual tapes of said programs leads us to the inescapable conclusion that the changes are not significant." He concluded that "three seminal scripts penned by Morales and Jimenez were the ones used as the basis for the pilot programs without being re-written by Logrono as he alleges."

Logrono also argued that the written contracts Morales and Jimenez made with the manager of TMTV after prior oral agreements did not establish work for hire status. The judge disagreed, saying that the contracts simply ratified "a clear and undisputed understanding between the parties." Therefore, concluded Judge Acosta, TMTV was the sole author and copyright owner of "the original defining scripts used for the pilot of '20 Pisos de Historia' sitcom." Additionally, the judge concluded there were no facts to show that TMTV ever "contemplated sharing ownership or copyrights with Logrono or with anyone else at any time prior or subsequent to the production of the pilot programs of '20 Pisos de Historia.'" This meant that TMTV owned the copyrights for the entire two-year series with the "concomitant right to claim infringement if a substantially similar program were to be aired copying therefrom."

The judge then examined whether "El Condominio" was a derivative work. He noted that "'El Condominio' even [made] reference to the program's 'relocation,' which [evinced] a clear indication of the continuity from the previous '20 Pisos de Historia'". Judge Acosta said: "In this court's opinion, the similarities between the two programs are so striking that there is no doubt that 'El Condominio' is a derivative work of '20 Pisos de Historia' and for that matter an unauthorized derivative work." Therefore, the judge concluded that an infringement had occurred and that there was "no need to bring the infringement aspect of this case before a jury." Accordingly, the judge sent the case back to trial only on the issue of damages.

TMTV was represented by Roberto Sueiro-Del-Valle in San Juan, Puerto Rico. Logrono was represented by Ileann M. Canellas-Correa in San Juan. *(AMF)*

TMTV v. Mass Productions, Inc., 345 F.Supp.2d 196, 2004 U.S.Dist.LEXIS 23737 (D.P.R. 2004)

ESPN didn't defame stuntman Evel Knievel, appellate court affirms, because no reasonable person would think that website photo caption saying Knievel was a "pimp" was actual accusation

Evel Knievel may be cool, but don't dare call him a "pimp." That at least was the message Knievel sought to convey with a defamation lawsuit he filed against ESPN in federal court in Montana.

In April 2001, ESPN held its Action Sports and Music Awards ceremony where "celebrities in the fields of extreme sports and popular music" were honored. Knievel and his wife attended the event and were photographed while walking in. ESPN published this photo of Knievel, his wife and an unidentified woman on its "EXPN.com" website, along with numerous other celebrity photos taken at the event. EXPN.com features extreme sports.

The photograph depicted Knievel, "who was wearing a motorcycle jacket and rose-tinted sunglasses, with his right arm around [his wife] and his left arm around another young woman." The photo was captioned: "Evel Knievel proves that you're never too old to be a pimp." The photo was online for a total of six days before being removed.

Knievel brought suit claiming that "the photograph and caption were defamatory because they accused [Knievel] of soliciting prostitution and implied that [his wife] was a prostitute." ESPN won the case, with a motion for summary judgment, on the grounds that no reasonable person would have interpreted the photo and caption as an allegation that Knievel was a "pimp" in the criminal sense. (*ELR* 24:10:11) The trial court reasoned that the context of the communication was "directed at a younger audience and contained loose, figurative, slang language such that a reasonable person would not believe ESPN was actually accusing [Knievel] of being involved in criminal activity."

On appeal, Knievel maintained that the Montana Constitution guaranteed him a jury trial and that the trial court erred in granting summary judgment for ESPN. In an opinion by Judge Wallace Tashima, the Court of Appeals disagreed, saying there were no issues of fact that warranted a jury trial. It therefore affirmed the dismissal of Knievel's lawsuit.

Judge Tashima agreed that the First Amendment protected ESPN's communication and that no reasonable person would find the photo and caption defamatory within its context. He made specific note of the "overwhelming presence of slang and non-literal language" on the website.

Judge Carlos T. Bea dissented because he felt a reasonable person could find the photo and caption were defamatory.

Knievel was represented by Wade J. Dahood of Knight Dahood Everett & Severs of Anaconda, Montana. ESPN was represented by Nathan Siegel of ABC Inc. in Washington, D.C.

Knievel v. ESPN, 393 F.3d 1068, 2005 U.S.App.LEXIS 45 (9th Cir. 2005)

Record producer "Hype" Williams wins dismissal of remaining negligence claim filed by Blackground Records arising from the death of R&B singer Aaliyah in a plane crash following a video shoot; New York appellate court rules that Blackground did not have standing to bring a wrongful death action

After Aaliyah's death, her record company, Blackground Records, filed breach of contract and negligence claims against record producer "Hype" Williams. Blackground alleged that Williams was liable for damages Blackground suffered from Aaliyah's death, because Williams had made the arrangements for the fatal flight.

Williams responded by filing a motion to dismiss the entire case. New York trial court Judge Carol Edmead granted Williams' motion to dismiss the contract claim, but denied his motion to dismiss the negligence claim (*ELR* 26:8:15). Williams then appealed, successfully.

On appeal, Williams argued that Blackground's negligence claim was really a wrongful death action. New York appellate court Justice Joseph Sullivan agreed. Justice Sullivan ruled that New York does not recognize a common law wrongful death action. Therefore, the right to bring a wrongful death action is a statutory right. The New York wrongful death statute only permits a wrongful death action to be brought by the personal representative of the decedent, and the damage award is for the exclusive benefit of the decedent's heirs.

Since Blackground was neither the personal representative Aaliyah's estate nor her heir, Justice Sullivan granted Williams' motion to dismiss the negligence claim.

Williams was represented by David H. Fromm of Brown Gavalas & Fromm in New York City. Blackground Records was represented by Frank H. Penski of Nixon Peabody in New York City. *(MAR)*

Barry & Sons, Inc v. Instinct Productions LLC, 788 N.Y.S.2d 71, 2005 N.Y.App.Div.LEXIS 39 (N.Y.App.Div. 2005)

In case filed by adult entertainment website Perfect10.com, federal District Court holds that DMCA's "safe harbor provisions" protect payment-processing, age-verification and webhosting companies from copyright infringement liability; but court rules they are not immune from trademark or right of publicity claims

Perfect 10 is an adult magazine that displays copyrighted photographs on its Perfect10.com website. The company alleges that its photos have been copied and displayed by other websites, without permission, and it has responded by filing an infringement lawsuit. This much is not unique; Playboy has done likewise, many times.

Perfect 10 however has adopted a unique strategy. Instead of (or perhaps in addition to) suing the offending websites, Perfect 10 also has sued companies that merely process payments, provide age verification or webhosting services for the offending websites. The lawsuit alleges that these companies have committed copyright and trademark infringement, RICO violations, violations of rights of publicity, false advertising and unfair competition, because they failed to terminate services to websites that were repeat infringers.

The companies responded to Perfect 10's suit with a motion for summary judgment, arguing that Perfect 10's copyright claim is barred by the "safe harbor" provision of the Digital Millennium Copyright Act, and that other claims are barred by the Communications Decency Act.

Federal District Court Judge Lourdes Baird granted part of their motion, but only part. She ruled that the "repeat infringer" policies adopted by the companies are adequate, and that the DMCA does not require perfect implementation of a repeat infringer policy, it merely requires reasonable implementation. Moreover, Judge Baird agreed that the companies do reasonably implement their repeat infringer policies. Perfect 10 argued they do not; but the judge found that Perfect 10 had failed to comply with the DMCA's notification provisions, because the copyright infringement notifications it had submitted to the companies did not identify Perfect 10's copyrighted photographs with enough specificity to permit them to locate the photographs.

Perfect 10 also argued that the companies were not protected by the "safe harbor" provisions of the DMCA, because they had the right and ability to control the infringing activity and had knowledge of it. Judge Baird disagreed, even though one of the companies provided service to a password hacking website. Judge Baird held that hosting a password hacking website does not result in copyright infringement liability without evidence that the passwords were actually used to access Perfect 10's copyrights, because attempted access to copyrighted works is not sufficient to demonstrate copyright infringement. The judge also ruled that the companies did not have knowledge of the infringing activity, even though the photographs were of celebrities, because a celebrity's photo alone is not sufficient to indicate that a website is a pirate website with infringing material.

However, the judge did deny the companies' motion to dismiss Perfect 10's right of publicity and trademark claims. Although they argued that the CDA provided immunity from these claims, Judge Baird ruled that the CDA does not limit or expand any law pertaining to intellectual property, and that giving the companies immunity from publicity and trademark claims would limit the laws pertaining to intellectual property. However, the companies' motion to dismiss Perfect 10's unfair competition and false advertising claims was granted, because those claims did not rely on intellectual property rights.

Perfect 10 was represented by Jeffrey N. Mausner of Berman Mausner & Resser in Los Angeles. The companies were represented by John P. Flynn of Tiffany & Bosco in Phoenix, Jay M. Spillane of Fox & Spillane in Los Angeles, Brandon Baum of Cooley Godward in Palo Alto, Dennis T. Kearney of Pitney Hardin Kipp & Szuch in Morristown, and Bruce Wessel of Irell & Manella in Los Angeles. *(MAR)*

Perfect 10, Inc v. CCBill, LLC, 340 F.Supp.2d 1077, 2004 U.S. Dist. LEXIS 17643 (C.D.Cal. 2004)

Lanham Act does not protect the term "Beerman" – when applied to entertainment/promotional services for beer vending character – because it's merely a composite of two generic marks, federal appeals court affirms

Robert Donchez would like to introduce himself as "Bob the Beerman," a beer vending character that Donchez created and named himself. "Bob the Beerman" sold beer at numerous sporting events, wrote a book titled "A View from the Stands: A Season with Bob the Beerman," and even appeared on TV and radio, in print and at charitable events. In 1993 Donchez registered "Bob the Beerman" as a Colorado state service mark for "Education and Entertainment Services."

In 1996, Donchez dressed up as "Bob the Beerman" and met with Coors' promotional company to discuss using the character in Coors' advertising campaigns. But Coors and Donchez never entered into a contract.

Nevertheless, in 1997, Coors' advertising campaign featured beer vendors, one of whom was named "Beerman." Donchez claimed that Coors' advertising campaign confused consumers into believing Donchez was somehow affiliated with Coors. So in 1999, Donchez filed suit against Coors in federal court in Colorado alleging claims for unfair competition in violation of the Lanham Act, service mark infringement, and common law right of publicity. The trial judge granted Coors' motion for summary judgment on all his claims, and Donchez appealed.

The Court of Appeals has affirmed summary judgment in favor of Coors. In response to Donchez's claim for unfair competition in violation of the Lanham Act, Judge Mary Briscoe noted "there are five different categories of terms with respect to the protection of a mark: generic, descriptive, suggestive, arbitrary and fanciful." If a mark is *generic* it cannot be protected because it is a common description of the product or service, and the public has "an inherent right to call a product or service by its generic name." If a mark is *descriptive*, it can only be protected if it has acquired "secondary meaning." *Fanciful, arbitrary* and *suggestive* marks are protected. But Coors did not use the term "Bob the Beerman" – it only used "Beerman." So, Judge Briscoe had to determine what category the term "Beerman" fell into when used for entertainment and promotional services or for a beer vending character.

Donchez claimed "Beerman" was suggestive, or at least descriptive with secondary meaning when used in connection with his products and services. Donchez pointed to the fact that leading dictionaries do not define the term "Beerman." However, Judge Briscoe ruled that the term "Beerman" is generic because, as Coors argued, it is merely a composite term made up of two generic words – "Beer" and "Man" – that are found in all dictionaries. In short, unlike the term "Seven-Up" (two generic words with an unexpected meaning), "Beerman" is nothing more but "a sum of its parts." The judge also ruled there wasn't sufficient evidence to show the term was descriptive with secondary meaning.

With respect to Donchez's common law service mark infringement claim, Judge Briscoe affirmed summary judgment in favor of Coors because there wasn't sufficient evidence to show "Beerman" should be protected.

In response to Donchez's right of publicity claims – a claim designed to "reserve to a celebrity the personal right to exploit the commercial value of his own identity" – the judge ruled there was no evidence that Donchez's own identity has any commercial value or that Donchez *himself* is a celebrity.

Donchez was represented by A. Bruce Jones of Holland & Hart in Denver. Coors was represented by K. Preston Oade Jr. of Holme Roberts Owen in Denver. (*SG*)

Donchez v. Coors Brewing Co., 392 F.3d 1211, 2004 U.S.App.LEXIS 26749 (10th Cir. 2004)

Massachusetts Revenue Commissioner's decision to deny request of NHL's Boston Bruins request for tax abatement is largely upheld because out-of-state income was properly "apportioned" to the state, but revenue from international and out-of-state broadcasts and trademark licenses should not have been taxed, Massachusetts high court decides

The Boston Bruins' tax abatement claim is partially "on ice." The National Hockey League team has challenged the Massachusetts Commissioner of Revenue's tax apportionment determinations for the years from 1991 through 1994. Specifically, the Bruins contended that the Commissioner "erred in ruling that one hundred per cent of the revenue [the Bruins] received from the following sources was properly apportioned to Massachusetts: the sale of tickets . . . ; the licensing of local, national and international broadcast rights; the licensing of logos and trademarks; and a limited partnership interest in the New England Sports Network." Further, the Bruins claim that the Commissioner's determination violated the Commerce Clause of the United States Constitution.

In its state tax returns, the Bruins didn't treat all income received from these sources as Massachusetts income, because some of it came from out-of-state sources. The Appellate Tax Board affirmed the Commissioner's denial of the Bruins' application for an "abatement" of its taxes; and the team appealed that ruling to the Supreme Judicial Court of Massachusetts (the state's highest court).

In an opinion by Justice Robert Cordy, the court examined each source of income individually to determine if the Commissioner properly computed the team's taxes, and decided that for the most part, the Commissioner did.

First, the court held that even though the Bruin's away games took place outside of the state, "the 'operation of an NHL franchise,' not just playing the individual games" is the income-producing activity.

Second, the Bruins objected to the "inclusion of the license fees paid to broadcast away games on the theory that those licenses were 'used' in States outside Massachusetts, and that the direct costs incurred by the licensees were largely incurred outside Massachusetts." The court affirmed the Commissioner's apportionment with respect to advertising revenue and upheld the affiliate revenue apportionment "only with respect to cable affiliates commercially domiciled in Massachusetts."

On the other hand, the court agreed with the team that licensing revenue from international and out-of-state broadcasts of Bruins games should not have been apportioned to Massachusetts, nor should logo and trademark license fees paid by out-of-state licensees.

In response to the Bruin's Commerce Clause challenge, the court held that the Commissioner's apportionment calculation was acceptable and didn't violate the U.S. Constitution. Specifically the court found that the taxes applied to each activity had the necessary substantial nexus with the state and didn't discriminate against interstate commerce.

The Bruins were represented by John Kenneth Felter in Boston. The Commissioner of Revenue was represented by Pierce O. Cray, the Assistant Attorney General, in Boston. *(ANC)*

Boston Professional Hockey Association, Inc. v. Commissioner of Revenue, 820 N.E.2d 792, 2005 Mass.LEXIS 10 (Mass. 2005)

NFL's Cincinnati Bengals don't have right to arbitrate dispute with fans over season tickets because first contract which didn't have arbitration or required ticket purchase clauses is valid and subsequent document containing such clauses is invalid, Ohio appellate court rules

The Cincinnati Bengals have been punted back to a trial court in a lawsuit filed against the NFL team by some of its fans. The case involves the question of whether the fans are obligated to buy season tickets.

The dispute arose because the Bengals sold "seat licenses" to fans in order to raise money for the construction of Paul Brown Stadium. It was a two-step process: first fans bought licenses to buy season tickets, and then those fans were able to purchase their actual tickets. After fans agreed to the seat license agreement and paid their deposits, the Bengals sent them another document "which added some provisions not part of the original [agreement]." The added provisions included an arbitration clause and a default and acceleration provision "that required patrons to pay for any unbought season tickets over the duration of their lease, even if the patrons did not want to want to buy the tickets."

When some fans did stop buying season tickets, the team demanded payment anyway, pursuant to one of the added provisions. The fans responded by suing the Bengals, seeking an injunction that would bar the team from attempting to collect for unwanted tickets. The Bengals cited the arbitration clause in the second document and persuaded a trial court to stay the fans' lawsuit pending arbitration. The trial court also denied the fans' preliminary injunction motion.

In an opinion by Judge Mark Painter, the Ohio Court of Appeals has reversed. Judge Painter rejected the

Bengals' argument that the first contract was merely a brochure. The first contract was complete and controlling and the second document was not supported by any separate consideration, and thus not binding, Judge Painter concluded.

The Bengals also argued that these fans are bound by a previous case settlement which required arbitration of any future disputes. Judge Painter rejected this claim stating that this case involves an entirely different agreement, namely the second contract containing the arbitration, default and acceleration clauses. Therefore the case was remanded to the trial court with instructions to lift the stay pending arbitration and rule on the fans' motion for a preliminary injunction.

The fans were represented by Janet G. Abaray of Lopez Hodes Restaino Milman & Skikos in Cincinnati. The Bengals were represented by Eric Combs of Taft Stettinius & Hollister in Cincinnati.

Dunkelman v. Cincinnati Bengals, Inc., 821 N.E.2d 198, 2004 Ohio App. LEXIS 5948 (Ohio Ct. App. 2004)

Pennsylvania Interscholastic Athletic Association's anti-recruiting rule barring schools and personnel from recruiting student athletes does not violate First Amendment, federal District Court decides

In the movie *"Johnny Be Good,"* football star Johnny Walker (played by Anthony Michael Hall) is torn between temptations offered by flashy college recruiters. In the real world, recruiting begins before high school, even though rules usually prohibit it.

North Catholic High School head varsity girls' basketball coach Molly Rottmann went to basketball games of a grade school, and after each game, approached team members – including one named April Austin – to "offer congratulations or to extend a greeting." An investigating committee found Rottmann spoke to the grade-school athletes as a representative of the North Catholic girls' basketball program, in violation of a rule of the Pennsylvania Interscholastic Athletic Association.

The Association is a non-profit organization that develops and enforces rules regulating interscholastic athletic competition among its member schools. One of its rules forbids recruiting. The anti-recruiting rule forbids coaches from "approach[ing] a student . . . and attempt[ing] to influence . . . that student to transfer to that school . . . for any athletic purpose . . . ."

An investigating committee determined that Rottmann had engaged in "recruiting April Austin for an athletic purpose." Rottmann appealed, but the Association's Board of Appeal affirmed committee's determination that "the evidence . . . demonstrated that Coach Rottmann's course of conduct was intended to influence eighth-grade girls basketball players, [including April Austin,] to attend North Catholic and to play girls' basketball for Coach Rottmann."

As a result of this rule violation, Rottmann was suspended for a year. She responded by filing a lawsuit in federal court that claimed that the Association's anti-recruiting rule was unconstitutional because it violated her First Amendment right to free speech and because it is vague and overbroad. Rottmann made a motion for a preliminary injunction, but Judge Gary Lancaster denied the motion.

Judge Lancaster agreed that the anti-recruiting rule is a regulation that places a burden on a public employee's speech. This meant that he had to "determine whether the speech affected by the challenged regulation involves a matter of public concern. If so, the court must then balance the speaker's interest in promoting the purposes behind the restriction in determining whether the regulation is constitutional."

Here, the judge reasoned that Rottmann's efforts to influence students to play basketball for her was a matter of private concern to Rottmann, and *not* one of public concern. The judge did not believe Rottmann's testimony that she was simply encouraging girls to continue to play sports and to continue in Catholic school education. What's more, Judge Lancaster found that the "Rule's purpose in promoting academics over athletics, protecting students from exploitation, and maintaining competitive equity greatly outweigh any public interest in allowing [Rottmann] to recruit standout eighth grade athletes to play girls' basketball at North Catholic High School."

Rottmann was represented by Samuel J. Reich of Reich Alexander & Reisinger in Pittsburgh. The Pennsylvania Interscholastic Athletic Association was represented by Alan R. Boynton, Jr., of McNees Wallace & Nurick in Harrisburg. *(SG)*

Rottmann v. Pennsylvania Interscholastic Athletic Association, 349 F.Supp.2d 922, 2004 U.S.Dist.LEXIS 27506 (W.D.Pa. 2004)

Previously Reported:

Supreme Court denies cert in DMCA tort case. The United States Supreme Court has denied a petition for certiorari filed by Michael J. Rossi, the operator of the website InternetMovies.com. Rossi filed a tort lawsuit against the MPAA, because his website was taken down in response to an MPAA request, even though – as things eventually turned out – the site may not have been distributing pirated movies after all. The District Court dismissed Rossi's case (*ELR* 25:2:9), and the Court of Appeals affirmed (*ELR* 26:10:15), because at the time it sent Rossi's webhost a take down notice, the MPAA had a good faith belief the site was offering pirated movies for download. The MPAA's belief was based on a statement on the site that read "Full Length Downloadable Movies," accompanied by graphics of the logos of MPAA members. *Rossi v. MPAA*, Case No. 04-1166 (2005), available at http://www.supremecourtus.gov/orders/courtorders/050205pzor.pdf.

Rosa Parks/OutKast case settled. Civil rights pioneer Rosa Parks has settled her right of publicity and Lanham Act lawsuit against LaFace Records and the rap group OutKast – a suit that was triggered by the use of her name as the title of one of the cuts on OutKast's 1998 album "Aquemini." Early in the case, a federal District Court issued a pre-trial ruling that LaFace and OutKast had not violated Parks' rights (*ELR* 21:12:9). But that ruling was reversed by the Court of Appeal which held that Parks' was entitled to a trial on her claims (*ELR* 25:5:11). The Supreme Court then denied a petition for certiorari filed by LeFace and OutKast (*ELR* 25:12:20). According to news reports, LaFace and its parent companies will help develop educational programs to "enlighten today's youth about the significant role Rosa Parks played in making America a better place for all races."

DEPARTMENTS

Entertainment Lawyer News:

Foley & Lardner forms entertainment and media industry group headed by Miriam Beezy and James Nguyen in Los Angeles. Foley & Lardner has formed an Entertainment & Media Industry Team of some two dozen lawyers located in Los Angeles, New York, Orlando and other firm offices across the country. The team will be led by Miriam Beezy and James Nguyen, partners in the firm's Los Angeles office. Beezy is the former chief trademark counsel for The Walt Disney Company. She has long practiced in the industry while a partner at entertainment law firms Mitchell Silberberg & Knupp, where she founded and led the trademark practice, and Greenberg Glusker Fields Claman Machtinger & Kinsella, where she founded and chaired the Intellectual Property and Technology Department. Beezy graduated from UCLA and received her law degree from Southwestern University School of Law. Nguyen previously practiced at a prominent Los Angeles entertainment firm and has since focused his practice on the entertainment and media industry. He also is a member of the Academy of Television Arts & Sciences. Nguyen graduated from UCLA and received his law degree from USC.

Amy Nickin joins Frankfurt Kurnit Klien & Selz in New York City as Counsel to firm's entertainment and sports group. Amy Nickin has become Counsel to Frankfurt Kurnit Klein & Selz in the firm's Entertainment and Sports Group in New York city. She represents actors, writers, and directors in all business and legal aspects of their film and television careers. Her clients include clients include Jason Smilovic, Method Man, Redman, and Kazuaki Kiriya. Prior to joining Frankfurt Kurnit, Nickin was an associate at the boutique entertainment law firms of Barnes Morris in Los Angeles and Schreck Rose & Dapello in New York. She began her career in business and legal affairs at Metro-Goldwyn-Mayer and The Shooting Gallery. Frankfurt Kurnit Klein & Selz represents publishers, writers, actors, directors, athletes, producers, financing entities, distribution companies, broadcast entities, commercial production companies, corporate executives, and many of the top advertising agencies and brands, as well as a wide range of other businesses and charitable organizations.

Yakub Hazzard named co-chair of Alschuler Grossman Stein & Kahan entertainment and media department. Yakub Hazzard has been named Co-Chair of the Entertainment & Media Department at Alschuler Grossman Stein & Kahan in Los Angeles. The Department represents actors, directors, producers, writers, recording artists, executives, independent motion picture and television production and distribution companies, talent agencies, and personal managers, in litigation, including vertical integration lawsuits. The firm also represents commercial and music video production companies, post-production and special effects companies, infomercial and direct marketing companies, and sports and apparel companies. Hazzard's practice focuses on music-related disputes. His clients include songwriters, musicians, actors, business and personal managers, independent record and music publishing companies, entertainment guilds, gaming companies, and beverage manufacturers. Since joining AGSK, Hazzard has represented in litigation such musical notables as Michelle Branch, Weezer and Incubus as well as music icon Berry Gordy. Hazzard will co-chair the Department with Michael Plonsker, who litigates idea submission, copyright and defamation actions, and was recently named Entertainment Lawyer of the Year by the Century City Bar Association. Hazzard obtained a B.A. in Public Policy from Stanford University, where he was a member of the men's basketball team. He received his J.D. in 1990 from UCLA. He is a member of the John Langston Bar Association, the Litigation Section of the State Bar of California, the Black Entertainment and Sports Law Association, and the Century City and American Bar Associations. He is the former co-chair of the Entertainment Section of the Century City Bar Association. He serves on the boards of the Fulfillment Fund and of the Berry Gordy Family Foundation. He is the co-author of *Employment Services May Trigger Act*, which appeared in the November 1996 edition of the National Law Journal. He also is the co-author of *Los Angeles News Service v. Reuters: Loosening the Grip of Territoriality Restrictions in International Copyright Law Enforcement*, for which he was featured on the cover of the March 1999 edition of *Los Angeles Lawyer* magazine. His article, *I Still Have a Dream,* was published in the February 2002 edition of the California Law Business section of the Los Angeles Daily Journal. Hazzard frequently speaks on entertainment industry legal issues. He has lectured on intellectual property and entertainment law at the California State Bar Intellectual Property Institute, USC, Harvard, Stanford, and the University of California's Boalt Hall schools of law.

John M. Gatti joins Greenberg Traurig in Los Angeles as co-chair of firm's entertainment and media litigation group. John M. Gatti, a litigator with extensive trial experience in entertainment disputes, has joined the Los Angeles office of Greenberg Traurig as a shareholder and co-chair of the firm's national Entertainment & Media Litigation group. Gatti's entertainment clients include entertainers, athletes and various studios, production companies and other businesses involved in the development and distribution of entertainment projects including motion pictures, television shows, interactive games, music and internet content. The majority of Gatti's litigation practice is centered in the entertainment industry though he also handles numerous complex business matters. A former partner at Alschuler Grossman Stein & Kahn, Gatti counted among his clients Barbra Streisand, Pete Sampras, Pamela Anderson, Emmy Award-winning television director Gary Halvorson, co-creator of The Simpsons Sam Simon, The Ladd Company, heavy-weight boxing champ Lamon Brewster, Rhino Entertainment, and Boulevard Management. Prior to Alschuler Grossman, Gatti was a name partner in White O'Connor Curry Gatti & Avanzado, a spin-off of Christensen Miller Fink Jacobs Glaser Weil & Shapiro which he joined in 1990. Gatti earned a bachelor of science degree magna cum laude from University of Southern California and obtained his JD from the USC Law Center in 1988. He serves on various community and charitable foundation boards including the Executive Committee and Board of Directors of Junior Achievement of Southern California, and the Board of Trustees of Children's Bureau.

In the Law Reviews:

The Right of Publicity Gone Wild by Gil Peles, 11 UCLA Entertainment Law Review 301 (2005)

THE COLUMBIA JOURNAL OF LAW & THE ARTS has issued Volume 28, Number 2 with the following articles:

Screening the Law: Ideology and Law in American Popular Culture by Naomi Mezey and Mark C. Niles, 28 The Columbia Journal of Law & the Arts 91 (2005)

It's an Original! (?): In Pursuit of Copyright's Elusive Essence by Diane Leenheer Zimmerman, 28 The Columbia Journal of Law & the Arts 187 (2005)

Copyrighting Medieval Literature: Editing and Publishing the Pre-Modern Public Domain by Brad Bedingfield, 28 The Columbia Journal of Law & the Arts 213 (2005)

VILLANOVA SPORTS & ENTERTAINMENT LAW JOURNAL has published Volume 12, Issue 1 with the following articles:

Keeping Out the Little Guy: An Older Contract Advisor's Concern, a Younger Contract Advisor's Lament by Lloyd Zane Remick and Christopher Joseph Cabott, 12 Villanova Sports & Entertainment Law Journal 1 (2005)

The Band from Hell: An Examination of Suicide on Stage as Expressive Conduct Under the First Amendment by Elizabeth Cameron, 12 Villanova Sports & Entertainment Law Journal 27 (2005)

Is the Football Culture Out of Bounds? Finding Liability for Korey Stringer's Death by Kelly Basinger Charnley, 12 Villanova Sports & Entertainment Law Journal 53 (2005)

Strictly Speaking about Ephedra: A Baseball Tragedy Helping to Define the Dynamic Between Warning Defect and Design Defect by Michael Kane, 12 Villanova Sports & Entertainment Law Journal 97 (2005)

Bulletproof Speech: Are Political Books Beyond Litigation's Reach? by Emily Kirstine Wacker, 12 Villanova Sports & Entertainment Law Journal 125 (2005)

Sanitizing the Obscene: Fighting for the Right to Edit Objectionable Film Content by Davey Williams, 12 Villanova Sports & Entertainment Law Journal 161 (2005)

Rethinking the Role of Copyright in an Age of Digital Distribution by David Nelson, 78 Southern California Law Review 559 (2005)

Free(ing) Culture for Remix by Lawrence Lessig, 2004/4 Utah Law Review 961 (2004)

Rethinking Copyright Misuse by Kathryn Judge, December 2004 Stanford Law Review 901 (2004)

Taxing the New Intellectual Property Right by Xuan-Thao N. Nguyen and Jeffrey A. Maine, 56/1 Hastings Law Journal (2004)

The Day the Music Died: The RIAA Sues Its Consumers by Andrew C. Humes, 38 Indiana Law Review 239 (2005)

Will Mickey Be Property of Disney Forever? Divergent Attitudes Toward Patent and Copyright Extensions in

Light of Eldred v. Ashcroft by Jonathan Schwartz, Issue 1 University of Illinois Journal of Law, Technology & Policy 105 (2004)

The Movie Empire Strikes Back: 321 Studios v. MGM Studios by Thayer M. Preece, Issue 1 University of Illinois Journal of Law, Technology & Policy 181 (2004)

Intent: The Road Not Taken in the Ninth Circuit's Post-Napster Analysis of Contributory Copyright Infringement by Karen M. Kramer, Santa Clara Computer & High Technology Law Journal 525 (2005)

Altering the Contours of Copyright-The DMCA and the Unanswered Questions of Paramount Pictures Corp. v. 321 Studios by Arnold P. Lutzker and Susan J. Lutzker, Santa Clara Computer & High Technology Law Journal 561 (2005)

Toward an Incentivized but Just Intellectual Property Practice: The Compensated IP Proposal by Caroline Nguyen, 14 Cornell Journal of Law and Public Policy 113 (2004)

The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation by Derek J. Schaffner, 14 Cornell Journal of Law and Public Policy 145 (2004)

"What's Really in the Package of a Naming Rights Deal?" Service Mark Rights and the Naming Rights of Professional Sports Stadiums by Christian Maximilian Voigt, 11 Journal of Intellectual Property Law 327 (2004) (www.lawsch.uga.edu)

"Every Artist is a Cannibal, Every Poet is a Thief": Why the Supreme Court was Right to Reverse the Ninth Circuit in Dastar Corp. v. Twentieth Century Fox Film Corp. by Joshua K. Simko, 11 Journal of Intellectual Property Law 355 (2004) (www.lawsch.uga.edu)

Sine Qua Non: Trademark Infringement, Likelihood of Confusion, and the Business of Collegiate Licensing by C. Knox Withers, 11 Journal of Intellectual Property Review 2004) (www.lawsch.uga.edu)

COMMLAW CONSPECTUS: A JOURNAL OF COMMUNICATIONS LAW AND POLICY , published by Catholic University of America School of Law, has issued Volume 13 with the following articles:

The Law of Property & the Law of Spectrum: A Critical Comparison by John Berresford and Wayne Leighton, 13 CommLaw Conspectus: Journal of Communications Law & Policy 35 (2004) (for publisher, see above)

Principles or Puffery? The Validity of the Cable Industry's Dual Carriage Arguments and Their Impact on Public TV in the Digital TV Future by Dionne McNeff, 13 CommLaw Conspectus: Journal of Communications Law & Policy (2004) (for publisher, see above)

What the #$%& Is Happening on Television? Indecency in Broadcasting by Treasa Chidester, 13 CommLaw Conspectus: Journal of Communications Law & Policy 135 (2004) (for publisher, see above)

COMMUNICATION LAW AND POLICY, published by Lawrence Erlbaum Associations, www.leaonline.com, has issued Volume 10, Number 2 with the following articles:

The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents by Mark Feldstein, 10 Communication Law and Policy 137 (2005) (for publisher, see above)

The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment by Joel Timmer, 10 Communication Law and Policy 179 (2005) (for publisher, see above)

If It Walks, Talks and Squawks Like a Trial, Should It Be Covered Like One? The Right of the Press to Cover Deportation Hearings by Dale L. Edwards, 10 Communication Law and Policy 217 (2005) (for publisher, see above)

The First Amendment Grounded: Constitutional Implications of Federal Air Regulations on Airborne Newsgathering by Thomas C. Terry, 10 Communication Law and Policy 241 (2005) (for publisher, see above)

Towards a New Core International Copyright Norm: The Reverse Three-Step Test by Daniel J. Gervais, 9 Marquette Intellectual Property Law Review 1 (2005)

An Umbrella Or a Canopy?: Why the 17 U.S.C. Section 512 (A) Safe Harbor Should Be Read Broadly by Sven Eric Skillrud, 9 Marquette Intellectual Property Law Review 91 (2005)

The Spawn of Learned Hand-A Reexamination of Copyright Protection and Fictional Characters: How Distinctly Delineated Must the Story Be Told? By Gregory S. Schienke, 9 Marquette Intellectual Property Law Review 63 (2005)

ENTERTAINMENT LAW REVIEW, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issues Volume 16, Number 3 with the following articles:

New Motion Picture Tax Incentives in France and Hungary, by Winston J. Maxwell, Julie Massaloux and Aurel Pinter, 16/3 Entertainment Law Review 43 (2005) (for website, see above)

Film Piracy-A Window of Opportunity for the Studios? by David Engel, 16/3 Entertainment Law Review 48 (2005) (for website, see above)

Taming the Beast of File-Sharing-Legal and Technological Solutions to the Problem of Copyright Infringement over the Internet: Part 1 by Colin Nasir, 16/3 Entertainment Law Review 50 (2005) (for website, see above)

Copyright in Commissioned Work: Court of Appeal Put the Boot In by Peter Groves, 16/3 Entertainment Law Review 56 (2005) (for website, see above)

"Blunkett Lover: It's All Over" by Helen Padley, 16/3 Entertainment Law Review 59 (2005) (for website, see above)

Internet Libel-Jurisdiction by Stephen Sampson, 16/3 Entertainment Law Review 61 (2005) (for website, see above)

COPYRIGHT WORLD, available at www.ipworldonline.com, has published Issue 148 with the following articles:

Possible Outcomes from the US Supreme Court Review of Grokster by Jeffrey D. Sullivan and David A. Bell, 148 Copyright World 8 (2005) (for website, see above)

Copyright Owners Have Their Hand Strengthened by Japanese Government by Daisuke Tatsuno and John Kakinuki, 148 Copyright World 16 (2005) (for website, see above)

Do TV Format Rights Really Exist and To What Degree are Programmes Protected? by David Brooks, 148 Copyright World 18 (2005) (for website, see above)

Copyright Infringement on the Internet: Who Pays the Piper? by Barry Sookman, 11 Computer and Telecommunications Law Review 40 (2005) (published by Sweet and Maxwell, www.sweetandmaxwell.co.uk)

"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech by Gregory S. Gordon, 45 Virginia Journal of International Law 139 (2004)

Not Yet Released and Already a Critical Disappointment: Still in Committee: The Proposed "Family Movie Act of 2004" Garners Few Accolades by Matthew David Brozik, 31 Rutgers Computer & Technology Law Journal 35 (2004)

School Houses Rock: University Response to the Threat of Contributory Copyright Infringement and Forced Compliance of the Digital Millennium Copyright Act by Elizabeth M. Harris, 31 Rutgers Computer & Technology Law Journal 187 (2004)

Property, Intellectual Property, and Free Riding by Mark A. Lemley, 83 Texas Law Review 1031 (2005)

Comment-Intellectual Property Isolationism and the Average Cost Thesis by John F. Duffy, 83 Texas Law Review 1077 (2005)

Reply-What's Different About Intellectual Property? by Mark A. Lemley, 83 Texas Law Review 1097 (2005)

The Future of Copyright reviewed by Lawrence B. Solum, reviewing *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 83 Texas Law Review 1137 (2005)

Brands, Dilution, and Parody: An Indigestible Dish? by Matthew Sumpter, 11 New Zealand Business Law Quarterly 29 (2005)(http://www.natlib.govt.nz/en/services/6innzcurrent.html)

Holding Virtual Child Pornography Creators Liable By Judicial Redress: An Alternative Approach to Overcoming the Obstacles Presented in Ashcroft v. Free Speech Coalition by Daniel W. Bower, 19 BYU Journal of Public Law 235 (2004)

Intellectual Property: Trademark Law: Victor Victoria? The United States Supreme Court Requires Trademark Dilution Plaintiffs to Show Actual Harm: Moseley v. Victoria's Secret Catalogue, Inc. by Stephanie Egner, 26 University of Arkansas at Little Rock Law Review (2004)

Educational Programs Calendar:

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.

Litigating Trademark, Domain Name, and Unfair Competition Cases, May 19-20, Washington, D.C. This Sixth Annual Advanced American Law Institute-American Bar Association program considers Developing the Litigation Strategy; Developing and Executing the Discovery Plan; Using the Internet in Trademark Litigation; Strategies to Develop and Detect Confusion Evidence; Trademark Dilution after Victoria's Secret; Use of Expert Witnesses; Strategies for Funding IP Litigation: Insurance and Other Avenues; Ethical Issues; Strategies for Dealing with Infringements and Related Issues Outside the United States; Temporary Restraining Orders, Injunctions, and Seizure Orders; Strategies for Mediation and Other Forms of Alternative Dispute Resolution; Trying the Intellectual Property Case to the Jury; Strategies for Securing and Obtaining Monetary Relief; and the View from the Bench. For additional information, phone 800-CLE-NEWS; FAX 215-243-1664; or online at www.ali-aba.org.

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.

Advanced Seminar on Trademark Law 2005, June 30, New York City. This Practising Law Institute program will provide an Up-To-Date Look at Important Trademark Issues in the Face of Rapidly Occurring Economic and Technological Changes in the United States and the World. For additional information, call (800) 260-4PLI or online at www.pli.edu.

Film & Television Law: Exploring the Fundamentals Facing the Entertainment Industry, June 23-24, Millennium Biltmore Hotel, Los Angeles. This second annual conference, sponsored by CLE International, considers Trademarks; Credits; Financing Feature Films; Hot Entertainment Industry Guild and Employment Issues; Recent Developments in Contract Litigation; Copyright and Infringement Claims; the Legalities of Reality TV; The First Amendment Implications of the FCC's Recent Indecency Rulings; Motion Picture Development and Production; the Right of Publicity; Elimination of Bias; Ethics; the Treatment of Lost Profits in Television and Film Litigation Matters; the Right of Privacy; and Intellectual Property Rights on the Internet: A Panel Presentation. For further information, contact CLE International, 1620 Gaylord Street, Denver, CO 80206, call (800) 873-7130, e-mail registrar@cle.com or online at www.cle.com.

Understanding Basic Copyright Law 2005, July 18, PLI California Center, San Francisco and July 25, PLI New York Center, New York City. Presented by the Practising Law Institute, the program is offered in conjunction with Understanding Basic Trademark Law 2005 described below. The program provides an Overview of Basic Principles of Copyright Law and Copyright Office Practice; Enforcing Copyrights; Ethics; Notable New Cases in Copyright Litigation; and Web and Streaming: Music on the Internet. For additional information, call (800) 260-4PLI or online at www.pli.edu.

Understanding Basic Trademark Law 2005, July 19, PLI California Center, San Francisco and July 26, PLI New York Center, New York City. The program is presented in conjunction with Understanding Basic Copyright Law 2005 described above by the Practising Law Institute. It offers an Overview of Basic Principles of Trademark Law and Unfair Competition; Trademarks in Practice: Searching, Clearance, the Application Process and Strategies in the U.S. and Abroad; Creating a Trademark Protection Program in the U.S. and Abroad: Cost-Benefit Analysis; Trademark Infringement Primer; and Litigation Alternatives-Trademark Office and UDRP Proceedings. For additional information, call (800) 260-4PLI or online at www.pli.edu.