

INTERNATIONAL DEVELOPMENTS

UK House of Lords decides that Roman Polanski may testify by video link from France in libel lawsuit he filed in London complaining about article published by American magazine Vanity Fair that reported on Polanski's alleged behavior in Elaine's restaurant in New York City; if Polanski appeared in London to testify, he may have been extradited to United States where he pled guilty to sex with a minor, but France will not extradite him

Though he is the son of Polish parents, film director Roman Polanski was born in Paris and is a French citizen and resident. What's more, he plans to stay in France for the foreseeable future; at least he plans to stay *out* of the United States and the United Kingdom.

The reason he plans to stay out of the United States is that in 1977, he pled guilty to having sexual relations with a 13-year old girl – an offense for which he could have been imprisoned for years. Before being sentenced, he fled the U.S. and is now, technically, a fugitive from American justice. The reason he plans to stay out of the United Kingdom is that the U.S. and the UK have an extradition treaty with one another. If Polanski ever goes to Britain, he could be arrested there and returned to the U.S. against his will. Polanski, though, is safe in France, because France does not extradite its citizens to other nations.

The reason that all this matters is that Polanski has filed a libel lawsuit against Conde Naste, the publisher of Vanity Fair magazine. In his lawsuit, Polanski complains that an article that appeared in Vanity Fair in 2002 has injured his reputation. The article was not about Polanski in particular. It was about Elaine's restaurant in New York City, and the many remarkable things that have occurred there.

One of the remarkable things the article reported was that while Polanski was in the United States in 1969 for the funeral of his murdered wife Sharon Tate, the director went to dinner at Elaine's and made a pass at a beautiful Swedish girl who was the date of another customer. Worse yet, the article asserted that Polanski "slid his hand inside her thigh and began a long, honeyed spiel which ended with the promise 'And I will make another Sharon Tate out of you.'"

Vanity Fair is an American magazine. When it published the offending article, its circulation in the U.S. was 1.13 million. In Britain, by contrast, its circulation was only 53,000; and in France, it was only 2,500. As a result, Polanski's damages – if the article caused him any – are likely to have been much greater in the United States than in the United Kingdom.

But something besides his outstanding arrest warrant may have persuaded Polanski's lawyers to file suit in London rather than New York. Because of critical differences between American and British libel law, if Polanski sued in the United States, Polanski would have to prove that the Vanity Fair article was false and that it was published with reckless disregard for the truth; but, because he filed suit in the United Kingdom, Vanity Fair will have to prove that the article is true.

Polanski didn't have to go to the United Kingdom to file his lawsuit. In the UK, as in the U.S., the filing of a lawsuit involves paperwork handled by lawyers, rather than their clients. When it comes to offering testimony, however, the general rule in the UK, as in the U.S., is that it should be done in person, in the courtroom. Nevertheless, the UK has a rule that authorizes courts to "allow a witness to give evidence through a video link or by other means." That's what Polanski asked to do – give his testimony by video link from France. He was candid about his reasons for wanting to do so. He admitted that he wouldn't come to London to testify, because he feared being arrested and returned to the United States, pursuant to the UK/U.S. extradition treaty.

The trial judge said that Polanski's reason for wanting to testify by video link was "unattractive, but this did not justify depriving Mr Polanski of his chance to have his case heard at trial." As a result, the trial judge ordered that Polanski could testify by video link from France. Conde Naste appealed, successfully. In a unanimous 3-0 opinion, the UK Court of Appeal reversed, saying that the "general policy of the courts should be to discourage litigants from escaping the normal processes of the law rather than to facilitate this."

Polanski then appealed to the UK House of Lords (Britain's highest court), where he has been successful. By a 3-to-2 vote, the House of Lords has decided that Polanski should be allowed to give his testimony by video link, even though his reason for not coming to London to testify is to avoid being extradited to the U.S. for sentencing in connection with a crime to which he pled guilty.

The issue before the British courts was not a technical one of rule interpretation. All of the judges agreed that on its face, the rule authorized Polanski to testify by video link, especially because doing so was more likely to make his case against Conde Nast less persuasive, not more. Instead, for all of the judges, the issue involved an important matter of public policy – namely, whether Polanski’s right of access to British courts was more or less important than Polanski’s use of the video link rule to avoid American justice.

The votes of the judges showed how difficult a policy decision this was to make. Indeed, of the nine judges who considered the issue from start to finish, they split 5-to-4 in favor of *denying* Polanski the right to testify by video link. The only reason he will be able to

do so is that three members of the House of Lords agreed with the trial judge that Polanski’s right to pursue his case was more important; and their four votes (indeed, the votes of the three members of the House of Lords alone) outweighed the votes of the five judges (three Court of Appeal judges plus two dissenting members of the House of Lords) who thought it was more important that Polanski not be permitted to use the video link rule to evade American justice.

Polanski v. Conde Naste Publications Limited, [2005] UKHL 10, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd050210/poland.pdf>

The
ENTERTAINMENT LAW REPORTER
is now on CD-ROM !

Doing entertainment law research, or looking for a back issue?

Now you can have instant access to:
25 volumes, covering . . .
26 years of developments, that take up . . .
40 inches of shelf space, as originally
published on paper in . . .
349 individual issues, containing more than . . .
7,000 printed pages, all on just . . .
1 CD-ROM

Every back issue of the ENTERTAINMENT LAW REPORTER — from the Preview Edition published in 1978 through Volume 25 Number 12 published in May 2004 — has been digitized and reformatted for easy on-screen reading. Using special Adobe Acrobat® software provided on the CD-ROM (requires Windows 95 - Windows XP), you can perform full-text searches — by word, phrase, case name, author’s name, or ELR citation — to instantly locate and retrieve material published in all 349 back issues.

Available for \$300.00 (California residents add sales tax of \$24.75)
by check or credit card directly from the

**Entertainment Law Reporter Publishing Company,
2118 Wilshire Blvd. #311, Santa Monica, CA 90403-5784
Email: orders@EntertainmentLawReporter.com
Web: www.EntertainmentLawReporter.com**

RECENT CASES

Mitchell Silberberg & Knupp not disqualified from representing Warner/Chappell Music in discrimination and wrongful termination lawsuit filed by former in-house counsel, even though former firm partner had consulted with in-house counsel about her Warner employment contract, because former partner left law firm three years before lawsuit was filed and no other firm member obtained confidential information

Ilene Goldberg was in-house counsel at Warner/Chappell Music for ten years. When they parted ways, it was not pleasant. In fact, after a failed attempt at mediation, Goldberg filed a lawsuit against Warner, alleging claims of gender discrimination and wrongful termination.

The merits of the case have not yet been decided, in part because its first two years have been devoted to a very preliminary question: whether Warner can be represented by Mitchell Silberberg & Knupp – a firm that has been outside counsel for Warner on a regular basis since 1997. Goldberg sought to disqualify MS&K just as soon as it filed Warner’s answer to her complaint. But the trial judge denied her motion, and a California Court of Appeal has affirmed, ruling that under the circumstances of this case, MS&K is not disqualified from representing Warner.

Goldberg sought to disqualify MS&K, because while she was employed by Warner, she consulted with J. Eugene Salomon, who was then an MS&K partner, about an employment agreement Warner had offered her. This happened in 1997 – by coincidence, just a few days after MS&K became outside counsel to Warner – some six years before she sued Warner. Salomon left MS&K and joined another firm some three years before she filed suit.

Goldberg did not retain Salomon to negotiate her contract. Instead, the consultation was brief and informal; and Salomon never opened a file on the matter or billed her for the consultation (though she asked him to). Nevertheless, the appellate court agreed with the trial court that Salomon and Goldberg had an attorney-client relationship. What’s more, under California law, it is “presumed” that lawyers have confidential information concerning their clients. The appellate court

acknowledged that this meant that *if* Salomon were still an MS&K partner, the firm would have been disqualified from representing Warner in Goldberg’s lawsuit.

The issue in the disqualification motion thus became what significance, if any, should be given to Salomon’s departure from MS&K, three years before Warner retained the firm to defend it in the lawsuit Goldberg had filed.

Goldberg argued that “an attorney’s presumed knowledge of a former client’s confidences should cause vicarious disqualification not just of the attorney’s present firm, but also any firm the attorney passed through after he gained possession of confidential information.” Warner, on the other hand, argued that California “should follow the lead of ABA Model Rules of Professional Conduct, which permit a firm [MS&K, in this case] that employed the conflicted attorney [Salomon] in the past to undertake representation adverse to the attorney’s former client [Goldberg], as long as the firm [MS&K] can prove no current member or associate is actually possessed of confidential information concerning the client [Goldberg].”

In an opinion by Justice Daniel Curry, the Court of Appeal agreed with Warner. “[A]n attorney’s presumed possession of confidential information concerning a former client should not automatically cause the attorney’s former firm to be vicariously disqualified where the evidence establishes that no one other than the departed attorney had any dealings with the client or obtained confidential information . . . ,” the appellate court concluded.

In this case, MS&K avoided vicarious disqualification by establishing that Salomon had never discussed with any MS&K lawyer what had been said in his consultation with Goldberg. Also, because “Salomon is no longer with MS&K” the appellate court concluded that it “need not be concerned that he will inadvertently pass on confidential information to his colleagues in the future because he is no longer there. . . .”

Goldberg was represented by Dale F. Kinsella of Greenberg Glusker Fields Claman Machtinger & Kinsella in Los Angeles. Warner/Chappell Music was represented by Adam Levin of Mitchell Silberberg & Knupp in Los Angeles.

Goldberg v. Warner/Chappell Music, Inc., 23 Cal.Rptr.3d 116, 2005 Cal.App.LEXIS 16 (Cal.App. 2005)

California Supreme Court rules that successor to Bing Crosby's estate cannot use Crosby's attorney-client privilege to prevent MCA Records from discovering documents relating to Crosby's earlier royalty audits, because the privilege terminated when estate was distributed

After singer Bing Crosby died in 1977, his executor and his surviving spouse transferred his entire estate to HLC Properties Limited. In 2000, HLC filed suit in a California state court alleging that MCA Records had underpaid Crosby's royalties. During pretrial discovery, MCA demanded that HLC produce certain documents concerning a royalty audit that Crosby conducted in 1959 and 1960. HLC withheld the documents, alleging they were privileged attorney-client communications.

The trial court ruled that HLC did not hold the privilege. But later, the California Court of Appeal reversed that ruling and held that HLC could assert the privilege, because it was the successor in interest to Bing Crosby Enterprises, an organization which held the privilege during Crosby's lifetime. MCA appealed to the California Supreme Court, which has now ruled in its favor.

MCA argued that Bing Crosby Enterprises never held the privilege, because it was not the client. MCA argued that Crosby was the client, and under the California Evidence Code, once a client dies, his personal representative is the privilege holder until the estate is distributed; then the privilege ceases to exist.

In an opinion by Justice Marvin Baxter, the California Supreme Court has ruled that the evidence supported the trial court's finding that Crosby himself, not Bing Crosby Enterprises, was the client. Justice Baxter noted that the attorney who prepared the documents regarded Crosby as the client. Also, Bing Crosby Enterprises was an unincorporated organization whose name was used by Crosby's business manager as a loose term to cover everything that Crosby did.

HLC argued that it also held Crosby's privilege as the successor to his entire estate. The Court rejected that argument, because under the California Evidence Code, the privilege is only transferable to the executor of the estate and once the estate is distributed and the executor is discharged, the privilege terminates. Justice Baxter noted that an estate could not hold the privilege under the statute when the client is a deceased person.

HLC was represented by Mark A. Brodka in Los Angeles and by Thomas V. Girardi of Girardi & Keese in Los Angeles. MCA was represented by Gregory R. Smith of Irell & Manella in Los Angeles. (MAR)

HLC Properties, Ltd. v. Superior Court, 105 P.3d 560, 2005 Cal.LEXIS 1607 (Cal. 2005)

Court refuses to dismiss good faith/fair dealing and fiduciary duty claims, in lawsuit filed by creator of "Who Wants to Be a Millionaire" alleging that ABC failed to maximize profits to be shared pursuant to their contract's Contingent Compensation clause

Vertical integration is a mixed blessing. When the integrated companies produce and also broadcast television programs, integration assures the production company an outlet for its programs. But it also exposes the production company to allegations by profit participants that it did not seek as great a license fee as it could have from its broadcaster sibling. This is exactly what has happened to ABC and Valleycrest Productions, both of which are subsidiaries of The Walt Disney Company, in a lawsuit filed by the creator of "Who Wants to Be a Millionaire."

Celador International is the British company that created "Who Wants to Be a Millionaire." After that television series enjoyed enormous success in the U.K., Celador entered into an agreement with ABC for the series to be produced and broadcast in the United States. Celador itself wasn't going to produce the American version of the show. ABC or its assignee was to do that. As things turned out, production duties were assigned to Valleycrest Productions – an ABC sibling within the larger Walt Disney Company.

The agreement between Celador and ABC provided the British company with fixed compensation and "50% of Defined Contingent Compensation." The amount of contingent compensation Celador would actually receive depended in part on the amount of the license fees Valleycrest obtained from broadcasters and on Valleycrest's production costs.

According to Celador, Valleycrest licensed ABC to carry the show for a per-episode fee equal to Valleycrest's per-episode production costs, thereby eliminating any possibility that Celador would actually receive contingent compensation. Even when the series became a huge hit for ABC, Valleycrest failed to renegotiate the license fee, though according to Celador "it is the custom and practice in the entertainment industry to renegotiate higher license fees when a show is highly successful."

Celador responded to this as profit participants often do: with a lawsuit. Along with a plain vanilla claim for breach of contract, Celador alleged additional claims that focused on the fact that Valleycrest and ABC are corporate siblings. Celador alleged that this enabled Valleycrest to accept lesser licensing fees without reducing the profit of their vertically integrated parent company. Indeed, according to Celador, Valleycrest's willingness to accept lesser licensing fees actually

increased Disney's profits, because Celador was entitled to share only in Valleycrest's profits from the show, not Disney's.

Among the claims that focused on the corporate relationship between ABC and Valleycrest were claims for breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. Disney, ABC and Valleycrest replied to these claims with a motion to dismiss, but without success. Federal District Judge Florence-Marie Cooper has denied the motion, ruling that both claims allege facts, which if proved, would entitle Celador to a judgment.

Judge Cooper rejected the argument that Celador's good faith and fair dealing claim simply duplicates its breach of contract claim. Rather, the judge ruled, even if Celador is not successful with its contract claim – because, for example, the contract did not obligate Valleycrest to get the highest possible license fee – Celador might still be entitled to prevail on its good faith/fair dealing claim. It would, the judge ruled, if it were found that Valleycrest, ABC and Disney “frustrated a benefit of the contract – the benefit of receiving Contingent Compensation from the Series.”

Judge Cooper agreed with Valleycrest that its duty to account to Celador did not, by itself, give it a fiduciary duty to Celador. Nevertheless, the judge refused to dismiss Celador's fiduciary duty claim, because the company's complaint adequately alleged a joint venture between it and Valleycrest. Joint ventures do create fiduciary duties, and Judge Cooper decided that Celador “should be given the opportunity to prove a joint venture existed by virtue of the conduct of the parties.”

Celador was represented by Bridgette M. Taylor, Marcia J. Harris and Stanton L. Stein of Alschuler Grossman Stein & Kahan in Santa Monica. ABC, Valleycrest and Disney were represented by Lisa N. Stutz and Martin D. Katz of Sheppard Mullin Richter & Hampton in Los Angeles.

Celador International Ltd. v. The Walt Disney Co., 347 F.Supp.2d 846, 2004 U.S.Dist.LEXIS 25278 (C.D.Cal. 2004)

Marvel Enterprises and Stan Lee settle compensation dispute after federal judge rules that Lee's contract entitles him to 10% of Marvel's profits from movie and TV productions using Marvel characters, including movie and TV merchandising profits, regardless of whether Marvel's profits were received pursuant to “net profits” or “gross profit participation” deals

Marvel Enterprises and Stan Lee have settled a multi-million dollar dispute over how much money the company was obligated to pay Lee pursuant to a profit participation provision in an employment agreement they entered into in 1998. The terms of the settlement have not been made public. But Marvel has told the SEC that the settlement “resulted in a \$10 million charge” against the company's earnings (for which it had created reserves in 2004), and that the settlement “resolved all past and . . . future royalty claims . . . by Mr. Lee under his employment agreement.”

Lee is the creator of many of Marvel's best-known and most popular characters, including Spider-Man, the Incredible Hulk, the X-Men and the Fantastic Four. In 1998, after Marvel emerged from bankruptcy, the company entered into an agreement with Lee that entitled him to “be paid a participation equal to 10% of the profits derived during [his] life by Marvel . . . from the profits of any . . . television or movie (including ancillary rights) productions utilizing Marvel Characters.”

At the time that agreement was entered into, Marvel had licensed its characters to studios using agreements that entitled Marvel to receive “net profit” contingent compensation. “Net profits” are computed in ways that are often referred to (with disdain) as “Hollywood accounting,” because they often result in no contingent compensation being received. For example, Marvel had a “net profits” deal with the studio that made the movie “Blade” (a movie based on a Marvel character). And though “Blade” was profitable for the studio that made it, the movie didn't generate “net profits” for Marvel.

As a result, Marvel decided that it would insist on “gross profit participation” deals with studios that licensed its characters – something it was able to do for “Spider-Man: The Movie.” Marvel's gross profit participation in “Spider-Man” has earned it revenues of more than \$50 million.

When Lee interpreted his employment agreement to entitle him to 10% of the \$50 million that Marvel earned from “Spider-Man,” Marvel balked. It contended that the agreement entitled Lee to 10% of Marvel's movie and TV profits, only when Marvel had “net profit” deals, not when it had “gross participation” deals.

The two also disagreed about whether Marvel's income from movie and TV "ancillary rights" included merchandising income. This dispute may have been triggered by an additional contract clause that excluded (from the profits Lee was entitled to 10% of) licensing fees charged by Marvel for the use of its "characters for merchandise."

In response to cross-motions for summary judgment, federal District Judge Robert Sweet ruled that the agreement entitled Lee to 10% of Marvel's profits from all movie and TV productions using Marvel characters, regardless of whether Marvel received those profits pursuant to "net profits" or "gross participation" deals. This was so, the judge explained, because the agreement itself did not limit Lee's participation to "net profit" deals, and because the dictionary definition of "profits" is "valuable gain or return," a meaning that certainly includes "gross participation" revenues.

Judge Sweet also ruled that "ancillary rights" includes merchandising rights – a point on which even Marvel's expert agreed.

The dispute over whether Lee was entitled to a percentage of fees earned by Marvel for character merchandise licenses involved two types of merchandise: Spider-Man toys, and Hulk merchandise. Judge Sweet determined that he couldn't resolve that dispute in response to the parties' summary judgment motions, because neither party established whether Marvel earned revenues from those sources as a result of "fees" it collected for "licensing" Spider-Man and Hulk merchandise.

Lee was represented by Howard Graff of Dickstein Shapiro Morin & Oshinsky in New York City. Marvel was represented by David Fleischer of Paul Hastings Janofsky & Walker in New York City.

Lee v. Marvel Enterprises, Inc., 2005 WL 89376, 2005 U.S. Dist. LEXIS 587 (S.D.N.Y. 2005); *Marvel Enterprises, Inc.*, SEC filings available at <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000933730&owner=exclude>

Florida right of publicity statute does not apply to "The Perfect Storm," because statute applies only to movies and other publications that directly promote a product or service, Florida Supreme Court rules in case filed by survivors of deceased crew members depicted in Warner Bros. movie

"The Perfect Storm" case is over at last, as a result of a ruling of the Florida Supreme Court that favors Warner Bros. and others involved in making and distributing the movie. Movie-goers (and readers of these

pages) will recall that "The Perfect Storm" was based on the true story of the sinking of the fishing vessel "Andrea Gale" and the deaths of the ship's crew members, including Billy Tyne and Dale Murphy.

Tyne and Murphy's survivors sued the film makers, alleging claims for commercial misappropriation under Florida's right of publicity statute and for common law invasion of privacy. Early in the case, it was dismissed altogether, in response to Warner Bros.' motion for summary judgment. Federal District Judge Anne Conway ruled that the Florida right of publicity statute did not apply to the movie, that Tyne and Murphy's privacy rights did not survive their deaths, and that the survivors' own privacy rights were not violated (*ELR* 24:5:8).

The survivors appealed, and won a partial reprieve. Though the Court of Appeals affirmed the dismissal of the survivors' privacy claims, the appellate court said there was some "doubt" about whether the Florida right of publicity statute applied to "The Perfect Storm" or not. The federal Court of Appeals therefore certified that question to the Florida Supreme Court (*ELR* 25:7:17).

The Florida Supreme Court has now answered the question by ruling that the Florida right of publicity statute does not apply to movies like "The Perfect Storm." In an opinion by Justice Charles Wells, the Florida Supreme Court held that the statute's ban on the unauthorized use of person's name or likeness "for any commercial. . . purpose" "does not apply to publications, including motion pictures, which do not directly promote a product or service." Indeed, Justice Wells added, if "commercial purpose" were defined so that it did apply to motion pictures, doing so would "raise[] a fundamental constitutional concern," because movies are protected by the First Amendment.

Tyne and Murphy's survivors were represented by Stephen J. Calvacca and W. Edward McLeod, Jr., in Winter Park, and Jon J. Mills and Timothy McLendon in Gainesville. Warner Bros. was represented by Gregg D. Thomas and James J. McGuire of Holland & Knight in Tampa.

Tyne v. Time Warner Entertainment Co., Case No. SC03-1251 (Fla. 2005), available at <http://www.floridasupremecourt.org/decisions/2005/sc03-1251.pdf>

Federal anti-bootlegging statute is unconstitutional, federal District Court rules in case filed by KISS against distributor of DVD of 1976 KISS concert performance

Gene Simmons and Paul Stanley – the founding members of the "iconic rock band" KISS – have sued Passport International Productions, the company that

released the DVD titled “KISS: The Lost Concert.” The concert in question was one in which KISS performed, back in 1976, in New Jersey’s Roosevelt Station, as part of the band’s “Spirit of ’76” tour.

The concert promoter filmed the performance while projecting it live on a screen behind the band. More than a quarter of a century later, Passport obtained a “Stock Footage License” from an archive acting on behalf of the concert promoter. And relying on that license, Passport released DVDs of the concert in 2003, without the consent of Simmons or Stanley or KISS Catalog, Ltd. (the company that owns the band’s intellectual property).

The promoter agrees that KISS owns the copyright to the concert footage, so part of the lawsuit involves nothing more than a straight-forward infringement claim, in which KISS argues that Passport simply got a license from the wrong person.

A second part of the lawsuit involves a separate claim that Passport’s distribution of the DVD also violates the rights of Simmons and Stanley, as performers, under the federal anti-bootlegging statute that Congress enacted in 1994 in order to satisfy the United States’ obligations (under the TRIPs Agreement) as a member of the World Trade Organization (*ELR* 17:2:6).

One section of that statute does in fact prohibit the distribution of recordings of live musical performances, without the consent of the performers. What’s more, it applies even to recordings of performances – like the KISS performance in 1976 – that were given before the statute was enacted. And, it prohibits the unconsented-to distribution of those recordings forever. That is, a performer’s rights never expire, the way, say, a traditional copyright eventually does.

There are two types of remedies for violating the anti-bootlegging statute. One is criminal; the other is civil. And the civil remedies are precisely the same as those available in a traditional copyright case, because the anti-bootlegging statute expressly refers to the Copyright Act’s civil remedies sections, in describing the civil remedies available for bootlegging.

There has been surprisingly little reported litigation involving the anti-bootlegging statute, even though it is now a decade old. Two reported decisions arose out of criminal bootlegging prosecutions. But the KISS case appears to be the first civil bootlegging lawsuit. In response to all three cases, the defendants asserted that the statute is unconstitutional, and thus far, the results are running 2-to-1 in support of that assertion.

The two criminal cases split evenly on the question of whether the statute is constitutional. In the earlier of the two cases, *United States v. Moghadam*, the Court of Appeals for the Eleventh Circuit upheld the constitutionality of the statute (*ELR* 21:5:11). But in the next case, *United States v. Martignon*, a federal District Court in the Southern District of New York held that it is unconstitutional (*ELR* 26:4:8).

Now, in the KISS case, federal District Judge William Rea (in the Central District of California) has agreed with his counterpart in New York and has held that the statute is unconstitutional.

The constitutional issue is *not* one of free speech. Instead, it is a question of Congressional power. The Copyright Clause of the Constitution gives Congress the power to enact legislation protecting “writings” for “limited times.” The anti-bootlegging statute protects live performances which are not writings, and it protects them forever, not just for limited times. Of course, the Commerce Clause of the Constitution contains neither of those limitations, and in *Moghadam*, the Eleventh Circuit held that Congress had adequate authority to enact the anti-bootlegging statute under the Commerce Clause.

In the KISS case, Judge Rea agreed that if there were no Copyright Clause, Congress could have enacted the anti-bootlegging statute under the Commerce Clause. But, since there is a Copyright Clause and it does authorize protection only for “limited times,” he held that Congress could not avoid that limitation by relying on the Commerce Clause instead. He therefore concluded that the anti-bootlegging statute is unconstitutional, because it “violates the ‘for limited times’ requirement of the Copyright Clause and may not be properly enacted via the Commerce Clause. . . .”

Simmons, Stanley and KISS were represented by Barry E. Mallen of Manatt Phelps & Phillips in Los Angeles. Passport was represented by Michael R. Blaha in Santa Monica.

KISS Catalog v. Passport International Productions, 350 F.Supp.2d 823, 2004 U.S.Dist.LEXIS 25897 (C.D.Cal. 2004)

Charter Communications wins order requiring RIAA to return and not use subpoenaed information about identities of subscribers allegedly engaged in P2P copyright infringement; Internet service providers acting merely as conduits between P2P users are not subject to subpoenas, federal appeals court rules

Finding an Internet protocol address is easy. Finding the person behind the IP address is the hard part. Such was the case when the Recording Industry Association of America attempted to learn the names and addresses of Charter Communications’ subscribers who were allegedly infringing music copyrights.

Using “tracking” programs, the RIAA determined the IP addresses and user names of Charter subscribers who were allegedly infringing copyrighted music through peer-to-peer services. However, the IP addresses

alone did the RIAA little good, because IP addresses only identify the Internet service provider through which users get access to the Internet. The RIAA needed Charter to link the IP addresses to specific names and addresses of its subscribers. To do that, the RIAA used the DMCA to obtain subpoenas from a federal District Court in Missouri requiring Charter to disclose its subscribers' information.

Charter responded to the subpoenas by filing a motion to quash them. The motion was not successful, at first. The District Court ordered Charter to disclose the names, addresses, and email addresses of approximately 220 of its subscribers. Charter filed a motion to stay in the District Court and Court of Appeals, but to no avail. Soon after, Charter reluctantly disclosed the names and addresses of its subscribers to the RIAA, and then appealed.

Charter's appeal was important to the entertainment industry – so important, that several Internet, telecommunications, music, and movie companies filed amicus briefs on behalf of both Charter and the RIAA.

The outcome of that appeal was a victory for Charter. The appellate court vacated the District Court's order to comply with RIAA's subpoenas, and it ordered the RIAA to return and not use the information it had obtained about the identities of Charter's subscribers. In an opinion by Judge Kermit Bye for a 2-to-1 majority, the Court of Appeals held that Charter's function as a mere conduit for its allegedly infringing subscribers did not expose it to the DMCA's subpoena power. Judge Bye reasoned that Charter is merely a conduit, because it only provides Internet access and does not store material for its subscribers.

Since the DMCA only authorizes subpoenas where "an ISP was storing, caching, or providing links to copyrighted material," Judge Bye concluded that Charter fell outside the DMCA's subpoena power. Judge Bye also stated that "a requirement of issuing subpoenas under the DMCA is an ISP's ability to remove or disable one user's access to infringing material." Since Charter could not remove or disable a P2P user's access to infringing material on another P2P user's computer, Charter effectively escaped RIAA's subpoenas under the DMCA.

In a passionate dissent, Judge Diana Murphy chastised the majority. Judge Murphy reasoned that the DMCA did not limit the type of service provider susceptible to subpoenas. Therefore, Judge Murphy concluded that the RIAA's subpoenas were properly issued to Charter, because the DMCA's definition of "service provider" specifically includes conduit service providers. Were this not so, Judge Murphy explained, copyright owners would be deprived of "the only viable way to vindicate their rights when infringing materials are transmitted across P2P networks, which is to subpoena the ISPs for disclosure of the identities of alleged infringers."

The RIAA petitioned the Court of Appeals for a rehearing, but its petition has been denied.

Charter Communications was represented by James W. Erwin and Mark S. Sableman of Thompson & Coburn in St. Louis, and Paul Glist, John D. Seiver and by K.C. Halm of Cole & Raywid in Washington D.C. The RIAA was represented by Thomas C. Walsh, David A. Roodman and Kenneth L. Marshall of Bryan & Cave in St. Louis, Donald B. Verilli, Jr., and Thomas J. Perrelli of Jenner & Block in Washington D.C., and by Stanley Pierre-Louis of the RIAA in Washington D.C. (KH)

In re Charter Communications, Inc., Subpoena Enforcement Matter, 393 F.3d 771, 2005 U.S.App.LEXIS 31 (8th Cir. 2005)

“Back That Azz Up” by rap artist Juvenile did not infringe copyright to “Back That Ass Up” by D.J. Jubilee, because Juvenile independently created his song, Court of Appeals affirms

Juvenile's "Back That Azz Up" and D.J. Jubilee's "Back That Ass Up" were both recorded in the fall of 1997. Positive Black Talk released D.J. Jubilee's song in the Spring of 1998, without much success. After D.J. Jubilee's song was released, Juvenile released "Back That Azz Up" on an album produced by Cash Money Records and distributed by Universal. Juvenile's album, "400 DEGREEZ," sold over 4 million copies.

Positive Black Talk filed a copyright infringement suit against Cash Money Records, alleging that Juvenile's song was copied from D.J. Jubilee's. Federal District Judge Jay Zainey entered judgment in favor of Cash Money Records and Universal, after a jury found that Juvenile had independently created "Back that Azz Up." Positive Black Talk appealed the judgment on the ground that Judge Zainey had erred in instructing the jury on the definition of "probative similarity."

In an opinion by Judge Carolyn King, the appellate court concluded that the instruction was not an obviously incorrect statement of the law even though it may have been misleading. Also, Judge King noted that Judge Zainey had offered guidance to the jury on the definition of probative similarity and that the jury found that the songs were independently created.

The appellate court also ruled that Judge Zainey had not erred when he refused to give an instruction on copying and the inverse relationship between access and similarity. Judge King said that the Fifth Circuit has not adopted the inverse relationship test.

Positive Black Talk also argued that Cash Money did not prove independent creation by clear and convincing evidence, but the appellate court ruled that

independent creation need only be proved by a preponderance of the evidence.

Positive Black Talk was represented by Nathan T. Gisclair, Jr., of Montgomery Barnett Brown Read Hammond & Mintz in New Orleans. Cash Money Records was represented by Bruce Victor Schewe of Phelps Dunbar in New Orleans. Universal was represented by Thomas K. Potter III of Jones Walker Waechter Poitevent Carrere & Denegre in New Orleans. (MAR)

Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 2004 U.S.App.LEXIS 26372 (5th Circuit 2004)

DreamWorks defeats copyright infringement claim alleging “Antz” was copied from script titled “Eddie the Existential Ant”

Because he believed DreamWorks based its animated film “Antz” on his script “Eddie the Existential Ant,” scriptwriter David Seals-McClellan sued for copyright infringement. According to news sources, Seals-McClellan had sent his script to a Universal-affiliated scriptwriting contest, and believed his story made it to DreamWorks via a former Universal employee, Nina Jacobson, who eventually moved on to DreamWorks. Jacobson was also named in the suit.

In a Memorandum opinion marked “may not be cited,” the Court of Appeals rejected Seals-McClellan’s appeal from a lower court order granting DreamWorks’ motion for summary judgment.

To prevail on a copyright claim, it must be shown that the supposed “infringer had access to the protected work before creating the accused work and that a substantial similarity of expression exists between the protected and accused works.” In this case, though, the appellate court agreed that “the record does not disclose a genuine issue of material fact regarding [DreamWorks’] opportunity to access the protected work.” Seals-McClellan had not “shown anything beyond a bare possibility of access.”

Because Seals-McClellan failed to show access, he had to prove that the “protected and accused works are “strikingly similar.” Ironically, Seals-McClellan’s own expert testified that the accused work “could have been the result of independent creation.” And thus the two works were not “strikingly similar.” The appellate court explained: “Here, the works differ markedly in plot, theme, dialogue, mood, setting, pace, characters and sequence of events.”

While the court acknowledged that there were certain similarities between the works, those were the result of similar ideas, and the appellate court ruled that

“similarities derived from the use of common ideas cannot be protected.”

Seals-McClellan was represented by Todd M. Friedman in Chicago. DreamWorks was represented by Louis P. Petrich and David Aronoff of Leopold Petrich & Smith in Los Angeles. (AMF)

Seals-McClellan v. DreamWorks, Inc., 120 Fed.Appx. 3, 2004 U.S.App.LEXIS 25426 (9th Cir. 2004)

Vigorously litigated feud between Shady Records and The Source magazine, triggered by magazine’s web posting of allegedly racist songs by Eminem, ultimately dismissed at Shady’s request

“The events central to this case span a fifteen-year period, and a geographic distance of similar scope, from the basements of Detroit to the upper echelons of hip-hop society in New York city.” So said federal District Judge Gerard Lynch in one of the four separate decisions he rendered in the well-publicized lawsuit between Eminem’s Shady Records and The Source magazine.

At issue were two allegedly racist, early Eminem recordings, which, in 2003, made their way to the desks of The Source which purchased the songs from their alleged co-author for the purpose of publication. After The Source posted the recordings and lyrics of “Oh Foolish Pride” and “So Many Styles” on its website, Shady Records, Inc., the record company owned by Marshall Mathers (aka Eminem) filed a suit in federal court. In the suit, Shady claimed that The Source infringed its copyright of the two songs. Shady sought damages and equitable relief.

In December of 2003, Judge Lynch entered a temporary restraining order “prohibiting Source from ‘reproducing, distributing or publicly performing or in any way making available any hard copy or electronic copy’ of the songs.” Despite this, in early January of 2004, Shady’s law firm discovered that the “lyrics were available [on The Source’s Web site] for public download.” Shady moved for an order holding The Source in contempt and for legal fees. Judge Lynch concluded that “an award of attorney’s fees would be an appropriate sanction if Source [was] held in contempt, whether or not contempt was willful.” The judge concluded that The Source, while not willful in allowing the content to remain available on the web, was nonetheless “slipshod and ineffectual” in its efforts to comply with the order. Therefore, it was in contempt and were ordered to pay Shady’s “costs of enforcement, including reasonable attorneys’ fees.”

Separately, The Source counterclaimed against Shady and Marshall Mathers, claiming *it* held the rights to the songs which it had acquired from a co-author.

Mathers moved to dismiss these claims as made against him individually, and requested sanctions. The court agreed to the dismissal, but denied the sanctions. The Source argued that since “Mathers controls Shady . . . the declaration of rights and legal relations issued by this Court should apply not only to Shady but also to [Mathers].” The judge, however, noted that “it is elementary that a corporation is a separate legal person from its officers, directors and shareholders.” In this case, “The copyright registrations that are challenged by Source were filed by Shady, a corporation, not by Mathers, and the complaint alleges that Mathers has assigned whatever rights he may once have had to Shady. There is thus no case or controversy between Source and Mathers, as it is not alleged that he asserts any interest in the material disputed between Source and Shady.” Thus, the copyright counterclaims against Mathers were dismissed.

The Source’s amended pleadings alleged 18 affirmative defenses and four counterclaims against Shady and Mathers, “including one seeking a declaration of their ownership” of the two songs. The parties then both moved for summary judgment on their claims. The Source claimed that “material fact disputes exist as to whether they were licensees of the [songs], via a license granted by alleged co-author Matthew Ruby, or in the alternative, a license created by estoppel.” The court noted that the evidence showed that Ruby, a former collaborator of Eminem, did not participate in writing the two songs in question. Thus Ruby had no right to license the works to The Source. As to the estoppel claim, the judge noted that this argument relied on the actions of Matthew Ruby, who had, if inadvertently, allowed the songs to ultimately arrive in The Source’s hands. Since “no reasonable fact finder could conclude Matthew Ruby was a co-author of these recordings,” The Source had no claim for estoppel either; and summary judgment was therefore granted in favor of Shady on these issues.

The Source also claimed that Shady didn’t validly register the songs with the Copyright office, which would have quelled Shady’s copyright claim altogether. After wading through a mountain of facts and contentions by The Source, Judge Lynch nonetheless concluded that The Source “failed to show any fraud on the Copyright Office, or that Shady was not in compliance with the deposit requirement [of the Office].” Therefore, the court found that Shady has valid copyright registrations for both “Oh Foolish Pride” and “So Many Styles” – and so is “entitled to maintain this copyright infringement action.”

In response to The Source’s misuse and abuse of copyright defense, the judge noted that in the Second Circuit, it has not been established firmly that the argument will work as either a counterclaim or an affirmative defense. Regardless, he also concluded that The Source “produced no evidence of any such misuse.”

The Source also asserted a “duplication of claims” defense against Shady for seeking an infringement claim both before and after the temporary restraining order was issued. But said the judge: “[nothing] prevents Shady from pleading these allegations as two separate counts, rather than as different events supporting a single count of copyright infringement.” As to Shady’s motion for permanent injunctive relief against The Source, he also said this was distinct from the first claim of copyright infringement – and was “therefore entirely appropriate.”

As to The Source’s claim that Shady failed to join indispensable parties in not naming the other co-owners of the songs in the suit, Judge Lynch said The Source misunderstands the law, “which merely permits courts to require joinder of co-owners where desirable.” Also, by the time The Source’s amended complaint was filed, “Shady owned the copyright interests of all possible co-owners by virtue of the assignments executed by” Mathers and his other collaborators on the songs. Thus, there were, in fact, no co-owners who could have been joined in this action anyway.

The Source also claimed that “Shady has destroyed the value of the [songs] by withholding the recordings from the public, and that therefore Shady should be barred from vindicating its copyright interests.” Said the judge on this affirmative defense: The Source has “failed to allege facts which would support a finding that Shady has done anything but exercise its right as a copyright holder to refrain from publication.” Therefore, this defense too was dismissed.

Shady moved for summary judgment on The Source’s claim that Shady had been unjustly enriched – that is, “that Shady retained an improperly obtained benefit, without adequately compensating The Source.” Said the judge, “in the absence of a quasi-contractual relationship, there is no basis for the Source parties’ unjust enrichment claim and summary judgment the claim is granted.”

As to the issue of damages, the judge disallowed Shady’s claim for attorney’s fees and costs, based on section 412 of the Copyright Act which (until its very recent amendment (*ELR* 26:11:4)) didn’t allow such recovery when “any infringement of copyright in an unpublished work commenced before the effective date of its registration.” While Shady tried to argue that a second infringement commenced “when the Source Parties re-posted the lyrics to the website,” and thus deserved damages for this occurrence, the judge refused to accept “Shady’s characterization of the facts . . . as showing a separate series infringements postdating the copyright registrations.” This left only the possibility of actual damages.

Despite these setbacks, the judge eventually favored The Source on one of its claims: “[it] is only in asserting a fair use defense . . . that the Source parties finally get to the heart of the real dispute here.” And, because there existed evidence that weighed toward both sides on this

claim, the judge was not willing to budge on making a decision on the matter. “[T]he cause must proceed to trial on the sole issue of whether the Source parties have established a fair use defense as to any or all of the alleged acts of copyright infringement.”

According to news sources, after this decision, which left the sole issue of The Source’s possible “fair use” of the copyrighted material, Shady’s lawyers concluded there was “nothing left to win.” So they filed a motion to dismiss. Initially, Shady moved to dismiss without prejudice, but the court “made clear that the motion would not be granted in that form.” So Shady modified its request, seeking a dismissal with prejudice. Meanwhile, The Source moved to “memorialize a finding of fair use,” to “vacate its contempt order” and sought to recover its costs and attorneys’ fees.

The judge stated that The Source misconstrues the law. “The Court has not made ‘a finding of fair use,’ and it has not been ‘actually decided’ by anyone that defendants’ use of the materials was fair.” Concerning the contempt order, Judge Lynch said: “[t]hroughout the lengthy contempt proceedings, The Source never once contended that the order that it violated was erroneously entered.” Among other things, he added: “[n]or does termination of the case in defendant’s favor lead to the conclusion that the order was erroneously entered.” As to the issue of fees, said the judge: “[i]n this case, it would be entirely inequitable for either party to be awarded costs, let alone attorneys’ fees.” He noted that both parties litigated in a manner “that greatly escalated the number of issues to be resolved,” and that The Source “asserted completely meritless counterclaims against both Shady and Mathers, vastly expanding the scope of discovery and delaying adjudication of the case.” He concluded: “In light of the litigation excesses of both sides, the Court has resisted the repeated cries of both parties for sanctions. The most equitable result, in light of the totality of the circumstances, is for each side to bear its own costs.”

Shady Records was represented by Donald N. David of Fischbein Badillo Wagner Harding in New York. The Source was represented by Michael S. Elkin of Thelen Reid & Priest in New York. (*AMF*)

Shady Records Inc. v. Source Enterprises, 351 F.Supp.2d 64, 2004 U.S. Dist. LEXIS 10511 (S.D.N.Y. 2004); *Shady Records Inc. v. Source Enterprises*, 351 F.Supp.2d 74, 2004 U.S. Dist. LEXIS 10796 (S.D.N.Y. 2004); *Shady Records Inc. v. Source Enterprises*, 2004 U.S. Dist. LEXIS 26143 (S.D.N.Y. 2004); *Shady Records Inc. v. Source Enterprises*, 2005 U.S. Dist. LEXIS 4742 (S.D.N.Y. 2005)

New York trial court denies motions for summary judgment in right of publicity case against Getty Images and licensee that used minor’s photo in advertising campaign, because of dispute about whether mother’s signature on release was forged and whether Getty and licensee stopped using photo once mother denied signing release

In 1996, Enriqueta Alvidrez allegedly signed a release consenting to the use of her then minor daughter’s photographs when she accompanied her daughter to a photo shoot in Spain. In 2003, Getty Images licensed one of the photographs to Roberto Coin, which used the photograph as part of its holiday advertising campaign to market and sell diamond jewelry. A necklace was digitally superimposed on the minor’s photograph and the words “100% SPOILED” appeared beneath the photo, which was published in numerous magazines including *Vogue*, *Harper’s Bazaar*, and *Vanity Fair*.

The mother claims that the release was a forgery, and in a lawsuit against Roberto and Getty, she alleged invasion of privacy under section 51 of New York Civil Rights Law. She sought a permanent injunction, \$500,000 in damages for mental distress, and exemplary damages. The New York Civil Rights Law requires written consent for the commercial use of a photograph, though a parent’s written consent is binding on a minor.

Roberto and Getty responded with motions for summary judgment, and relied on a New York decision which said that “something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.” Judge Rosalyn Richter denied their motion, however, for several reasons.

The judge concluded that there was more than a “bald assertion” of forgery, because the mother also asserted that she did not accompany her daughter on the trip, which would therefore make it impossible for her to have signed the release. Second, while a Getty employee stated that the release was made and kept in accordance with Getty’s usual business practices, there was no evidence that he had personal knowledge of the relevant events.

Third, the alleged witness to the signing was not produced. Fourth, no expert opinion was offered to establish that handwriting samples matched. Finally, since the original release was not produced, the judge said it’s questionable whether Alvidrez would be able to conduct any meaningful analysis of the signature in dispute. Judge Richter also concluded that there was still a material question as to whether Roberto and Getty stopped using the photograph once they were requested by Alvidrez to do so.

Alvidrez was represented by Sussman & Zapfel. Roberto and Getty were represented by Wolff & Godin. (AR)

Alvidrez v. Roberto Coin, Inc., 791 N.Y.S.2d 344, 2005 N.Y.Misc.LEXIS 18 (N.Y.Misc. 2005)

Model Jaime Harlock wins a partial summary judgment in contract and publicity lawsuit against jeweler Scott Kay, Inc., after New York appellate court finds that Scott Kay's "Model Release" is unenforceable because it was missing essential terms

A New York appellate court has reversed a trial court order that denied model Jaime Harlock summary judgment on her breach of contract and publicity claims against jewelry maker Scott Kay, Inc. Harlock argued that her agreement with Scott Kay authorized the use of her photos only for one year and only in bridal magazines, and that the company had used her photos "in violation of those terms."

The trial court had dismissed Harlock's lawsuit and granted Scott Kay summary judgment, because Harlock signed a release of all claims.

The appellate court ruled that the Scott Kay "Model Release" was not enforceable because essential terms were missing. The court said that the release failed to specify the manner of use of Harlock's identity, it failed to specify whether use was authorized outside of the United States, and the release failed to specify the duration of the use. The court also noted that although multiple photographs were taken, the release only granted rights for the use of one unspecified photograph.

Harlock offered extrinsic evidence to prove the terms of the agreement. An employee of Click, Harlock's management company, submitted an affidavit that stated that the terms of the agreement were for one year and that the pictures could only be used in bridal magazines. The appellate court said that invoices which were sent to and paid by Scott Kay corroborated the Click employee's testimony. Also the court noted that Scott Kay didn't contradict the testimony of the Click employee.

As a result, the appellate court reversed the lower court's ruling and granted Harlock summary judgment as to liability. The court remanded the case for a determination of Harlock's damages.

Harlock was represented by Aaron Richard Golub in New York. Scott Kay was represented by Sheldon M. Greenbaum of Goldman & Greenbaum in New York. (MAR)

Harlock v. Scott Kay, Inc., 787 N.Y.S.2d 303, 2005 N.Y.App.Div.LEXIS 28 (N.Y.App.Div. 2005)

Mexican film production companies own restored U.S. copyrights to Mexican movies that once were in public domain in U.S., federal appellate court agrees in case involving ownership of restored copyrights to Cantinflas movies

Before 1995, hundreds of foreign films were in the public domain in the United States, even though they were still protected by copyright in their countries of origin. This happened for a variety of reasons, including the failure of the films' owners to register or renew their copyrights in the U.S., and the omission of copyright notices then required by U.S. law. Among these public domain films were 34 Mexican movies starring the famed actor Cantinflas.

Then, in 1995, Congress did a remarkable thing: it restored the U.S. copyrights of certain foreign works that had been in the public domain in the U.S. (*ELR* 17:3:3). The Cantinflas movies were among those works whose U.S. copyrights were restored; and that set off a three-cornered dispute over who owns the now-restored U.S. copyrights to those movies. The contenders were Cantinflas' son, Columbia Pictures, and the Authors' Rights Restoration Corp.

The 1995 Copyright Restoration Act gave ownership of each work's restored copyright to the work's "author . . . as determined by the law of the source country of the work." The "source country" of the Cantinflas movies was Mexico. But Cantinflas' son and Columbia Pictures, on the one hand, and the Authors' Rights Restoration Corp., on the other, could not agree on who the "author" of those movies was, under Mexican law.

Federal District Judge William Rea determined that the companies that produced the Cantinflas movies were their authors under Mexican law, as Cantinflas' son and Columbia had argued – not the movies' directors, screenwriters and composers, as the Authors' Rights Restoration Corp. had argued.

In a short Per Curiam opinion, the Court of Appeals for the Ninth Circuit has affirmed that decision. The appellate court noted that this is exactly the conclusion that had already been reached by the Court of Appeals for the Fifth Circuit, in a separate case that also involved the Authors' Rights Restoration Corp. (*ELR* 25:4:11). The Ninth Circuit "agree[d] with the Fifth Circuit's well-reasoned opinion," and thus the Ninth Circuit affirmed Judge Rea's ruling that "the [Mexican] production companies were the 'authors' of the 34 films."

The disagreement between Cantinflas' son and Columbia apparently turned on a contract between the actor and the studio (or perhaps their predecessors). In unpublished rulings, Judges Rea and Dickran Tevrikan found in favor of Columbia. Cantinflas' son was ordered to withdraw claims he had made to ownership of the

movies' copyrights, and when he refused to do so, he was held in contempt and sanctioned. In an Memorandum opinion marked "may not be cited," the Court of Appeals has affirmed those orders.

Columbia Pictures was represented by Henry J. Tashman in Los Angeles. Cantinflas' son was represented by Timothy C. Riley in Pasadena. The Authors' Rights Restoration Corp. was represented by Gina E. Och in Los Angeles.

Laprade v. Ivanova, 387 F.3d 1099, 2004 U.S.App.LEXIS 23271 (9th Cir. 2004); *Laprade v. Ivanova*, 116 Fed.Appx. 100, 2004 U.S.App.LEXIS 23471 (9th Cir. 2004)

Rates for statutory license fees payable by webcasters for Internet transmission of music recordings are upheld by federal Court of Appeals

When Congress gave record companies and recording artists the right to be compensated for digital transmissions of their recordings (*ELR* 17:6:3, 20:6:4), it set in motion a years-long, multi-step process for determining how much they were entitled to receive. At issue in this process was the amount to be paid by webcasters who choose to take advantage of the statutory license that Congress built into the Copyright Act itself.

The first step in the process involved negotiations between webcasters and record companies. Those were not fruitful, so a Copyright Arbitration Royalty Proceeding was held which resulted in recommended license fee rates that pleased no one (*ELR* 23:10:12). Webcasters and record companies both appealed to the Librarian of Congress who rejected the CARP's recommendation (*ELR* 23:12:9). The Librarian of Congress then set the statutory license fee rates himself, again pleasing no one (*ELR* 24:3:6).

Again, there were appeals, this time to the federal Court of Appeals in Washington, D.C. Webcasters wanted lower rates. Record companies (represented by the RIAA) and artists (represented by AFTRA) wanted higher rates. Several small webcasters who had not participated earlier in the case sought to intervene at the Court of Appeals level, also seeking lower rates.

The parties' complaints on appeal were several and conflicting, and largely involved disagreements about what evidence the Librarian of Congress considered in deciding what rates to adopt. None of their complaints was successful, though. In an opinion by Judge David Sentelle, the Court of Appeals affirmed the Librarian's decision in an opinion that denied their petitions for review.

Judge Sentelle held that the small webcasters who had not participated in earlier stages of the case did not

have standing to seek judicial review of the Librarian's decision, and would not be allowed to intervene before the Court of Appeals to raise issues that were new to the case.

Judge Sentelle also rejected the parties' complaints about the evidence considered by the Librarian, and the weight he gave some items of evidence. And the judge concluded that the rates set by the Librarian were reasonable.

The webcasters (who had participated before) were represented by Bruce G. Joseph. The small webcasters (who had not participated before) were represented by Elizabeth H. Rader and David Kushner. The record companies and artists were represented by Michele J. Woods. The Librarian of Congress was represented by Mark W. Pennak of the U.S. Department of Justice.

Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939, 2005 U.S.App.LEXIS 667 (D.C.Cir. 2005)

Court rules for Kid Rock in suit brought against him by promoter Alvin B. Williams, because Williams' claims were barred by statute of limitations

Promoter Alvin B. Williams alleged that in 1989, before Robert Ritchie achieved success as the artist known as "Kid Rock," Williams entered into "a partnership agreement with Kid Rock" to form Top Dog Records and to promote Kid Rock's career. Williams also alleged that soon after, Kid Rock unlawfully "transferred his interest in the partnership to a Michigan 'production' company," and the production company and Kid Rock later "entered into contracts concerning Kid Rock's songs" with Zomba Records and Bow-Wow Publishing. These acts, claimed Williams, were a breach of his contract with Kid Rock.

Williams allegations were first made in a lawsuit filed in Michigan state court. Kid Rock, however, transferred the case to federal court, arguing that Williams' case actually asserted claims for copyright infringement (which only federal courts have jurisdiction to hear). The federal District Court then dismissed Williams' lawsuit, because the statute of limitations for copyright infringement claims is three years, and Williams had waited 10 years to file his suit.

Williams appealed, but without success. Judge Gilbert Merritt agreed that Williams' claims were "equivalent" to infringement claims, because there was "no meaningful 'extra element' [in Williams' state claims] . . . that removes the reformulated claims from the policy of national uniformity established by the preemption provisions of section 301(a) [of the Copyright Act]."

When Kid Rock wrote a letter to Williams which “flatly [stated] that he did not intend to work with the parties to the 1989 contract,” this “triggered the running of the federal copyright three-year statute of limitations for copyright infringement claims,” because it was a “‘plain and express repudiation’ of ownership by one party as against the other.” Since Williams waited 10 years to file the suit, it was barred.

Williams’ also asserted claims against Kid Rock for breach of fiduciary duty and breach of a so-called “Supplemental Agreement” in which Kid Rock allegedly agreed to recruit additional talent for Williams’ Top Dog Records. The court said these claims may not be “equivalent to” copyright claims, and so would come under Michigan state law. That didn’t help Williams though, because the state statute of limitations on both of these claims had run as well.

Finally, the court ruled that the “District Court accurately concluded that the Williams parties abandoned their interest in the Top Dog trademark,” because the “only entity that may have continued to use the . . . trademark after Kid Rock’s repudiation (other than Kid Rock) was Zomba Records,” and because even if Zomba was a licensee, Williams did not “exert control over the licensee.”

Williams was represented by Stephanie L. Hammonds in Detroit. Kid Rock was represented by William H. Horton of Cox Hodgman & Giarmarco in Troy. (AMF)

Ritchie v. Williams, 395 F.3d 283, 2005 U.S.App.LEXIS 388 (6th Cir. 2005)

Fox News Network defeats defamation lawsuit filed by parents of JonBenet Ramsey because television broadcast did not contain defamatory meaning, federal District Court rules

News reports are simply a recounting of facts. Information is passed on, and the listener is free to create any inferences. So it was that John and Patsy Ramsey became extremely upset after watching a Fox News Network broadcast of a report noting the sixth anniversary of the murder of their daughter, JonBenet Ramsey. The Ramseys ire was kindled by Fox’s alleged portrayal of John, Patsy, and Burke, their nine-year old son, as suspects in JonBenet’s death.

Angry that Fox negatively splashed their private lives on national television, the Ramseys immediately filed a defamation lawsuit against Fox in federal court in Georgia. In response, Fox filed a motion to dismiss the Ramseys’ complaint. But before the court could rule on the motion, Judge Thomas Thrash, Jr., transferred the case to federal court in Colorado. This occurred because

Colorado was better suited to hear the case since the subject matter of the suit related to the Ramseys’ activities when they previously resided in Colorado.

Having won large sums of damages in prior defamation lawsuits, the Ramseys were eager to obtain retribution for Fox’s alleged wrongdoing. However, the court in Colorado thought otherwise and surprised the Ramseys by granting Fox’s motion to dismiss. Judge Phillip Figa held that “looking at the totality of the broadcast and the plain meaning of its language, no defamatory meaning as against the Ramseys can be derived from it as a matter of law.”

In so holding, Judge Figa reasoned that Fox’s “broadcast did not make any judgment as to who was involved in the murder nor did it urge any provably false facts suggesting the Ramseys participated in any crime.” Fox’s broadcast was simply a news report that stated facts: police suspected John or Patsy Ramsey of committing the crime. The Ramseys even acknowledged the fact they were under suspicion.

As for Fox’s statements about Burke, Judge Figa concluded the statements did not contain any defamatory meaning. Judge Figa reasoned that since the police cleared Burke of suspicion, no defamatory meaning could exist. Judge Figa also noted that the purpose of Fox’s broadcast was to report that the Ramseys were no longer the focus of an investigation.

The Ramseys were represented by L. Lin Wood in Atlanta. Fox News Network was represented by Dori Ann Hanswirth of Hogan & Hartson in New York. (KH)

Ramsey v. Fox News Network, 351 F.Supp.2d 1145, 2005 U.S.Dist.LEXIS 138 (D.Colo. 2005)

Rainbow/PUSH Coalition lacks standing to appeal FCC decision that renewed broadcast license of University of Missouri’s KWMU-FM, and rescinded a fine, despite allegations of employment discrimination

In 1997, the Rainbow/PUSH Coalition filed a petition opposing the FCC’s renewal of KWMU’s broadcast license, because the Coalition believed that KWMU had engaged in employment discrimination. The FCC denied the petition and renewed KWMU’s license, because the Coalition did not establish that renewing the license would be inconsistent with the public interest. The FCC noted that the discrimination complaints were resolved in KWMU’s favor and referred the Coalition’s complaints to the Equal Employment Opportunity Commission (EEOC). Although the FCC initially fined KWMU because its renewal application did not mention employment discrimination complaints that were filed against it, the fine was later rescinded because the FCC said that the omission was not serious enough.

The Coalition appealed the renewal of KWMU's license and the recession of the fine. In an opinion by Court of Appeal Judge Karen LeCraft Henderson, the court held that the Coalition did not have standing to appeal the FCC decision, because at the procedural stage it did not establish that KWMU's actions had an adverse effect on the Coalition's fight against discrimination. Judge Henderson said for the Coalition to have standing it must *demonstrate* a specific injury resulting from the alleged discrimination and that merely *alleging* an injury is not enough.

The court said that the Coalition failed to allege that the discrimination at KWMU frustrated its efforts or that it spent resources to counteract KWMU's alleged discrimination. Although the Coalition argued that it was burdensome to keep track of discriminating employers and to counsel young people about discrimination, Judge Henderson said that such an injury was insufficient, because it was a generalized grievance about an abstract societal interest in advancing racial equality.

The Coalition would have had standing if the broadcaster's violation of an FCC rule affected the programming listeners hear, said Judge Henderson. But the court ruled that the Coalition did not establish that the alleged discrimination had an effect on KWMU's programming.

In a dissenting opinion, Judge Judith W. Rogers said that the court applied a heightened and unprecedented standing requirement. The judge said that the Coalition did have standing to appeal the FCC decision, but the FCC correctly denied its petition on the merits.

The Coalition was represented by William L. Lowery. The FCC was represented by Jacob M. Lewis of the FCC. KWMU-FM was represented by Kathryn R. Schmeltzer. (MAR)

Rainbow/PUSH Coalition v. Federal Communications Commission, 396 F.3d 1235, 2005 U.S.App.LEXIS 1821 (D.C. Cir. 2005)

Idaho State University defeats breach of contract case filed by head women's basketball coach; since State Board of Education never approved the contract, no breach occurred, Supreme Court of Idaho affirms

As one legal maxim says, "A voided contract means no contract." Unfortunately for Shirley Huyett, she found this out the hard way. In June of 2001, Idaho State University signed Huyett to a one-year employment contract to serve as head coach of the women's basketball team. Shortly after, Huyett expressed her desire for a multi-year contract. As a result, negotiations for a multi-year contract took place between Huyett and

ISU, culminating in ISU preparing a draft of a contract. However, before either party could sign the contract, ISU rescinded the draft and placed Huyett on administrative leave.

Upset and angry over ISU's actions, Huyett filed suit in Idaho state court alleging breach of a multi-year employment contract and violations of her liberty and property rights associated with continued employment.

In the trial court, ISU surprised Huyett by striking preemptively. Before Huyett could present her case, Judge Randy Smith granted ISU's motion for summary judgment. Judge Smith held that because the Board of Education did not approve the alleged contract between Huyett and ISU, the contract was void. Finding no contract existed, the court also dismissed Huyett's liberty and property claims.

Confident in the strength of her case, Huyett subsequently appealed to the Supreme Court of Idaho. However, she did not fare better the second time around. In an opinion by Chief Justice Gerald Schroeder, the court affirmed the trial court's holding that no contract existed between Huyett and ISU. Chief Justice Schroeder concluded that the "subject to approval by the Board" language in the Governing Policy and Procedures of Idaho's State Board of Education created a contingency that made Board approval necessary to establish a multi-year employment contract. Since the alleged contract lacked the Board's approval, Chief Justice Schroeder deemed the contract void and unenforceable. Because no contract existed, the high court rejected Huyett's liberty and property claims as well.

In ruling against Huyett, Chief Justice Schroeder rejected her argument that Board approval was unnecessary because ISU had the "apparent authority" to enter into a multi-year contract. The Chief Justice reasoned that under Idaho precedents, "university employees are deemed to know the State Board's Policy and its effect on their employment contracts." Thus, during her contract negotiations with ISU, Huyett was deemed to know that her contract was subject to approval by the Board. As such, she could not claim that ISU had the apparent authority to enter into a multi-year contract.

Huyett was represented by Steven V. Richert in Pocatello. ISU was represented by David E. Alexander of Racine Olson Nye Budge & Bailey in Boise. (KH)

Huyett v. Idaho State University, 104 P.3d 946, 2004 Ida.LEXIS 209 (Ida. 2004)

DEPARTMENTS

Entertainment Lawyer News:

Alan U. Schwartz and Robyn Plashuk join Greenberg Traurig in Los Angeles. Greenberg Traurig has announced that **Alan U. Schwartz**, an entertainment attorney with extensive experience in creative financing for film, television and legitimate theater, has joined the firm's Los Angeles office as a shareholder and member of the firm's entertainment practice. An innovator in "split rights," film financing deals and insurance-enhanced bank lending arrangements, Schwartz represents producers and production companies in the financing of film production for world-wide distribution. Formerly a partner at Manatt Phelps Phillips in Los Angeles, Schwartz is a long-time colleague of Jay Cooper, chairman of Greenberg Traurig's entertainment practice in Los Angeles. Schwartz represents a diverse array of clients including motion picture, television, music, video, book publishing and live theatrical producers, as well as distributors, publishers, directors, writers and actors, both nationally and internationally. For example, he has represented Mel Brooks for four decades and arranged the financing for his upcoming musical movie *The Producers*, which is currently in production in New York. He also is at the forefront in representing international media companies such as Granada (ITV), the German public broadcaster MDR, Telepool, Chorion, Paradine Productions, BFC Productions and Distribution, Degato, and September Productions. Schwartz formerly practiced in New York and continues to be very active in representing legitimate stage projects there and elsewhere. Schwartz graduated with honors from Cornell University where he received a bachelor of arts degree. He also studied at Oxford University and obtained his LL.B. from Yale Law School. He is a member of the State Bar of California and the Los Angeles County Bar Association as well as the New York State Bar, and he serves as the trustee of The Truman Capote Literary Trust. An accomplished writer, Schwartz has co-authored books on privacy and censorship. He has had articles featured in numerous well-known publications such as *Atlantic Monthly*, *Publishers Weekly*, *Theatre Arts Magazine* and *Saturday Review*. **Robyn Polashuk**, the former vice president of distribution legal affairs at Lifetime Television Entertainment, also has joined the Los Angeles office of Greenberg Traurig in its corporate department. For almost four years, Polashuk served as legal counsel for Lifetime's distribution and sales department and was a

member of the senior management team responsible for developing and implementing distribution and affiliate relations policy and strategy. She also represented the broadcast television stations of Hearst-Argyle Television. Polashuk has extensive experience in the licensing and distribution of cable television networks and broadcast stations via cable, satellite, fiber-optic and other technologies on a full-time and video-on-demand basis. She joins the firm as of counsel. Prior to Lifetime, Polashuk served as senior counsel in the Technology Law Group of The Walt Disney Company, where she was responsible for negotiating and drafting agreements for the development, licensing and acquisition of technology, electronic media and telecommunications services for various company business units throughout the world including Disney Internet Group, Disney Consumer Products, Walt Disney Parks & Resorts, and Walt Disney Pictures and Television. Polashuk also was involved in the development of Disney's information privacy initiative. She started her legal career at Irell & Manella in Los Angeles. At Greenberg Traurig, Polashuk will be working closely with Barbara Meili who heads the media practice group in the firm's New York office. Polashuk is a member of Women in Cable and Telecommunications and the National Association for Multi-Ethnicity in Communications. In 2004, she completed Harvard Business School's Executive Management Program focused on case studies of telecommunications and service businesses. She earned her law degree in 1994 from UCLA School of Law, where she graduated with honors and served as chief comments editor of *UCLA Law Review*. Polashuk has a master's degree in communications management from the Annenberg School of Communications, University of Southern California – a program focused on U.S. regulation of communication technologies and mass media. She graduated from Duke University *cum laude* with a bachelor's degree in advertising design.

Howard Weitzman joins Greenberg Glusker in Los Angeles. Howard Weitzman has joined Greenberg Glusker in Los Angeles. His practice includes litigation in civil, criminal, antitrust and regulatory forums. He has been the lead trial lawyer in over 200 jury trials. Weitzman first entered the public spotlight during his successful and innovative criminal defense of automobile maverick John DeLorean. Since then, Weitzman has represented dozens of celebrity clients in major litigation matters. He is a frequent television

commentator for high profile trials, and has been appearing on E! Entertainment Television's coverage of the Michael Jackson trial. Weitzman is a two-time recipient of the Jerry Geisler Memorial Award for outstanding trial lawyer in Los Angeles County. He has been profiled in a number of publications and has been recognized as one of the most influential attorneys in the nation, as well as one of the top fifteen lawyers in the country by the *National Law Journal*. Weitzman also has an insider's knowledge of the motion picture studio business, having served as Executive Vice President, Corporate Operations of Universal Studios (then MCA), where he oversaw various divisions, including studio operations, theme parks, real estate, new media, consumer products, corporate marketing, human resources and sponsorships. He taught at the University of Southern California Law School for 12 years, and he has lectured at Harvard, Georgetown, UCLA and other law schools across the country. He has spoken at countless seminars and symposiums for numerous organizations, including the American Bar Association, American Trial Lawyers Association, Corporate Counsel, National Association of Criminal Defense Lawyers and 27 State Bar Associations.

Elissa D. Hecker opens law office in Irvington, NY. Elissa D. Hecker has opened her own law office in Irvington, New York. Her practice focuses on copyright, trademark and corporate law. Hecker's clients include music publishers, artists, producers, photographers, authors, marketing companies and spas. In addition to her private practice, Hecker is Chair of the Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association, and Editor of the *EASL Journal*. She is also a frequent author, lecturer and panelist, a member of the Copyright Society of the U.S.A (CSUSA) and a member of the Board of Editors for the Journal of the CSUSA. She is the recipient of the New York State Bar Association's 2005 Outstanding Young Lawyer Award. Hecker was previously Associate Counsel with The Harry Fox Agency and its parent company, the National Music Publishers Association.

Lori Silver becomes Counsel to Law Office of Zick Rubin in Newton, Massachusetts. Lori Silver has become Counsel to Zick Rubin in his Newton, Massachusetts office. For the past 4-1/2 years, she has been an associate attorney in Harvard University's Office of the General Counsel where she had major responsibilities relating to intellectual property, student affairs, and general litigation. She advised faculty members on publishing and copyright issues, created content development and collaboration agreements for major distance learning projects, and advised IT directors on Harvard's operations as an Internet Service Provider. Prior to joining the Harvard General Counsel's office, she was an associate in the

Litigation Department of Palmer & Dodge. Silver is an alumna of Stanford University (where she was Managing Editor of *The Stanford Daily*) and of Harvard Law School, and was Law Clerk to U.S. District Court Judge Reginald C. Lindsay.

In the Law Reviews:

THE UCLA ENTERTAINMENT LAW REVIEW has published Volume 11, Issue 2 with the following articles:

Conflicts of Interest and the Shifting Paradigm of Athlete Representation by Scott R. Rosner, 11 UCLA Entertainment Law Review (2004)

Copyright Class War by Niels Schaumann, 11 UCLA Entertainment Law Review (2004)

The Right of Publicity Gone Wild by Gil Peles, 11 UCLA Entertainment Law Review (2004)

Where Madison Avenue Meets Hollywood and Vine: The Business, Legal and Creative Ramifications of Product Placements by Matthew Savare, 11 UCLA Entertainment Law Review (2004)

Musicians, Record Labels, and Webcasters: In Need of an International Royalties Collection Society by Cole A. Sternberg, 11 UCLA Entertainment Law Review (2004)

"How High Is Up": Interstitial Dilemmas in Nonexclusive Copyright Licensing Cases in the Ninth Circuit by Boryana Zeitz, 11 UCLA Entertainment Law Review (2004)

LOS ANGELES LAWYER MAGAZINE, www.lacba.org/lawyer, has published its 21st Annual Entertainment Law Issue with the following articles:

The Jobs Creation Act of 2004 and the Entertainment Industry by M. Katharine Davidson and Mark Saulino, 28/3 Los Angeles Lawyer 12 (2005) (for website, see above)

Negotiating Ownership of Video Game Engines and Tools by Alan J. Haus, 28/3 Los Angeles Lawyer 18 (2005) (for website, see above)

Combating Vertical Integration in Television Deal Making by Barbara M. Rubin, 28/3 Los Angeles Lawyer 24 (2005) (for website, see above)

Access Hollywood: In Determining Whether Arrangement of Other Unprotectable Elements are Subject to Copyright, the Ninth Circuit Seems to Give

Great Weight to Access by Andrew J. Thomas, 28/3 Los Angeles Lawyer 29 (2005) (for website, see above)

Think Global: Act Local: Protection of International Copyrights Requires a Careful Examination of the Law of the Country of Infringement by Julia Swanson, 28/3 Los Angeles Lawyer 38 (2005) (for website, see above)

Facing Reality: Dramatic Changes in the Business of Television Production Pose Major Hurdles for Entertainment Lawyers Trying to Make the Best Deals for Their Clients by Jody Simon and Arnold Peter, 28/3 Los Angeles Lawyer 44 (2005) (for website, see above)

Book Review: Risky Business: Financing and Distributing Independents Films by Mark Litwak, reviewed by Daniel Meisel, 28/3 Los Angeles Lawyer 54 (2005) (for website, see above)

Closing Argument: The Need to Rethink the Fin-Syn Reforms by Kenneth Ziffren, 28/3 Los Angeles Lawyer 60 (2005) (for website, see above)

CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL has published Volume 22, Number 3 with the following articles:

On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models by Justin Hughes, 22 Cardozo Arts & Entertainment Law Journal 725 (2005)

The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper by the Committee on Communications and Media Law of the Association of the Bar of the City of New York, 22 Cardozo Arts & Entertainment Law Journal 767 (2005)

Title Blanding: How the Lanham Act Strips Artistic Expression from Song Titles by Lisa Tomiko Blackburn, 22 Cardozo Arts & Entertainment Law Journal 837 (2005)

The Supremacy of SoundExchange: Federal Preemption of State Escheat Laws by Marc Shaw, 22 Cardozo Arts & Entertainment Law Journal 845 (2005)

Digital First Sale: Friend or Foe? by Eurie Hayes Smith IV, 22 Cardozo Arts & Entertainment Law Journal 853 (2005)

Where Have All the Royalties Gone? Emerging Technologies and the Lack of Equitable Mechanical Royalties by Cole Sternberg, 22 Cardozo Arts & Entertainment Law Journal 863 (2005)

A "Quizzical" Look into the Need for Reality Television Show Regulation by Tara Brenner, 22 Cardozo Arts & Entertainment Law Journal 873 (2005)

COMM/ENT: HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL, has published Volume 27, Number 3 with the following articles:

Leveling the IP Playing Field: Conditional Waiver Theory and the Intellectual Property Protection Restoration Act by Jason Karasik, 27/3 Comm/Ent, Hastings Communications and Entertainment Law Journal 477 (2005)

Undermining the Initial Allocation of Rights: Copyright Versus Contract and the Burden of Proof by Thomas A. Mitchell, 27/3 Comm/Ent, Hastings Communications and Entertainment Law Journal 525 (2005)

The War Against the Illegal Antiquities Trade: Rules of Engagement for Source Nations by Jason McElroy, 27/3 Comm/Ent, Hastings Communications and Entertainment Law Journal 547 (2005)

On ClearPlay, You Can See Whatever: Copyright and Trademark Issues Arising from Unauthorized Film Editing by Gail H. Cline, 27/3 Comm/Ent, Hastings Communications and Entertainment Law Journal 567 (2005)

Into the Grey: The Unclear Laws of Digital Sampling by Bryan Bergman, 27/3 Comm/Ent, Hastings Communications and Entertainment Law Journal 619 (2005)

Will Mechanicals Break the Digital Machine?: Determining a Fair Mechanical Royalty Rate for Permanent Digital Phonographic Downloads by David Kostner, 27/3 Comm/Ent, Hastings Communications and Entertainment Law Journal 653 (2005)

THE EUROPEAN INTELLECTUAL PROPERTY REVIEW, published by Sweet and Maxwell, www.sweetandmaxwell.co.uk, has issued Volume 27, Issue 5 with the following articles:

International Framework for Legal Protection of Digital Rights Management Systems by Maciej Barczewski, 27/5 European Intellectual Property Review 165 (2005) (for website, see above)

Game Over: The "Region Lock" in Video Games by Angus MacCulloch, 27/5 European Intellectual Property Review 176 (2005) (for website, see above)

Supreme Court of Japan Brings Racehorses' Publicity Rights to Heel by John A. Tessensohn and Shusaku Yamamoto, 27/5 *European Intellectual Property Review* 187 (2005) (for website, see above)

VIRGINIA SPORTS AND ENTERTAINMENT LAW JOURNAL has published Volume 4, Issue 1 with the following articles:

Fans and the First Amendment: Cheering and Jeering in College Sports by Clay Calvert and Robert D. Richards, 4 *Virginia Sports and Entertainment Law Journal* 1 (2004)

Baseball's Antitrust Exemption: Its History and Continuing Importance by Thomas J. Ostertag, 4 *Virginia Sports and Entertainment Law Journal* 54 (2004)

So You Want to Create the Next Survivor: What Legal Issues Networks Should Consider Before Producing a Reality Television Program by Joel Michael Ugolini, 4 *Virginia Sports and Entertainment Law Journal* 68 (2004)

Mistaken Identity: A Call to Strengthen Publicity Rights for Digital Personas by Anthony L. Pessino, 4 *Virginia Sports and Entertainment Law Journal* 86 (2004)

Musical Composition as Technological Art: Are All Algorithms for Creating Music Patent Eligible Subject Matter? by Chi-Ru Jou, 4 *Virginia Sports and Entertainment Law Journal* 119 (2004)

Doping, Judging, and Executive Bypass Oversight: A Case Study of Major League Baseball's Steroid Scandal by David K. Osei, 4 *Virginia Sports and Entertainment Law Journal* 155 (2004)

Educational Programs Calendar:

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.

Visual Arts & the Law, August 11-12, Eldorado Hotel, Santa Fe. This seventh annual conference, sponsored by CLE International, outlines Current Developments and Decisions in Art and Antiques for 2004/2005; Copyright Basics; Digital Issues; Visual Artists Rights Act; Primary Art Market and Museums; Appraisal and Valuation Issues; The Auction Process; Licensing Art; Native American Issues: A Panel Presentation; Fine Art Loss Control and Claims Handling; Selling Art Internationally; Estate Planning; and Ethics. For additional information, contact www.cle.com; CLE International, 1620 Gaylord Street, Denver, CO 80209 or call (800) 873-7130.