

Entertainment, Arts and Sports Law Journal

A publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association

Remarks from the Chair



We ended our spring season with a new record-breaking Section membership of 1,676! However, this exciting news is tempered by an observation that many of you have not yet paid your Section dues. *This is a final reminder from your Chair to pay your dues immediately*, if you have not already done so. You certainly do not want to miss out on the numerous bene-

fits available from participation in our active and enormously productive Section.

For example, over the last six weeks alone, the Section has hosted several Committee events. Our Copyright and Trademark Committee, chaired by **Alan Hartnick**, hosted a program featuring Mechelle Evans (Vice President, Legal & Business Affairs, Madison Square

Garden), entitled, "Cable Television—Some Copyright and Trademark Issues." Our Young Lawyers Committee, chaired by **Jennifer Unter**, presented a panel program in conjunction with Fordham Law School's *Intellectual Property Journal* entitled, "A Career in Publishing: How to Enter the Industry and What the Future Holds." Panelists included **Muriel Alix Caplan** (Senior Counsel, The Walt Disney Company), **Eric Rayman** (Counsel, *The New Yorker*) and **Eric Zohn** (Vice President & Business Affairs Attorney, the William Morris Agency). In addition, EASL's Committee on Literary Works and Related Rights, chaired by **Jay Kogan**, hosted a program entitled, "From the Dark Room to the Court Room. Recent Developments in Photography Law," featuring **Stephen Filler**, whose law practice specializes in the information, media and technology industries, with an emphasis on photography law.

In regard to Section meetings, on April 26, EASL hosted, as a joint production with the Philadelphia Volunteer Lawyers for the Arts, a day-long program in Philadelphia with seven CLE credits entitled, "ART

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LAW 2001: New Perspectives on the First Amendment, Digital Technologies and the Business of Art." Participating from our Section to a packed house was **Marc Jacobson**, Founding Chair, along with the featured speakers, **Ralph Lerner**, Chair of our Fine Arts Committee and your **Chair**. On June 5, a terrific program was held by our Program Chair, **Mary Ann Zimmer** entitled, "From Seven Dirty Words to the Nuremberg Files—The First Amendment and the Shape of Things to Come." This morning program offered 2½ CLE credits as well as guest speaker **Robert Corn-Revere** of the Washington law firm Hogan & Hartson. We are already planning an exciting Fall 2001 Section Meeting and our Annual Meeting of January 2002, which you will hear about in the coming months.

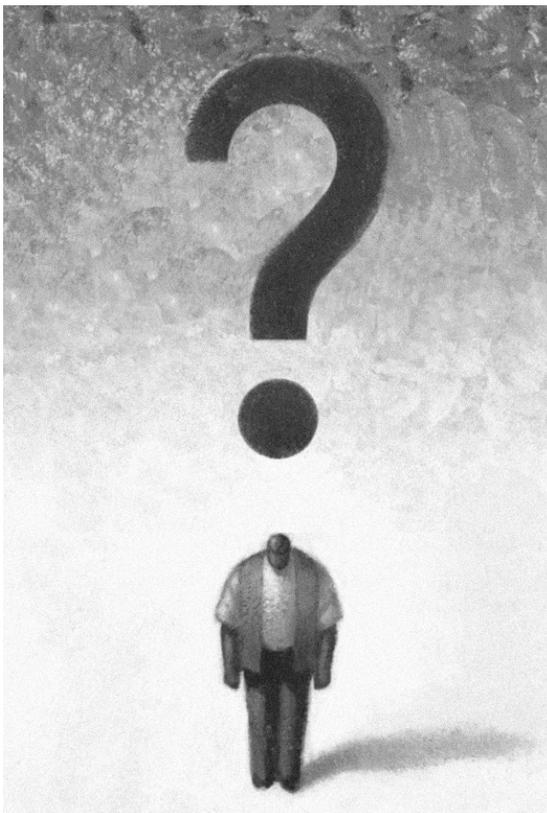
Aside from organizing and hosting timely, informative and diverse Section and Committee programs, we are proceeding with development of our Section Web site, under the energetic leadership of New Technologies Committee Co-Chairs **David Sternbach** and **Ken-**

neth Swezey. While I am on the subject of Web sites, I would like to welcome two new enthusiastic and hard-working Section members to the EASL Executive Committee: **Daniel Marotta** and **Jay Flemma**. Both Dan and Jay are now EASL liaisons to the NYSBA's Cyber Law Committee, joining our other two liaisons, **Ronald Bienstock** and **Gary Roth**. In addition, Jay and Daniel have agreed to assist David Sternbach and Ken Swezey in their efforts to launch our Web site.

Finally, it goes without saying—but I am saying it anyway—that our *Entertainment, Arts and Sports Law Journal* continues to thrive under our energetic and capable Editor, **Elissa D. Hecker**. Our Section is always looking for contributors—and we would love to hear from you.

I hope to see some of you over the summer—and *all* of you at a meeting or two during the second half of this year!

Judith Bresler



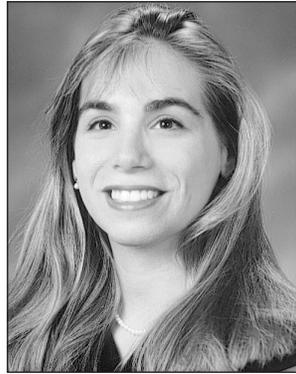
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or fax your question to:
518-487-5694.



Editor's Note

I hope that everyone is having a wonderful and relaxing summer. I am pleased to present a very diverse selection of articles for this issue of the *Journal*—some beach reading for those of you who cannot bear to leave work at the office.



First, David Sternbach has outlined for you the vision of what our Web site, www.nyeasl.org, will consist of when it is launched. Further information regarding when the site will have its official launch will be forthcoming.

There are also several timely articles in this issue, coming on the heels of major decisions that impact the EASL membership.

One of the submissions provides a very thorough analysis of the knowledge requirement for contributory copyright infringement liability on the Internet. The article discusses common law, the DMCA and the *Napster* cases.

This *Journal* also includes a submission that outlines the *Eldred v. Reno* case, in which the U.S. Court of Appeals for the D.C. Circuit addressed a challenge that was brought against the constitutionality of the part of the Copyright Term Extension Act of 1998 that extended the term of copyright protection to an additional 20 years.

We also have an opinion piece responding to the many negative reactions that were made public in the wake of the Supreme Court's decision in *PGA Tour, Inc. v. Martin*. The Court ruled that the Americans with Disabilities Act requires the PGA to allow pro golfer Casey Martin to use a golf cart during tournament play.

We are also fortunate to have an article regarding the issues facing the author and publisher communities raised by the increased profile of Electronic Books, or Ebooks. The author walks the reader through a step-by-step analysis of the pros and cons of publishing on the Internet.

The *Journal* is pleased to continue its series of concerns facing sports agents. This issue includes an article about conflicts that arise from mergers and the consolidation of companies in the sports agency industry.

This *Journal* also contains an article that raises an interesting analysis about the theory that trademark law may be used to protect those works that are no longer protected by copyright, and which have fallen into the public domain.

I am pleased to provide a feature article about the WNBA and its players. Several professional basketball players have legal training, and use that discipline both on the basketball courts during the season and in the courtroom during the off-season.

Finally, this issue of the *Journal* highlights a stream of consciousness piece written by a musician who lends his opinion as to how MP3 digital music files impact musicians.

As always, I encourage Letters to the Editor and articles of interest to this readership. The members of this Section have a tremendous impact on the day-to-day workings of the Entertainment, Arts & Sports Law industries, and feedback about issues that interest you is crucial to keeping everyone informed.

Please feel free to contact me with any ideas you may have. The next deadline for the *EASL Journal* is Friday, November 2, 2001.

Elissa D. Hecker

Elissa D. Hecker is Associate Counsel to The Harry Fox Agency, Inc., licensing subsidiary of The National Music Publishers' Association, Inc., where she is involved with legal, educational and policy matters concerning the world's largest music rights organization and the U.S. music publishing industry trade group. In addition to membership in the NYSBA, Ms. Hecker is also a member of The Copyright Society of the U.S.A., Co-Chair of the FACE Initiative children's Web site, Associate Member of the Graphic Artists' Guild, and a member of other bar associations.

Entertainment, Arts and Sports Law Section Web Site: WWW.NYEASL.ORG

By David Sternbach

EASL Is Coming to the World Wide Web!

Before the end of summer, the EASL Section will announce the formal launch of a Web site that will feature news, information and resources of interest to EASL members and others practicing in the entertainment, arts and sports law related fields.

The Web site project was spearheaded by our forward-looking Chair, Judith A. Bresler, and is being executed by New Technologies Committee Co-Chairs David Sternbach and Kenneth Swezey. The site will be located at the URL www.nyeasl.org and is being constructed by independent developer and designer Leslie Harpold of Fearless Media.

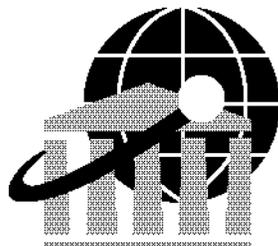
In planning the new site, EASL has consulted with NYSBA staffers Stephen Gallagher and Gary Sawtelle at each stage of the project. In addition, *EASL Journal* Editor Elissa D. Hecker has contributed in various ways, most importantly by ensuring that *Journal* articles and back issues will be available for use on the Web site

(which will be accessible only to Section members). Cyber Law committee liaisons Daniel C. Marotta and G. John Flemma will also be helping to gather additional content and see the project through its final stages.

As the site takes shape, we expect it to include the following features:

- Recent news articles and legal opinions of note;
- Current articles and archives of the *EASL Journal* (available to Section members only);
- Links to sites of topical interest to practitioners;
- Listings for EASL Section meetings and related events; and
- EASL Section membership information.

Over time, we hope to add content and features that will make www.nyeasl.org an important resource. Meanwhile, pay close attention for the announcement of the launch of *your* Web site soon.



Coming Soon!

Catch Us on the Web

at

WWW.NYEASL.ORG

Ebook Standards: Why They Are Essential

By Ed McCoyd

Imagine for a moment that I am a publisher, and I am preparing to release a travel guide entitled *McCoyd's Guide to New York City*. In addition to publishing a paperback edition, I would like to distribute the work in electronic format—in other words, as an “electronic book” or “ebook.”

Advantages of Ebooks

I see many advantages to publishing my travel guide as an ebook. First, electronic editions can easily be broken into components for individual sale. Imagine that you are going to take a car trip through six or seven different states on the east coast, and when you get to New York City, you will only be stopping in the Bronx (to visit Yankee Stadium and a few other sites). New technologies enable me to sell you the chapter on the Bronx from *McCoyd's Guide to New York City* as an individual product.

Second, portability may be of special concern for travelers. Perhaps you are picking up a handful of guidebooks to cover all of the states that you are visiting. Rather than lugging a stack of printed books around with you, you can carry all of the titles on a portable digital reading device.

Third, I can revise the ebook frequently without the burden of doing new print runs. Perhaps as a purchase incentive, I will enable consumers to access the revisions without charge or for a minimal fee. Finally, while I am currently only including text and still images in the book, I plan to eventually include multimedia enhancements such as video clips of a bustling Times Square and/or Grand Central Station, and audio of some famous speeches made in New York City.

Platforms

So how do I go about making my title available as an ebook? Many companies offer software and file formats that enable publishers to distribute books electronically. Depending on the reading software and format used, ebooks can be read on devices ranging from desktop and laptop PCs to digital personal organizers to handheld devices dedicated for ebook reading.

Technology Issues

In addition to making the book available electronically, however, I will need to tackle a number of other technological issues.

Product Information

One crucial area to address is the generation of product information files. There are many distributors and retailers of printed and electronic books, and they all need me to provide detailed information about my titles. When you visit a retail Web site like Amazon.com to review a title that you are considering purchasing, a significant amount of information about the book may appear: Everything from the publication date and the target audience to excerpts of reviews, an image of the book's cover and the author's biographical information. All of this information is known in the industry as *meta-data* (meaning “data about data,” or data about the content).

“New technologies enable me to sell you the chapter on the Bronx from McCoyd's Guide to New York City as an individual product.”

For publishers, assembling metadata is a significant task. In addition to having to compile and transmit all of this information, the publisher needs to be sure that the party receiving it can effectively process the data. A few years ago, companies with major databases of publishers' product information (including not only retailers and distributors, but also book industry directory providers like R.R. Bowker) requested various formats for its submission.

The Association of American Publishers (AAP) saw that the industry could exchange this information much more efficiently if a standardized format were adopted. In 1999, AAP acted swiftly, working with the major wholesalers, retailers and book information services to create the ONIX standard.

ONIX, which stands for “Online Information Exchange,” describes what information should be included in the document describing the book (known as the ONIX “record” or “message”). It provides codes for certain types of information, and defines how the informational elements should be ordered and relate to one another. ONIX records are written in the computer language XML and conform to a specific template, or set of rules for the construction of the document, known as the ONIX DTD, or Document Type Definition.

ONIX is now the metadata standard for electronic communication about printed books. It has been adopted by a large segment of publishers, distributors and retailers in the industry, and is in test phases of implementation by others.

“Especially important will be informing my potential readership of what usage rights to the work are available.”

As the industry steps up efforts to make books available electronically, however, metadata for ebooks must now also be addressed. In addition, there are a host of new intermediaries to which publishers need to provide ebook metadata (companies that “wrap” the ebook in encryption protection, rights clearinghouses that fulfill permissions requests on behalf of publishers, print-on-demand distributors and other parties).

With respect to the ebook edition of *McCoyd’s Guide to New York City*, I want to inform companies and consumers of new information such as size of the electronic file containing the book, the reading software with which it can be viewed, the file formats in which it is available and other details. Especially important will be informing my potential readership of what usage rights to the work are available. Consumers may want to know whether: 1) The ebook they acquire can be printed; 2) the consumer may make a certain number of copies of the book (a teacher using the work for class instruction, for example, might be interested in using this feature for distributing the ebook to students); 3) the work is available for peer-to-peer sharing; 4) the consumer may lend the ebook to a friend and 5) other information about usage rights.

Identifiers

In addition to providing detailed information about the ebook, I need to enable people and systems to find the product. Currently, I assign an ISBN, or International Standard Book Number, to all printed editions of the books that I publish. The ISBN is a machine-readable number that uniquely identifies a book or edition of a book, and is used by publishers to track the sales activity of their titles, as well as by other parties in the industry to locate and order books.

I decide to assign an ISBN to my ebook edition of *McCoyd’s Guide to New York City*, because all of my current systems are set up around the ISBN to monitor sales, royalty payments to authors, and other items. However, I also want to assign an identifier with added functions such as online linking to the content, routing consumers to purchase choices based on the usage

rights they are seeking and identification of separately available components.

Secure Delivery of Content

Another extremely important issue to me is preventing copyright infringement of *McCoyd’s Guide to New York City*. Many third parties offer services to distribute ebooks securely through the use of what is referred to as Digital Rights Management (DRM) technology. While DRM is a broad term describing the protection of intellectual property generally, in the technical context it often refers to encryption technology preventing unauthorized access.

DRM services may be provided by companies with their own file format and reading software platforms, such as Microsoft, Adobe Systems and Gemstar-TV Guide International. Other DRM providers may offer services such as hosting ebooks on their servers and fulfilling orders and permissions.

In publishing my New York travel guide as an ebook, I can choose to work with any number of DRM companies. However, a difficulty I am going to encounter is the widespread inability of the different DRM systems, file formats and reading devices in existence today to interoperate. The reading device one of my consumers owns will not handle all of the different reading formats and DRM systems currently on the market.

Take the contrasting example of the well-known audio CD. You can carry around the same CD and listen to it on your home stereo, your car stereo and your portable stereo, even if each listening device is produced by a different manufacturer. Although most CDs do not incorporate technical measures to prevent copying, they are extremely popular among consumers because they can be used across so many different devices. A potential ebook consumer, on the other hand, may be able to read the ebook only on her PC at home and not on her handheld organizer on the way to work.

Solutions Proposed by AAP

In May of 2000, AAP and Accenture (then known as Andersen Consulting) launched AAP’s Open Ebook Standards Project, a major effort to develop standards for the ebook marketplace. By November, the project teams had released proposed standards for ebook metadata and numbering, as well as extensive recommendations for DRM standards development.

The proposed metadata specification consisted of numerous add-ons to ONIX that would cover ebook metadata. As of the date of this writing, all of the extensions are being incorporated into the upcoming release of ONIX Version 2.0 (ONIX is updated and maintained

by an international organization called EDItEUR, with the input of committees in the U.S. and other countries).

The ebook numbering standard introduced by AAP makes extensive use of an innovation for the Internet called the Digital Object Identifier (DOI). Unlike a URL (Uniform Resource Locator), which is simply the address of a piece of electronic content, the DOI identifies the content itself, and enables a user to find the object even if it is moved from one URL to another. That can occur because the DOI is associated with a directory which is continuously being updated, and which points the user to the location of the content.

The system works as follows: A publisher can assign DOIs to its content and record them with a registration agency (a company called Content Directions recently became the first registration agency focused on ebook DOIs), which operates a directory containing metadata for the different pieces of content. When changes need to be made to the metadata, the publisher provides them to the registration agency, which updates its directory.

Perhaps a given publisher of ebooks eventually will be acquired by another house, or will sell a group of titles on its list to another company. When such a transfer takes place, the URLs for accessing and purchasing the content may change (for example, distributors move the books to different pages on their Web sites, the subsequent publisher sells some titles from its own server, etc.). As soon as the registration agency receives the new URL information from the acquiring house, it updates the DOI directory, allowing Internet users to enter the same DOI as before and still find the ebook to which it was originally assigned (instead of entering the original URL and receiving an error message saying that the page could not be found).

The DOI also enables consumers to access all kinds of information that the publisher may wish to associate with the ebook or other "digital object" to which the identifier is assigned (such as a chapter or photograph contained within the ebook). This information appears on a page to which the DOI takes the user, or even in a window on the user's desktop. An ebook may be available on numerous retail sites; there may be a selection of pricing scenarios based on how the consumer wishes to use the content (for example, the seller may charge more for additional usage options such as the right to print the book or to make electronic copies of it); if the publisher chooses to sell components of the ebook separately, like I intend to do with sections of *McCoyd's Guide to New York City*, the consumer can be supplied with that option. All of this metadata can be stored and accessed through the identifier database.

The DOI can then be used for further linking. When the consumer clicks on the reading format she wants

(Palm Reader, Gemstar, etc.) she accesses links to the locations where she can purchase the ebook in that format. The consumer may also be able to choose a retailer or find out more information about the book by clicking to another page or window.

AAP's Ebook Project numbering team has recommended assigning both a DOI and an ISBN to an ebook, to employ the added features of the DOI while maintaining use of the well-established ISBN system.

While producing specifications for metadata and numbering, AAP made certain DRM recommendations but has not attempted to create standards for DRM interoperability. AAP has instead left that task to the technology providers in the ebook industry, and a large group of experts within an organization called the Open eBook Forum (OeBF) have begun working to create DRM standards.

"Word of mouth has traditionally been known as one of the most powerful catalysts of print sales; now consumers can act as marketing agents of digital content by passing on copies within the framework of the DRM system."

OeBF, an association of hardware and software companies, publishers, library groups, booksellers, and other participants in the ebook industry, is seeking to establish widespread adoption of standards to help the ebook marketplace flourish and improve the ebook usage experience for consumers. The group within OeBF that is addressing DRM seeks to establish standards for interoperability within a 9- to 18- month period (an ambitious time frame in the world of industry standards).

AAP is participating in the DRM activities at OeBF by submitting the many recommendations publishers have made regarding the types of functions DRM systems should be able to perform. In addition to protecting their content, publishers want DRM systems to provide consumers with flexible and easy usage. The recommendations include enabling ebook consumers to lend their copies to others, choose items from a variety of sources and purchase them together in a single electronic package and preview the work prior to deciding whether to purchase it.

Publishers also see great possibilities in the area of peer-to-peer sharing. Word of mouth has traditionally been known as one of the most powerful catalysts of print sales; now consumers can act as marketing agents

of digital content by passing on copies within the framework of the DRM system. In an example given in the promotional literature of one of the current technology providers, a doctor makes an online purchase of a medical journal article and wants to pass it onto colleagues. Pursuant to the DRM system protecting the content, she would be able to send friends or colleagues an e-mail message containing an abstract of the article, as well as an encrypted file containing the full text. Recipients of the message would be able to purchase access to the content from the publisher.

DRM technologies will also enable many other purchasing models, such as time-metered usage, subscriptions to content on a particular subject, and pay-per-view. Data clearinghouses are able to gather and report usage data to publishers—such as the amount of time a consumer spent reading a particular section of a text—if the consumer consents to the collection of this information (perhaps in exchange for incentives from publishers).

Rights clearinghouses are also emerging to process sales and permissions requests for ebook publishers. There are all kinds of clearances that a DRM system can handle: Perhaps a college professor wants to enable his 20 students to read a chapter from an ebook online, without the ability to print or copy it; another professional may want to post a chart from the ebook on a screen at a conference presentation; or maybe a participant in an online discussion group desires to post certain material from the work for a limited period of time. Individual publishers will need to determine the uses and terms of usage for their ebooks.

The Outlook for Electronic Publishing

In order for the ebook market to reach its full potential, standards are essential. The market can grow exponentially if companies and individuals can easily participate due to agreed-upon technological processes, and consumers' needs for flexible usage, including interoperability among platforms, are addressed.

Ed McCoy is an attorney and Director of Digital Policy at the Association of American Publishers, the principal trade association of the U.S. book publishing industry. He also serves on the Board of the Open eBook Forum.

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The Knowledge Requirement for Contributory Copyright Infringement Liability in the Online World—How Much Do You Have to Know?

By Sarah E. Sully and Carolina M. Saez

In order to be found liable for copyright infringement under United States law, a defendant must have directly infringed a protected work, must have contributed to another's direct infringement or must have vicariously benefited from the direct infringement of the work. Numerous judicial decisions have addressed contributory copyright infringement, and the test for contributory infringement under the common law is fairly well settled. One of the two factors for finding contributory copyright infringement is that the defendant must have a certain level of knowledge of the infringing activity. Courts have not fully analyzed this requirement, however, particularly in the online context. Just how much knowledge of the infringing activity is required? Is the level of knowledge required for a finding of contributory infringement in the online arena going to be different?

The most frequently cited formulation of the standard for contributory infringement is that of the *Gershwin* court, which stated that "[o]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."¹ This knowledge standard, as developed by the courts, is an objective one. Knowledge is established if the defendant knew or *had reason to know* of the infringing activity.² Such knowledge does not have to rise to the level of a legal conclusion that the activity is infringing.³

Actual Knowledge

Courts have found that defendants had actual knowledge of infringing activity in a variety of circumstances. In some cases, the defendants' statements and/or actions allowed courts to easily establish that they had actual knowledge. In *Sega Enterprises v. MAPHIA*, the defendant, an electronic bulletin board operator, helpfully admitted that users were allowed to upload and download Sega games from his bulletin board service (BBS).⁴ The court in *Cable/Home Communication Corp. v. Network Productions, Inc.* found that the defendant had actually known that the computer program incorporated into a chip he was selling and distributing was copyrighted and that "he acted in direct defiance of this knowledge."⁵ The court based its findings on the fact that the defendant encouraged the reproduction of the computer program by giving funds and equipment to a third party in order to "break" the program, and on his many comments regarding the illegal nature of the chips.⁶ Courts have also found actual knowledge in cases involving termination by plaintiffs' of defendants' licenses to use the works in question. One court, for example, found actual knowledge where the defendant

continued to sell the plaintiff's software after he had received a letter terminating the license agreement between them.⁷

Actual knowledge may be imputed where defendant received notice of the infringing activity, though courts seem to differ on when notice is sufficient to establish defendant's knowledge. In *Fonovisa, Inc. v. Cherry Auction, Inc.*, the court stated that for purposes of the appeal, there was no dispute that the defendant, an operator of a swap meet, was aware that vendors were selling pirated recordings.⁸ In support of its finding, the court pointed out that thousands of counterfeit records had been seized in a raid by the sheriff's department and that the defendant subsequently received a letter from the sheriff notifying him of the continuing sales of the infringing records.⁹

The issue of whether notice serves to establish knowledge by the defendant was explored in some detail by the court in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, in response to the defendant's argument that its knowledge of the infringing nature of the postings by a user of its Internet access and BBS was too equivocal, given the difficulty in assessing whether the registrations were valid and whether the use was fair.¹⁰ The court stated that although a mere unsupported allegation of infringement by the owner "may not automatically put a defendant on notice of the infringing activity, Netcom's position that liability must be unequivocal is unsupported."¹¹ The court found that the fact that the works contained copyright notices made it "difficult to argue that a defendant did not know that the works were copyrighted."¹² It agreed, however, with the central thrust of the defendant's argument, stating that its lack of knowledge would be found reasonable and there would be no liability for contributory infringement for allowing the continued distribution of the works on its system, where the defendant cannot reasonably verify a claim of infringement because of: (i) A possible (colorable) fair use defense; (ii) lack of copyright notices on the copies or (iii) the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement.¹³

Constructive Knowledge

There is little case law on what constitutes constructive knowledge for contributory infringement liability because courts often do not explicitly address the issue. Two scenarios are typical: Either the courts find that the defendant had actual knowledge and therefore ends its analysis,¹⁴ or courts summarily conclude that the defendant knew or should have known of the infringing activi-

ty. In the latter scenario, though courts suggest that the fact scenario may have given rise to constructive knowledge, it is impossible to identify which facts, if any, these courts would consider sufficient to establish constructive knowledge in the absence of actual knowledge by the defendant.

The meager case law that explicitly discusses defendants' constructive knowledge does provide some indication of the types of facts that might be viewed to give rise to actual knowledge. A price for a work that is much lower than that of comparable works may be the kind of fact that indicates that a defendant "should have known" of the infringing activity.¹⁵ The bulletin board operator in *Sega Enterprises v. Sabella*, unlike the operator in *Sega Enterprises v. MAPHIA*, did not admit knowledge of her user's infringing activities. Yet the court found that certain facts established the inference that she had reason to know of their activities: Files on the BBS were labeled as Sega games; she had the ability to track user uploads and downloads of these files; she advertised on the BBS the copiers which played unauthorized copies of the game; and she offered downloading privileges to the customers who bought the copiers and sold downloading privileges to other users.¹⁶

Knowledge Standard Under the Digital Millennium Copyright Act (DMCA)

The Digital Millennium Copyright Act generally recognizes concepts of third-party liability, including those pertaining to contributory infringement, and addresses the level of knowledge required for a finding of contributory infringement in the online context. In particular, a provider of online services is ineligible for the DMCA's limitation on liability from all monetary relief and certain kinds of injunctive relief for copyright infringement if the provider had actual knowledge that the applicable material or activity was infringing, or if the provider was "aware of facts or circumstances from which infringing activity is apparent."¹⁷ Of interest for purposes of this article is how the DMCA's standard for constructive knowledge (awareness of "facts or circumstances from which infringing activity is apparent") departs from the traditional standard articulated in *Gershwin* ("reason to know of the infringing activity"). The different phrasing of the knowledge requirement in the DMCA is no coincidence. The legislative history of the Act indicates that constructive knowledge will be attributed to a service provider only if there are "obvious and conspicuous circumstances" ("red flags") from which infringing activity or material is apparent.¹⁸ It is clear that a different level of knowledge was intended by the drafters of the DMCA in order to find contributory liability on the part of an online service provider.

If the DMCA is found not to apply in the online context, however, a service provider will not automatically be liable for copyright infringement.¹⁹ Rather, the conduct of the service provider will be evaluated in the context of

case law and the other statutory provisions of the copyright law. Accordingly, for such providers, the *Gershwin* knowledge standard is applicable.

Napster

The recent District Court and Court of Appeals decisions involving the online file sharing service known as Napster²⁰ analyzed Napster's contributory infringement of copyrighted music files. The case did not flesh out the constructive knowledge standard under the DMCA, but the common law analysis was applied because the DMCA was found by the court not to apply. Judge Patel, in her decision of May 5, 2000 denying the defendants' motion for summary judgment, held that the Napster service fell outside of the DMCA's protections because, among other reasons, the defendants had failed to comply with one of the Act's "threshold eligibility requirements."²¹ That is, Napster had not posted on its Web site (or otherwise informed users of) a policy providing for termination of access to the service by users who were "repeat infringers"²² when the service began, or even before the instant lawsuit was filed.²³ Writing later for the District Court (in the court's August 10, 2000 decision granting the plaintiffs' motion for a preliminary injunction), Judge Patel also found that Napster could not avail itself of the DMCA because the Act "expressly excludes from protection any defendant who has 'actual knowledge that the material or activity is infringing.' . . ."²⁴

Judge Patel found that the defendant in *Napster* had actual knowledge of its users' infringing activity, and then went on to find that the defendant had constructive knowledge as well. Judge Beezer's decision for the Court of Appeals, however, scaled back Judge Patel's findings with respect to the defendants' level of knowledge. The *Napster* Court of Appeals emphasized actual knowledge of specific occurrences of infringing activity in the online environment—a signal that the Court understood the realities of that environment. While not dispositive regarding the interpretation of the knowledge standard under the DMCA, the Court of Appeals decision nevertheless sheds some light on the issue of constructive knowledge in the online arena *in dicta*. Online service providers will have to wait for more definitive guidance as to how much knowledge of possibly infringing activity is required to incur contributory liability under the DMCA, and how much to police the activities of the users of their services.

District Court Decision

Judge Patel, writing for the District Court, found that Napster executives had actual knowledge that the Napster service was used to transfer copyrighted music files without permission.²⁵ Judge Patel could have ended her analysis there, since actual knowledge of infringing activity is enough to satisfy the knowledge requirement for contributory liability under any definition. She, however, went further. She rejected the argument offered by Napster that "titles in the Napster directory cannot be used to distinguish infringing from non-infringing files and thus that

defendant cannot know about infringement by any particular user of any particular musical recording or composition."²⁶ She further found that the defendants had experience with the recording industry, and held that, therefore, Napster had "constructive knowledge of its users' illegal conduct."²⁷

Judge Patel offers scant justification for the first conclusion mentioned above, that the mere titles of songs in the Napster directory sufficiently distinguished infringing from non-infringing files to infer knowledge of the infringement. The court relies on the *Gershwin* and *Sega Enterprises v. MAPHIA* decisions for this conclusion.²⁸ Reliance on *Gershwin* to prove requisite knowledge seems particularly inapposite; the level of knowledge was not at issue in that case since the defendant admitted that it had actual knowledge of the infringing activity.²⁹ Rather, the issue in *Gershwin* concerned the second prong of the test for contributory liability, that is, whether the defendant caused or materially contributed to the infringing conduct. Similarly, Judge Patel cites *Sega* as an example of constructive knowledge because the defendant did not know *when* the infringing uploading and downloading occurred on its BBS.³⁰ The defendant knew, however, that the users' copying of games was infringing. Additional facts did not help the defendant in *Sega*: The Sega logo appeared on screen whenever a game was played by a user, the defendant's advertising touted the availability of Sega games, and he profited from both the sale of downloads and of the copiers necessary to play the games.

If the service provider is properly given notice of infringement, as the "notice and take down" steps set up by the DMCA are designed to accomplish, it may be fair to attribute knowledge of the infringement to the service provider. However, forcing online service providers to infer infringement based solely on the titles of the works displayed on screen as a result of executing a search functionality is far too burdensome, and tips the balance unfairly against services that seek to offer new technologies and functionalities on the Internet.

Judge Patel's second unnecessary conclusion, if left alone by the Court of Appeals, would have created even more confusion regarding the standard of knowledge required for contributory infringement on the part of online service providers. Judge Patel supports her finding that the defendant had constructive knowledge of the infringing nature of the files available through its service with the fact that "[s]ome Napster executives boast recording industry experience,"³¹ and that the defendant "possessed enough sophistication about intellectual property laws to sue a rock band that copied its logo."³² Whatever the correct standard of knowledge to be applied to service providers in the online world, actual knowledge, "reason to know,"³³ "knew or should have known,"³⁴ or awareness "of facts or circumstances from which infringing activity is apparent,"³⁵ mere sophistication about an industry or about the right to bring a lawsuit seems far from meeting any such requirement.

Court of Appeals Decision

The Court of Appeals narrowed Judge Patel's holdings, and relied on Napster's actual knowledge of infringement to support its affirmation of contributory liability.³⁶ Judge Beezer analogized the facts in the *Napster* case to those of *Religious Technology Center v. Netcom* because both involved "an online context."³⁷ As stated by the Court: "This analysis is similar to that of *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, which suggests that in an online context, evidence of actual knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement."³⁸

Judge Beezer goes on to note that, "The [Netcom] court determined that for the operator to have sufficient knowledge, the copyright holder must 'provide the necessary documentation to show there is likely infringement,'"³⁹ and cites a 1991 Southern District of New York decision, *Cubby, Inc. v. Compuserve, Inc.*,⁴⁰ as "recognizing that [an] online service provider does not and cannot examine every hyperlink for potentially defamatory material."⁴¹ The Court of Appeals concludes, with respect to Napster, that "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement," and that "[c]onversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material."⁴² Judge Beezer also describes the requisite level of knowledge in an online context as knowledge that is "linked to demonstrated infringing use."⁴³

Conclusion

The DMCA has helped clarify the requirements according to which an online service provider may be held liable for contributory infringement. If a service provider does not have actual knowledge of infringing activity by users based on notice from the copyright owner in accordance with the steps outlined in the Act, the service provider can still be held liable for contributory copyright infringement liability if the service provider was "aware of facts or circumstances from which infringing activity is apparent." Although the Ninth Circuit Court of Appeals decision in *Napster* was rendered outside of the DMCA, it points to a different requirement of knowledge of infringement that might be applied in the online context as a prerequisite for contributory liability. The court's emphasis on actual knowledge, and its scaling back on the decision rendered by the District Court, seem to indicate cognizance of the realities of the online environment, where examination of millions of data, or records, or files, would be beyond any possible undertaking by a service provider. The court's analysis suggests that *Gershwin's* "reason to know" standard will, when applied in the online context, evolve

into a standard for constructive knowledge nearly identical to the “red flag” test of the DMCA. In the online world, awareness of infringement must mean something beyond “reason to know,” or contributory infringement liability will become a matter of strict liability.

Endnotes

1. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted) (emphasis added).
2. *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987); see also *Ez-Tixz, Inc. v. Hit-Tix, Inc.*, 919 F. Supp. 728, 732 (S.D.N.Y. 1996) (“constructive knowledge is sufficient to establish liability”).
3. *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247, 1255-56 (W.D.N.Y. 1983) (rejecting defendants’ argument that they could not be liable because they had no knowledge that their activities were in violation of the copyright laws). See also Paul Goldstein, *Copyright* § 6.1 n.1 (2d. ed. 2001) (“This rule is dictated by the more general rule that innocence is no defense to an action for copyright infringement.”).
4. 948 F. Supp. 923, 928, 933 (N.D. Cal. 1996).
5. 902 F.2d 829, 846 (11th Cir. 1990) (Defendant also testified that “using a pirate chip is totally illegal if you’re receiving programming you’re not paying for.” *Id.* at 835. (The court, however, noted this testimony only in its discussion of defendant’s liability for direct infringement. *Id.* at 840.)).
6. *Id.* at 835.
7. *Dynamic Microprocessor Assocs. v. EKD Computer Sales & Supplies Corp.*, No. CV 92-2787, 1997 U.S. Dist. LEXIS 6337, at *49 (E.D.N.Y. Mar. 18, 1997). See also *Casella*, 820 F.2d at 365-366 (holding defendant, who sold franchise, including plaintiff’s songs, to a third party after his rights to the songs had been terminated, liable for contributory infringement).
8. 76 F.3d 259, 261 (9th Cir. 1996). In its discussion, the court did not explicitly specify that the knowledge was *actual* knowledge.
9. *Id.*
10. 907 F. Supp. 1361, 1373 (N.D. Cal. 1995) (denying plaintiff’s motion for a preliminary injunction because little evidence indicated that defendants knew or should have known of the infringement, and their participation was not substantial). *Id.* at 1383.
11. *Id.* at 1374.
12. *Id.*
13. *Id.*
14. See *Sega Enterprises v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996).
15. *Nationwide Educ. Dev. Corp. v. Rex Communications, Inc.*, No. 88 Civ. 4957, 1990 U.S. Dist. LEXIS 5331, at *13-14 (S.D.N.Y. May 3, 1990) (denying defendant’s motion for summary judgment on contributory infringement claim because “a triable issue of fact remains concerning whether the low sales price of [the book] should have prompted defendants to suspect that something was amiss regarding the book,” especially in light of defendants’ expertise in marketing and promotion).
16. No. C 93-04260 CW, 1996 U.S. Dist. LEXIS 20470, at *23 (N.D. Cal. Dec. 18, 1996).
17. 17 U.S.C. §§ 512(c)(1)(A)(i), (ii) (with respect to information residing on systems or networks at the direction of users; e.g., Web sites and bulletin boards), and 17 U.S.C. §§ 512(d)(1)(A), (B) (with respect to information location tools; e.g., search engines).
18. S. Rep. No. 105-190, at 44, 49 (1998). See also Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.B.04[A][1](2) (“[T]he standard is not what a reasonable person would have deduced given all the circumstances; it is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.”) (footnotes omitted); see also Mark D. Robins, *Digital Millennium Copyright Act Defenses for Providers of Online Storage Services and Information Location Tools*, *The Computer Lawyer*, June/July 1999, at 11.
19. 17 U.S.C. § 512(l) (“The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.”).
20. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, (N.D. Cal. 2000), *aff’d in part, rev’d in part*, Nos. 00-16401, 00-16403, 2001 U.S. App. LEXIS 5446 (9th Cir. Feb. 12, 2001).
21. *A&M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *26 (N.D. Cal. May 5, 2000).
22. 17 U.S.C. § 512(i)(1)(A).
23. *Napster*, 2000 U.S. Dist. LEXIS 6243, at *27.
Napster attempts to refute plaintiffs’ argument by noting that subsection 512(i) does not specify when the copyright compliance policy must be in place. Although this characterization of subsection 512(i) is facially accurate, it defies the logic of making formal notification to users or subscribers a prerequisite to exemption from monetary liability. The fact that Napster developed and notified its users of a formal policy after the onset of this action should not moot plaintiffs’ claim to monetary relief for past harms.
24. *Napster*, 114 F. Supp. 2d at 919, n.24 (citing 17 U.S.C. § 512(d)(1)(A)).
25. *Id.* at 919.
26. *Id.* at 918.
27. *Id.* at 919.
28. “The law does not require actual knowledge of specific acts of infringement. See *Gershwin*, 443 F.2d at 1163 (holding that general knowledge that third parties performed copyrighted works satisfied knowledge element of contributory infringement); *Sega I*, 857 F. Supp. at 686-87 (concluding that plaintiffs established knowledge element, even though electronic bulletin board company did not know exactly when infringing video games would be uploaded to or downloaded from bulletin board).” *Napster*, 114 F. Supp. 2d at 918.
29. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*, 312 F. Supp. 581 (S.D.N.Y. 1970), *aff’d*, 443 F.2d 1159 (2d Cir. 1971).
30. 114 F. Supp. at 918.
31. *Id.* at 919.
32. *Id.*
33. *Cable/Home Communication Corp.*, 902 F.2d at 846; *Sega*, 948 F. Supp. at 933.
34. *Netcom*, 907 F. Supp. at 1373.
35. 17 U.S.C. § 512(d)(1)(B).
36. *Napster*, 2001 U.S. App. LEXIS 5446, at *40.
37. *Id.* at *40-41.
38. *Id.*
39. *Id.* at *41 (citation omitted).
40. 776 F. Supp. 135, 141 (S.D.N.Y. 1991).
41. *Napster*, 2001 U.S. App. LEXIS 5446, at *41.
42. *Id.* at *42.
43. *Id.*

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Conflicts Arising from Consolidation in the Sports Agency Industry

By Kenneth Nick

“Do you know what it’s like to be ME out there for YOU? It is an up-at-dawn, pride-swallowing siege that I will never fully tell you about!”¹

“I will not rest until I have you holding a Coke, wearing your own shoe, playing a Sega game featuring you, while singing your own song in a new commercial, starring you, broadcast during the Super Bowl, in a game that you are winning. And I will not sleep until that happens.”²

While not as well known or oft-repeated as “Show me the money!” (although no less relevant) these two declarations by fictional sports agent Jerry Maguire, from the movie of the same name, help to illustrate the all-consuming devotion that agents are required to show to their jobs, and more importantly, their clients. This responsibility has not hindered the top agents, as they are the ones who represent the most athletes, both in quantity and quality. Getting to that level is not easy and thus there is fierce competition to sign and retain athletes.³ When an agent signs a client, he must do everything to keep the client happy. This often means being more than a contract negotiator; agents must be lawyers, psychologists, social planners and counselors. In addition, full-service agencies now serve a variety of functions, including financial management and accounting, public relations, investment, tax and estate planning and legal counseling.⁴ With these types of demands on an agent, it is more and more difficult for small firms and solo agents to attract and keep clients because they cannot offer the same range of services that large agencies can. The easiest solution is for agents to join forces, either through voluntary mergers or by acquisition. These new mega-agencies are better equipped, from both a financial and personnel standpoint to cater to, and service, today’s athletes.

Agency expansion has taken many different forms. Over the past several years, with the exponential rise in player salaries,⁵ many people have taken a keen interest in the business of sports agency. Traditionally non-sports companies now see this industry as having a great potential for revenue, not only from the fees generated from agent commissions, but also from cross-marketing of athletes with other existing areas of their business.⁶ However, with these synergies, there is the potential for conflict. When groups become part of larger corporations, there is a natural blurring among the companies’ divisions. This phenomenon takes on a special significance when agents are involved. If the parent

company, either on an executive or corporate level, has an ownership interest in one, or several sports teams, there may arise a conflict of interest, either perceived or actual. The conflict may occur when an agent negotiates with a team that is owned by the same parent that owns the agency. Another conflict may come about when an agency grows so large, usually through acquisition, that one agent represents a disproportional large share of the athlete labor pool.

“Agents must be lawyers, psychologists, social planners and counselors.”

In this article I will examine these two conflicts, and offer some solutions to the problems raised. In addition, I will describe a situation involving the agency SFX Sports that will serve as an excellent case study in how these conflicts are manifested.

Agents and Consolidation

The business of sports agents has changed dramatically over the last 30 years. Relatively anonymous a few decades ago,⁷ agents are now predominant figures in contract negotiations for athletes.⁸ Initially, agents were not even welcome during a contract negotiation, or team general managers would not deal with players who were represented by agents.⁹ When agents were utilized, they were not professional agents; instead they often represented the athletes in other sports-related matters or simply were the athletes’ friends.¹⁰ But as sports expanded as a business, and the compensation and bargaining rights of athletes increased due to unionization efforts, the use of agents became more common and accepted in the negotiation process.¹¹ Free agency and skyrocketing salaries have swung the balance of power to the player,¹² to the point where most athletes would not dare enter a negotiation without representation.

With athletes making more money, agents are making more money. In return, athletes demand more in return from their agents. As such, an agent’s presence is felt in every aspect of an athlete’s professional and personal life.¹³ As previously mentioned, sports agencies are operating as full-service organizations, with person-

nel and departments dedicated exclusively to taking care of any need the athlete may have: From badgering teams about playing time to shipping clients' dogs.¹⁴ With this increase in services being offered by agents, many agents cannot operate alone.¹⁵ The industry has grown to a point where agents who cannot operate in the corporate world cannot compete with the large full service agencies like SFX, ProServ and IMG.¹⁶ The small agent is forced to go to great lengths, sometimes bordering on illegality, to secure athletes.¹⁷ Yet since breaking the rules is not an option for many, most small agents are forced to focus on niche representation and lower revenues that come with this type of representation.¹⁸ Just as huge chains squashed the quaint corner bookstores, so too are monstrous agencies shoving solos out of the picture.¹⁹ For those who do not want to be pushed aside, combinations and consolidations are the only answer.

Why would agents and agencies consolidate? Consolidation is prevalent in almost every industry. Mergers and acquisitions provide companies with the ability to combine resources and use each other's strengths for their own benefit. The companies hope that any potential harm created by the combination will be outweighed by the benefit the surviving entity will bring, usually in the form of financial gain. Sports agents are no different. The giant agencies see acquisitions as a way to gain access to a number of clients quickly.²⁰ For the more diversified agencies, acquiring agencies means that they can cross-market athletes to other areas of their business, for promotional and commercial purposes.²¹ The corporations use the athletes as in-house endorsers for their products. The individual agents also benefit, not only due to the financial security that a merger can bring, but because the merger grants the individual agent entrée into other worlds, such as marketing, financial planning and entertainment, with the hope of more exposure and more money.²² Just like *Jerry Maguire* and Home Box Office's *Arli\$\$*, many agents picture themselves as a commodity. To that end, the more areas of the industry they learn, the more they stand to earn.

What all this consolidation has done is move sports agencies from a "mom and pop" environment to a world of big business. To survive and prosper, an agent must be a corporate, or at the very least, an independent with "Microsoft-like" dominance, such as Scott Boras, of Scott Boras Corp.²³ Yet with big business come big conflicts. The following illustration shows how conflicts can arise when mega-corporations acquire sport agencies.

When Agencies and Sports Teams Are Owned by the Same Parent Company

SFX Sports Group is a sports management and marketing company. SFX Sports Group is a division of SFX Entertainment, the world's largest diversified promoter, producer and venue operator for live entertainment events.²⁴ Starting in June of 1998, SFX began to acquire several prominent agents and agencies: David Falk, who represents Michael Jordan, along with Alonzo Mourning and Dikembe Mutombo; the business of Arn Tellem, who represents baseball players, including Albert Belle and Nomar Garciaparra, and about 35 basketball players; and baseball agents Alan and Randy Hendricks, who together represent major league baseball players, including Roger Clemens and Chuck Knoblauch.²⁵

"For those who do not want to be pushed aside, combinations and consolidations are the only answer."

In February, 2000, SFX acquired the sports agency, Speakers of Sport ("Speakers"), which was owned and operated by Jim Bronner and Bob Gilhooley.²⁶ Speakers of Sport represented several high-profile baseball players, including 1999 Cy Young winner Pedro Martinez, 1999 World Series MVP Mariano Rivera and 1997 National League MVP Larry Walker.²⁷ SFX paid \$30 million for Speakers, plus another \$10 million in possible future payments.²⁸ SFX then signed both Bronner and Gilhooley to \$1 million, five-year contracts.²⁹

The acquisition of Speakers continued SFX's effort to build a talent management and marketing business of unmatched leadership and geographic reach.³⁰ After the Speakers acquisition, SFX Sports represented about 16% of players on baseball's expanded 40-man rosters, and its percentage of clients on 25-man rosters was probably greater.³¹ SFX was becoming expansive, playing a role in almost all areas of athlete representation, to such a point when its own corporate mantra reflected this across-the-board dominance.³²

By the end of this expansion period, SFX Sports may have become so diversified that it was unable to ethically conduct its own business. Last year, SFX Sports' parent company, SFX Entertainment, was itself acquired by Clear Channel Communications for about \$2.9 billion and \$1.1 billion in assumed debt.³³ Clear Channel is the global leader in the out-of-home advertising industry with radio and television stations and outdoor displays in 36 countries worldwide.³⁴ When Clear Channel acquired SFX, Tom Hicks became vice-

chairman and a director of the merged company.³⁵ Aside from his executive position at Clear Channel, Hicks was also the controlling owner of baseball's Texas Rangers, and part owner of two other baseball clubs, the Colorado Rockies and the Tampa Rays.³⁶ Since many of SFX's agents negotiated with these clubs, including Bronner and Gilhooley, many in the industry said that SFX's agents would have a conflict of interest when representing players in negotiations with these clubs.³⁷ Certain SFX agents were also concerned that other agents would try to leverage off of this corporate relationship by claiming that SFX's agents could not fairly represent certain athletes, because the agent's employer would be on both sides of the deal.³⁸

Two of those who felt that there were conflicts were Bronner and Gilhooley.³⁹ In March of 2001, the two were negotiating a contract extension for New York Yankee reliever Mariano Rivera. When negotiations failed to progress, Bronner and Gilhooley were fired from SFX. SFX claimed the two were fired for "cause," presumably a failure to get Rivera signed.⁴⁰ While SFX never actually disclosed what "cause" was, a lawyer close to SFX claimed that "cause" was a pretext, and in fact Bronner and Gilhooley were fired because they tried to restructure their deal with SFX because of the conflict that arose from Hicks's relationship with Clear Channel and the Rangers, and their concern that they would suffer a loss of income.⁴¹ Another lawyer said it was more of an economic issue; SFX was going to give its agents additional money as a result of the Clear Channel acquisition, but Bronner and Gilhooley wanted more, effectively overplaying their hand, the lawyer said.⁴²

Bronner and Gilhooley felt strongly enough that they were wronged by the Hicks situation, and the conflict of interest that it created⁴³ and that these issues ultimately led to their dismissal from SFX, that they filed a \$60 million breach of contract suit against SFX.⁴⁴ Bronner and Gilhooley claimed that the buyout of SFX by Clear Channel created a conflict of interest that hampered "their ability to retain their current existing players as clients" and to "attract new players as clients."⁴⁵ Further, Bronner and Gilhooley's suit stated that SFX deceived them because at the time they sold their business to SFX, SFX failed to tell them that the company was negotiating to be acquired by Clear Channel.⁴⁶ They said in the suit that damages were likely to exceed \$10 million and asked for an additional \$50 million in punitive damages.⁴⁷ As evidence, Bronner and Gilhooley cited the decision of long-time client, Juan Gonzalez, to switch to Boras, who then negotiated a \$10 million deal with the Cleveland Indians.⁴⁸ Speculation in the industry was that Boras convinced Gonzalez that Bronner and Gilhooley's position with SFX would prohibit fair negotiating, especially with the Texas Rangers.⁴⁹

Bronner and Gilhooley also claimed that baseball union chief Donald Fehr told players on "virtually all teams" that any player represented by an SFX agent "would be well advised to rethink his commitment to SFX Sports Group."⁵⁰ This is a reference to the conflict created by Clear Channel ownership of SFX and various baseball clubs. Fehr has said publicly that he never told players anything, whether positive or negative, about SFX.⁵¹

Hicks has denied that there existed any conflict of interest due to his position at both Clear Channel and the Rangers.⁵² Hicks said that he and other top Clear Channel executives "don't have any access to information about anything that has to do with anybody in sports."⁵³ Mark Ganis, president of a sports industry consulting firm, Sportscorp Ltd., seemed to agree with Hicks. Ganis believed at the time that the SFX and Clear Channel deal would be "relatively invisible to the owners and general managers" who are negotiating with [agent] Leigh Steinberg or [agent] Randy Hendricks, not [sports agency] Assante or SFX Sports.⁵⁴ One baseball official, however, did express doubts about the legitimacy of this arrangement. "I don't see how it gets approved," the official said. "I don't understand that. There's got to be something wrong with that."⁵⁵

“. . .the SFX case shows that consolidations involving sports agencies can lead to conflicts for the agents, not just the corporation.”

Regardless, Hicks and SFX have moved to eliminate the specter of any such conflict. In March of 2001, Clear Channel placed the baseball group of SFX Sports in a separate, autonomous company to avoid any conflicts of interest.⁵⁶ This new entity is called SFX Baseball Group Inc. SFX Baseball president and CEO Randy Hendricks said that, "This is something we very much wanted to achieve and we've done so. This, in my judgment, removed the appearance of conflict because in reality, we don't ever want to have a situation where there is even the appearance of conflict, much less an actual conflict."⁵⁷ Clear Channel does not have the right to remove directors or officers of SFX Baseball, only to receive the profits.⁵⁸ In a further effort to avoid future conflicts, SFX also split its basketball representation business into a separate entity, SFX Basketball Group.⁵⁹ Arn Tellem will run this group.⁶⁰

Most troubling, the SFX case shows that consolidations involving sports agencies can lead to conflicts for the agents, not just the corporation. Rarely will the individual agent control the merger process, but in the

event that a flawed union is formed, it is the agent that feels the economic and social consequences. Faced with the prospect of representing clients in negotiations with their employers, agents are put in a no-win position. Whether they are influenced by their corporate parent may not be relevant; athletes will not see a reason to be patient and give agents the opportunity to prove their neutrality. Unlike the very same athlete who may be given a second or third chance to atone for his off-field transgressions, agents will have a harder time recovering from the stigma of failing to dutifully represent their clients.

Agents Who Represent Multiple Players

The other type of conflict addressed herein is the divided loyalty of agents who represent multiple athletes in the same sport, or even on the same team. In these instances it is difficult for the agent to fulfill his fiduciary duty to each of his clients without compromising the interests of the other(s).⁶¹ This condition can arise through the consolidation of agencies, or when one agent becomes so successful that he signs a large number of athletes. In either case, the agent may not be able to sufficiently respond to the needs of his clients. Again, the best example of this situation is SFX Sports, before and after its acquisitions. Before the acquisitions, the agents that comprise SFX Sports were the preeminent agents in their fields, for example, David Falk in basketball and the Hendricks brothers in baseball. Then SFX brought together all of these top agents, who combined represent a staggering number of athletes in baseball and basketball: SFX Basketball represents about 25% of active NBA players⁶² and SFX Baseball represents about 15% of major league players.⁶³ With these numbers, it is easy to see how agents might not be able to devote enough time to their clients or keep their individual client interests separate.

This failure to represent a client with a single-minded purpose is arguably the most egregious result of this conflict. This problem will surface most readily in the NFL, which is the only major sports league with a “hard” salary cap. The hard cap, unlike the NBA’s, does not offer exemptions or loopholes that would allow a team to circumvent the cap.⁶⁴ In the NFL, a team has a specific amount of money to spend on all of its players.⁶⁵ George Young, former general manager of the New York Giants, knows the common scenario concerning agents representing multiple players: One agent represents five players on an NFL team, where the salary cap means that those players are competing for the same pool of money. If the agent begins pushing for one player to get more money, the other four might get squeezed out of the picture.⁶⁶ “So actually the agents get into situations where the more people they represent, the more they cost people jobs.”⁶⁷

Additionally, a single agent or agencies that represent(s) many players on one team can exercise leverage over that team.⁶⁸ Agents can influence general managers by steering super-star clients to certain teams if general managers will sign athletes of lesser stature also represented by that agent.⁶⁹ Teams may be forced to acquiesce to an agent’s demands for one player that they ordinarily would not have, because they know that there is an upcoming negotiation with another player. Worst of all, an agent may develop the sense that he is part of a team’s management and can therefore dictate terms usually reserved for coaches and general managers.⁷⁰ Agents may begin to feel empowered enough to complain about everything from playing time to pitch counts.⁷¹ Further, the small agents are pushed out of the scene because, with only a few players under their wing, they cannot exert the same influence over teams as the mega-agencies. Because of this, the resentment between the haves and have-nots grows and creates a market in which agents are using athletes to compete in a power play off the field, as opposed to managers competing with players on the field.⁷²

Avoiding Conflicts

There are several options available to either avoid or counteract the negative impact of these two types of conflicts. In the case of SFX, the insulation of its representation business was the most direct and effective way to shield the company from charges of unfair dealing, and should therefore be seen as a positive step. By setting up SFX Baseball and SFX Basketball (SFX Football was created in 2000, when SFX acquired Sports Management Group),⁷³ SFX recognized that its corporate structure presented problems of fair dealing.⁷⁴ In the instance of an agency that is as large and as diversified as SFX, this “blind trust” is an excellent way to avoid conflicts. It is difficult to believe that Tom Hicks had much influence over the negotiations between SFX’s agents and the Texas Rangers, but there were obviously those who did. Just the hint of impropriety could have been enough to steer athletes away from SFX, or at the very least, allow other agents to use this fact as a wedge between SFX and its clients. Regardless, if Hicks or other Clear Channel executives were really bent on manipulating negotiations, then there are few feasible solutions, short of divestiture, to avoid conflicts.⁷⁵ Although, in instances where an agent callously disregards the conflicts of interest, the courts will not hesitate to rescind contracts that are not negotiated at arm’s length.⁷⁶ At least the blind trust creates the impression of neutrality, which should be enough to alleviate most people’s concerns.

As with any potential conflict, the most direct way to avoid any unseemliness is for the agent to fully disclose to his client any issues that may lead to a conflict.

If the client is comfortable with the agent's unusual affiliations, or with the fact that he represents others in a similar position, he can consent to the agent's dealings. If not, the client can seek representation elsewhere. While this might work well in theory, or in a corporate environment where the parties have the business acumen to understand the facts, clients of sports agents may not be sophisticated enough to fully comprehend the ramifications of the conflicts presented. The athlete-client may be unable to make an informed determination as to the implication of the conflict and possible diminution of his interests. This problem is worsened as many hockey, baseball and now basketball, players are drafted right out of high school and are not mature enough to appreciate the situation due to a lack of experience. The trouble is only exacerbated if the agent is not completely forthcoming in disclosing the facts, which some might want to do when dealing with a valuable client. While full disclosure is the most pragmatic solution to dealing with conflicts, however, the real stumbling block is that what is understood by one client, may not be understood by another.

Not all conflicts lend themselves to a specific factual solution, such as setting up separate corporate divisions or full disclosure by agents. Rather, conflicts may best be addressed at a more macro level. An all-encompassing alternative would be the institution of a set of guidelines, suggesting a uniform course of dealing for agents, vis-à-vis conflicts of interest. Such a plan should not be a general code of ethics for all agents, but instead a guide for sports agents, and specific to their industry.

Scott Rosner, Assistant Professor of Finance and Legal Studies in the Center for Sport Management at Seton Hall University, proposes that such guidelines should originate from a professional trade group, most likely the Sport Lawyers Association, and take the form of a proclamation addressing how conflicts should be resolved.⁷⁷ These guidelines, not unlike other model rules, would not necessarily regulate activities, but rather serve as a moral compass for sports agents. Rosner further believes that the various bar associations could then work from these proclamations to create a codified set of standards that could assist agents in handling conflicts.⁷⁸

The bar associations could not be the policing body of these rules, however, as not all agents are lawyers, and the bar associations would not have jurisdiction over all agents, which could lead to inconsistent enforcement of the rules. Rosner adds that the bar associations also may not have the time or resources to investigate claims based upon sports agents' violation of these rules. Bar associations usually only investigate cases in which the facts are clear, which is often not the case in claims against sports agents, because of the sub-

jective nature of accusations made by agents' clients.⁷⁹ Additionally, the bar associations regularly focus their inquiries on violations involving the more unfortunate who need greater protection from unscrupulous lawyers, as opposed to highly-paid athletes.⁸⁰

Alternatively, Rosner offers that increased vigilance by the various unions and players' associations would best ensure that these proposed guidelines be followed.⁸¹ The unions and players' associations are the groups that certify agents to represent players and otherwise monitor agent activity in regard to representation of league athletes. If these groups determined that an agent violated their leagues' codes of agent conduct, they would have the ability to enact punishment, including fines or decertification of the agent. This power to punish would be enough of a deterrent to agents to compel them to comply with such guidelines, since the agents need the recognition of the unions and players associations to represent athletes.

Yet another way to reduce conflict would be to limit the role of the agent in the negotiating process. Eliminating the use of agents completely would be impractical and unproductive, but if salaries (probably the most negotiated aspect of any contract) are somehow predetermined, athletes may be able to rely less on agents, and therefore limit their influence. One way to fix salaries is through structured pay ranges. Some leagues have instituted maximum salaries for players with certain tenure in the league.⁸² Players on the high-end of the pay scale are capped as to the maximum salaries that they can be offered, effectively limiting the extent to which contracts can be negotiated. With such a limit, there is little or no value that an agent can bring to negotiations. Such athletes are better served negotiating on their own (if they are entitled to receive the maximum allowed) and thereby avoiding paying an agent's commission.

On the other end of the spectrum is the issue of slotting for rookie draftees, or rookie salary scales. Slotting involves paying draft choices the same amount of money that the player in the previous draft, drafted in the same position, or slot, received, plus a percentage raise to reflect inflation.⁸³ While the NBA has formal rookie salary scales, the NFL essentially uses *de facto* slotting in conjunction with a less structured team-wide rookie salary scale.⁸⁴ Granted, while these options affect only a small group of athletes, they can become valuable if rookies see that agents are not necessarily an integral part of the negotiating process for their first contracts, and thus become less reliant on agents later on in their careers.

Apparently, some athletes already believe that agents are no longer a necessary part of the process.

Rafael Palmeiro of the Texas Rangers for one, does not think he will need an agent to negotiate his next contract: "I don't think I need an agent to sit down with [owner] Tom Hicks and [general manager] Doug Melvin and figure out what's a fair deal. Next time I'm up, I'll sit down with Tom and Doug over coffee and get it done."⁸⁵

Conclusion

With the economics of professional sports today, there is a tremendous amount of money to be made, and not just by the athletes. Everyone associated with the games is going to try to get his or her piece of the action, including agents. Agents will look for any advantage in order to sign the best athletes, and as many of them as possible. Any one of those athletes could sign the one big contract that could make an agent's career (think of Scott Boras' commission for the \$252 million Alex Rodriguez contract). Rather than take many small bites of the apple, agents are trying for the blockbuster deal. And if their names are not Falk or Dell (or even if these are), they believe that they cannot do it alone. This leads to consolidation of, and among, agents.

As we have seen, the consolidation also brings the conflicts. Whether corporations control agencies and sports teams concurrently or agents represent a quarter of a sport's league, these conflicts are happening. To protect the athlete, and to protect the agent, something must be done. This article proposed several solutions to the problems. None of them could possibly be an across-the-board elixir, but they are a good starting point. It is up to the agencies, the agent, the unions and the leagues to see that these problems are addressed. Otherwise, it will become increasingly difficult to determine where the agent ends and the team begins.

Endnotes

1. *Jerry Maguire* (Gracie Films and TriStar Pictures 1996).
2. *Id.*
3. In 1992, of the 200 agents registered with the Major League Baseball Players Association, only 150 had clients. See Bryan Couch, *How Agent Competition And Corruption Affects Sports And The Athlete-Agent Relationship And What Can Be Done To Control It*, 10 Seton Hall J. Sports L. 111 (2000).
4. *Id.*
5. See Mark Fainaru-Wade and Ron Kroichick, *Agents of Influence; Massive Conglomerates Now Wield Tremendous Power Over the Games You See On the Field*, The San Francisco Chronicle, March 11, 2001, at C1.
6. An agent representing a player in certain leagues who signs for \$10 million over four years stands to earn \$400,000, or four percent over that four-year period, not including endorsement contracts where the earnings often exceed the value of the player's contract. See note 3, *supra*.
7. Back in 1975, when Leigh Steinberg began as an agent, athletes had no guaranteed right of representation. "So a team could essentially hang up the phone when an agent called, (saying) we don't deal with agents," Steinberg said. *Id.*
8. *Id.*
9. Legendary Green Bay Packers coach Vince Lombardi, who also served as the team's general manager, was known to employ any means necessary to thwart player advances during negotiations. Lombardi was able to use these tactics because agents had not yet become a part of the contract negotiation process. See David Maraniss, *When Pride Still Mattered* (Simon & Shuster eds. 1999).
10. ProServ founder Donald Dell was himself a former professional tennis player. After good friend Arthur Ashe won Wimbledon, Ashe asked Dell, an attorney, to help him sort through, and negotiate, endorsement offers that Ashe received.
11. See note 3, *supra* (quoting Michael A. Weiss, *The Regulation of Sports Agents: Fact of Fiction?*, 1 Sports Law. J. 329 (1994).
12. See note 5, *supra*.
13. See note 3, *supra*.
14. See note 5, *supra*.
15. See note 3, *supra*.
16. *Id.*
17. *Id.*
18. *Id.*
19. See note 5, *supra*.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. See *SFX Sports Group Might Be Put in Play By Clear Channel*, San Antonio Business Journal, March 10, 2000, at Vol. 14, no. 7; p. 12. According to SFX's filing with the Securities and Exchange Commission, "The SFX Sports Group is one of the world's leading fully integrated sports marketing and management agencies, providing marketers, athletes, broadcasters, teams, leagues, universities, events and properties unrivaled access to each other." See Eric Miller, *SFX Sports Group Dominates the Sporting World*, The Tampa Tribune, June 19, 2000, at 5.
25. See T.R. Sullivan, *Two Rangers Linked to Rivera Dispute*, The Fort Worth Star-Telegram, February 11, 2001, at 15.
26. See *SFX Sports Group Acquires Major League Baseball Representation Company Speakers of Sport; Pedro Martinez, Juan Gonzalez, Larry Walker Among Players Added to Client Roster*, Business Wire, February 3, 2000, available in the NEXIS Library.
27. *Id.*
28. See note 25, *supra*.
29. See Ronald Blum, *Two Agents Sue SFX for \$60 Million*, The Associated Press, February 9, 2001.
30. See note 26, *supra*. Commented SFX Sports Group President and CEO Bill Allard, "With Speakers of Sport, we have added yet another premier talent representation agency to SFX . . ." *Id.*
31. See Ronald Blum, *SFX Buys Bronner, Gilhooly Concern*, AP Online, February 3, 2000, available in the NEXIS Library.
32. "SFX Sports Group is one of the world's leading fully integrated sports marketing and management agencies, providing marketers, athletes, broadcasters, teams, leagues, universities, events and properties unrivaled access to each other. See note 24, *supra*.

33. *Id.*
34. See SFX Sports Acquires Major Professional Football Representation Company Sports Management Group, Business Wire, May 15, 2000.
35. See note 25, *supra*.
36. See Murray Chass, *Rivera's Agent is Fired, Setting Back Negotiations*, The New York Times, February 8, 2001, at Section D; Page 2; Column 1.
37. See Ronald Blum, *Clear Channel Creates New Company for SFX's Baseball Agents*, The Associated Press State & Local Wire, March 22, 2001, available in the NEXIS Library.
38. See note 3, *supra*.
39. See note 36, *supra*.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. See Mike Berardino, *Closer Alfonseca Helped Some Teams Save Money*, Sun-Sentinel (Fort Lauderdale, FL), February 18, 2001, at 3C.
45. See note 29, *supra*.
46. See note 37, *supra*.
47. See note 29, *supra*.
48. *Id.*
49. See note 36, *supra*. On April 4, 2001, Juan Gonzalez switched agents again, this time leaving Scott Boras and returning to the SFX Baseball Group. Gonzalez has now changed agents three times in the past year.
50. See Liz Mullen, *Fired agents blame losses on SFX merger*, Sports Business Journal, available at www.sportsbusinessjournal.com, retrieved February 20, 2001. SFX client Andres Galarraga signed a free agent contract with the Texas Rangers this past off-season, meaning he was working for Hicks even before he started playing for him. Ranger teammates Rafael Palmeiro and Jeff Zimmerman also are Rangers who are represented by SFX. See note 44, *supra*.
51. *Id.*
52. See note 25, *supra*.
53. *Id.*
54. See note 24, *supra*.
55. See note 44, *supra*.
56. See note 37, *supra*.
57. *Id.*
58. *Id.*
59. See Eric Fisher, *Like Baseball Arm, SFX Basketball Breaks Off Into a Separate Group*, The Washington Times, April 20, 2001, at B2.
60. *Id.*
61. Even though no one raised the conflict issue, in 1995 agent Leigh Steinberg represented all three quarterbacks on the Pittsburgh Steelers roster: Neil O'Donnell, Kordell Stewart and Mike Tomczak. See note 5, *supra*.
62. See note 59, *supra*.
63. See note 37, *supra*.
64. See National Football League, Collective Bargaining Agreement, Article XXIV Guaranteed League-Wide Salary, Salary Cap & Minimum Team Salary (1997); See CBA 101, Highlights of the Collective Bargaining Agreement Between the National Basketball Association and the National Basketball Players Association (prepared by the NBA Communication Group, November, 1996).
65. *Id.* at 78.
66. See note 5, *supra*.
67. *Id.*
68. Scott Boras started a friendship with Kevin Malone, former general manager of the Los Angeles Dodgers, which may have helped Boras get his clients to represent 4/5 of the Dodger's starting pitching rotation. *Id.*
69. SFX's David Falk is unquestionably the NBA's top power broker, openly celebrating his ability to not only steer players to certain teams, but to orchestrate trades (e.g., last summer's 12 man trade involving Patrick Ewing and Glen Rice, *et al.*). *Id.*
70. "I think the power [of agents] will grow exponentially," Giants Assistant General Manager Ned Colletti said, "and with that, the agents' grasp and hold over the field." *Id.*
71. *Id.*
72. Some agents became jealous of the Boras-Malone relationship because they thought that Malone was practically "under Boras' spell." The two sat together at games frequently and Boras negotiated a deal well above market value for his client, pitcher Darren Drieffort, with the Dodgers. *Id.*
73. See note 34, *supra*.
74. Minnesota Vikings owner Red McCombs also owns a piece of Clear Channel. See note 59, *supra*.
75. When Pittsburgh Penguin owner Mario Lemieux came out of retirement in December of 2000, there were concerns about the conflicts of interest involving an owner playing in the NHL. To alleviate these concerns, league rules required that Lemieux place his ownership interest into a blind trust. Lemieux did place his ownership interest in such a trust, and since then there has been less talk about conflict, and more talk of goal scoring. See Terry Frei, *Lemieux Should Return as Player Only*, ESPN.com, available at www.espn.com, December 12, 2000, retrieved January 12, 2001.
76. See *The Detroit Lions and Billy Sims v. Jerry A. Argovitz*, 580 F. Supp. 542 (1984) (Agent Argovitz was found to have breached his fiduciary duty to running back Sims of the Detroit Lions, while negotiating Sims' contract with the Houston Gamblers of the United States Football League. Argovitz was a co-owner of the Gamblers and therefore had a direct conflict of interest negotiating on behalf of Sims. The court found that Argovitz has acted unethically by not fully disclosing his interests to Sims, denying Sims the opportunity to make a well-informed decision. Consequently, the Gamblers' contract was rescinded.).
77. See Telephone Interview with Scott Rosner, Assistant Professor of Finance and Legal Studies in the Center for Sport Management at Seton Hall University (May 22, 2001).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. See note 64 at 15.
83. See note 64 at 17.
84. See note 77, *supra*.
85. See note 25, *supra*.

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Copyright Term Extension Upheld

By Joel L. Hecker

The United States Court of Appeals for the District of Columbia Circuit, in a split panel, recently rebuffed a challenge to the constitutionality of that part of the Copyright Term Extension Act of 1998 (CTEA)¹ which extended the term of copyright protection for an additional 20 years. The decision, dated February 16, 2001 in *Eldred v. Reno*,² raises intriguing questions of how “limited” the constitutional mandate of a copyright duration of “limited Times” is, or should be.

Issue as Framed by the Court

The majority opinion phrased the succinct issue, one of first impression before any appellate court, as “whether the First Amendment or the Copyright Clause of the Constitution of the United States constrains the Congress from extending for a period of years the duration of copyrights, both those already extant and those yet to come.”³

Historical Background

Any analysis of copyrights must begin with Article I, Section 8 of the United States Constitution, which authorizes Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

You will notice that the word “Copyright” is nowhere to be found in Article I, Section 8. However, Congress and the courts have consistently read this clause to provide protection for copyright holders. In fact, the very first Congress enacted legislation providing for a 14-year initial and 14-year renewal terms for copyright holders, covering both works “already printed” and for those that would be “thereafter made and composed.”⁴

The Court traced the history of legislative extensions of copyright protection to provide an historical connection to the issue to be decided.

Thus, the initial 28-year term was first extended to 42 years in 1831 (28-year initial term and the 14-year extension), and then to 56 years in 1909 (28 years plus a 28-year extension). Finally, the 1976 Copyright Act altered the way the term of copyright was to be computed in order to conform to international practice, so that the copyright duration became the life of the author plus 50 years, or if there was no identifiable

author or if the author was an organization, the earlier of 75 years from publication or 100 years from creation.⁵

The CTEA, the subject of this lawsuit, added 20 years to the term of each copyright duration to conform to the European Union, which has the longer term. Plaintiffs wanted to use copyrighted works which, but for the CTEA term extension, would have entered the public domain. They sued, claiming “that the CTEA is beyond the power of the Congress and therefore unconstitutional.”⁶

The Court’s Analysis

The court gave the proverbial short shrift to the first argument presented by plaintiffs, holding that decisions of the Supreme Court are “insuperable bars” to a First Amendment challenge as the idea/expression dichotomy provides sufficient balance. Accordingly, since ideas and facts are not copyrightable, and the concept of fair use protects the public’s access for scholarly and other purposes, the First Amendment is not a bar to copyright protection.

The second argument, that the duration of copyright to an existing work cannot be extended because the work already exists and therefore lacks originality, was also quickly disposed of as being unsupported in case law or commentary.

The third and main contention of plaintiffs deals with the constitutional requirement that the protection afforded by Article I, Section 8 endures only for “limited Times.” The majority held that a copyright term which is a “limited Time” may be extended by Congress for another “limited Time,” without violating the Constitution, as Congress did in its various extensions of copyright duration in 1831, 1909 and 1976. The only limitation on this power of Congress is judicial review “for rationality.”⁷

The Dissent

The dissenting opinion, drawing on an argument presented by an *amicus*, and not by plaintiffs, would hold the CTEA unconstitutional because “extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.”⁸

The dissent seemed particularly bothered by the possibility of successive Congresses conferring a perpetual copyright by an unlimited number of extensions

of "limited Times." The majority disregarded this perceived threat, citing to the relatively modest 20-year extension, which ostensibly was to conform to the duration of copyright granted by the European Union (and therefore having a rational basis).

Conclusion

Although the court upheld the constitutionality of the 20-year extension to the duration of copyright under the CTEA, it did not resolve the issue of how "limited" the constitutional mandate of a copyright duration of "limited Times" is, or should be. We now know that "forever" is too long, but 20 years is permissible.

We must leave it to a future Congress, and if challenged, to a future court to perhaps tell us how limited is the constitutional mandate of "limited Times." In the meantime life plus 70 years, or 95 years, would seem sufficient—at least for another 20 years!

Addendum

An application for *en banc* hearing before the full Circuit Court has been granted and a decision is pending. (With the change in Administration, the case is now

entitled *Eldred v. Ashcroft*.) Therefore, the next chapter may be forthcoming sooner rather than later.

Endnotes

1. Sonny Bono Copyright Term Extension Act of 1998, Section 102(d)(1)(B), Pub. L. No. 105-298, 112 Stat. 2827.
2. 57 USPQ 2d 1842, No. 99 - 5430 (D.C. Cir. 2001).
3. *Id.* at 1843.
4. *Id.*
5. *Id.*
6. *Id.* at 1844.
7. *Id.* at 1849.
8. *Id.* at 1850.

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Casey Martin Ruling of Limited Impact

By Jeffrey A. Rosenthal

The sports world did not collapse when the United States Supreme Court rendered its decision on May 29, 2001 in *PGA Tour, Inc. v. Martin*,¹ the highly publicized case concerning the right of disabled golfer Casey Martin to use a golf cart in PGA Tour events (as well as on the lower-level Nike Tour, now the Buy.com Tour). End-

“The Supreme Court found that the PGA Tour is subject to the ADA and rejected the PGA Tour’s defense that Martin’s use of a golf cart would fundamentally alter professional tournament golf.”

ing 3½ years of litigation accompanied by substantial negative publicity for the PGA Tour, the Supreme Court ruled by a 7-2 majority that the 1990 Americans with Disabilities Act (ADA) requires the PGA Tour to permit Martin to use a golf cart during tournament play. In addition to the legal issue of whether the Americans with Disabilities Act covers professional golfers, the crux of the debate and the issue that interested the public the most was whether walking is a fundamental part of the game of professional golf. The ADA defines discrimination as an entity’s “failure to make reasonable modification” for disabled individuals in policies, practices or procedures necessary to enjoy goods, services, facilities, privileges, advantages or accommodations, “unless that entity can demonstrate that making such modifications would *fundamentally alter*” the nature of these things. The Supreme Court found that the PGA Tour is subject to the ADA and rejected the PGA Tour’s defense that Martin’s use of a golf cart would fundamentally alter professional tournament golf.

Many defenders of the PGA Tour’s position have argued that professional golf as we know it would be destroyed were the Supreme Court to rule in favor of Martin. The same arguments were heard in numerous other instances in which internal rules of sports leagues or organizations were struck down, such as when Major League Baseball players were granted free agency by an arbitrator in 1976 (a decision later upheld by the federal courts), when the NCAA’s restrictive television policies were found by the Supreme Court in 1984 to violate the antitrust laws and when a federal court found the National Football League rookie draft to be unlawful in

1976. Characteristically, in an Associated Press article appearing on espn.com just after the decision was announced entitled, “Players wonder: Does this open floodgates?,” United States Golf Association Senior Director of Communication Marty Parkes is quoted as stating that “[i]t’s a concern as to who is going to make the rules and set them, and then how much leeway there is.” Both Parkes and well-known golfer Hal Sutton, a member of the PGA Tour’s policy board, questioned the potential breadth of the decision. Sutton wondered whether golfers with bad backs would be legally entitled to golf carts, while Parkes wondered what would happen “[i]f somebody had entered sectional qualifying and then had a sprained ankle and then wanted to use a cart. I don’t know what the answer is,” he said. In his dissent, Justice Antonin Scalia warned “that future cases of this sort will be numerous, and a rich source of lucrative litigation.”

Whether people like Sutton and Parkes were merely trying to stir up public alarm over the Supreme Court’s decision or were themselves simply uninformed, the “answer” is rather clear. Not only does the ADA apply *solely* to people with long-term or permanent disabilities, but to be covered under the statute, a disability must be “a physical or mental impairment that *substantially limits* one or more of the *major life activities* of such individual. . . .” So, no, Mr. Parkes, a sprained ankle would not require the PGA Tour or the USGA to provide a cart to a competitor.

“. . . it is so rare to find an athlete of Martin’s ability who can compete on a professional level notwithstanding his disability, there are unlikely to be many Casey Martins applying to the PGA Tour in the future.”

In light of the narrow definition of “disability” and the fact that, cart or no cart, it is so rare to find an athlete of Martin’s ability who can compete on a professional level notwithstanding his disability, there are unlikely to be many Casey Martins applying to the PGA Tour in the future. (Martin has a severe congenital degenerative circulatory disorder known as Klippel-Trenaunay-Weber Syndrome that makes it impossible for him to walk for an extended period of time). In fact,

over the past several years, only two other disabled golfers have sued the USGA or PGA Tour for the right to use carts in tournament qualifying play, and neither has demonstrated Martin's ability. The level of play required of a professional golfer, or any other professional athlete, is nearly impossible for a perfectly healthy and able-bodied person to achieve, let alone one with a permanent disability that substantially limits one of the major life activities.

“. . . the impact of the Martin ruling should be rather limited both in the world of professional golf and elsewhere.”

Further, while it may be distressing to an organization such as the PGA Tour to have its rules subject to judicial scrutiny in the manner similar to most other employers or associations, the question of whether the prohibition on the use of golf carts is so fundamental to the game of golf that Martin receives an unfair advantage can be answered with one simple fact—in events where competitors are given the choice between riding a golf cart and walking, nearly all golfers choose to walk.

Just as speculation that the Supreme Court's decision will clog the courts with a flood of golfers trying to gain the right to use a golf cart in tournaments is misguided, so too are the opinions that have been expressed about the potentially drastic implications of the ruling on other professional sports. Will Major

League Baseball or the National Basketball Association have to bend its on-field rules to accommodate disabled players now that the highest court in the land has found the PGA Tour to be subject to the ADA? The answer may surprise some followers of the Martin saga. While the applicability of the ADA to the PGA Tour had been uncertain until the recent Supreme Court decision, there has never been a question that the New York Mets, the Buffalo Sabres and every other Major League Baseball, NFL, NBA and NHL team (as well as teams in Major League Soccer, Arena Football, and so on) have always been subject to the Americans with Disabilities Act. Why? Unlike golfers, who are independent contractors and thus must rely on the protections of Title III of the ADA (governing all places of “public accommodation”), athletes in most other sports are employed by their teams or leagues and thus fall within the protections of Title I. The same is true for college athletes because educational institutions (including collegiate athletic associations) are considered “public accommodations” under Title III. Therefore, the impact of the *Martin* ruling should be rather limited both in the world of professional golf and elsewhere.

Endnote

1. 2001 US Lexis 4115.

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Trademark May Protect Characters No Longer in Copyright

By Alan J. Hartnick

The Issue

May Ulysses be protected? Do the assignees of Homer have a trademark claim? What about Becky Sharp? Do the assignees of Thackeray have such a claim? May you write a new video game, play or novel featuring Sherlock Holmes?

What about Tarzan, Superman, Mickey Mouse, Bugs Bunny and Godzilla? Certainly, famous character names in copyrighted works may not be used by others *during the life of the copyright* without the authorization of the copyright owner.

Should characters within a copyrighted work be protected by trademark even after the copyright expires? This article is not an effort “to bite the hand that feeds me,” but to explain the other side. A creative, original work that falls beyond the protection of copyright law is in the public domain. The constitutional grant is for a limited time.¹ According to the *Federalist*, the purpose of the limited grant is the public good.² The public domain is the consequence of the copyright law.

May *parts* of a copyrighted work continue to be protected under trademarks when the copyrighted work itself goes into the public domain? Character rights and perhaps trade dress and architectural works are “parts” that are of concern. Other kinds of copyrighted works seem to accept the bargain of limited duration.

Extension of Copyright Duration

The extension of copyright duration from 28 years and 28-year renewal to life plus 70 was not only to achieve uniformity with the EU Directive on Term, but also to protect the author’s third generation. The purpose was to delay the work going into the public domain.

*Donaldson v. Becket*³ concerned the first English copyright statute, the Statute of Anne of 1710, and the efforts of the Stationers’ Company to obtain perpetual rights after the expiration of the statutory term of copyright. The House of Lords, 6-5, ruled against the Stationers’ Company. We have followed *Donaldson*. After the expiration of the fixed term of copyright, there is only the public domain.

Character Rights in Copyright

Character rights had a tumultuous history in copyright law. Cartoon characters have had an easier time than literary characters.⁴ If characters are sufficiently delineated, there is no doubt that cartoon, television or literary characters are protected by copyright.⁵ And with copyright comes the end of copyright—the public domain.

Characters as Trademarks

The most respected author in trademark, Professor J. Thomas McCarthy, opines: “There is no policy reason why a character picture that is out of copyright cannot achieve protection under trademark law. The two types of protection are separate and independent and do not lean on each other for support.”⁶

Indeed, writings, in a constitutional sense, are “the creative products of the mind” and “are the fruits of intellectual labor,” trademarks “are the adoption of something already in existence as the distinctive symbol of the party using it.”⁷ Notwithstanding the existence of two *types* of protection, there is still the public policy concerning the *scope* of protection. In addition to copyright, the rules of unfair competition and trademark protect some characters. As a matter of fact, characters need not even come from copyrighted works. Take, for example, the trademark character Mr. Clean. However, if the characters do come from copyrighted works, such as Sherlock Holmes or his residence at 221B Baker Street, the question is how long is the protection?

Should trademark and copyright observe the same policy as to the public domain? What if there is a conflict between the two policies? Should Congress or the judiciary decide? The existence of two *types* of protection only begins the analysis.

The Few Cases on Point

The “provocative question” of whether trademark and unfair competition theories would protect a character beyond the term of copyright was specifically not reached in *Frederick Warner & Co. Inc. v. Book Sales Inc.*⁸ In *Harvey Cartoons*,⁹ the court assumed that trademark remained enforceable despite the expiration of copyright. The question of trademark life after copyright was avoided in *Silverman v. CBS, Inc.*¹⁰ A sprinkling of a very few cases does not yield judicial consensus. The question is still open.

The question is really one of public policy. Preemption analysis is not dispositive because § 301(d) of the Copyright Act states that, "Nothing in this title annuls or limits any rights or remedies under any other Federal statute." However, preemption analysis may guide us. The question then posed is, should policy grounds for preemption include national uniformity and consistency? Should trademark respect the aims of copyright?

Generic Names

How does trademark treat the public domain? Under § 14(3) of the Lanham Act, a registered mark that has become the generic name for goods or services may be canceled. A generic designation *is* the trademark public domain. It tells the buyer what the product *is*, not *where* it comes from. Generic names are the public domain. The Supreme Court in *Kellogg* said:

Sharing in the goodwill of a article unprotected by patent or trademark is the exercise of a right possessed by all—and in the free exercise of which the consumer public is deeply interested.¹¹

What about copyright? Should not the same apply? The Supreme Court in *Sears* said: "The purpose of Congress to have national uniformity in patent and copyright laws can be inferred from such statutes as which rests exclusive jurisdiction to hear patent and copyright cases in federal courts . . ."¹²

If the concept of genericism recognizes the **patent** public domain, as *Kellogg* indicates, it should equally recognize the **copyright** public domain. Using preemption principles, is this a matter that Congress "left the area unattended" so that there *need* not be a conflict between copyright and trademark public policy? The House Report on the 1976 Copyright Act regarding preemption provides an answer: ". . . the bill prevents the States from protecting it . . . because it has fallen into the public domain."¹³

If states cannot protect a work in the public domain, trademark principles also should not. There should be no difference concerning the public domain between copyright and patents. Although the Restatement¹⁴ declares that there is no rule that a trademark for a patented article ceases to be a trademark on the expiration of a patent, two Supreme Court cases suggest the opposite.¹⁵ Moreover, it could be a violation of the Sherman Act to enforce a mark where the name became generic and the patent expired.¹⁶

I suggest that if a proprietor uses a character from a copyrighted work, the designation becomes generic when the work goes into the public domain. The work

and character within it are a "right possessed by all." Are not three generations enough protection?

What about titles of works out of copyright? Titles are protected by the laws of unfair competition, not copyright. In *Gotham Music*,¹⁷ the Court of Appeals held that the name is *publici juris*, and may be used by all. Why should characters, part of the copyright, be different?

A Variation: Genus and Species

There is another approach to the public domain/trademark/copyright issue *Abercrombie* teaches us that: "A generic term is one that refers, or has come to be understood as referring to, the genus of which the particular product is a species."¹⁸

It can be argued that the copyrighted work is the genus. The characters, the species, will be generic if the court classifies the characters as merely being various species within the same genus of the copyrighted work. Characters are as much part of the copyright work as *mise-en-scene* and parallelism of incident. It could be argued that the characters become generic when the work enters the public domain.

By contracting or expanding the definition of a "genus," courts can affect what is generic. For the purpose of reconciling the public policy concerning the public domain between trademarks and copyright, a court *could* hold that a character from a public domain work is as generic as the work itself, and is not protectable. This approach would be exactly the same as that for titles of works, as discussed earlier. In that way, the public policy of copyright and trademarks are compatible. We are dealing with the *scope* and not the *type* of protection.

Prospects

It is possible, but unlikely, that a court would hold that a character from a public domain work is unprotectable as a matter of trademark law. U.S. core copyright industries have achieved more foreign sales and exports than agriculture, automobiles and auto parts and the aircraft industry. Notwithstanding pious declarations of the importance of the public domain, the thrust of intellectual property law is to achieve perpetual protection through trademark, trade secrets, design protection or unfair competition.

Professor McCarthy writes that trademarks should not trump the public domain policy of copyright law. In his view, ". . . a court should not permit trademark in an image to serve the same function as did the lapsed copyright to exclude others from reproducing and distributing the out-of-copyright work such as a film."¹⁹

Such a so-called balancing test does not permit others to make an entirely new film or play featuring a character from a public domain work. Such new work takes the work out of its original context, and cannot cause confusion of source, connection or affiliation because the original owner no longer has **any rights** in the public domain work. One cannot carve out the public domain. For the purpose of this article, that is the “absolutist” copyright position. It means that copyright has a limited term; no “ifs” or “buts.”

The Senate Report on the Copyright Term Extension Act of 1996 stated that: “. . . intellectual property is the only form of property whose ownership rights are limited to a period of years, after which the entire bundle of rights is given as a legacy to the public at large.”²⁰

Character rights apparently are *not* included in that “entire bundle of rights,” one dissenter at the time, Senator Kohl, observed that: “Like all monopolists, copyright holders are loath to give up their power.”²¹

Is there any consequence to essentially abandoning the public domain? Yes, and it is called public attitude. There seems to be an aversion to “double dipping”—a kind of intellectual property shell game.

Intellectual property is among our nation’s largest export sectors. Legal analysis inevitably will be cast aside, and, with it, the notion of achieving policy compatibility as to the public domain between copyright and trademark. Remember, the words of Justice Holmes, that: “The life of the law has not been logic, it has been experience.”²² I doubt if Mickey Mouse and Bugs Bunny need worry, but you never can tell.

Endnotes

1. Article I, Section 8, Clause 8.
2. No. 43.
3. 98 Eng. Rep. 257 (1774).
4. *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys.*, 216 F.2d 945 (9th Cir. 1954); *Film Video Releasing Corp. v. Hastings*, 668 F.2d 91 (2d Cir. 1981).
5. *Warner Brothers, Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231 (2d Cir. 1983).
6. 2 McCarthy on Trademarks and Unfair Competition, § 10:42, p. 10-78.3.
7. Trade-Mark Cases, 100 U.S. 82 (1879).
8. 481 F. Supp. 1191, n. 3 (S.D.N.Y., 1979).
9. *Harvey Cartoons v. Columbia Pictures Industries*, 645 F. Supp. 1564 (S.D.N.Y. 1986). See *Edgar Rice Burroughs v. Mann Theatres*, 195 U.S.P.Q. 159 (C.D. Cal. 1976); *Comedy III Productions Inc. v. New Line Cinema*, 46 U.S.P.Q. 2d 1930 (C.D. Cal. 1998).
10. 870 F.2d 40 (2d Cir. 1989), *cert. denied*, 492 U.S. 907 (1989).
11. *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938).
12. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, n. 7 (1964).
13. House Report No. 94-1476, 94th Cong., 2d Sess. (1976) p. 131; See *Benito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).
14. Restatement of Torts, § 735, comment b (1938).
15. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896); *Kellogg, supra*.
16. 2 McCarthy on Trademarks and Unfair Competition, § 12.55.
17. *Gotham Music Service, Inc. v. Denton & Haskins Music Publishing Co.*, 259 N.Y. 86 (1932).
18. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976).
19. 1 McCarthy on Trademarks and Unfair Competition, § 6.31, pp. 6-62.
20. Senate Report No. 491, 104th Cong., 2d Sess. (1996), p. 35.
21. Senate Report No. 491, 104th Cong., 2d Sess. (1996), p. 12.
22. The Common Law.

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Law and Basketball: Several WNBA Players Take Their Games to Another Court—the Court of Law

By Tracey Reavis

Do you know the difference between *ipso, ex post* and *de facto*? Are you confused about your rights outlined in a contract? Could you use some savvy legal advice? Then look no further than the half dozen women in the WNBA who've got the legal jones. There is a practicing lawyer, three women enrolled in law school, one law school graduate and an aspiring judge. Boasting two careers, these women can make statements on both the basketball and in the judicial courts.

Until recently, many players planned for a post-basketball career because women who did not want to play overseas when their college careers ended had to set their sights on other means of making a living. The law is a popular career choice.

"Many female basketball players have always thought, 'What career will I have,' and it was not being a professional athlete," said Sonja Henning, General Counsel for Lucy.com, a women's sports clothing online retailer, and guard for the Seattle Storm. "So I'm not surprised there are so many lawyers in the League. I think it was a factor of us growing up knowing that our career aspirations had to go further than just playing basketball."

The case for mixing courts, torts and sports is not generally an easy one to make. Both professions require a lot of time, commitment to hard work and the dedication to putting into practice what one learns. But Henning, who is fortunate to have found a company that allows her to play basketball during the summer, contends that each of her two careers teaches her important lessons about the other.

"Anyone that has done a sport for a number of years has the self-discipline to constantly try to improve through practice," the Duke Law School graduate said. "There are no direct benefits from spending three hours in the gym every day. You can still have a game and shoot horribly, but you understand that the practice behind it can lead to your success. And that's consistent with the law. You spend a lot of time researching and studying and trying to prove different issues for your cases, but there's no guarantee that spending 10 hours in the law library is going to get you the answer you are looking for."

At Lucy.com, Henning handles spokesperson agreements, human resources issues, occasionally drafts contracts and hacks away at the privacy and security issues

that arise in Internet law. Said Henning, "This is what I consider my full-time job."

Sometimes, it's more a matter of being able to talk the talk.

"I like to argue, to put it simply," said the Houston Comets' Coquese Washington, who attended Notre Dame Law School while playing in the American Basketball League. "I'm the type of person who always has an answer for everything." Washington successfully completed her law degree in 1997, sandwiching an ABL season between semesters.

Washington cut her teeth at the Gault Davison law firm in her hometown of Flint, Michigan, where she was a clerk for two summers prior to finishing law school. Placed in the labor and employment division, Washington "loved it."

"Boasting two careers, these women can make statements on both the basketball and in the judicial courts."

"What I like about labor and employment law," she said, "is you get all of the personal, juicy, life stuff that you get in criminal law without it being as depressing or without having the pressure of knowing the balance of someone's life and or liberty is in your hands. I didn't want to deal with that kind of dirty work. Sexual harassment, racial discrimination, wrongful termination—these are meaty and juicy issues, but they don't have the finality of 25 years in prison."

Although she earned her juris doctor three years ago, the much-traveled guard has yet to take the bar exam. Instead she is in her second season as an assistant coach for the Notre Dame Fighting Irish. "I will take it one day soon. I just don't know where I'm going to practice," she said. "I've been in Indiana, New York, Portland, Houston. My mom lives in Georgia, my dad lives in Michigan."

Working full time and playing in the WNBA is nothing compared to juggling law school classes, studying for tests and trying to stay fit in the off-season. For Heather Owen of the Washington Mystics, who started her first semester at Santa Clara School of Law last fall,

the biggest adjustment was getting back into the routine of working all day.

"I remember that first week," said Owen, who was a political science major at Stanford. "By Friday I was comatose at about noon. I slept like, forever. Going to classes, getting in a workout, coming home, having dinner and studying until you go to bed. Then you get up and you do it all over again. Then on the weekend you think you can rest, but you have to study. But I'm in the groove now."

Owen's commitment to attend law school was cemented when she secured a position as an assistant to a partner at Wilson, Sonsini, Goodrich and Rosati, a law firm in Palo Alto, California, during the fall leading up to the 2000 WNBA training camp. It was an invaluable experience.

"He [the firm's partner] was very busy every day, but made it a point to see that I understood what was going on. That was great. I don't think you can replace that kind of thing," said Owen, who is undecided as to what field of law she wants to specialize in.

Property, constitutional law and contracts were courses that awaited Jamila Wideman when she started at New York University Law School in the fall. The Portland Fire guard, whose father is Pulitzer Prize-winning author John Edgar Wideman, is planning to pursue criminal defense, civil rights work and death-penalty litigation. Her interest in that field of law stemmed from the case against her older brother, who is serving a life sentence in an Arizona prison.

"I have wanted to be a lawyer since I was 10," said the 5 foot-6 inch guard. "That was the first time I accompanied my mom to law school classes."

Judy Wideman put her studies on hold while raising Jamila and her two brothers, then eventually earned her law degree in 1997 at age 51. She is practicing law in Amherst, Massachusetts. Jamila graduated from Stanford University in 1997 as well, earning an undergraduate degree in both political science and African-American studies. Once she completes law school, she plans to practice law with her mother during the WNBA off-seasons.

Minnesota's Kate Paye already has a year of law school under her belt, having spent last year buried beneath books and basketballs while attending Stanford University to complete both her law degree and MBA.

The law career of Houston's Tina Thompson is also on hold for now. The four-time WNBA champion wants to be the gavel-wielding, robe-wearing judge who listens to her basketball colleagues debate the merits of cases in court. Thompson earned her undergraduate degree in sociology and minored in psychology at the University of Southern California, but she has not yet proceeded toward pursuing her judicial future.

"Despite the rigors of attempting dual careers as professional basketball players and lawyers, these women are determined to be successful on and in both courts."

"I'm taking it step by step," said the 6 foot-2 inch forward. "Basketball is here now and school will always be there. I want to take advantage of my opportunities in the WNBA first, and after that, see where the road will take me."

Henning, for one, hopes Thompson's road leads her to law school, because the lessons learned there will benefit her in every walk of life.

"It's not so much the memorization of commercial law or criminal law codes, but the new way that you've been taught to think and approach problems," she said. "That's going to carry you throughout the rest of your life, whether you're in the legal field or not. The skills that I learned in law school will be with me and will contribute to whatever career I choose."

Despite the rigors of attempting dual careers as professional basketball players and lawyers, these women are determined to be successful on and in both courts.

"It's definitely a challenging thing," said Owen of embracing basketball and the law. "But I'm going to make it all work. That's the plan."

The defense rests.

Tracey Reavis found herself considering law school after talking to the WNBA players. In the end, she decided to stick with her day job.

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MP3s and the Holy Rock'n'Roll Spirit

By Jarl Anderson

"Yo! Guitar-Man! Play some Black Sabbath!"

"Play some Neil Young!"

"Play something we can *dance* to!"

One of the more challenging aspects of being a performing singer-songwriter is handling a dimly-lit room full of rowdy drunken louts. But the *real* challenge is trying to convince them that although Black Sabbath, Neil Young, and dance music all have their merits, what they really want to hear are *your* songs.

If your music is good, it will speak for itself and pretty soon you will win the brutes over. Most likely however, you will have to negotiate. For instance, if they agree to listen to one of your songs and refrain from bottle tossing, you will play "War Pigs" for them on your acoustic, 12-string guitar.

So, you wipe away the sweat that has been stinging your eyes, pull the stray hair out of your mouth, and summon up all the Holy Rock'n'Roll Spirit it is going to take to win them over.

That is what being a performing musician is all about. Building a *following*. Creating a *buzz*. It takes quite a bit of work.

What it really is about is hauling bass amps through inches of snow over frozen parking lots at two in the morning, taping up astro-brite flyers for your next gig in the rain, having a brand new, heavy-gauge guitar string break on the third song of your set and having that same guitar string give you a sharp poke under your fingernail when you are trying to fix it later on between sets. It is about having your P.A. get nuked by power spikes at some crummy falafel restaurant that you are only playing because you saw a cute waitress there.

Being a working musician is about duct tape, shielded cables and knowing what most of those little knobs on a sound board can do to make you sound better. It is about riding herd on pretentious collegiate types in coffeehouses, stoned sound guys at gigs and overzealous engineers in the studio.

Then, for an hour or two here and there, you actually get to do what you really enjoy; playing your music by yourself or with other talented performers. It is a lot of work to do what you love, but the Holy Rock'n'Roll Spirit will help you through.

There is yet another factor to add into the mix for a musician, that is the dichotomy of MP3 digital technology. Is an MP3 music file a promise or a problem? Are MP3s really the death knell for musicians, or are they the next phase in the evolution of that rabid carnival we call the music industry? Finally, could they just be this year's fad?

In case you have recently returned from a Carthusian monastery, let me quickly explain MP3s. An MP3 is a computer algorithm that allows one to record one's favorite music from CDs onto a computer. The algorithm compresses the song's wave files into nice, neat packets that can be quickly disseminated over the Internet. MP3 is also a slang term for such song files, and once they are uploaded onto the Web, they can be traded easily and anonymously.

The promise of MP3s is that they allow up-and-coming songwriters and bands to distribute their music freely, and connect with a much broader audience than could have been reached merely by taping up flyers in hometowns or playing roadhouses.

The problem with MP3s is that because they can be traded over the Internet so quickly and anonymously, and because of the actions of infringers who pirate unauthorized copies, even the word "MP3" itself has developed a bad reputation when mentioned in connection with blatant and rampant disregard for the copyright law.

So how do I, as a working musician, feel about MP3s?

It is reminiscent of the fall of the Soviet Union. In the beginning, there was a sense of boundless optimism and hope. MP3s would bring democracy and justice to all of the music industry. Yet the rubles were hard to come by, and it was not long before the whole enterprise fell into the hands of Mafia-types and shady characters. Pretty soon, the proletariat was screaming for the KGB hard-liners (or in this case the five major multi-national corporate music labels) to return and restore some order.

There was plenty of cause for optimism in the beginning. After countless years spent just trying to hack out a small following, here was an opportunity to reach out to a worldwide audience—millions of potential listeners (or so we dreamed) just by turning our own songs into MP3s and posting them on the Web. The Holy Rock'n'Roll spirit had discovered the Internet, and it smiled.

For most bands, whether they are rookies or seasoned vets, making MP3s is a piece of cake. The recording process has become so thoroughly wedded to tech culture in the last ten years that a musician who records even the most unvarnished four-song demo should feel perfectly entitled to a Bachelor of Science in Computer Science when it is finished. Which would you prefer, DAT or ADAT? What kind of digital modeling would you like to add to those tracks? How would you like your reverb—deep and rich like the limestone halls of Salisbury Cathedral, or tight and boxy like the tiled rooms at Sun Studios, and what color would you like those tiles?

After all that, ripping some MP3s and sending them out onto the Web is almost anticlimactic. Planning a demo can take months of rehearsals, recording, mixing, mastering and promotion. Ripping MP3s and posting them for all in the world to hear and share takes less time than playing four sets at a local coffeehouse.

Yet, the greatest cause for optimism at the beginning of the MP3 hysteria was that we could promote and distribute our music without needing THEM to do it. No more sycophantic toadying just to get some A&R lackey to pay attention to you. No more groveling to club owners, those tin-pot Napoleons who feel that it is an acceptable and ethical business practice to set bands on the same bill against each other like starved pit bulls in an underground gambling ring. And no more fruitless calls to radio stations whose pre-programmed play lists are a locked-down, post-Orwellian nightmare. Unless you are coming with a dump truck full of hype, they will never shut down their automated loops of 15 or 20 chart hits just to play *your* song. You might be an unrecognized genius, but you have no chance against Matchbox 20 or Collective Soul. The focus groups have spoken.

I was caught up in the initial euphoria. I posted MP3s of my songs on all of the major Web sites that provided free forums for unsigned bands: MP3.com, rollingstone.com, IUMA and the Ultimate Band List. These sites provide a battery of stat tracking tools, allow bands to sell their own CDs and some of them even pay royalties to the bands for each time an MP3 is played.

Yet, just days after I began taking advantage of MP3.com's services, it introduced its controversial "Beam-It" service. "Beam-It" was aimed at consumers. The service encouraged anyone to rip entire CD collections into MP3s and store the songs in virtual drives on MP3.com's Web servers. Unfortunately, users were "beaming" unauthorized, copyrighted material. In retrospect, MP3.com was probably feeling pressure from its investors to be more competitive with other, more successful song trading services like Napster and Scour.com. All sins, it seemed, would be forgiven by the "new economy" of venture capital being dumped into such file-sharing services. However, the song sharing was done with an arrogant and contemptuous disregard for the copyright law.

Pretty soon, the attorneys showed up. The multi-billion dollar lawsuits flew fast and furious. Finally, representatives of those parties with vested interests in the future of the music industry found themselves testifying before the Senate Committee on the Judiciary, where Senator Hatch declared, "Napster, as we know it, cannot continue."

Although the reckless disregard for the copyright law is ugly, I hope that the Napster's "peer-to-peer" protocol survives. It allows a limitless number of home users to connect via the Internet and share the contents of their hard drives with each other.

The strangest fallout from the Napster debacle was that the major labels tried to reinvent themselves as the "Protectors of Musician's Rights." Yet we have not forgotten what the majors are capable of in their more ignominious moments. Soulsinger Jackie Wilson was so poor when he was buried that his family could not even afford a headstone. Former Motown superstar Mary Wells was on welfare when she died. Crusty song-writing genius Tom Waits had to sue his record label because it was paying him a mere fifteen cents for every album he sold.

Until musicians receive guaranteed health insurance, pension plans and free agency from the major labels, MP3s and Napster-like file sharing services provide an important set of checks and balances. They provide a safe harbor for the Holy Rock'n'Roll Spirit by allowing struggling musicians and songwriters access to an alternative system of promotion and distribution. If we give away the possibilities of independent, Web-based distribution of music, we are trading Manhattan Island for a handful of trinkets and costume jewelry.

I support the right of unsigned musicians to post their own songs on the Web, and to allow users to share them freely for promotional use. However, it is imperative that songwriters register their songs with the U.S. Copyright Office in order to protect their material. Then, if unauthorized usage occurs, one can always sue. After all, it is the American way.

Jarl Anderson is a writer and a musician, and he is also the Webmaster for the city of Arvada, Colorado (www.ci.arvada.co.us). Despite his iconoclastic rambling, he is not above shameless self-promotion, and invites you to listen to some of his music at www.mp3.com/jarl.



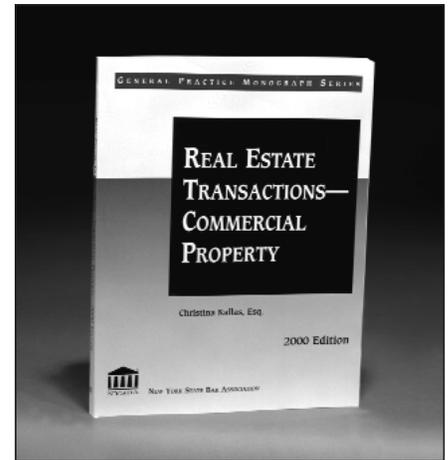
Real Estate Transactions—Commercial Property

Author

Christina Kallas, Esq.

Attorney at Law
New York, NY

Commercial real estate is a vast field, encompassing the selling, financing, and leasing of numerous types of properties, and involving a plethora of professionals including attorneys, real estate and mortgage brokers, accountants, tax lawyers, title insurance representatives and lenders. A new addition to the monograph series, *Real Estate Transactions—Commercial Property* provides an overview of the major issues an attorney needs to address in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise in the context of commercial real estate transactions. Complete with practice guides and forms, this is an extremely useful resource.



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Business/Corporate Law and Practice*

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This monograph, organized into three parts, includes coverage of corporate and partnership law, buying and selling a small business and the tax implications of forming a corporation.

The corporate and partnership section offers advice to the general practitioner or new attorney on the basics of forming a business for a client. The more popular types of business entities are discussed, along with the advantages and disadvantages of each. The chapter also examines considerations relative to the different forms of doing business, including domestic and foreign corporations and limited liability companies.

Part two, on buying and selling a small business, guides practitioners through the necessary procedures and corresponding responsibilities as a transaction passes from proposal to completion. It covers the pre-contract, contract, pre-closing, closing and post-closing stages.

Whether the corporate form of business organization is appropriate is a preliminary question you must answer after meeting with your client and determining the particular facts and relevant circumstances. The tax implications of such a decision are the focus of the third part. Alternative business organizational forms are discussed, including the general partnership, lim-

ited partnership, sole proprietorship, S corporation and the limited liability company.

This last part addresses important questions that should be considered when advising a client on forming a corporation: What is the *desirable* tax treatment to the client—that gain or loss on the exchange of his or her property for stock of the corporation be taxed in the tax year in which the transfer occurs or that it be deferred? Is deferral of gain or loss on the exchange *feasible*? What are the *consequences* of the client's deferring to a later year the reporting of gain or loss realized by the client on the exchange?

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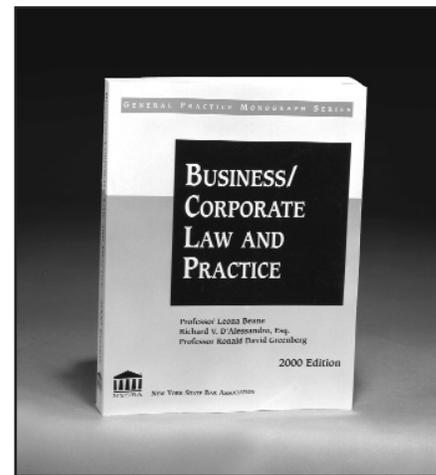
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