

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



I am excited to be writing my first remarks as your new Chair of the Entertainment, Arts and Sports Law Section. For those who do not know me, I am a member of Cleary, Gottlieb, Steen & Hamilton and specialize in commercial litigation and sports law. In addition to serving as Vice-Chair under Judith, I have been the Co-Chair of the Committee on Professional Sports for the past several years.

I have also taught Sports Law since 1996 at Rutgers Law School and, most recently, at New York Law School.

I take over a Section from **Judith Bresler** that has truly been energized over the past several years, due in large part to Judith's tireless work. Thanks to Judith and our new Vice-Chair, **Elissa Hecker**, our *Journal* has been

reborn as one of the best in the NYSBA. With the efforts of our New Technology Committee Co-Chairs **Ken Swezey** and **David Sternbach**, we succeeded in launching our Web site, <<http://www.nyeasl.org>>. For those who have not yet visited our Web site, I would encourage you to check it out. You will find a wealth of information, including a calendar of Section programs, past issues of the *Journal*, membership information, industry news, recent decisions of note and a collection of Internet links to other sites of interest to Section members. The *Journal*, industry news and recent case law are all in a searchable format.

It will be a challenge over the next two years for me to continue such progress. I am pleased to undertake this task with an excellent group of Executive Committee officers: In addition to Elissa as the new Vice-Chair (although readers need not fear—Elissa accepted the position on the condition that she be permitted to remain Editor of the *Journal*), **Alan Barson** will serve as Secretary, **Stephen Rodner** will be Treasurer, and **Ken Swezey** will be our Assistant Secretary. I look forward to

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working closely with all of them, as well as with the other members of our Executive Committee.

I have two “new” Executive Committee members to introduce: The first is **Elisabeth Wolfe**, former Director of Programs at Musicians on Call, who joins us as Membership Chair. The second is not a new Executive Committee member at all, but a new position for my predecessor, **Judith Bresler**, who has been appointed as our Section’s representative to the House of Delegates. I look forward to working with Elisabeth and to having Judith provide guidance to me in my new position, and to serve our Section in Albany. Judith and I both hope that the Section will take a more active role in the House of Delegates, and I would encourage members to contact Judith or me concerning any issues on which you believe the Section should be initiating discussion or taking a position on in the House of Delegates. In addition to Elisabeth and Judith, I anticipate announcing several additional appointments in the next issue of the *Journal*.

Our recent Annual Meeting on January 25th at the Marriott Marquis was a huge success. Program Chair **Mary Ann Zimmer** succeeded in putting together a three-and-a-half hour program on “Sex, Fear and Popular Culture: Free Expression in the Aftermath of Terror.” It featured short presentations by Marjorie Heins (author of *Not in Front of the Children: “Indecency,” Censorship and the Innocence of Youth*) and Gail Markels (Senior Vice President and General Counsel of the Interactive Digital Software Association), followed by a panel discussion involving Congressman Jerrold Nadler (D-NY), Robert Corn-Revere (partner at Hogan & Hartson LLP), Jeffrey Chester (Executive Director of the

Center for Digital Democracy), Ronald Collins (Scholar at the First Amendment Center) and Mss. Heins and Markels. I would like to thank our Legislation Chair **Steven Richman** for his efforts in securing the participation of Congressman Nadler, who provided some terrific insights into recent debates in the House of Representatives. Also, thanks to Joyce Silver of Ellen Grauer Court Reporting Services. For the second year in a row, we have been able to provide our Section members with a transcript of the program in this *Journal*.

On a sadder note, many of you may have read in our last issue that Philip Cowan, one of the founders and former Chair of this Section, passed away on December 6, 2001. As Judith mentioned, at the suggestion of **Marc Jacobson**, the Executive Committee has decided to establish the Phil Cowan Memorial Scholarship, which will be awarded each year to a deserving local law student who is committed to practicing in the field of entertainment, arts or sports law. We will be announcing shortly the details of an essay contest to select the recipients of the scholarship, and updated information will be found on our Web site. Those who are interested in contributing to the scholarship fund can send donations to the New York State Bar Foundation, One Elk Street, Albany, NY 12207 (specifically designating that the contribution is for EASL’s Phil Cowan Memorial Scholarship). Such donations are tax deductible.

I look forward to serving as your Chair for the next two years, and hope to meet many of you at upcoming Section and Committee events!

Jeffrey A. Rosenthal

The Phil Cowan Memorial Scholarship

Phil Cowan, former Chair of the EASL Section, passed away in December 2001. Those of us who knew him will remember him well as a leader, an advocate for his clients, partners and his friends, as well as a student of the law and an active participant in life. The EASL Section is establishing a scholarship in his memory, which will be awarded each year to a deserving law student who is committed to practicing in the field of entertainment, arts or sports law. Details about the eligibility and entry requirements will appear in the next issue of the *Journal* and on our Web site, <<http://www.nyeasl.org>>.

Those who are interested in contributing to the scholarship fund can send donations to the New York State Bar Foundation, One Elk Street, Albany, NY 12207. *Please designate that the contribution is for EASL’s Phil Cowan Memorial Scholarship.* Such donations are tax deductible.

Editor's Note

I am extremely pleased to once more offer a very diverse selection for your reading pleasure. Feel free to read and ponder the analyses, ramifications and assertions presented within.

On January 25th the EASL Section held its Annual Meeting at the New York Marriott Marquis. It was a great success and included a panel of experts who were well-versed in the issues and challenges concerning the First Amendment, freedom of expression and censorship. For those of you who were unable to attend, this issue includes a transcript of the event.

One item of import that was introduced at the Annual Meeting is the establishment of the Phil Cowan Memorial Scholarship. Details regarding the Scholarship will be forthcoming in future issues and on our Web site at <<http://www.nyeasl.org>>.

I would like to take the opportunity to highlight a very exciting and important week of events. The Copyright Society of the U.S.A., a not-for-profit educational organization, has organized the first annual Copyright Awareness Week. The events of this nationwide program will take place during the week of April 22–28, 2002. Aimed at the youth of America, it is a national push to educate the public about the importance of copyright. Details are provided in Robert Bernstein's letter, the Copyright Awareness Week Mission Statement and participation guidelines, all of which are included in this issue. The list of Friends of Copyright Awareness Week is extensive, encompassing the U.S. Copyright Office, the EASL Section and participants from just about every creative industry that has an interest in copyright law. I ask all readers to volunteer and participate somehow, either as individuals or as part of an organization, as this will truly grow into something great. All EASL Section members will also be getting a mailing from the Section in this regard, with additional information.

This *Journal* contains several interesting articles. One focuses on the case law surrounding the control that an artist has over his or her voice when that voice is distinctive. The article discusses some instances when an artist may be protected from voice misappropriation.



This issue also includes an analysis of a recent decision regarding the rarely litigated Section 104A of the Copyright Act. The article addresses the doctrine of simultaneous publication, restoration of a U.S. copyright and the dispositive effect of Section 104A(d).

This *Journal* also includes an article submitted by two in-house attorneys from Court TV, who share their insights into that cable network's recent attempt to open federal and New York trial courts to television cameras. The article summarizes the history and reasoning behind the current laws and explains why Court TV believes that the time has come for a change, in that it is to the public's benefit that the televised media be allowed access to trials.

In addition, this issue includes an article that raises the question as to whether folklore should be protected by copyright law. There is an increasing international awareness that indigenous and local communities should share in the benefits of exploitation of their traditional knowledge and customs.

The *Journal* is also pleased to present an interesting analysis regarding the legal and policy issues involved with protecting privately developed codes and standards under copyright law, which are incorporated by reference into state and local laws.

Finally, we are fortunate to have a piece that was written by a Chief Information Officer, which addresses the importance of accountable systems of internal control for companies who operate in the digital world.

As always, I encourage Letters to the Editor and articles of interest. Please feel free to contact me with any ideas you may have. The next deadline for the *EASL Journal* is **FRIDAY, MAY 24, 2002**.

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. Ms. Hecker is the Vice-Chair of the EASL Section. In addition to membership in the NYSBA, Ms. Hecker is also a member of The Copyright Society of the U.S.A., Chair of the FACE Initiative children's Web site, a member of the Steering Committee of the FACE Initiative, Associate Member of the Graphic Artists' Guild and a member of other bar associations.

THE NYSBA EASL SECTION IS PROUD TO BE A FRIEND OF COPYRIGHT AWARENESS WEEK

THE COPYRIGHT SOCIETY OF THE U.S.A.

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STUART DUNWOODY - NORTHWEST

KAREN FRANK - NO. CALIFORNIA

MICHAEL KLIPPER - DC AREA

WILLIAM T. McGRATH - MID-WEST

SUSAN POWLEY - SOUTHWEST

NANCY RUBNER-FRANSEN - PHILADELPHIA

JON TANDLER - DENVER

MARYA LENN YEE - NEW YORK

Dear Friends of Copyright Awareness Week:

The Copyright Society of the U.S.A. is pleased to announce our first annual Copyright Awareness Week from April 22 through April 28, 2002, and to invite your participation.

The Copyright Society of the U.S.A. is a non-profit educational organization with 900 members located in Chapters throughout the United States. Our primary function is the gathering, dissemination and interchange of information concerning the protection and use of creative works, such as music, movies, television, books, sculpture, painting and photographs. The Society seeks to promote better understanding of copyright through its lectures, publications, panel discussions and meetings, and to enhance dialogue among industry groups, creators and users of works protected by copyright.

Because of the ever-increasing popularity of the Internet among the American public, especially teenagers, and its potential for facilitating the unauthorized use of creative works easily and anonymously, the Society feels that its resources can most effectively be focused at the present time upon encouraging respect for copyright.

Toward that end, we are launching Copyright Awareness Week as an annual nationwide event. The purpose of Copyright Awareness Week is to foster a greater awareness and understanding of copyright by educating the public, and specifically young people, about the significance and purpose of protecting creative works. As one of our main activities, we are organizing copyright teach-ins for the week, in which Society members will talk to students about copyright at various schools, colleges, clubs and organizations throughout the United States. In addition, assuming sufficient funding, we will conduct a widespread promotional campaign to make the public take notice of our activities and goals.

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THE COPYRIGHT SOCIETY OF THE U.S.A.

352 Seventh Avenue, Suite 307
New York, NY 10001

The attached mission statement describes the goals of Copyright Awareness Week in more detail. Also included are guidelines and suggestions for participation in this project by outside organizations. We realize that our goals are ambitious, but they must be in light of the daily headlines concerning the challenges to copyright. Therefore, financial assistance for our programs is most welcome and will help make Copyright Awareness Week a viable and effective way to bring an important message to the public's attention. Every organization which signs on to this project will be named a "friend" of Copyright Awareness Week, will be licensed to use the CAW logo and will be listed on our website as an official participant.

We hope that you will consider becoming a friend of CAW through your financial or participatory support. Please contact the Society with your commitment to become involved. The more organizations that assist us, the more we can effectively spread the word where it is most needed about what copyright is and why it should be respected.

Sincerely,

Robert J. Bernstein
President

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MISSION STATEMENT

Copyright Awareness Week

April 22-28, 2002

The Copyright Society of the U.S.A. is launching Copyright Awareness Week in April 2002. The mission of Copyright Awareness Week is to create a greater awareness among the youth of America about the protection and use of creative works. During Copyright Awareness Week, copyright experts and educators throughout the country will seek to teach young people about the basic purpose of copyright as articulated in our Constitution-- to promote the advancement of the arts by providing creators with the exclusive rights to their works for limited terms. A public that has a basic understanding of copyright law and its relationship to the arts -- including its fair use exceptions -- is far more likely to respect and comply with the law, than one that functions on misinformation.

The Copyright Society of the U.S.A. is a non-profit educational organization with 900 members located in Chapters throughout the United States. Our primary function is the gathering, dissemination and interchange of information concerning the protection and use of creative works, such as music, movies, television, books, sculpture, painting and photographs. The Society seeks to promote better understanding of copyright through its lectures, publications, panel discussions and meetings, and to enhance dialogue among industry groups, creators and users of works protected by copyright.

Now more than ever, familiarity with copyright will play a crucial role in maintaining the vitality of the arts in the United States. Music, literature, theatre, television, film and the fine arts enhance our lives. These crafts tell us who we have been and help us to define who we are. It is impossible to imagine life without the arts. What kind of world would it be if no one could make a living writing songs or books, and in which producers dared not invest in new playwrights, or publishers in novelists?

Copyright law ensures that the creators of our cultural heritage will be fairly compensated for their works. It enables the creators, producers, publishers and distributors of artistic works to control whether, how and when their works of art are used. Copyright provides incentives to creators by reassuring them and those who invest in their works that others will not use the fruits of their imaginations without fair compensation and/or rightful credit.

Copyright law takes on a particularly important role in the digital age, now that the consumer can copy music, books, films and other creative works at home more easily than buying them in the store. If copyrights are to be protected in the digital age, copyright law needs to be understood and respected. This is particularly true with the younger generations. It is our belief that, by fostering an understanding of copyright law, including those activities which are prohibited and

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those that are permitted as fair use, a greater respect for copyright and the creators it protects will naturally follow.

Copyright Awareness Week will target students and educators. Copyright Society members will be called upon to speak in local schools, colleges, universities, libraries, arts and educational associations and other organizations about the importance of copyright. Throughout the nation, copyright experts and educators will distribute materials and speak in schools and other educational institutions and over the Internet.



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FRIENDS OF COPYRIGHT AWARENESS WEEK: HOW TO PARTICIPATE

The Copyright Society of the U.S.A. welcomes the support and participation of other professional and educational organizations to help publicize and further the objectives of Copyright Awareness Week. Organizations who participate in any of the ways described in these Guidelines will be identified as "Friends of Copyright Awareness Week" in our promotional materials and on our website.

Here are some of the ways an organization can participate as a Friend of Copyright Awareness Week:

- Conduct copyright education initiatives
- Disseminate information to your members about Copyright Awareness Week and request that they speak on copyright at schools or other organizations during the week of April 22-28, 2002 (using curriculum and other materials we have prepared)
- Encourage members who are educators to teach their students about copyright
- Produce and/or distribute stickers, posters, bookmarks, buttons, etc. that contain the Copyright Awareness Week logo (currently in development)
- Provide announcements or information about Copyright Awareness Week in your organization's newsletter or other publication
- Produce and broadcast public service announcements or special programming
- Distribute press releases
- Post advertising banners and publish information on your web site
- Link to the FA©E website and its educational materials
- Provide funding for any of the above

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We ask that you advise of us of how you plan to participate and coordinate with us to avoid any duplication of efforts. If you would like to use our logo for any of your activities, we can provide you with a [jpeg] file or permit you to download it from our website, provided that you agree to the terms of our CAW Logo License Agreement and deliver an executed copy to us. The CAW Logo License will be made available in the Copyright Awareness Week area of our website www.csusa.org. All use of the Copyright Awareness Week logo and other trademarks will be subject to the CAW Logo License.

The Copyright Society of the U.S.A. will be available to help with the substantive aspects of any television or radio announcements or programming regarding copyright education. Lesson plans, which will include an easy-to-follow outline, interactive exercises and handouts, will be available on the Copyright Society's FA©E website at www.csusa.org for use in the classroom. An outline on the basics of copyright law for adults will also be available on the site. The Copyright Society's FA©E website at www.face-copyright.org and our kids site at www.copyrightkids.org (both of which are also accessible through our main site at www.csusa.org) provide additional material on copyright that can be used by educators and students alike.

Organizations interested in participating in Copyright Awareness Week may contact The Copyright Society of the U.S.A. by email at: barpan@rcn.com or by phone at: (212) 354-6401.

The Copyright Society of the U.S.A. is a not-for-profit, non-political organization that was chartered by the New York State Board of Regents to educate the public about the U.S. copyright law. The Copyright Society of the U.S.A. is uniquely positioned to lead the initiative of Copyright Awareness Week, as its aim is to present what copyright is in a fair and neutral way. The goal of Copyright Awareness Week is to foster a greater understanding and appreciation for copyright. As the country's second largest export industry, copyright is not an issue for the few but for all of us.

Sex, Fear and Popular Culture: Free Expression in the Aftermath of Terror:

Transcript from the EASL Section Annual Meeting

New York Marriott Marquis

Friday, January 25, 2002

EASL Speakers: Jeffrey Rosenthal, Mary Ann Zimmer

Panel Speakers: Marjorie Heins, Gail Markels, Robert Corn-Revere (moderator), Congressman Jerrold Nadler, Ronald Collins and Jeffrey A. Chester

MR. ROSENTHAL: Good morning. A few very brief welcoming remarks. First thing I want to do—and I am going to turn over the microphone very shortly to Mary Ann Zimmer—is, I would like to thank Mary Ann for all the hard work that she has put in in putting together this program. From having put together last year's annual program, I know that it requires a great deal of hard work over many months to pull it all together with Albany and with the speakers and putting together panels. This is obviously a very ambitious program with both speakers and a panel discussion and, I believe, three-and-a-half CLE credits, which is our biggest panel, our biggest program we have put together since CLE. And, after the events of September 11th happened, Mary Ann completely changed course in terms of the planning she had been doing to date, and in just a few months managed to pull together this entire program from scratch. And the entire section really appreciates what Mary Ann has done.

This was to be Judith Bresler's last Annual Meeting as Chair of the Section, and I would just like to take a moment to thank Judith, in absentia, for all she has accomplished and for really helping to further the revitalization of our Section over the past couple of years. And I would just like to highlight a couple of accomplishments, in particular, that this Section has achieved during the time that Judith has been Chair. I think the two that she is most proud of are, one, the reemergence of our *Journal* which I think is, perhaps, the best Section journal now of the New York State Bar Association. Elissa Hecker, the incoming Vice-Chair, has been editing the *Journal* and, really, I think, putting out some first quality content in there with a great deal of help from some of our Section members in all areas of practice. The second accomplishment that I think Judith really deserves a lot of credit for is working with our Cyberlaw liaisons and, in particular, David Sternbach and Ken Swezey in founding the Section's Web site. And for those who haven't been on the Web site yet, it is www.nyeasl.org. Some of the content is free and open to the public and some of it just requires your New York State Bar Association ID number to access. I think our founders of the Web site have really done a phe-

nomenal job in putting that together, and I hope over the coming years we will see that grow. But people can check in regularly to see upcoming news, developments, Section programs and the like, and I hope that it becomes something that people visit regularly.

One other order of business I just wanted to mention, is that some of you might be aware that one of our founding members of this Section and one of our first Chairs of this Section, Phil Cowan, passed away recently. The executive committee of the Section has decided to form a Phil Cowan Memorial Scholarship available to current law students who are dedicated to the practice of entertainment, arts or sports law. I just wanted to mention that we are going to be developing details of how it is going to be administered shortly, but we anticipate an essay contest in which a committee of the former and current chairs will select a winner and give out what we hope to be a \$2500 annual scholarship. Donations for those who are interested can be made to the New York State Bar Foundation, and that's a 501(c)3 tax-exempt organization. And I just wanted to just take a moment and commemorate what Phil has accomplished. Phil was a founding partner of the firm of Cowan DeBaets Abrahams & Sheppard, which has provided us with a number of very active members in this Section, including our two most recent Chairs. Tim DeBaets and Judith Bresler are both members of Cowan DeBaets. And he was a fine lawyer, and I think a really strong leader of our Section.

Last thing I just wanted to mention are a couple of upcoming programs that are going to be run by our committees over the next month. On February 19th there will be a program by the Copyright Committee called, "One Suit, Two Suit, Red Suit, Lawsuit: Is Dr. Seuss Gone With The Wind?," which will be a program on parody. That's going to be two-and-a-half credits. It's going to be a lunch program. It's going to be no charge for Section members. And included within the two-and-a-half credits will be a half-hour on ethics, for those people who are looking for ethics credits. On February 28th, the Cyberlaw Committee will be running a committee on antitrust and the Internet. That is going to be at the McDermott firm at 50 Rockefeller Center.

The last order of business, and I'm probably the first one to be in a position of introducing himself for election as the coming Chair, is to elect our slate of officers for the next two years. The nominees that have been nominated by the Nominating Committee and presented for approval have been myself, Jeff Rosenthal, as Chairman; Elissa Hecker, our current *Journal* Editor, as Vice-Chair; Alan Barson as Secretary; Ken Swezey as Assistant Secretary; and Stephen Rodner as Treasurer. I guess we can just—the simplest way, there is no opposition that I know of yet, is just to do it by acclamation of the Section members. If people could, just by a show of hands, all approving the nomination of the Committee? Any opposed? Thank you. And I guess the Committee's nominations then are approved and those will be the current officers for the next two-year term. I'd like to thank you for attending and turn it over to Mary Ann Zimmer.

MS. ZIMMER: Well, good morning to all of you and thank you, Jeff, for your very generous comments. This program is going to be organized with two short presentations starting out and then followed by the break and then the panel discussion. The subject of our program today includes the events of September 11th. We continue to see the repercussions of that day on a daily basis. And so our focus today is on how we've changed in ways of expressing ourselves and how we view the limits on expression. Some of these changes have been self-imposed, both as matters of good taste and editorial discretion, and some are exercises of the bully pulpit. Some are based on arguments for greater restriction of civil liberties. Recent examples of the entertainment industry's reaction to the World Trade Center tragedy include immediate withdrawal of album covers depicting or exploding the World Trade Center, the Clear Channel do-not-play list, the decision of Hollywood to delay the release or alter content of theatrical films, and the screening of message boards on Yahoo! and other Internet services. So this program is going to be a wide-ranging discussion of the state of free expression in the age of terrorism, and we are going to explore whether the limits of free expression have shifted, as well as our inclination to engage in free expression.

We are really fortunate today to have a distinguished group of individuals who have been involved in these issues and who are going to engage in them today. This includes, first of all, Congressman Jerrold Nadler of the New York Eighth Congressional District, as well as leading First Amendment lawyers who, among them, have written numerous scholarly articles and briefs to the U.S. Supreme Court as well as state and federal courts on these issues. And thank you, also, to Steve Richman for helping make it possible for us to have Congressman Nadler with us today. Congressman Nadler is serving his fourth full term in the House of Representatives and he's represented the New York

Eighth Congressional District, which includes Manhattan's West Side as well as parts of Brooklyn. And prior to serving in the U.S. House of Representatives, he was for 16 years in the New York State Assembly. He has been a national leader on civil rights, civil liberties and a host of other progressive issues. And he's been a prominent member of the House Judiciary Committee, and there, he has been vocal in defending individual rights and religious freedoms. And his unwavering demands for bipartisan adherence to the Constitution has earned him national praise. Within the Judiciary Committee, Representative Nadler is both the ranking member on the Subcommittee on Commercial and Administrative Law, as well as a member of the Constitutional Subcommittee which considers all proposed constitutional amendments and deals with such issues as constitutional rights, federal civil rights, abortion, gay rights and government ethics. Congressman Nadler's work on First Amendment religious freedoms is widely recognized.

Also with us today is Ronald Collins, who is a scholar at the Freedom Forum's First Amendment Center in Arlington, Virginia. He was a judicial fellow under Chief Justice Warren Burger at the U.S. Supreme Court. He has written many briefs to the U.S. Supreme Court, as well as to state and appellate courts, and has been a prodigious and prolific writer. Among his other books is the upcoming, *Comedy on Trial: The Free Speech Struggles of Lenny Bruce*, which will be published in October of this year. Also, we have Gail Markels, who is Senior Vice-President/General Counsel to the Interactive Digital Software Association where she is responsible for managing all the legal issues affecting the organization, as well as for state public policy issues. And prior to joining IDSA, she was Vice-President of State Government Affairs at the MPAA, the Motion Picture Association of America, and she was counsel to the film industry's rating system.

Robert Corn-Revere, who is going to be hosting the panel and who some of you have heard address this group before, is a partner in the Washington, D.C. office of Hogan & Hartson LLP; and Bob specializes in First Amendment Internet and communications law. He has been involved in a broad range of First Amendment litigation, including the Communications Decency Act, the Child Online Protection Act, Internet content filtering and public libraries, public broadcast regulations and export controls on encryption software. And he recently successfully argued *U.S. v. Playboy Entertainment Group* to the U.S. Supreme Court in which the Supreme Court struck down Section 505 of the Telecommunications Act of 1996 as a violation of the First Amendment. And prior to joining Hogan & Hartson, Bob served as chief counsel to interim Chairman Jim Qualloly of the FCC and was his legal advisor for a number of years before that. Marjorie Heins, who is also going to be addressing

us as well as being part of the panel, directs the Free Expression Policy Project at the National Coalition Against Censorship here in New York City. She is the author of a book that has been widely noted in the last year, *Not in Front of the Children: "Indecency," Censorship and the Innocence of Youth*, which is a thorough exploration of our national preoccupation with repressing the sexual thoughts of youth. She also has directed, for a number of years, the ACLU's arts censorship project, and there she was involved in a number of Supreme Court First Amendment cases.

In addition, we have with us Jeffrey A. Chester who is Executive Director of the nonprofit Center for Digital Democracy, which is based in Washington. He has been a vocal critic of the FCC and is engaged now in research advocacy in public education to ensure that the digital media serve the public interest. He is currently focusing on preserving the Internet's open architecture in the new broadband environment. Prior to being involved with the CDD, Jeff was co-founder and Executive Director of the Center for Media Education whose mission was to promote the democratic potential of the electronic media. So without any further ado, I would like to introduce Marjorie Heins, who's going to be talking about some of the issues that were raised in her book and who has a number of materials that she has provided that are part of the coursebook. So I introduce Marjorie. Thank you.

MS. HEINS: Thank you, Mary Ann. This is great. Thanks for inviting me. I am going to see if I can follow my notes without my glasses, but I have them just in case.

Has September 11th changed the censorship debate—sex, violence and political dissent? That's a lot to cover in half an hour, so we are going to get sort of a Monarch Notes version of at least the sex and violence part of it. Of course September 11th has changed everything for all of us. In terms of censorship we now have some new issues. Before September 11th, sex and violence were the major targets of censorship in the United States and, as I discussed at some length in my book, presumably vulnerable minors were relied on most often to justify the censorship attempts. After 9-11 political dissent, attacks on presumably unpatriotic or even insensitive speech were new targets in a way that I don't think we have really seen since the McCarthy era of the 1950s. But sex and violence have not lost their resilience as hot political issues, and they are just temporarily on the back burner, I think. What I am going to do is give you a very abbreviated overview of the sex and violence issues by focusing on one case, one recent case in each category; the so-called COPA case, *Ashcroft v. ACLU*, now before the Supreme Court. I have a suspicion that in the coming years there will be a lot of cases named *Ashcroft v. ACLU*. And in the violence area, a

case called *American Amusement Machine v. Kendrick*, which had to do with an ordinance from the great City of Indianapolis that attempted to restrict violent video games. Then I'll talk about some of the First Amendment issues relating to arts and culture in the wake of 9-11, and I'm sure that is going to be explored a lot more during the panel discussion.

Sex, well, this is the one area, as you probably know, where official government censorship of arts and culture is still permitted. But the Supreme Court has—and it's primarily through obscenity laws—the Supreme Court has struggled over the years with trying to articulate the dividing line between constitutionally protected obscenity and constitutionally protected arts and literature about sexual subjects. And you all know, Justice Potter Stewart didn't throw up his hands, Justice Brennan threw up his hands at this attempt, but Stewart said we've got to have this dividing line, and we all know it when we see it. Actually, there is not just one standard for censorship of sexual content of arts and literature in this country, there are three separate standards.

There is the famous *Miller v. California* standard for adult obscenity, a case decided in 1973. And the *Miller* standard, of course, has three parts, which a lot of you know: Is the material patently offensive according to contemporary community standards and that contemporary community standards test is a state and local standard rather than a national standard. Does the material, primarily taken as whole, appeal to prurient interest, which I further defined in later Supreme Court cases as unhealthy or morbid interest in sexual matters, not healthy sexual interests. And the final part of *Miller* is the so-called SLAPS test. Does the material lack any serious literary, artistic, political or scientific value? And that's basically supposed to be the dividing line between obscenity and arts and literature and entertainment and constitutionally protected expression for adults, for censorship for all of us.

But there are two additional standards that are focused on those vulnerable kids. One is *Ginsberg v. New York*, 1968, and the problem that arose. *Miller* was the last in a series of cases in which the Supreme Court grappled with what should be the obscenity definition. And before 1957, the definition had been basically turned on vulnerable youth and, finally, in '57 the Supreme Court, following what the Second Circuit had been doing for about the previous 30 years, said, you know, we can't have a censorship standard for adults that turns on what might be harmful to a child, so we're going to have a separate standard for adults. Well, that still left the problem of the vulnerable child, a very powerful and long-standing cultural and social concern in Anglo-American culture. So in 1978, the Supreme Court decides the case of *Ginsberg v. New York*, and

upholds the conviction of a candy store owner for selling nudie magazines to a 16-year-old kid. And although this material would not have been obscene for adults, under the then-prevailing obscenity law, there was going to be a variable obscenity standard for kids, and that was going to be basically the same three-part test that—it was actually earlier than *Miller*—but it was essentially the same three-part test for obscenity, ratcheted down for kids: Would the material be patently offensive, according to contemporary community standards of what would be appropriate for kids; would it lack serious value to kids? So that's the second sexual censorship standard we have, *Ginsberg*.

But there's yet a third one and that comes from the 1978 *Pacifica v. the FCC*, the famous "seven dirty words" case involving the George Carlin monologue that parodies—and it's a hilarious monologue—the taboos that we have around those seven words that you can't possibly say on the air waves. And, sure enough, the FCC sanctioned *Pacifica* for broadcasting the monologue; and when the case got to the Supreme Court, five to four, they said, okay, this does not meet the adult obscenity standard. It doesn't even meet the *Ginsberg* harm to minors standard, but we are going to approve the FCC's indecency standard, yet a third standard for censoring sexual content or vulgar words because the airwaves invade the home and a child could be irreparably harmed by hearing one of these words before a parent even had time to turn off the radio. The indecency standard the FCC essentially borrowed was from the patently offensive prong of obscenity laws. So you don't have to have a serious value test. It can be *Ulysses*, it can be the greatest sex education work of great educational value, but if it's patently offensive according to contemporary community standards, as determined by the Mass Media Bureau of the Federal Communication Commission, it's indecent and can be sanctioned and banned from the airwaves.

Why do I give you these three separate standards? In order to introduce the case that I just want to talk about for a minute or two, *Ashcroft v. ACLU*. What happened, the three standards for censorship of sexual expression were sort of the situation we had in the courts, chaotic as it was, in the mid-'90s and then, suddenly, all of our lives changed because the Internet arrived and the World Wide Web arrived. And Congress went into a panic about pornography on the Internet. And the first response, which took about more than a year for Congress to finally enact, was the Communications Decency Act of 1996. There was a lot of debate in Congress over what standard we're going to articulate. Now we've got to protect the kids from pornography on the Internet, and a lot of debate—will it be the *Ginsberg* harm-to-minor standard, which at least has the three parts and has some inquiry into serious value, or will it be the *Pacifica* indecency standard, which was

being pushed very hard by the conservative right as the more appropriately censorious. Courts should not have to, prosecutors should not have to, look into whether the work has value. If it's patently offensive, the Internet is just as invasive as radio and television. You turn on the computer and there's all this stuff, and so kids have to be protected from anything that's indecent, even just vulgar words. I should step back for a minute because this becomes relevant.

In the *Pacifica* case—"seven dirty words" case—an appendix to the opinion of the Supreme Court reproduces the Carlin monologue in all its vulgar and hilarious glory. You can read it in the U.S. reports, you can read it on LEXIS and lots of places on the Web. And interestingly, because of the way the FCC operated, indecency adjudications were never, after *Pacifica*, essentially reviewed by a court. And so this was the only actual legal adjudication of what was indecent and what indecency meant. And it was all over the Internet and it was in the law library and here was the Communications Decency Act which was now making it criminal if it was made available to a minor online. And, of course, a lot of the litigation in the CDA case, the first Internet censorship case, Communications Decency Act, turned on whether there really were ways for Web sites and other Internet speakers to identify and screen out people under 18. And the case was persuasively made that there really weren't. So anything on the Internet is essentially available to a minor who can turn on the computer and knows how to type. And when the case made its way through the court, and once the Communications Decency Act was struck down, the Supreme Court pointed out that among the items that had already been adjudicated indecent and therefore would very likely be found criminal under this law was the Supreme Court decision in the *Pacifica* case. So the CDA is struck down.

On to chapter two, within a short order, really just a year after the CDA decision, *Reno v. ACLU*, Congress passes COPA, Child Online Protection Act. And COPA is narrower than the CDA in a number of respects, most significantly the indecency standards have been struck down as too broad and probably too vague for the Internet, so Congress now adopts the *Ginsberg* harmful-to-minor standard. And I'll just review very briefly what that standard is in COPA. It's in the amicus brief of the National Coalition Against Censorship and for sexual scholars organizations. And we filed the brief in order to, at least, identify for the court this underlying issue which is very rarely articulated or litigated in these child protection, sex censorship cases. What's the government's compelling interest? There's no empirical proof that even explicit sexual content is actually harmful to minors. Nobody is saying it's the greatest thing or educational or that they will understand it, but what's the proof that it is harmful, where is the government's

compelling interest in enacting a criminal law? That was the purpose of the brief. Anyway, the standard under COPA is, it's criminal for commercial purposes by means of the worldwide Web, if the material is available to minors and is harmful to minors. Harmful to minors means any picture, writing or other communication depicting or describing an actual or simulated sexual act or sexual contact if it is patently offensive and prurient with respect to minors, according to contemporary community standards, and if it lacks serious literary, artistic, political or scientific value for minors. Essentially the *Ginsberg* test.

The plaintiffs in the COPA case, Ashcroft—incidentally, were not pornographers. They were all Web publishers who publish for commercial purposes, including A Different Light Bookstore; Salon.com which carries, among other things, the sexpert opinion columns of Suzie Bright; and sex education sites Sexual Health Network and RiotGirls.com. The COPA was struck down in the Third Circuit on the ground, not unanticipated ground, a broader ground, really, than the ACLU, or anybody, anticipated. The Court looked at the *Ginsberg* standard, and particularly the local community standards part of it, and said that's passably constitutional, or at least the Supreme Court has said it's passably constitutional to have different standards for what's criminal in every different community, depending on what they think is patently sensitive. That's okay for books and videos and things that have a geographic tangible presence. But for the Internet, to have criminality turn on a local community standards test means that all Web publishers will have to self-censor to meet the most puritanical community standard because their material can be accessed anywhere and they can be prosecuted anywhere.

The Third Circuit said that's unconstitutional, that's unduly chilling; it violates the First Amendment. They were absolutely right, but it presents a very big political and legal problem. The Supreme Court had said in *Miller* that the national standards test isn't going to fly because there is no national standard. We are too diverse as a nation. Well, if you can't have a national standard and you can't have a local standard, how can you censor? You have to start from scratch, rewrite with this process that's gone on for a hundred years without much success of trying to define what's going to be punishable and what's going to be permitted in the area of sexual expression. The even bigger problem is if local community standards won't fly for harmful to minors, it won't fly for adult obscenity either and that's just politically untenable—unfortunately, in my opinion, not in everybody's—politically untenable situation. The case was argued in November and the Supreme Court was pretty clearly, the Justices were pretty clearly, interested in trying to find some way to save this COPA statute. So we will see what they do. On to violence.

Unlike sexual content in art and entertainment, violent content at least since the late 1940s has been constitutionally protected. Of course there are exceptions. There are always exceptions to the First Amendment. It's not an absolute. If you have incitement, if you have threat, if you have extortion, or even if you have harassment, those are not constitutionally protected. In the early '50s the Supreme Court upheld laws like the Smith Act which criminalized simply the abstract advocacy of the violent overthrow of the government. By the late '50s those laws were being struck down and you had to have something closer to incitement to violence to lose your constitutional protection for what is, in that case, at least, political speech.

In 1948 the Supreme Court decided a case called *Winters v. New York* which involved one of these hybrid statutes in, again, New York. We have a rich history of censorship laws here. The *Winters* statute targeted both sexual content and violent content, crime magazines, police detective magazines that kids and adults as well love to read; and the statute in *Winters* banned criminalized publication, featuring "bloodshed, lust or crime." The Supreme Court, as it often does when it doesn't want to face a First Amendment issue head on, struck down the statute as too vague. And the line went on to say, in response to the argument, well, this stuff is crap, it has no serious value, the line between the informing and the entertaining is too elusive for the protection of the First Amendment. So the area of violence, unlike sexual content where the Supreme Court was playing with—started with this utterly without redeeming social value test and eventually settled on the *Miller* SLAPS test, serious value.

In the area of violence, there is no exception to the First Amendment if somebody, the police or a jury or a judge decides material has no serious value. Now this difference in the treatment of sexual content and violent content obviously has deep roots in our culture, but that has not prevented some creative, enterprising theorists from attempting to—from proposing that the obscenity standard or the three obscenity standards that I have described be extended to violence. And there have been statutes that have been passed in a number of places that basically try to include violent content or excessively violent content or gratuitously violent content within the three-part patently offensive prurient interest test, and those attempts have been rejected by the courts. So there's no basis under the First Amendment for carving out this kind of exception. And when you get out of the area of sexual content, which is such a fraught issue in this culture and to the area of violent content, it's pretty clear that standards by patent offensiveness and serious value are completely vague and subjective and wholly inappropriate and offensive of the First Amendment to allow government, even in the persons of judges and juries, to make be making those kind of judgments about artistic entertainment.

The case I'll talk about for a minute is *Kendrick*. Indianapolis, inspired by these creative proposals to add violence to the obscenity standard, passed a fairly narrow statute restricting minors from access to video arcade games that have graphic violence. And Indianapolis, also, relied on the famous social science literature. Now there isn't time here to go into the social science literature on violence which has been so widely proclaimed by so many of our political leaders to have definitively proven that violence in entertainment has deleterious effects, causes imitation, causes desensitization, causes Columbine, causes all these horrible things. And when I first—I accepted that when I first started looking into that literature. It seemed commonsensical, among other things. Although I had some lingering doubts what's meant by violence, there's a lot of violence in literature right from the very beginning of civilization; and when you started looking at the studies, in fact, each social scientist, each researcher would have some different example of what violence they were concerned about and they thought was harmful, and some of them thought it was cartoons because they trivialized violence and some of them thought it was movies in which the hero commits violence because then you would identify with the hero. Some thought it was if the film or the TV show showed a lot of blood and gore—they thought precisely the issue of blood and gore. So the definitions were all over the place.

The brief that we did at the Coalition Against Censorship on behalf of media and communications scholars to the Seventh Circuit in the *Kendrick* case, the video games case, was primarily focused on why the city of Indianapolis' reliance on social science experiments that purported to show violence in media in general or violent video games in particular had identifiable adverse effects on youth was not reliable, and much more had been claimed for it than could be reasonably extrapolated. The Seventh Circuit struck down the statute. And in an opinion by the famous, although often erratic, Judge Posner, I will just read you a couple of excerpts from what he said. "As to the reliance on the social science literature," Posner said, "the studies that Indianapolis relied on," and they are actually very few in the area of video games, "most of them showed no adverse effect." There is one in particular where the experimenters, this is very typical of lab studies in this area. The experimenters take a little excerpt from the video game, a violent excerpt, show it to one group in a laboratory setting; a control group will be shown something much less exciting and less violent, and then they will be tested in the laboratory. And in this particular study they were tested for aggressive behavior by whether they would give a white noise blast to a setting of the experimenter in the laboratory setting, questionable whether that's equivalent to real world violence. And then they were, also, tested on what the research called aggressive cognition, how fast they would recognize an aggressive

word on the computer screen. And lo and behold, the students who played the violent clip from the video game recognized aggressive words, I guess they were words like "kill" or "murder," a millisecond faster. And this was supposed to prove something about the actual effect of these games played—some of these games take hours and weeks, as you know—played in the real world. So Posner says the studies they rely on do not support the ordinance. There is no indication that the games were used—and the studies are similar to those in the record in this case or other games likely to be marketed in game arcades—the studies do not find that video games have ever caused anyone to commit a violent act as opposed to feeling aggressive or have caused the average level of violence to increase anywhere.

Posner also talks a little bit about the issue of censoring violence, which is still very much with us politically. Violence has always been and remains an essential interest of humankind and a recurrent, even obsessive theme. This opinion is in your materials. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Anderson and Pearl are aware. To shield children right up to the age of 18 from exposure to violent descriptions and images, without any quixotic but deforming effect, and leave them unequipped to cope with the world as we know it. And in case any of you were wondering, I don't take the position that a steady diet of disgustingly violent entertainment is good for kids, or anybody else, or not harmful in some situations. What offends me, as a thinking person, is that anyone would rely on these social science experiments to prove it or that it could ever really be proven because violence is a very widespread phenomenon in art, literature and entertainment. It comes in numerous varieties, and context matters, and of course what matters most is what predispositions and mental equipment the viewer is bringing to it. So this is something that is not likely to be known, proved by science, and something that needs to be addressed through non-censorial educational kinds of media literacy efforts.

I will just briefly mention another area of the law where violence, art and culture is sought to be censored and that's the famous kind of copycat cases. Tort cases where enterprising, usually contingent-fee lawyers, I would suspect, prevail upon grieving families of victims of violent episodes perpetrated by young people such as Columbine, to sue not the criminals but video game producers, television producers, movie producers. And there are two examples in your materials. One is the *Byers* case where Oliver Stone's film, *Natural Born Killers*, Stone himself, as well as the producers, were sued because some young criminals purportedly imitated the crimes shown in that film. And another case—I couldn't find a reported decision, but it's the *Slayer* case involving music. There have been lots of lawsuits

against heavy metal and rap musicians and producers for these supposed copycat crimes. And I think it ought not to take a lot of cogitation to see the rather dire First Amendment implications of attempting to hold artists and entertainers and producers liable for depicting criminal or violent conduct.

In the *Byers* court, the decision you have reversed the dismissal without discovery or any further discovery or further development of a lawsuit—of the lawsuit involving *Natural Born Killers* on the theory that, although most entertainment would be protected from even the burdens of having to go forward with defending such a lawsuit here, the plaintiff alleged that the producers intentionally and deliberately made this film with the intention that it would be imitated, and somehow putting that in a paragraph of the complaint, alleging that intent was enough to get the plaintiff to pass a motion to dismiss. Ultimately after discovery, the case was dismissed because they weren't able to find evidence of such intent. But even the Louisiana Court of Appeals is not the most sensitive to free expression of values in our nation. The *Byers* opinion, noting the severe chilling effect that civil liability can have, in fact could be markedly more inhibiting than pure prosecution under a criminal statute. I was looking yesterday online for some articles about the ultimate dismissal of the case and I think that the dismissal may again be on appeal, but anyway, there was a little quote from Oliver Stone: "Warner Brothers and I spent close to two million dollars and close to five years, three years of which were devoted to the discovery process in which the plaintiffs weren't able to discover anything. A great deal of time and energy was taken for many lives to defend the producers of the film against this charge." And that's Warner Brothers and Oliver Stone, so you can imagine what the chilling effects of these copycat lawsuits can be on less well-heeled defendants.

Okay, September 11th. It really did change everything. I mean you all know this was the first attack on the continental United States in two centuries on U.S. territories since Pearl Harbor, and the reaction was understandably strong. But I have to admit I was shocked. I was not prepared for the level of jingoism and pro-censorship sentiment that we began to see. Not only anything that was redolent of dissent or questioning of U.S. foreign policy or any kind of suggestion that U.S. support for Saudi Arabia might have somehow contributed to this, but even anything that was deemed insensitive. And thus we had, as Mary Ann mentioned, the famous Clear Channel episode where there were no-play lists in the days after 9-11 including not only songs like "Great Balls of Fire," but "Bridge Over Troubled Water" and "Imagine." The *Daily News* and *Newsday* pulled the Boondocks strip. The strip that they pulled had Hughey, which I am not reader of Boondocks, but Hughey Freeman calling the FBI anti-terror-

ist hotline to report that he had the names of Americans who trained and financed Osama bin Laden. When the FBI agent said that yes, he wanted the names, Hughey began, "All right. Let's see. The first one is Reagan. That's R-e-a-g-a-n." The series of strips was pulled from the *Daily News* and *Newsday* and shuffled off comic pages in other papers.

Well, of course these are examples of private censorship by private entities. They were within their First Amendment rights, most probably, to do that. But nevertheless it's of some concern because, as we know, the media is—the mass media now is mostly controlled by large conglomerates so these decisions can often have, in fact, more impact on the marketplace of artistic and cultural ideas than even government censorship. Clear Channel owns about 1200 radio stations and 150 potentially offensive titles were on its list. At the other end of the First Amendment spectrum, there have been a few direct and pretty intimidating, if not technically coercive, efforts at government censorship. Condoleezza Rice has requested TV networks, you may remember, to limit broadcasts of bin Laden's statements. And it was only a request, and the networks rapidly agreed, but one has to wonder what perhaps unstated message there was about future access to the White House if the stations did not accede. Ari Fleisher's famous statement, "That at a time like these, people have to watch what they say." And a couple of interesting visits from the FBI investigations of what they called anti-American activity.

I don't know how many of you saw the article in the *Progressive* a couple of weeks ago, one investigation took place at an art gallery in Houston, Texas where the FBI agents said they had reports of anti-American activity and wanted to see the exhibit. The exhibit was called "Secret Wars" and contained many anti-war statements made before September 11th happened. These guys walked in. They looked at the art. They interrogated the curator. They wanted to know where the artists were from. They took notes. They pointed out things that they thought were negative in the pictures, like a recent painting of a Houston skyline burning and a devil dancing around. Another incident that's recounted in the *Progressive* article, a freshman at Durham Tech University in North Carolina got a knock on her door on October 26th. She opened it. There were two men who said they were from the Raleigh branch of the Secret Service. They had ID cards and they said we are here because we have a report you have un-American material in your apartment. And she was like, "What? No, I don't have anything like that." "Are you sure, because we got a report that you've got a poster, that it's un-American." They asked if they could come into the apartment. She said, "Do you have a warrant?" They said no, but they wanted to come in and look around. She said "Sorry, you're not coming in." And then one of

the agents said "We already know what it is. It is a poster of Bush hanging himself." And she said, "No. It's a poster with a target on Bush's head." And what it actually was was an anti-death penalty poster which said, "We hang on your every word, George Bush, 152 dead," referring to the number of people who had been executed in Texas when Bush was governor. Ultimately she agreed to let the agents see what the poster actually was. They were taking notes on this, and she had other posters, a free Louima poster, a picture of Jesse Jackson and a Pink Floyd poster with a quotation "Mother should I trust the government?" And then one of the agents pulled out a little slip of paper and asked her name, her Social Security number, did she have any pro-Taliban stuff in her apartment. And then they called two days later to make sure the information was correct, including asking for her phone number. So we can laugh, but, anyway, that stuff is going on. And it has an intimidating effect. There's no question.

One final idea though, just about official government censorship in the wake of 9-11, which is the secret tribunal, secret detentions, secret legal proceedings. Lots of due process issues immediately come to mind, but there is also a case, 1980 decision, *Richmond Newspapers v. Virginia* challenge to essentially secret criminal trials and Richmond Newspapers objected. The Supreme Court said the First Amendment guarantees a free speech and press, prohibits governments from summarily closing courtroom doors which had long been open to the public before the First Amendment was adopted.

The last thing I was going to talk to you about but I think shouldn't so that Gail has time and everyone else has time. Perhaps we can talk about it in the panel. This is somewhere in between government censorship and private censorship. It's a very interesting report put out by a group that calls itself American Council of Trustees and Alumni. It's Lynne Cheney and Senator Joe Lieberman's group. The report is called "Defending Civilization: How Our Universities Are Failing America and What Can Be Done About It." And their basic argument, their basic purpose in life pre 9-11, had been to try to get rid of anything they considered PC on campus such as Asian studies or black studies, and focus the humanities curriculum strictly on the virtues of American democracy and American capitalism. In the wake of 9-11, they compiled a report which contains an appendix of 115 incidents in which they say university professors or students or statements made at teach-ins were insufficiently patriotic and supportive of U.S. foreign policy. Pervasive moral relativism statements that were equivocal and divided in their response. I will just give you one example of what they think is an unacceptable statement, and then I'll quit. "Our security can only come by using our national wealth not for guns, planes and bombs but for the health and welfare of our people

and for people suffering in other countries," said by somebody at Boston University. "I'm not sure which is more frightening, the horror that engulfed New York City or the apocalyptic rhetoric emanating daily from the White House," said a professor of history at Harvard University.

Well, one can say, okay, you know, they have a right to be ridiculous and say these statements should not be made, but what this document is very reminiscent of, for anybody who remembers or remembers having read about the McCarthy eras, is essentially blacklisting publications that were put out by private entities and circulated within industries and universities, many of which are public and all of which get public funds, which led to the firing, the silencing, the blacklisting of hundreds and hundreds of people. So that's an interesting thing to contemplate. And I guess my final word would be, at times like this we need more discussion of the world situation and our American policies, rather than less. So thank you very much and we will talk about this some more.

MS. ZIMMER: Thank you Marjorie. That was great. I also recommend to all of you who are interested in this issue, the online index that the NCAC has at its Web site and the focus of the index is "Free Expression Post 9-11." And there's material from that in your coursebook. Our next speaker is Gail Markels and she is going to be talking about, "Industry Rating Systems—Self-Censorship or Self-Defense." Gail.

MS. MARKELS: Hello. Thank you all. It's a pleasure to be before you today. As Mary Ann said, my name is Gail Markels, Senior Vice-President and General Counsel to the Interactive Digital Software Association which is a trade association representing companies that publish or bring to market video games, games that you play on the PC or that you play on a console-based system. IDSA members account for 90 percent of the entertainment sold in the United States and include companies that you know, companies like Disney, Activision, Microsoft, Vivendi/Universal, Electronic Arts, Sega, Sony and Nintendo. As Mary Ann indicated before, prior to joining IDSA, I worked for the Motion Picture Association of America. I had involvement in state government affairs and their rating systems. I was also a former assistant district attorney in Brooklyn, so I have had a little bit of experience in crime, and that comes up when we hear issues made about how entertainment media causes crime. But when you have been in the trenches, dealing with prosecutors, defense attorneys, most of us who have done that throw our hands up and say those who have been involved in that field don't see a cause and effect with media and criminal acts.

During my tenure at MPAA and IDSA, both industries faced numerous attempts to regulate the content of

their products, as well as access to material by children that was deemed inappropriate for them because of depictions of sex, violence or the rating issued by the bodies themselves. In the 1980s, the film industry was hit with dozens of bills when attempts were made to regulate access to videocassettes, then the new entertainment media kid on the block. The number of bills targeting videocassettes surged and finally tapered off after a Missouri statute prohibiting the sale or rental of violent videocassettes to minors was declared unconstitutional in *VSDA v. Webster* back in 1992. Today the video game industry is a new kid on the block, and we are facing the legislative onslaught.

Before I talk about the legal and legislative challenges we have faced over the past seven years, I think it would be helpful to discuss the IDSA approach to industry self-regulation through the Entertainment Software Rating Board. We, at the IDSA, are strong supporters of industry self-regulation because we think that industry self-regulation is the best and probably the only defense to government intrusion into our businesses. Seven years ago the members of the IDSA created a rating system called the Entertainment Software Rating Board to rate video and computer games. The ESRB is a voluntary rating system which was developed to give parents and consumers information about the contents of video and computer games so they can make informed purchase and rental decisions about what materials are appropriate for their children in their homes. To date the ESRB has rated over 8500 products. Outside advisors, including nationally recognized academics, consumer representatives and children's advocates and educators helped shape the rating system and ensured it's a credible body. The ESRB has formed an academic and consumer advisory board which meets periodically to review how the system is doing and give input as to what changes should be made. Membership on the board includes people like Mary Ellen Fise, the Consumer Federation of America, Dr. Parker Page of the Children's Television Resource and Education Center, among others.

The ESRB rating system has been called the most comprehensive rating system in the country by the FCC which studied this issue. Senator Joseph Lieberman has characterized the ESRB ratings system as the best entertainment rating system as well. This system has also been praised by Peggy Charren, founder of the Children's Television and the Consumer Federation of America, as well as retailers such as Wal-Mart, K-Mart, Toys 'R' Us and Target. A recent national PTA report card assessing industry progress in establishing rating systems gave the IDSA an "A" for creating the ESRB rating system.

The ESRB rating system is based on the actual review of product content by three raters who are randomly chosen from a pool of over 200 demographically

diverse individuals. All raters undergo extensive training. These raters don't see the whole product, they can't, since games can be 10, 20, 30, 40 or 50 hours. But they do see a range, including a requirement of the most extreme content. The raters assign the rating and appropriate content descriptors, after reviewing these materials. The ESRB ratings represent the use of typical consumers with notices to the industry. In fact, that is the only requirement, that's the only requirement we have, with respect to service as a rater, you cannot have a tie into the industry. We look for people that, I believe, are generally over 21 years of age and that have experience in different walks of life; sweeping diversity is very important. The ESRB has five age-based rating categories. It is unique in that it, also, supplements the ratings with short phrases called "descriptors." We further explain the content of the product. The rating categories are early childhood, ages three plus; everyone, ages six plus; teen, ages 13 plus; mature, 17 plus; and adults only, which is limited to 18 and older. The descriptors fall in several categories, including violent content, sexual themes, language and others such as drug and alcohol use. No other rating system provides consumers with both age and content information.

I'd like to just show you, I brought a box with me, a popular game from Activision called "Tony Hawks Proskater 2," that has a teen rating on the front of the box. And on the back of the box it has what we call our content descriptors. It says, "mild animated violence and mild language," because we think that parents are in the best position to make those decisions. And if you provided them with the information in the form of age and what content influenced the rating, we think that's helpful and allows parents to do the jobs they are fully equipped and able to do. And we understand that parents are busy and parents can't go and play the game in advance of the child, but we think the rating sometimes gives the information that helps them make informed choices.

The ESRB system was developed with the direct input of consumers who participated in focus groups aimed at making the system user-friendly and informative. To ensure that the ESRB ratings accurately reflect the views of average Americans, the ESRB periodically conducts reviews of consumers, conducts consumer surveys. Recently the ESRB hired Peter Hart Research to ask consumers what ratings they would assign to actual games and compared the consumer preferences to the ratings issued by the ESRB. More than 400 consumers in 16 cities participated in the project. Hart Research found that 84 percent agreed with the ESRB ratings, and that those who disagreed with the ratings—that more thought the ratings were too strict rather than too lenient. The industry supports the goal of protecting children and we have created a rating system that gives parents the tools they need to determine what content is appropriate for their children.

At the same time, we have serious reservations regarding the constitutionality of governmental efforts to determine what magazines, books, motion pictures and games are appropriate for children. And, quite frankly, I can't really speak to the issue of terrorism now because it's very early in the session. Most states went back in January, some started in February. So I, quite frankly, haven't seen a spike in legislation that influences the—that talks about the depiction of terrorist acts, but I can tell you that we saw increased efforts to blame the media and target the media in the aftermath of the Columbine school shooting. As Marjorie alluded to, everything changed after Columbine. As a nation watched, the search began for answers and scapegoating began almost immediately. As you know, the game industry was a target of a lot of the scapegoating and finger-pointing. Never mind that violent crime, particularly among the young, has decreased dramatically during the 1980s or the 1990s, while video games steadily increased in popularity.

When I was assistant district attorney in Brooklyn during the 1980s, that was before video games were part of the scene, we had a tremendous amount of crime. And in my experience it was factors such as dysfunctional families, poverty, the availability of guns and drugs that resulted in the spike in the crime rate. And, quite frankly, the most important thing, demographics. When you have more young men in the population between 18 and 25, that influences a crime rate more than anything else, not the media. Never mind that as Marjorie alluded to, there is no research establishing that playing violent games causes violent behavior. We have the same questions and skepticism as the research that was presented. In fact, research has been done or reviews of the research has been done where other researchers say "there is no there there." There is no evidence of content-affecting behavior. In fact, there is research, which is interesting, one of my favorite studies was performed by researchers from Hofstra University, and they found that children became more violent or more aggressive after watching pro-social programming such as Sesame Street. But that works with something that Marjorie said before. And that constitutes anything that energizes or excites an individual, whether it's pro-social or whether it's negative. Violent content makes them more—kids more excited and, therefore, more aggressive. There hasn't been a lot of research in that area, possibly because finding an absence of cause and effect is a negative and people don't research that. But I think there are many different ways of looking at research and what is actually happening.

I consider myself a practitioner in the field, and I think even more important than what the researchers say or what they don't say are what other practitioners have said. The FBI looks at the issue of school shooting

and they issued a report that looked at the causes of school violence. And they have reviewed 30 factors, including bullying, dysfunctional families, drugs, access to guns but not games, or not the media, not television, but they looked at those other factors. When the National Association of Attorneys General looked at the issue of school violence, they found as well that the dysfunctional families and bullying were the two main causes of school violence, not the media. Surgeon General David Satcher released a report last year on youth violence in which he stated that youth violence is caused by numerous factors and targeted lifestyle decisions as the main culprit causing violence. Satcher also said that it was extremely difficult to distinguish between the relatively small long-term effects of exposure to media violence and those of other influences.

In the aftermath of the Columbine school shooting, the video game industry, and the rest of the media, in fact, as well, faced several congressional hearings, an FTC investigation authorized by the President into marketing practices, federal universal ratings legislation, state and local legislative increase with much coming from unlikely cities like Los Angeles and San Francisco, as well as unlikely states as New York and California. Legislation introduced at the state level exploded from three video-games-specific bills in 1998 to 29 in 2001. Of those bills, 15 carried over to this session with five additional bills introduced, as starting in January, in Mississippi, Tennessee, Washington and Florida. In some states these bills are introduced by Democrats and in other states Republicans. Generally they are not introduced by both parties together, which is a good thing too from the content providers' point of view. What do these bills attempt to do? The bills that we have seen and that we're concerned about fall into three categories. The first creates state-run rating boards and mandates retailer enforcement of those state-issued ratings. The second would restrict minors' access to violent video games variously defined as dismemberment, blood shedding, decapitation or grotesque cruelty. The third mandates retailer endorsement of ESRB ratings. All impose criminal penalties. Many contain multiple elements, including a rebuttal of the presumption that if a game is rated M, that it is proposed to be violent as well. There are, also, variations on this theme, with some states attempting to impose special taxes on M-rated games or authorizing studies of the issue of violence.

The intensity of the battle we face has increased exponentially. For the first time the California Assembly Judiciary Committee passed a bill prohibiting the display of violent arcade games to minors. It was rather stunning when you think it was a Democratic sponsor of a bill in a Democratically run Committee. When I approached the podium to address the committee, the chairman asked me, he said, "Ms. Markels, I hope

you're not going to tell us that violent content doesn't cause violent behavior," which is an interesting introduction as you're going to speak about those issues. And I responded to the Chairman hoping he wouldn't hold me in contempt that, well, perhaps let me tell you what the FBI has said, let me tell you what the Surgeon General has said, let me tell what you the National Association of Attorneys General and Secret Service think about this issue. Needless to say, the bill did pass out of his Committee, but it's being held in Appropriations, and we're waiting to see what happens. We're hoping that the *Indianapolis* violence case will help us, but it's not clear. Every sponsor of these bills sees himself arguing this issue before the Supreme Court. That's the goal, to change law and make new law. Whether it's realistic or not, they are clearly sponsoring the bills, and although they will not be arguing these cases, they still envision themselves there. The New York State Senate passed a bill establishing the state-run Rating Board with mandatory rating enforcement. The sponsor of the bill, a Republican, told our lobbyist that he was trying to deflect attention away from gun control. Irrespective of his reasons, the bill did pass out of the Senate, is pending in the Assembly, and he's one of those sponsors who clearly wants to argue his case before the Supreme Court, and we're hoping he does not have that opportunity.

At the federal level, we have seen a number of legislative issues. We have seen bills that would introduce universal ratings legislation, mandate continuing FTC oversight; and those bills, as far as my understanding goes, are pending. It's not a huge issue before Congress with all the problems with terrorism and security and the budget, but it is an issue that we faced last year and we have faced in years before. In 2001, a single bill mandating a task force to study the issue of media violence passed in Oklahoma City. Now that's the good news; and the bad news is that ISDA and other media organizations have seats on that task force which meant that we got to make numerous trips to Oklahoma City, which is time-consuming and expensive, but the result was that the task force was a balanced one and recommended that parents be given more information about the content of products. It endorsed the establishment of a state-run Web site with information about content, and we thought that was thoughtful and a less extreme outcome than it might have been otherwise. In 2000, there was a quite a different story at the legislative end. The arcade and video game industry faced enactment of two ordinances; one, as Marjorie alluded to, in Indiana which limited violent arcade games, and the second in St. Louis County that included arcade and video games as well. I want to talk a little bit about the litigation, although I will not focus on Indiana, but I will talk a little bit about St. Louis and also a little bit about, as well, litigation that has been filed to impose civil liabili-

ty on video games and other companies in the aftermath of Columbine.

The case, in Indiana, was a startling one. The enactment was the first ordinance that was enacted after three, four, five years of pushing. What was surprising in *Indianapolis* is the initial decision of the district court, that it refused to grant the preliminary injunction motion; and that's something that I don't think any of the representatives of the content media saw coming and it was a wake-up call. And it resulted in the filing of a number of well-drafted amicus briefs which I believe had a tremendous impact on the court's ruling later. One of those was the brief that Marjorie worked on, Bob Corn-Revere did a brief on behalf of one of his clients, the IDSA submitted one as well. But I think all of our hearts skipped a beat when the judge decided not to grant that preliminary injunction motion. One of the interesting things to come out of the *Indianapolis* case is that a couple of weeks ago the consent agreement was filed, and one of the terms of the consent agreement contained a payment to the arcade industry in the amount of \$318,000 to cover the arcade industry's attorneys' fees. And we also understand the city of Indianapolis spent in excess of \$400,000 defending the lawsuit. So when you combine the two numbers it's over \$700,000 to defend an unconstitutional statute. We're hoping that decision may not prevent the introduction of future legislation, but it may slow down their passage. It's a cold splash of water when the citizens have to, out of their tax dollars, pay these huge attorneys' fees, although that has more impact at the local level than the state level, because there is a little bit more distance between state officials and their constituents than there are city councilmen and otherwise.

The most important thing about the Posner decision is that Judge Posner found that children—clearly stated that children have First Amendment rights and that the city must demonstrate legitimate grounds for claiming that violent video games cause harm. This is the first decision we have seen involving this form of new media in video games, and that's why Judge Posner was building on case law from earlier media, from television, from movies, from videocassettes, but this is the first decision affecting our industry which is tremendously important. As I mentioned a couple of moments ago, a federal district court judge is—we hope will rule soon on our IDSA motion for summary judgment to overturn a St. Louis County law which seeks to ban the sale or rental of violent video and arcade games.

The St. Louis ordinance is a classic case of politics and bad timing. St. Louis passed the Violent Video Game Ordinance as an effort by a Democratic council member, Council Member Wagoner, who was in a shaky district, to bolster his chances of being reelected and was introduced last October. The bill was support-

ed by the Democratic majority who wanted to keep its one-seat majority on the council so it was a four-three split in favor of the passage of the bill. With respect to timing, the district court's refusal to grant the preliminary injunction motion in *Indianapolis* was issued the day before the hearing in St. Louis, which sealed the bill's fate. It was an unhappy moment when I had to stand up and discuss that bill and debate the city attorney who was saying the bill is constitutional. Look at what the district court did in *Indianapolis*; which, I responded, I bet him, be reversed. I bet you \$20, which I have not yet collected on, but we're still in litigation. I think, hopefully, at one point I will be able to collect on that because a lot of people's egos get involved in the passage of these bills and there are often a lot of other things going on, other than the desire to protect children. Unfortunately, the Constitution and taxpayers have to suffer because of it until the courts sit back and look at it. At the same time, after the district court's decision in *Indianapolis*, we worry about what the courts will do. And that's why we think the best defense is industry self-regulation to keep these bills from being enacted in the first part. Because the problem is, if they get passed, you end up in court where the outcome is unfortunately not as certain as we would like it to be. With respect to St. Louis, we believe that, based on prior U.S. Supreme Court and federal court decisions, including *Indianapolis*, as well as the prior Eighth Circuit case in *VSDA v. Webster* in which the Eighth Circuit found that a violent videocassette law was unconstitutional, that this type of regulation will be stricken as well.

There are also two other lawsuits that merit discussion regarding attempts to hold the media liable in school shooting cases. In April of 2000, the U.S. District Court for the Western District of Kentucky dismissed a complaint against movie, video game publishers and Internet Web sites alleging liability that had to do with the Paducah, Kentucky school shooting. The court concluded that the acts of Michael Carneal, by murdering his classmates, were so highly extraordinary in nature and unforeseeable in character, the media defendants could not be held liable. The court further suggested that to hold the media liable would violate the First Amendment. Prior to the statute of limitations running, a complaint identical to the lawsuit dismissed in Paducah, down to typos in the complaint and defendants, was filed in Columbine, Colorado. We suspect it will meet the same fate. Of course what is ironic here is that in all school shooting cases there were ample warnings that the children involved in the shootings were disturbed, and that they planned the horrible acts and they told others, not just one, not just two people, all of their friends and, in some cases, adults.

An interesting aside, a week before Columbine, my daughter who was a junior in high school at the time,

told me that a girl in her junior high school who was from the Soviet Union, who didn't have any friends and who smoked a lot of pot and took acid, said she was going to get a gun and shoot all of the "Japs" in the school. Now, for those who are not from New York, "Jap" is a euphemism for a "Jewish American Princess," which my daughter is a proud member of that group. The next day I called the principal, Dr. Mitchell, and said, "Dr. Mitchell, I just don't know if this is a problem, but my daughter shared something with me that I'd like to share with you." And I spoke to him and he was very concerned. He said please come back to me with the name of the girl. I spoke to my daughter. She said, "Mom, everyone is going to think I'm a nerd. How could you do this to me? I wasn't there. She told my friends." And I said, "Well, were your friends scared?" She said, "Oh, yes, my friends were scared." So I called the principal back, and I live in a suburban Westchester community and said, Dr. Mitchell, I don't know the name of the girl, but how many girls were there that come from the Soviet Union and live in Chappaqua, New York. You figure it out. He brought the girl in but he also brought the social workers, the psychologists. And I don't know if this girl had access to a gun and I don't know if she would have done what she said she was going to do, but, if nothing else, a troubled kid got some attention and, hopefully, some of her problems were resolved. I sometimes wonder, am I the only parent in America who would do that? After Columbine, I think things changed a little bit, and I think there have been a number of school shootings that have been thwarted because kids, if not adults, have come forward and said I have a friend who is in trouble. Was it video games that influenced this girl from the Soviet Union who smoked a lot of pot and dropped acid? Gee, I don't know, maybe she played games. Every kid in America plays games. But, clearly, there were other things that were going on that hopefully were rectified.

Just very briefly, as Marjorie alluded to, attempts to regulate a minor's access to content that imitates violence are not new. The issue has gone on since the 1950s. And it seems that every new medium, whether it's detective novels, whether it's movies in theaters, whether its movies on videocassette and even serial killer trading cards have been the target of litigation. Each and every court, except for the District Court of Indianapolis has said—and which was reversed—that you can't regulate a minor's access to material. I think it's really a question of it's the media. It's not media, it is the content. And I think that's something that legislators sometimes have a problem with. They see a void and they say, "Gee, there's no regulation on video games or videocassettes or serial killing trading cards, let's pass a bill," which is understandable but it doesn't necessarily accomplish what they want to do. Marjorie alluded to the *Winters* case. There are numerous other cases. If any of you would like a listing of all the cases

on violence, send me an email. You can find me at Gail, gail@idsa.com, and I will shoot out a list of cases. I don't want to bore you by going over this, but there are 10 or 15 cases that clearly indicate that regulation in this area is not acceptable by the courts.

Now, again, as I mentioned before, when we talk to legislators sometimes, and we tell them, it's their attitude—well, it's time for things to change, we want to make new law. So we do have some members of the legislature that are activists and want to make restrictions on violence part of the judicial framework. Will they do that? I don't know. Our concern is that it would limit too much. It's very hard to draw that line between what is good violence, what is bad violence. Everyone says, well, no, we don't mean to say *Saving Private Ryan*, but when they talk about violence, I can't think of any movie that was more graphic than *Private Ryan*. Was that a bad product? Would I take my 11-year-old son to see *Saving Private Ryan*? I don't think so. Would I take a 15-year-old, perhaps. Should all movies with violence or all video games with violence be prohibited? As parents, we all have to make decisions as to what's suitable for our children. We make them every day. Sometimes saying no is hard, but we do it all the time. We all know our children. And my child is 11, would I let him play with Tony Hawks Proskater game? Probably. He is a mild-mannered kind of a kid. I don't think it would have lasting problems or harm on him, but, as a parent, I would like to make those decisions.

We have talked a little bit about our ratings. We do the ratings. M rating does indicate that it's not suitable for children under 17. And we, also, have legislative issues, as I mentioned, with bills that attempt to require the enforcement of the ratings. We oppose those bills because we support industry self-regulation. We work very closely with retailers across the country with their organizations. We worked in the Video Software Dealers Association with the Wal-Marts, K-Marts, the Targets to work with them to voluntarily enforce. Is it perfect? When I was a DA we had lots of laws in Brooklyn and lots of people broke those laws. Do we think that a good faith effort to monitor and manage makes sense and it works? And if retailers aren't good corporate citizens, we all vote with our pocketbooks and can choose who to do business with. So thank you.

MS. ZIMMER: Thank you, again, Gail. We have a really distinguished panel here. Two of whom you heard from. Also, we will be joined by Jeff Chester and, of course, Congressman Jerrold Nadler and Bob Collins. Bob Corn-Revere is moderator. There will be plenty of time for questioning, so even during the proceedings, if you would like to ask a question, raise your hand and certainly afterward there will be time as well. So let's begin, please. Bob.

MR. CORN-REVERE: Thank you, Mary Ann. Let me begin the panel discussion with a story. On November 30, 1917, Robert Goldstein was found guilty by the Federal District Court for exhibiting a movie about the American Revolution entitled, *The Spirit of '76*. Judge Bledsoe, who was presiding, noted that ordinarily the exploitation of such highly inspiring scenes as Paul Revere's ride, which is one of the most beautiful things in history, could not be detrimental or distasteful to anybody. Ordinarily it would be put on in such a way as to be a source of unending delight and gratification to any man, be he American or be he English. But that is not the point, the judge said, because America was at war and the film depicted British soldiers committing atrocities against the colonists. Accordingly, Judge Bledsoe wrote, "History is history and fact is fact. There is no doubt about that. At the present time, however, the United States is confronted with what I conceive to be the greatest emergency we have ever been confronted with at any time in our history. There is now required of us the greatest amount of devotion to a common cause, the greatest amount of cooperation, the greatest amount of efficiency and the greatest amount of disposition to further the ultimate success of American arms that can be conceived. As a necessary consequence, no man should be permitted by deliberate act or even unthinkingly to do that which would in any way detract from the efforts which the United States is putting forth or serve to postpone for a single moment the early coming of the day when the success of our arms shall be a fact and the righteousness of our cause shall have been demonstrated. Because the film might cause audiences to question the good faith of our ally and to make us a little bit slack in our loyalty to Great Britain."

The judge wrote, "Goldstein was convicted of violating the Espionage Act of 1917 for knowingly, willfully and unlawfully attempting to cause insubordination, disloyalty, mutiny and refusal of duties in the military naval forces of the United States during a war." The Ninth Circuit confirmed that conviction two years later.

Today we are once again at war, although it is not as well-defined as the war and all wars of the past century. And although we have not been in the post-September 11th environment for that long, it makes sense at this point to assess the state of free expression in the United States at this point. So far, Congress has not enacted any restrictions on free expression quite as dramatic as the Espionage Act of 1917, although certain provisions of the U.S. Patriot Act may come close. Nevertheless, there have been some official actions that are worth noting, some of which Marjorie talked about during her presentation. There was the November 7th visit of the Art Museum in Houston by FBI agents to investigate the art there. On November 26th there was a visit in Durham, North Carolina to freshman A.J. Brown about the anti-American posters in her apartment; and

on October 23rd, Barry Rheingold of San Francisco was visited by two FBI agents after someone at his gym reported that he had said that President Bush is a servant of the big oil companies and his only interest in the Middle East is oil. If there seems to be a chill in the air, perhaps it is because Americans are being told to watch what they say, literally. Of course the most notorious example is White House Press Secretary Ari Fleischer who admonished "Politically Incorrect" host Bill Maher for his statements about the war effort. Fleischer said that "Americans need to watch what they say, watch what they do and this is not a time for remarks like that. There never is." On December 6th, Attorney General Ashcroft told the Senate Judiciary Committee that, "Those who had asked whether we are sacrificing too much freedom only aid terrorists while they erode our national unity and diminish our resolve."

There have been a number of indications that Americans are taking these admonitions to heart. In the days following the terrorist attacks, there of course was the well-publicized do-not-play list on the Clear Channel stations. One record label withdrew an album cover for a hip-hop group called the Coo which depicted the World Trade Center in flames. Late night talk show hosts curbed their monologues and strictly avoided any subjects that could be construed as critical of the administration. Now this is not to suggest that these are necessarily inappropriate actions. It is not censorship for those in the entertainment industries to be sensitive to the needs of a grieving nation, rather, this is an exercise of editorial judgment. But there may be a fine and uncertain line between responsible judgment and what columnist Michael Kinsley had called, "Listening to Our Inner Ashcrofts." In this process, it is not formal political dissent that is suppressed, rather it is the lesser criticisms of our government and its leaders, the odd speculative comment that you're not sure of yourself or the joke that may fall flat. What gets lost in this is the spirit of free expression that is bedded in American culture. This may have been best captured in the recent Doonsbury comic strips where Mike Doonsbury and Zonker Harrison don fire hazard suits before voicing any criticism of the administration. As playwright Edward Albee said last year, "There are two kinds of censorship. Government censorship imposed from without and the censorship we impose on ourselves which, in a democracy, is much more insidious and much more dangerous." Of course we are not only talking about self-censorship as the FBI examples I mentioned earlier, and, in addition to that, some are citing the current situation to promote the same types of censorship that they were advocating before September 11th. For example, the anti-pornography group, Women for Decency, is calling for greater restrictions on sexually oriented material and their director, a Jennifer Holt, calls the parallels between smut and terrorism simply

uncanny. She says pornography destroys families just as terrorists do.

Well, we are going to discuss some of those issues on this panel, and we have an excellent group to discuss the state of the First Amendment or perhaps, more importantly, the state of free expression in the United States after September 11. You have already gotten the extended introductions, but let me just say a couple of words. First of all, Congressman Jerry Nadler. I am very pleased to have him on this panel, primarily because of his membership on the Constitution Subcommittee in the House. I was privileged to see him in action during the legislative hearings on electronics surveillance, including the FBI's use of the carnivore system. And I think he is uniquely qualified to address these issues. To my far left is Jeff Chester.

MR. CHESTER: I know you wanted to say that. I'm happy to give you the line you want.

MR. CORN-REVERE: Jeff, I think I would be able to say that wherever you're sitting. But you're in need of a more extended introduction. I first met Jeff when I was still at the FCC and he was first coming to Washington to help set up the Center for Media Education and has been a fixture in Washington policy debates since that time. We have Ronald Collins who is a distinguished First Amendment scholar at the First Amendment Center at the Freedom Forum. In addition to all of those other things you heard about him, also in the fall the Freedom Forum, because of Ron, will be announcing a major First Amendment online database that he has compiled. The site will have well over 3,000 links to First Amendment cases and articles about it when it's launched, and it is designed to be the nation's first online library about the First Amendment. Gail Markels, who just spoke, is from IDSA. She is involved in all of the ongoing debates about censorship and electronic games that are cropping up all over the country, and we're very pleased to have her on the panel. And, finally, of course Marjorie Heins who formerly was with the ACLU and is continuing her work with NCAC and, also, in publishing. So, again, thank you everyone for coming to talk about this important issue. Congressman Nadler, I would appreciate it if you would tell us your perspective on this for about five or ten minutes and then we will go across the panel and hear from the others.

CONGRESSMAN NADLER: Thank you very much. Let me begin by welcoming all of you to the Eighth Congressional District and warn you not to walk across the street because then you will no longer be in the same precinct of the Eighth Congressional District, at least pre-reapportionment, which will happen some time this year.

The United States was attacked on September 11th, and we're obviously in a war of sorts. We are not sure how to define victory in this war. We are not sure exactly who all the enemies are, but it is a war. And it is not the first war this nation has fought, and we have a history. In almost every nation, in almost every war, I should say, in which the United States has been involved, official actions have been taken, all of which have the same characteristics. And I will talk about the list: The Alien and Sedition Acts, in our pseudo war with France in the late 1790s; the suspension of *habeas corpus* in the Civil War; the Espionage Act of 1917 in World War I; the Palmer raids after World War I; the detention of Japanese Americans, including citizens of Japanese descent in World War II; the McCarthy era degradations on civil liberties during the Cold War; and the covert operations of the FBI against the opponents of the war in Vietnam in the late '60s and '70s. All of these occurred during a time of national emergency or national stress, wartime or pseudo war. All of them were thought at the time to promote national security and to enhance the war effort in some way. All of them suppressed civil liberties to a greater or lesser extent. All of them, in hindsight, added nothing to national security or to the war effort. All of them we today apologize for; all of them almost nobody defends today. I say "almost" because some of these things served, to some extent, as cited precedents for some of the steps that are being taken for today.

Now today we are following in that tradition. And we're taking a number of steps that I fear will have no real impact in helping national security or finding or stopping terrorist acts but do effect liberty. And of course we have a generally repressive atmosphere that has developed and some of this has been remarked upon, some of it is private, some of it is governmental, some of it is a combination of both. When Bill Maher observed on "Politically Incorrect" on TV that what seemed to me an obvious factual observation, it's one thing to call the terrorists who flew the planes into the World Trade Center SOB's and terrible people and criminals, which they certainly are, and immoral, which they certainly are, it is another thing to call them cowards. Bill Maher, as a lot of people did, observed it is probably less cowardly to commit suicide as part of what you believe in. It may be horrible because you're killing a lot of other people, but it is less cowardly than it is to drop bombs from afar when you don't see what's happening and you're not materially endangering your own life. For that observation a lot of people can agree or disagree with, the White House Press Secretary said this was terrible and people should watch what they say, and he was threatened with a lawsuit, his show, his job and it turned out only a few advertisers, just for that remark. And that is obviously chilling and repressive of free speech, and you don't have to agree with the remark, but it shouldn't be commented upon by the

Press Secretary to the President of the United States and it shouldn't lead to loss of your platform.

We mentioned the comic strip withdrawal, the FBI invasion of a dorm room and of art shows looking for what, for un-American speech? For un-American arts? All of that is symptomatic. But we have more serious results, too. First and foremost, the Patriot Act was passed by the Congress last year. Now the Patriot Act, so-called Patriot Act, the title is an interesting acronym, but this was an anti-terrorism bill. Now remember that in 1996 we passed the Anti-Terrorism and More Effective Death Penalty Act of 1996 which was the judgment of Congress in 1996 as to how far we should go with anti-terrorism measures. This was in the aftermath of Oklahoma City and some bombings of American targets abroad. And there was a lot of controversy on that, and it was thought that that was as far as we should go, a lot of people thought it went too far. But the Patriot Act was, is that when—after September 11th, the Justice Department reached into the bottom drawer and took out everything that they had tried to enact, tried to propose to Congress and Congress had rejected for the last 15 or 20 years, and then had not made its way into the '96 act and they said, now let's use this as an opportunity to get these wiretap revisions and other provisions that Congress has rejected enacted into law.

And some of these have absolutely no relationship to terrorism. For instance, increased wiretap authority, which already existed for alleged terrorism or counter espionage, applied to normal criminal investigations. Now, maybe that's a good idea, maybe it's a bad idea, but it certainly has nothing to do with terrorism because those powers already existed for investigating terrorist acts or threats to national security or counterintelligence. The Judiciary Committee, on which I sit, and on which I am the ranking Democrat on the Constitution Subcommittee, currently is a very polarized committee. It tends to have some of the most liberal Democrats in the house and some of the most conservative Republicans because if you're from a marginal district, you don't really want to be highlighted all the time on hot button issues like abortion and cloning, and you name all the hot button issues, gay rights, women's rights, you don't want to be on the Judiciary Committee. If you come from a fairly safe district and you're very interested either in protecting civil liberties and protecting the right of choice or in protecting the right to life and killing the right of choice, as the case may be, we tend to want to be on the Judiciary Committee. And that's why we are a very polarized committee, some of the most liberal Democrats and some of the most conservative Republicans. I have served on another committee, the Transportation Committee, which tends to be a much more unified, non-ideological committee. Everybody wants highways, railroads, bridges, something, and the question is whose district should it be

built in and where should the money go. Not a lot of ideological decisions. They have a lot of moderates in that committee. And, also, it's not a large committee in the House because it's a nice committee to serve on. The point is, the Judiciary Committee rarely agrees on anything. Most amendments are done on party line votes. Occasionally you get a stray Democrat voting with Republicans. You rarely get a stray Republican voting with the Democrats. But it's basically a very ideologically polarized committee.

When it came to the anti-terrorism bill of 2001, much to my surprise and delight, people seemed to be much more reasonable. The Republicans became a little more careful of civil liberties, the Democrats a little more understanding of the necessity to tighten up some provisions, and amendments were considered on their merits; they were decided by votes that weren't party line. I can't think of any party line votes during that. And we eventually voted what I thought was a reasonable anti-terrorism bill and it was considered by most people a reasonable anti-terrorism bill. The vote was 36 to nothing. When you have myself and Barney Frank and Maxine Waters voting the same way as Bob Bahr and some of the other Republican ultras, either everybody lost their mind or just—it was fairly reasonable, and it was. It did things like catch up to the modern technological developments on wiretapping, so-called portable wiretapping. Some people objected to it, but most people gave support. It didn't do—it was very carefully considered and it didn't really do terrible violence to civil liberties. So after the committee considered that bill for a few weeks and after a several-day markup, voted the bill out unanimously. The Republican leadership of the House took the bill and threw it in the garbage. And overnight, negotiating with the Justice Department, they negotiated a different bill. Much more harsh, much more restrictive of civil liberties. They produced a 187-page bill which was printed at ten o'clock in the morning and passed by the House at one o'clock in the afternoon, which nobody, except the drafters, had a chance to read. We voted based on summaries. And there was 66 of us who voted against it because who can vote against the Patriot Act?

One of the problems in modern politics, by the way, because in the politics dominated by 30-second TV ads, if you write a bill and you say this bill, and the first sentence you write is this bill—you have a 200-page bill and the first sentence is this bill shall be known as the Terrorism Prevention and Public Safety Promotion Act of 2001, or the Economic Stimulus and Prosperity Creation Act of 2001, it doesn't matter what you write in the next 200 pages. Most people will have a difficult time voting against it because that 30-second ad looms in the next campaign saying he voted against the Prosperity Bill or the Anti-Recession Bill or the Anti-Terrorism Bill. And so this bill passed, unfortunately, with 66

dissenting votes in the House, and it does a number of things. It minimizes judicial supervision of telephone and Internet surveillance, expands government's ability to conduct secret searches without court approval. Gives the FBI broad access to sensitive medical, financial, mental health and education records without having to show evidence of a crime and without a court order. A lot of these things you could say okay to if you could show a court first some probable cause of a crime or likelihood of a crime being committed, to show why it is necessary to do these invasions of privacy. But a lot of these provisions lack that protection, lack any balancing.

Remember, the drive for American independence started in 1761 with opposition in Boston to the British Writs of Assistance which was a writ given to the King's soldiers that commanded everyone to assist them. So it was a broad, limitless writ. You could go in to anyone and say, let me see your house or anything else, your papers, unlimited. That's why we have a Fourth Amendment that says limited searches only upon probable cause particularly describing the place to be searched and the thing to be searched for, et cetera. There are provisions in the Patriot Act that seem to mock, seem very broad in what they can search for without describing it, and instead it seemed to be—I, at one point, asked the Deputy Attorney General when he was testifying before us on the administration bill, on language that eventually got into the bill. I said, I read the provision of the Fourth Amendment. How do you square these words that you're proposing with these words? And he said, We don't. The Fourth Amendment doesn't apply to non-citizens, to aliens, to immigrants which, of course, is ignorant of constitutional history, because it says Congress shall make no law, most of the Bill of Rights, it says no person shall be subject to various things and no person shall be deprived of life, liberty or property without due process of law, doesn't say "no citizen." And the Supreme Court has repeatedly held that most of these protections apply to everyone, not just to citizens. We have seen the indefinite detention with very weak protections, or the bill provides for the ability to have indefinite detention with very weak protections of immigrants, of anybody who isn't a citizen.

And we have seen that this is now being implemented. We have had over 1200 people, now I think it's 400, who have been in detention for four and five months and we know nothing about them. We don't know if they had access to lawyers, we don't know what the charges are, we don't know if there are charges. No information has been released. This is unprecedented and, obviously, very dangerous. Second—that was the second. Third, the military tribunals. The President put out this executive order establishing military tribunals and delegating to the Secretary of

Defense all the legal questions; what shall be the standards of evidence, who shall the appeal be to. No *writ of habeas corpus*, the President said—with what authority, God knows—and so forth and so on. Now that's a doubtful constitutionality. They based it on the authority to do this on the Querying Decision. The Querying Decision was eight Nazi saboteurs who had landed on Long Island or somewhere else and they were arrested and tried before a military tribunal established by President Roosevelt at the order of President Roosevelt, and the Supreme Court upheld it but upheld it on the very narrow grounds that these people were unlawful combatants. They were, in fact, *Vermacht* members. They were members of the German Army out of uniform behind American lines in the United States. And that, traditionally, that is the one situation over which the courts said you can have a military tribunal.

There are two other Supreme Court decisions, one going back to the Civil War, the *Milligan* decision, essentially overthrowing President Lincoln's suspension of the Writ of Habeas Corpus. And what that decision said you couldn't try someone, I think it was in Missouri, in a military court if the civilian courts were functioning. If there was chaos and war, you can have a military court but not if for lack of chaos the civilian courts were functioning. And then you had a case shortly after the querying case, also coming from 1942, in which, after Pearl Harbor, martial law was declared in Hawaii and alleged Japanese spies who were residents—people who were residents in Hawaii and who were alleged to be Japanese spies were then tried by a military court because the civilian courts weren't functioning because of the martial law, and the Supreme Court said, no, no, no. We told you in *Milligan* 85 years ago, whatever it was, that you can't have a military court if the civilian courts are functioning. And you can't stop the civilian courts from functioning by declaring marshall law and then say, well, they are not functioning, therefore, we will use a military court. So if you read the Querying Decision in context with this other decision that came down about the same time, clearly the Court was drawing a very narrow exception to the doctrine that the Bill of Rights applies and you have all the normal rights of trial in a military court.

Let me say one other thing. There are probably certain cases outside the United States, because inside the United States the civil courts are functioning, but if we capture terrorists in Paris or Afghanistan, or whatever, there may be situations where we could constitutionally and properly have a military tribunal. But that military tribunal should, and I think constitutionally it has to, afford all the normal or at least equivalence of all the normal due process rights. It doesn't have to have a jury of 12 people, but it has to have due process. It has to have compulsory production of witnesses, it has to have a right to confront your accusers, it has to have the

right to know what the charges are, it has to have the right to effective assistance of counsel and it has to have the right of appeal to a civilian court. Congress enacted the Uniform Code of Military Justice to govern military justice. It is often said that military justice is an oxymoron, and it may have been true at one point, but not since 1950 when Congress, after some complaints about military justice during World War II, enacted the UCMJ, the Uniform Code of Military Justice, which has been amended subsequently. But it is still in force and governs court martials and provides that if military personnel are tried in a military court for an alleged—for some crime—and convicted, there are appeals first up the line. But then to a civilian court, the court of military justice, I think it is called, and from there to the United States Supreme Court. The way the President has outlined these military tribunals, you have a set of officers who may know damn well they are supposed to find this guy guilty, the appeal is to another set of military officers and from there to the Secretary of Defense to the President who issued the orders to find them guilty in the first place. It puts the Secretary of Defense and the President in the position of being the prosecutor, the judge, the jury and the appellate court all at the same time. And obviously that denies fundamental fairness and due process.

We, also have now the order, based on what authority, God knows, to allow the interception of attorney/client communications when the President or the Secretary deems it dangerous not to because maybe they are communicating some terrorist information. If that was done pursuant to a court order on a showing, you might have a constitutionally defensible situation. But just to give the President or the people he delegates broad discretion to order that with respect to anybody they call a terrorist, has no—I don't see how they can get away with it. Now Ashcroft and Cheney, I'm sorry, I should be more respectful, Attorney General Ashcroft, Vice-President Cheney, and I think the President summarized their understanding of the constitutional situation in the United States in a pretty interesting quote where they got it exactly backwards. The quote was, "People who commit such heinous crimes," referring presumably to the World Trade Center attack and some other things, "People who commit such heinous crimes do not deserve the protection of the Constitution." And people who commit murder or rape should be strung up without bothering with a trial because, after all, these are heinous crimes, too. The whole point of the American justice system, the whole point of our constitutional system, the whole point of our due process traditions and laws is that nobody is guilty of a heinous or other crime until they have been given a fair trial. Then you can string them up if you believe in the death penalty or throw them in jail if you don't. But you have to establish guilt with due process and proper protections. First, because if you don't, our history reminds

us, number one, you get tyranny and, number two, you hang a lot of innocent people and guilty people walk away because you thought you got them. Hopefully, I am hopeful but not terribly confident, that the courts will not be swept along on this wave of, I won't call it hysteria, but on this wave of something and will protect our constitutional rights.

Let me say one other thing. Wars have always done this in this country. They have always produced a lack of perspective and have damaged our civil rights and civil liberties. And it is not only what you think of as declared wars. Let me give you an example of another current war, the war on drugs. Congress, in the year 2000, two years ago, passed a law, with almost no coverage in the press, that said that the President must publish annually a list of foreign narcotic drug kingpins. How do you get to be a foreign narcotic kingpin? The President says you are, on the recommendation of the Attorney General or the Secretary of State. He says so with no hearings, no necessity of any evidence, no opportunity to say, "Hey, wait a minute, that's my brother," or "It's not me," or "I'm not a foreign narcotic drug kingpin." And if someone is designated a foreign narcotic drug kingpin, the sole restriction is that person cannot be a citizen of the United States; he has to be a foreigner. But if someone is designated by the President, it becomes a felony for any American to have any business dealings whatsoever with him. If you sell him your car, you're a felon. If you sell him a milk shake, you're a felon. The courts specifically are denied jurisdiction to hear an appeal of the designation. And if an American is prosecuted for having some dealing with a foreign narcotic drug kingpin, the courts are specifically denied jurisdiction to listen to your defense: "Wait a minute, Joe is not a foreign narcotic kingpin. The President was wrong." You can't collaterally attack the President's decision in court. Your only defense is, "I didn't deal with him." Your defense cannot be, "He's a fine guy, the President was mistaken." So the President becomes a dictator in this respect. That bill was put into—that was a rider. It was an amendment conducted on the floor of the House with no hearings, no committee consideration, no nothing, into the intelligence appropriations bill, the CIA appropriations bill of 2000. I was one of the few people who opposed it on the floor. I went to Henry Hyde who was then the Chairman of the Judiciary Committee and I said, "Henry, do you have any suspicion that this bill might conceivably be constitutional?" He said, "No no, absolutely not. It didn't come through my committee." So he wiped his hands of it, but it went through. So we have hysteria and irrationality, not only when it comes to declaring war. So let me make a couple of comments and then I will finish because I'm talking too long already.

On the video games and the CDA and some of the other things, the pending litigation, after any violent act

there is an always a flurry of discussion as to whether the media—be it films or TV or video games—is too violent and whether they contributed to the violent acts. Columbine is a prime example of this. The point was made that the murderers were fans of heavy metal music and liked to play violent video games frequently. Now when I hear heavy metal music, I want to get violent against the producers of the heavy metal music, but my son insists on listening to it. But the fact is that there is absolutely no evidence that listening to violent music or watching violent films or anything contributes to violence. One can even make the case that it may subliminate the urge of someone to commit violence. It may give you an outlet for your aggressive urges. It is important to note that the terrorists who attacked our country recently did not grow up exposed to heavy metal music or violent video games or TV, but they were on a mission to destroy what they say as a decadent culture, decadent because of our entertainment industry, among other things.

We must support our freedom of expression from attacks whether from people who think it will help our national security or from people who think that violence on TV, or whatever, promotes violence in reality. The Telecommunications Act of 1996 had numerous flaws. Unfortunately, I was one of only 16 people that voted against it in the House. One of the reasons I voted against it was the Communications Decency Act, which has been overthrown by the Supreme Court; but now Congress came back with the Child Online Protection Act, which was discussed earlier, which is presently on appeal. Similar laws have already been struck down in Michigan, New Mexico, New York and Virginia, but this is on appeal to the Supreme Court. The district court struck it down because it is impossible to know the age of a person online, so you can't—unless eliminate what's prohibited under this Act from the Internet altogether you can't give it to, you can't deny it to your children. In other words, this dumbs down the Internet to what's appropriate for children or what is thought to be appropriate for children. Even if you could have stuff appropriate for adults, you're not allowed to put it on. The appellate court struck it down because the community standards test allowed the most restrictive community in the country to regulate the content of the World Wide Web.

You have to look at all of this as a part of a long battle for some individuals to impose their own values on the information and artistic expression that others may seek out in the name of protecting our children. They are using the excuse of protecting our children really to try to say that things that are offensive to them should not be on the media at all. And, finally, parents have many options for controlling what services they subscribe to and what screening technology they purchase. We do not need to reduce what adults can view

to what is appropriate for a five-year-old. And the last thing is, we have in Congress, pending in the legislature, the so-called filtering legislation that would mandate that filtering devices that filter out sex or violence be placed on all computers in schools, in libraries, et cetera, to protect children.

Now, research has shown that, as far as I know, all of the existing filtering programs, software programs, are very indiscriminate. They are all based on certain algorithms and certain words and they would block information on safe sex, on gender equality and other issues. For example, the report by the Gay and Lesbian Alliance Against Defamation concludes that most blocking products categorize and block all information about gays and lesbians in the same manner that they block sexually explicit and pornographic materials. Similarly, another study found that one blocking software classified as full nude sex acts, Web sites of the United States Army Corps of Engineers construction, engineering research laboratories and Cafe Haven at Brigham Young University. But there was one good filtering software which blocked, as completely pornographic expression, the Web site of Congressman Dick Armey. With the exception of that very useful filtering software, we have to be very, very careful of protecting, of censoring what all of us can see. Thank you very much.

MR. CORN-REVERE: Mr. Chester.

MR. CHESTER: Hi, I am Jeffrey Chester and from the Center for Digital Democracy and you can go on the Web at democraticmedia.org to learn more about the work of the Center. While the Congressman and Marjorie and Robert have been talking about life and death issues, what I am going to talk about is far less grave, although, ultimately, I think a major threat to our civil liberties, our Democracy and to journalism, in particular. But I first want to point out that—and to commend to you the groups that have been fighting the attempts of the Bush administration and others to restrict our civil liberties as a result of September 11th. In defense of Freedom.org, the work of the ACLU and the Electronic Privacy Information Center, probably Marjorie's group, too, a very large coalition of public interest organizations that have been out there fighting the attempt to extend the Carnivore, for example, et cetera. And I want to thank Mary Ann for inviting me to speak today.

Now, two days after September 11th, the Bush administration went ahead with its plans to begin a massive deregulation of the media and communications industry. Really what I'm going to talk about is the role which the communications and media industries are playing to distort and weaken the First Amendment, to reduce the ability of citizens and others to be guaranteed a diverse and open media and telecommunications system, self-censorship of the press around these issues which affect the coverage of September 11th, and, ulti-

mately, that the country is at a very critical crossroads about what our media system will look like, what kinds of democratic culture we will be able to raise our children in.

Now, the biggest media companies in this country—GE/NBC, NewsCorp./Fox, Viacom/CBS, AOL/Time Warner, Comcast/AT&T—I hope I haven't left anybody totally out, Microsoft—Microsoft now because of its partnership with Comcast and AT&T. They have been engaged in a lobbying effort for a number of years which has taken on sort of an acceleration after September 11th, and you will hear how they are using September 11th. So I don't know about if it's bad taste or bad judgment or a little bit of both. But here's what they want. They want to end rules, which have been around a long time, that basically ensure a diverse ownership of the major media system in this country and an open and non-discriminatory Internet.

The rules that these companies have targeted are the rules which restrict the ability of one company to own a newspaper and television station in the community or radio station, the rules which limit the number of stations that a television network can own. Right now television networks can't own more than a number of stations that reach beyond 35 percent of the television audience. The networks, everybody but Disney, supports this, but Disney told me they didn't file or sue because they didn't want to spend legal money on it. They want no limits, unlimited number of TV stations is what they are working on. They will accept 50. The cable industry, AOL/Time Warner, and AOL has continued Time Warner's steady attack on these ownership rules. They don't want any kind of limit on the number of cable systems or the number of channels on the systems that any one company, namely them, in part, can own. Right now there has been a very incredibly modest ceiling. No cable company can own more than 30 percent of the nation's cable systems. Well, AOL and Time Warner have gotten that overturned and they just told the FCC a few weeks ago there shouldn't be any limit on how many systems, how many channels.

Finally, the Internet. The Internet up until now has been governed under an open access paradigm. Everybody can have access to multiple ISPs. There are more than 7,000 ISPs in this country and groups like Consumer Federation of America have looked at the telephone-based Internet as the most competitive and, obviously, the Supreme Court thought at one point, the most diverse medium ever created. The cable industry, which will be delivering us broadband for the most part, doesn't have any open access requirements; and has been successful in resisting the calls by consumer groups, competitors such as Earthlink, legal scholars such as Larry Lessig and others to have an open access. And very soon the Federal Communications Commis-

sion—and unfortunately, let me tell you, this is a very bipartisan kind of thing because of the campaign contributions which the media industry gives to Congress—for the most part. The Democrats and Republicans really are walking here in lockstep around these issues and I can go into that further. But very soon, in the next few weeks, you will hopefully read in the paper, hopefully because we have to make sure it gets the kind of prominent placement it deserves, that the FCC says cable broadband doesn't have to have any open access. The cable monopoly that controls your television will, also, be able to control your access to the Internet. And very soon after that the local phone companies, because they have been lobbying, they hope to get similar deregulatory treatment.

Now, as I said, this campaign has been going on for quite awhile. Unable to get what they wanted from the Federal Communications Commission, unable to get what they wanted to get totally from the Congress, they have gone to the courts. And their message is consistent. Our First Amendment rights, whether it's AOL/Time Warner asking that the cable ownership caps be overturned or the television networks saying that the caps on broadcast network ownership should be overturned, our First Amendment rights restrict the ability of the government to do anything around ownership. Any concern about ensuring diversity of ownership, diversity of access, competition, free flow of ideas, violates our First Amendment rights. And when you read their filings and their pleadings, which I recently did in preparing an article, what strikes me is—and maybe because I am not a lawyer, I am a former investigative reporter and public interest advocate, so obviously this is what you do—but not even a discussion to suggest that perhaps the public has some First Amendment rights here to a diverse and open system.

Now right after September 11th, and I knew this would happen because there is a consistent theme of bad taste here, the media industry began to say, wait a second, we had a bad economy, it has gotten worse, here we need deregulation. And, indeed, a few weeks later, in the first week of October, Mel Karmazin, the president of Viacom/CBS, got up at Goldman Sachs, and if you come to my Web site, you can hear what he said, and he said, "Well, you know," this is a quote, "there's a silver lining in the September 11th attacks." I couldn't believe he said that. Thank God, Mel, you're an idiot, because I have it on NPR and other places. "There is a silver lining in those attacks because there is now a lot of depressed media stocks and if only the government would come in and deregulate us, we could buy those stocks. And, by the way, didn't the government come in and deregulate after the last war, the Gulf war? That's why they had the '96 Act." Well, I said at the time, thank God, he is just a media executive and not a media story because there was no relation-

ship between the Gulf War and the '96 Act. But the media industries are now running around Washington and saying, you know, you have to help us out. We are an important part of the economy, and we are doing our part in what I call, "we'll wave the flags, you waive the rules." I don't think there was a coincidence when Walter Issacson of CNN and others were sitting in that room at the White House with Condoleezza Rice, and they said "we don't want you to run the bin Laden tape." You know, all of a sudden, CNN and NBC declared war before the country did. When you see the peacock got a dye job and now has the flag, it's not a coincidence because we know from the Democrats and the Republicans there is a *quid pro quo* here. And in the mind of Walter Issacson, he understood that AOL/Time Warner, his company, has asked that the rules on cable ownership be eliminated. AOL/Time Warner, CNN's parent, has asked that the rules which prevent a cable company from owning a cable system and a television system in the same market be eliminated. This is going on. There has been no press coverage. You have not seen a single word, you didn't see it in the '96 Act except for one "Nightline." You have not seen one television network do one story which says here is our legislative agenda right now that will affect you.

So our media system is at a very important cross-roads here. If you read what the media companies are filing, and I don't know, how many people here today are representing companies who are major communications entertainment companies? Because if you read what they are filing and what their legal arguments are, it's very clear what you'll get. A, you're going to get, on the basic level, one company is going to own your newspaper, several TV stations, several radios stations, your cable systems, maybe your phone company. And because there won't be any open access, there wouldn't be any guarantee for non-discrimination about how content flows. And the cable industry in particular has made very clear, and I found a key document which was used during the AOL/Time Warner merger, it's on our Web site, by the FCC to impose an open access on AOL, it is clear what is going to happen. The people that own the wires are going to be able to monopolize and ensure that contents and services flow faster, be more efficient. So you're not going to have a competitive market and non-commercial civic voices, in particular. And those people who have been left out of the media system will get marginalized. So what the media industry is now doing is a threat to our civil liberties and our First Amendment, and not enough people are speaking up. Because there should be some public shaming about what is going on, let alone some resistance, which we are going to try to build over the next few years. Thank you.

MR. CORN-REVERE: Ron Collins.

MR. COLLINS: Uninhibited and wide-open and always robust, Jeff, thank you for your comments. It's good to be in New York. Lenny Bruce once said that "New York is such a sinful town, I love it." Six months later he was convicted for obscenity and, contrary to popular belief, that conviction was never reversed in the case of Lenny Bruce. But I come to not to speak about Lenny Bruce, the book comes out in October, but to offer a few general observations, and I will be brief about what Bob Corn-Revere called the spirit of free expression post 9-11. I would like to share some of those observations with you.

Let me just start off with three very basic observations about the spirit of free expression post 9-11. First, it is well to remember that this congressionally undeclared war is only about four months or so old. In other words, it is still very early in the day. And what may come if we have more terrorist bombings or more anthrax letters may very much change the relative restraint vis-a-vis the First Amendment. I don't say the Fourth Amendment, the Fifth Amendment, the Sixth Amendment, the right to *habeas corpus* the Congressman discussed, but the relative restraint as to the First Amendment, that may well change.

Secondly, the USA Patriot Act aside, and that is a big aside, the government's relative restraint may have less to do with its respect for the First Amendment than with the fact that there has been a paucity of vibrant criticism of the war. Almost no one is dissenting, is how Michael Kinsley put it. In such an atmosphere there is little demand for legislative or executive expression of the kind we witnessed during the First World War. I submit to you that had we had more vibrant dissent, the attacks on freedom of expression could be far greater than we have seen thus far.

Third, thus far the greatest curbs on our First Amendment freedoms have occurred in the area of access to information. Here we have seen restrictions placed on press access to combat zones. You may recall early on in the war, the undeclared war, the press was virtually denied access to combat zones. Press access to detention centers and detention camps, how free that access will be remains to be seen, at least as to the detention centers. We know, as the Congressman has so correctly pointed out, little or nothing about the people who are being held there and why. Press access to terrorist trials and also press access, should it come to it, to military trials or military proceedings before military tribunals—we don't know at all if those proceedings are to occur, those military tribunals, what press access will or will not be allowed.

And, finally, we have witnessed several government lock-downs of information vis-a-vis FOIA requests, that is Freedom of Information Act requests. There really has, as my colleague Paul McMasters has

pointed out, been a lockdown of information. So those are some general observations, I submit to you, about the First Amendment post 9-11.

I would like to add a few other observations about the spirit of free expression in terms of the Court's current First Amendment docket, and I think they are particularly germane to this group. This term the United States Supreme Court has agreed to hear seven freedom of expression cases. There's actually eight First Amendment cases before the Court, but seven of them—by before the Court, I mean in which they're granted *certiorari*—so they granted cert. in seven freedom of expression cases. They have likewise declined to hear 16 freedom of expression cases. Now of the various free speech cases before the court, one of the most important, although there are a number of them that are quite important, but one of the most important is *City of Los Angeles v. Alameda Books*. That is the zoning case prohibiting the operation of more than one adult business at a single location. More specifically, the *Alameda Books* case involves the application of the secondary effects doctrine about which my colleague and others have already written extensively, including, I think, Paul McMasters had a publication in your own *Journal* here about the secondary effects doctrine, so I will not add to that. But if, as is suspected and indicated by oral arguments in this case, the First Amendment claim is denied, I think it portends ill for the future of what I will label real world or face-to-face expression.

Just in a nutshell, let me just say what my concern is. I think our protection, as in *Ashcroft v. ACLU* and these other cases involving online freedom, I think it has to be vigorous. I think it has to be robust. I think it has to be constant and I think we can give no ground. What I'm concerned about is that there seems to be an increasing tendency by the United States Supreme Court to diminish the coin of First Amendment protection in what I call real world or face-to-face expression context. And let me give you some examples if I may.

With alarming frequency, the Court has imposed even greater restrictions on real world or face-to-face expression. It has done so, one, by broad applications of the time, place and manner doctrine. Two, by broad applications of the secondary effects doctrine. It's all well and fine to have a case like *Miller v. California*, the one that Marjorie referred to, problematic though it is, but when that case is being chipped away by time, place and manner doctrine by the secondary effects doctrine, one begins to wonder. Third, the relatively narrow application of the public forum doctrine. Certainly this is an area that the public interest advocate should be very concerned about as to what is happening to the public forum. Four, an increasingly lax attitude towards anti-picketing laws. And, fifth, a relaxation of the *Friedman v. Maryland* requirements on prior

restraints in the context of park permits. The net effect of such rulings in these five categories is an increase in government power to restrict real world or face-to-face expression. It's almost as if government has said, well, we don't want any adult businesses in our area and we're willing, if you want to have access to that, at least for the time being, to let you go to the Internet. If we can get to that, we will but, for the time being, there has been quite a bit of a shutdown there.

So in conclusion, while there is, of course, a great need to protect online expression as in the case *Ashcroft v. ACLU* and other cases indicate, that legitimate concern should not blind us to the equally great needs to safeguard more traditional venues of freedom of expression. Thank you very much for having me, and I will leave you with this. Like Lenny Bruce one said: "We all need a First Amendment lawyer who rocks or swings with the First Amendment in that spirit." Thank you for having me.

MR. CORN-REVERE: Ms. Markels.

MS. MARKELS: Thank you, Bob. Just a few observations on some of the subjects and what people have been talking about a little bit. As a former prosecutor, when I started reading about some of the different litigations put on right to counsel and intercepting communications between lawyer and attorney, I thought, "Wow!" I mean I just sat back and took notes because when I was with the DA in Brooklyn I had a 100 percent conviction rate, and I figured you don't really need the extra stuff to get to the convictions. And what troubled me is the unfairness of it. Clearly, you have cases where juries run amok, but if you sit down and you pick a jury, you understand them and they understand you and you weed out people you think are a little erratic, getting a conviction is not all that hard in Brooklyn. But, at the same time, I think all lawyers, particularly people who practice in that area, respect that there is a process and there have to be checks and balances. Occasionally people that are not innocent do get let out, but I was a little surprised when you started reading about all these limitations on rights to counsel, and it is troubling to see people languishing in jail.

And the story we all read about the gentleman who was at the hotel and there was talk that the radio was found in his room. It wasn't true. It was someone else's radio. And we think about what if this pilot never came forward and said "it was my radio." You'd have someone who is arguably innocent or is innocent just languishing in jail without counsel, and I think that's troubling. I think it says a lot about society when in an effort to protect ourselves, we restrict the rights of other people. I am not a bleeding-heart liberal with respect to convictions and putting people in jail that are guilty. I think people that are guilty should be punished. But I also think we should make a little effort into getting

there and you should have some elements or requirements of proof and people should have right to counsel. Very important. Very troubling concept that this is going on at the same time as has been noted speaking out in that area is hardly very popular and everyone is afraid of being labeled as supporting terrorists.

But there are groups out there that are speaking. There are groups like the National Coalition Against Censorship—Joan Bergman is in the audience. Marjorie is a member of that group as well, on the Board as well. They are taking tough positions and it is not always easy. I urge you to go on her Web site, <ncac.org>; is that correct, Joan? That's what I think, people do need to speak out, although it's hard and we get a little nervous about speaking out because nobody wants to be labeled inappropriately. I also sometimes wonder if we are that concerned about nabbing terrorists. Why are we sort of nickeling and dime-ing and concerned with things when it comes to issues like checking on who's been selling guns, gun shows. Who has been buying guns? The administration all of a sudden just doesn't want to know. Inappropriate area to go to. It's okay to look at other things. But I don't know. If I was with the FBI, I'd think the FBI would want to know who is buying guns, who has been filing applications. But the Justice Department doesn't want to go there. If you're really concerned about terrorism, I want to know who is buying guns everywhere. Terrorists buying it? Maybe not, but why wouldn't we want to know and why are we taking a pass at gathering information that could affect our security now and in the future. So I find that troubling.

With respect to industries and the way we operate and the video game industry, we had—a number of our members had—games that featured the World Trade Center. Some had planes flying around the World Trade Center. Some of those games were pulled briefly. Some covers were changed. In fact, good, bad or indifferent, I think it's you're responding to public tastes and demands. And it's like anything else, not every product was pulled. There are probably hundreds of products with the World Trade Center in them, but I think in some cases, whether it was Hollywood or the video game industry, in a rare moment of good taste stepped back and said we're going to respect public sensibilities and do the right thing. Most of those products are back on or they have been reconfigured a little bit to remove some things that people might consider inappropriate. I think that was the right thing to do. I think certain acts where industry takes a lead and behaves responsibly does make sense. I don't consider that self-censorship but acting responsibly.

MR. CORN-REVERE: Thank you. Ms. Heins.

MS. HEINS: I am going to try to be very brief so we can have some opportunity to have an exchange. I just

wanted to pick up on a couple of things that have been raised before.

Congressman Nadler mentioned Internet filters. A favorite *bête noire* of mine is because what they do is appalling, and we're not talking about industry self-regulation or parental empowerment here because, in addition to some of the legislation he has mentioned, we already have on the books a third of the Internet censorship laws that Congress has passed. This one is called CHIPA, Children's Internet Protection Act, and just as Congressman Nadler noted with relation to the titles of bills, when you have something called Children's Internet Protection Act, you're not going to get a lot of negative votes. And this one is in some ways more troublesome than the criminal censorship laws that we have seen on the Internet, the CDA and COPA, because this one requires that every school and library in the country that receives federal financial aid, for example, to raise assistance for getting online filters installed. And these filters are manufactured by private companies; they don't even let you know what their blacklists are; they give you broad categories. You don't know what is actually being blocked in this category, unless you try to find something. Congressman Nadler's favorite example is Dick Armey's site. Mine would be Archie R. Dykes Memorial Library at the University of Kansas. There are about a dozen copies outside of a public policy report on Internet filtering which my project did and it really just pulled together all the studies we could find. And the notion is to give the information to policymakers, educators, students, parents, everybody who is confronted with this law or with the Internet filtering issue in general, because sometimes people think, oh, chicken breasts or Dick Armey, these are funny aberrations. They are not aberrations. And the filter companies are making a bonanza off this law.

One other thing they do, of course, to relate it back to 9-11 and the whole issue of political dissent is among their categories that you can choose to filter, and many schools may choose to do this, are categories like anarchism or terrorism or intolerance and you really don't know what's in there, but a lot of political dissent is going to be in those categories. I think I'll just stop here and let's have a conversation.

MR. CORN-REVERE: Well, we have heard about a range of topics from the U.S.A. Patriot Act to Internet filtering to FCC ownership restrictions, a wide choice of things to talk about and ask questions about. I'd like to start just among the panel members and see if there are any questions or comments any panel members would like to make and I will be taking the prerogative, Jeff.

MR. CHESTER: I have one, though.

MR. CORN-REVERE: I'll start and then you can ask yours. I notice that among these ranges of topics that people have raised, most of it complains about too much government power, particularly as it relates to free expression. The issues that you raised about the ownership restrictions called for a greater exercise of government power over media companies. And I'm thinking in particular of a newspaper broadcast cross-ownership rule which really had its origins in the Nixon administration when the President was concerned about adverse Vietnam war coverage. So this was then imposed on media companies.

MR. CHESTER: That's not totally the history of it. That's your version of it. Let me add one thing that wasn't totally mentioned. Because I was part of a coalition of groups pushing for Internet privacy and expanding privacy online. And in my former organization we got the only legislation through COPPA so they can't collect the data on kids under 12 without parental permission.

Since September 11, what's happened is any attempt to really raise a debate to protect privacy online and elsewhere has really sort of disappeared. The momentum behind it has disappeared. This is perfect for the corporate political agenda of the industries. All of these major media companies have been fighting Internet privacy and digital media privacy protection. Go on my Web site at <democraticmedia.org> and look at my exposé of interactive television and data collection right on the home page, and you will see what the endgame is here. That the big companies want to be able to and are developing technologies so they will be able to track every time, not only online, but when you're watching interactive television. Learning sophisticated databases that create incredible profiles of your behavior and your kids' behavior and the system allows for microtargeting and the elections are going to be run by them.

So you have to sort of balance this. What the industry wants is a system that enables them to hear and understand what is going on with individual viewing and interactive participation with the electronic media environment and then to target you. I don't believe in censoring on the First Amendment grounds the companies push with violent stuff. Frankly, as a parent I'm concerned about it. They make their decisions about what they want to buy, they buy cheap stuff, they are flooding the market with it; but let me tell you something, their political agenda against privacy protection, their political agenda that will allow them to do this kind of microtargeting will enable them to know what exactly, what way, a kid is vulnerable and a prospect for the violent video game and the toys and all that, let alone the other stuff. So they are creating a culture which will be incredibly commercialized, incredibly

invasive and because you don't have open access, the alternatives that parents and others really need to grasp, whatever the public broadcasting is going to look like in the 21st century, what are the alternatives beyond "Sesame Street." They are going to be harder to access. That's not my issue but I just sort of want to prevent it. You have to really look at what the media industry is doing here when you come to their defense and start raising some concerns about what the endgame is here.

CONGRESSMAN NADLER: I have to say a couple of things. First of all, it's startling when you mention that the media companies are going to develop this interactive software—very, very specific profiles of every individual presumably for the purpose of marketing. I also presume that those profiles will be subject to subpoena in criminal prosecutions or in commercial litigation, because I don't see what would protect them offhand. So that's another danger. One of the things that some of us are trying to do, I must say this as a tangent here, is that when the government subpoenas an ISP to know what you're logging on to, at least you ought to get a copy of that subpoena so you can move to quash because the ISP has no particular interest in whether that subpoena should be honored or not. It is just as easy to give it up.

Let me say one other thing. I agree with essentially what Mr. Chester is saying. I mentioned I was one of 16 people to vote against the Telecom Act of 1996. There were two reasons. One is because it had the Communications Decency Act in it, which I thought was unconstitutional, but the other was it started down the road, it reduced ownership restrictions. It increased the ability of one media empire to own more outlets. And the fact is, the First Amendment was developed at a time when the power that might be a tyranny, that might exercise tyrannical power could only be conceived of as government. You didn't have large corporations, or joint stock companies were just starting, you didn't have large corporations that controlled what you saw or heard or read or did anything else. And freedom of speech was envisioned as freedom from government suppression of speech because anybody could go out and print a pamphlet and that's what you had.

Today I don't know if it's an equal or greater or lesser danger than government suppression but a very large danger that increasingly if you have fewer and fewer outlets, if five companies end up controlling essentially all the people hear and read and see and control 99 percent of the information and because of lack of open access paradigm in the Internet, you don't even know what else is out there, yeah, you can put anything you want on the Web site but no one will ever hear of it because under broadband you can't get to the ISP carrier or whatever. If five companies or three companies or with mergers probably eventually two or one

company they control everything, then they control the country and freedom of speech has to be not only the freedom against government to listen but the freedom, in effect, to be able to talk. And if you can only talk to the people in this room, but five companies or three companies control the ability to project anything and can censor anybody, they can all make sure there is only uniformity of the opinion, then you're not going to have free government in this country.

So we have to stop going down that route and go down the other route and make sure that there is a democracy which is premised on the assumption that there's an open, robust, uninhibited debate and you can choose from among competing opinions. But if you never heard competing opinions because very few people control what you hear or see, you can't have a self-government in any real meaning. And that's a danger that doesn't come from the government, it comes from large media companies, increasingly fewer media companies and the only agency that can control it is government. So it isn't a question only of which is the traditional way of looking at greater or lesser government power, it is the question of exercising the government power to retain and promote the ability of people to get and share and project information and not allow one or two or three people or companies to seize and monopolize that power.

MR. CHESTER: Can I say something? I thank you, Congressman. I hope you will speak out because in a few weeks the Federal Communication Commission will announce that cable broadband is not going to be a telecom service where open access is required by an information service which, under the '96 Act, is basically deregulated. That will allow the company that owned the wires, and you can have two companies in control of the entire cable and most of broadband. You're going to have AOL/Time Warner and after the merger sales go through in a few weeks or over the next year, Comcast, AT&T, Microsoft, these are the three partners. They are going to control because of no ownership rules, no open access. So it's very clear. It's two companies. Two companies, there won't be any ownership limits, without any open access. This is their political agenda and this is a major threat. And the fact part is what we're simply asking the government to do—and what the companies are resisting which makes me very anxious—is, open access means a policy of non-discrimination. You have to treat me like you treat yourself, and they don't want that policy. I suggest to you that we are setting ourselves up for a major problem here.

MR. CORN-REVERE: Marjorie.

MS. HEINS: I basically agree with you both. I think the work you are doing is very important, Jeff. Part of the problem here, of course, is the way courts have

interpreted the First Amendment. It's a restriction almost exclusively on government activity. So when we get into the area of corporate censorship we are in very legal limbo. And when it comes to regulation, I think it's important to distinguish between content-based regulation and content-neutral regulation. I don't think there is a First Amendment problem, Time Warner *et al.* to the contrary notwithstanding, with government content-neutral antitrust-type regulation that puts restrictions on the economic power and, therefore, the media power that these companies have, and government regulation of that access on equal terms. And, hopefully, the courts will begin to recognize that when the corporate media comes in with First Amendment complaints, with complaints about this content-neutral, antitrust-type regulation or public access regulation and wrap it in the First Amendment they are misusing the First Amendment and that is a bogus First Amendment claim. When it comes to content regulation we are in a very different place, and that's the main distinction I would make.

Another point is that since it is a very important First Amendment value, although the courts have not really recognized it, for the government; which, the government certainly ought to have an obligation to try to promote diversity and access, to prevent the monopolization of the media, another important way to do that, in addition to regulating on antitrust-type grounds, is public funding of diverse speech. And here we get into the whole area of schools, libraries and, dare I say it, public broadcasting and the National Endowment for the Arts, and the crises and traumas we went through in the '90s over imposing content regulations, essentially censorship provisions on public funding of artistic expression broadcasting and so forth have had a deleterious effect on that diverse marketplace of ideas because it is the less mainstream, the arguably indecent, the arguably disrespectful, the questioning, the controversial speech that is the speech that is not getting through and that needs the public funding. And when we have restrictions imposed by people like Jesse Helms, on agencies like the NEA not being able to fund any art that is indecent or disrespectful and political pressures being brought to bear on funded non-profits that we are also reducing the marketplace.

MR. CORN-REVERE: Let's go to the audience for any questions or comments in the 10 minutes or so we have remaining.

AUDIENCE MEMBER: I wonder if you could comment on this. It was reported recently that government or various government officials met with various members of the Hollywood studios to discuss, I think it was framed, as ways in which they could be of help, it's probably propaganda, whether you think that's a good thing or bad thing and I wonder if the panel members

could comment on the issues that kind of meeting would raise.

MR. CHESTER: I left that out, that was the one of the other things. I'm not saying there aren't well-meaning people in Hollywood here, but there is no question in my mind that Jack Valenti, et cetera, organized it. And, really, if you go to the television academy Web site and see what their president said, basically the president of the television academy said we need to do propaganda for you. But this, once again, is part of the reason the MPAA and the studios which are now owned really by the cable companies here, except for Universal which has the Bertelsmann connection now, and now they have a piece of EchoStar.

So, look, there is no doubt about it, this is part of the political lobbying campaign. This is part of you scratch my back, I scratch your neck. It happens all the time, and it is unfortunate, but we're playing ball here. Come on, guys. Get rid of the ownership rules, get rid of open access, play ball. That's part of it. And the fact is, by the way, I just want to say that in fighting the cable ownership, who came in on our side, the consumer unions, or the Federation of America, that's my coalition, but who came in on our side, saying there is no real competition in the entertainment industry? The Writers Guild. Go on our site and see what the Writers Guild said. The powerful writers and half the billionaires in Hollywood are saying there is no marketplace in Hollywood anymore because these three or four folks own everything.

AUDIENCE MEMBER: I think the tale you tell is a very chilling tale. It sort of reminds me of a film, *Meet John Doe*, a Frank Capra film where the concentration of wealth becomes so great they can control messages or change the message overnight. And I think you really gave a great call to action. I am not sure what we can do except to write letters. But I found it moving.

The question for Congressman Nadler, which may sound like bomb throwing but he made a very good point. Although I agree with your due process arguments and I agree with all the concerns and maybe the press was used improperly, an Israeli newspaper quoted a court justice in Israel who brought up the argument which says if you caught a terrorist and he had knowledge of a dirty bomb coming to New York harbor and you had him in a room probably within the next 24 hours where that dirty bomb was and how to stop it and save 500,000 lives, where would the Constitution come in, in your mind at that point, and where would extrajudicial action—we're fighting a different foe. What would be your view on that, taking into concerns, legitimate concerns, of civil liberty and due process and getting a lawyer, and 24 hours later we are talking about a dirty bomb heading for New York harbor? That's my question.

CONGRESSMAN NADLER: It's a very difficult question. Thankfully, we have not faced that situation. Traditionally, you have a different question. Put it a little more realistically—you are a combat commander, you're a lieutenant and in Guadalcanal, or wherever, and you've got a Japanese prisoner and he knows where the enemy machine gun nests are. You have to charge them in a few minutes. And either he tells you where they are and saves some lives in your platoon or he doesn't and your platoon gets mowed down by the machine gun nests. We have never judicially justified that, but there are any number of anecdotes of you take two prisoners, you shoot the first one and the second one tells you where they are. That's happened. Nobody has ever been charged under that. The problem, of course, you know Alan Dershowitz asks the question, do you torture the guy to tell you where the bomb is, make it a nuclear bomb, even worse. Hard cases make bad law. The problem with answering the question in the affirmative is that you will find that we will start disregarding all Constitutional civil liberties protections for speculative situations. I am not going to answer that question because we haven't been faced with it. I hope we are never and I don't know how you can provide for it in law without destroying everything we have built up in the last few hundred years since the Magna Carta. You can posit such situations on a large scale, like with the dirty bomb, but I can't think of an instance in American history where that has really happened on any large scale.

It is interesting that you ask me the question about the dirty bomb coming in a ship because I'm drafting legislation right now which is going to be denounced as radical and expensive, and it is certainly expensive legislation, which says that every container about to be loaded on any ship—and there five-and-a-half million containers that come into the United States—must be inspected by an American inspection team in the foreign port before—and sealed and certified before it gets on the ship. And if you're in Hong Kong or Singapore or Vladivostok and don't want to permit American inspection teams to do that, then you don't trade with the United States. Point one. And point two, that the Navy or Coast Guard would have to board every ship 100 miles or 200 miles out and inspect the entire ship, not just the containers and those accessible on top to make sure the seals are still sealed, but look everywhere, in the hold, in the engine room, in the captain's stateroom, in the galley to make sure there isn't a suitcase nuclear bomb there before you let that the ship within 200 miles of American shoreline.

By the way, the President and a lot of the people are pushing the missile defense system on the grounds that you may have one or two or three rogue nations, Iraq, Iran, North Korea which might have the capability of launching one, two or three nuclear missiles to the

United States. And they want to spend \$90 billion on that. I think that's a waste of money because if a rogue nation has one, two or three or four nuclear bombs, they are not going to put it on a missile because you'll know where the missile came from and that country will cease to exist 30 minutes later with retaliation. But if they want to bomb the United States, they will put it into a ship and suddenly New York or Los Angeles or San Francisco will have a nuclear explosion and nobody will know who did it. There I would rather spend whatever billions it takes to protect our ports. I'd rather take that kind of action than worry about your situation.

MR. COLLINS: I would like to add comments to what the Congressman said. If I could hurl the bomb back, I think that question is a very loaded one. It is precisely the one that Erik Strom raised several years back in a book that he wrote and the purpose of that book was calling on Americans to accept the paradigm of justice, not so much based on our Bill of Rights, but based more on an open-ended kind of clear and present danger approach, if I can use that verse, as he said was used in Israel. In that book he called upon the relaxation of the First, Fourth, Fifth, Sixth, Eighth Amendments rights and all suspension of the writ of *habeas corpus*.

I think the problem with your hypothetical is, first of all, it assumes—basically assumes that the person in question is guilty. In other words, we don't really need to know anything about this person, he is guilty. What we need is the precise information. That's very problematic that you have that. Precisely the reason we have our constitutional guarantees, one through nine, I don't include 10, maybe, if you forgive me, is that you cannot assume someone's guilt without some modicum of process. Also, I think the problem that is suggested by the hypothetical is that it creates a paradigm. It's not a one-time use; it's not just this case and never again. It becomes a paradigm that is used again and again and again in any variety of cases. And when that happens, you see the virtual annihilation of the Bill of Rights. So I think we should take strong exception to what Ariel Sharon and others suggested about diluting our system of constitutional justice in this country in the name of such hypotheticals—even if, even if they could exist with that degree of specificity that you suggested in your hypothetical.

MR. CORN-REVERE: I am afraid we are out of time. I would like to thank all of the panelists for their thoughtful participation and the audience. Thank you very much.

Thanks to Joyce Silver of Ellen Grauer Court Reporting.

Waits v. Frito-Lay, Inc.: A “Step Right Up” for the Right of Publicity

By Jeffrey H. Schulberg

The voice of Tom Waits has been described as “how you’d sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades. Late at night. After not sleeping for three days.”¹ Such a distinctive voice is protected from imitation by a commercial advertiser, as the Ninth Circuit Court of Appeals held in *Waits v. Frito-Lay, Inc.*² However, the groundwork for Waits’ victory was set four years earlier by fellow musician Bette Midler. Building on the Ninth Circuit’s decision in *Midler v. Ford Motor Co.*, Tom Waits forced the courts to extend even further the control that an artist has over his identity so that *any* voice that is widely known and distinctive is protected from voice misappropriation when the primary purpose behind the use is commercial exploitation, no matter what degree of fame or success the entertainer has attained.

Background

In developing an advertising campaign to introduce a new Frito-Lay product, Tracy-Locke found inspiration in a 1976 Tom Waits song, “Step Right Up,” itself a “jazzy parody of commercial hucksterism,” consisting of a succession of humorous advertising pitches.³ Tracy-Locke approached Waits about endorsing SalsaRio Doritos. However, he declined, maintaining a policy of not doing commercials.

Tracy-Locke auditioned a number of singers who could imitate Waits’ voice. One such applicant was told that his voice was too “bluesy” for what they were looking for. Another applicant was Stephen Carter, a professional musician and a Tom Waits fan who had consciously perfected an imitation of Waits’ voice.⁴ Carter’s imitation was so convincing that Tracy-Locke’s executives were concerned about legal problems from its use. They consulted the company’s attorney, who advised that although there was a risk of legal problems due to *Midler*, a recent case recognizing the protectability of a distinctive voice, a suit by Waits would not stand because there was no protectability of a singer’s style of music.⁵

The advertisement for SalsaRio Doritos ran on over 250 radio stations in 61 markets in September and October 1988.⁶ In November 1988, Waits sued Tracy-Locke and Frito-Lay, alleging claims of misappropriation under California law and false endorsement under the Lanham Act. A jury awarded Waits \$375,000 in compensatory damages and \$2 million in punitive damages for voice misappropriation, plus \$100,000 in damages for violation of the Lanham Act.⁷

The Ninth Circuit Court of Appeals upheld the trial court, reaffirming its previous decision in *Midler*, recognizing that, when a “distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.”⁸

Voice Misappropriation

The tort of voice misappropriation, commonly referred to as the “Midler tort” is a species of violation of the right of publicity, which constitutes the right of a person whose identity has commercial value to control the commercial use of that identity. When the voice is a sufficient indication of a celebrity’s identity, the right of publicity protects against its imitation for commercial purposes without the celebrity’s consent.

The Supreme Court recognized the authority of states to protect entertainers’ right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*,⁹ by endorsing a state right of publicity law to be in harmony with federal patent and copyright laws.¹⁰ Hugo Zacchini was an entertainer who performed 15-second “human cannonball” acts.¹¹ A freelance reporter videotaped his act, and the video clip was aired on the news.¹² The Supreme Court allowed Ohio to provide Zacchini with the “right to publicity value of his performance,”¹³ and stated that “the Constitution does not prevent Ohio from making a similar choice here in deciding to protect the entertainer’s incentive in order to encourage the production of this type of work.”¹⁴ However, most courts have been reluctant to grant relief to plaintiffs based on *Zacchini* unless the cause of action was premised on copyright law or the tort of commercial exploitation of name or likeness. At least one court has noted that *Zacchini* is a “narrowly drawn opinion effectively limited to its facts.”¹⁵

The Ninth Circuit was one such court. In *Midler*, Ford Motor Co. and Young & Rubicam, Inc. embarked upon an advertising campaign in which they tried to get original singers to perform their popular songs.¹⁶ After Bette Midler’s agent informed the agency that she was not interested (like Tom Waits, she had a personal policy of not doing commercials), the agency found Ula Hedwig, a long-time backup singer for Midler. The agency instructed Hedwig to sound as much as possible like the Bette Midler song, “Do You Want to Dance.” After the commercial spot aired, many people remarked to Midler that they thought she was the singer.¹⁷ Midler subsequently sued Ford and Young & Rubicam. After the Dis-

strict Court entered summary judgment in favor of the defendants, the Ninth Circuit overruled the decision and held that the imitation constituted voice misappropriation under California Law.¹⁸

Since Midler's claim did not fall under the California Civil Code § 3344, which protects only the use of a person's name, voice, signature, photograph or likeness, the Ninth Circuit had to find another common law remedy that was not precluded by the statute.¹⁹ Since a companion statute concerning deceased persons identified such rights as property rights, the court analogized from these statutes a common law right of publicity and concluded that in California, appropriation of the *attributes* of one's identity is a tort.²⁰ Thus, because a voice is distinctive, personal and "one of the most palpable ways identity is manifested," imitation was actionable.²¹ The court was obviously aware that it was breaking new ground, so it limited liability to instances where the professional singer has a distinctive voice that is widely known and is deliberately imitated to sell a product.²²

Distinguishing *Midler*

The *Waits* decision is much more than a sequel to *Midler*. The Ninth Circuit did not go so far as to hold that every imitation of a voice to advertise merchandise constitutes a cause of action, so the question continued to loom after *Midler* as to how far the court would go to broaden a celebrity's right of publicity, so that all celebrities had the right to maintain exclusive control over the commercial uses of their identities.²³

Many critics may attempt to distinguish the case from *Midler*, which created the California tort of voice misappropriation, and claim that *Waits* is not a proper case for recovery under the relatively new tort law.²⁴ Such critics may argue that the *Waits* defendants, unlike the *Midler* defendants, did not deliberately intend to imitate Waits in order to sell their product or that Bette Midler is a more well-known singer than Tom Waits and thus deserves more protection.²⁵

The first argument must fail however, because as in *Midler*, where the defendants' intent to imitate Midler was clear, the defendants in *Waits* similarly intended to imitate Tom Waits' voice. This was evidenced by the fact that Tracy-Locke had Waits' song "Step Right Up" in mind when it formulated the idea for the commercial.²⁶ In addition, Carter was recommended to the advertising agency as someone who could do a good Tom Waits imitation.²⁷

The second argument would also fail, as *Waits* stands to extend the right of publicity to protect lesser-known performers from voice misappropriation. Although Tom Waits has produced seventeen albums in the past twenty years, he has never had a top-ten hit, and neither he nor his music was recognized by the jury before trial.²⁸ In essence, Waits has proven little commer-

cial reputation of which to speak. Commentators have noted that "Waits is more a cult figure than a household name,"²⁹ and have even suggested that Waits use his award money to hire a good publicist, because no one seems to know who he is.³⁰ In other words, Tom Waits is no Bette Midler.

"It appeared to be very important to the courts in both the Midler and Waits decisions that the artists had refrained from participating in commercial endorsements."

The defendants in *Waits* argued that because Waits has not achieved the level of celebrity that Midler has, he is not well known under the *Midler* standard.³¹ However, the court rejects this argument, as it would have excluded from legal protection the voices of many popular singers who fall short of the level of super-stardom that Bette Midler has achieved.³² Waits' degree of fame should not be an issue, as long as he is "widely known"³³ which, the district court and the Ninth Circuit agree, the "great weight of evidence produced at trial indicates."³⁴

Finally, an entertainer of any degree, whether a well-known or a "prestige" artist, may be damaged by appearing in an advertisement when the performer has repeatedly staked a reputation on denouncing the commercialization of his or her craft.³⁵ It appeared to be very important to the courts in both the *Midler* and *Waits* decisions that the artists had refrained from participating in commercial endorsements. This seems to leave open the question of whether an entertainer who makes a living endorsing products, or "selling out," would be entitled to the same protection that Midler and Waits were given in their respective cases. Accordingly, one could argue that an entertainer who participates in numerous commercials cannot complain about damage to reputation when his or her voice is misappropriated in a commercial for which the artist did not give approval, as that artist may already be commonly known as one who regularly endorses products. However, the opinions in *Waits* and *Midler* can be expanded to require the law to protect a celebrity who *has* done endorsements in the past, but who believes that an advertiser appropriated the artist's likeness for a product that he finds distasteful or particularly shoddy.

Is *Midler* Constitutional?

Frito-Lay's strongest argument was that *Midler* was unconstitutional because it ignored *Sears Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting* which allowed courts to reject entertainers' challenges to imitations of their performances based on federal copyright

preemption. This argument failed for a number of reasons.

First, state laws are subject to preemption under the supremacy clause of the Constitution only if the state law “actually conflicts with a valid federal statute” or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁶ The *Zacchini* court had stated that “States may hold diverse viewpoints . . . in protecting intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress.”³⁷ Thus, although the 1976 Copyright Act was not yet in effect, the *Zacchini* court expressly mentioned the possibility of federal preemption, but held that the state right of publicity was not preempted by federal law.

Similarly, noting that Waits’ infringement claim concerned his voice, rather than the infringement of copyrightable subject matter such as a sound recording or musical composition, the court stated, as it had in *Midler*, that “a voice is not copyrightable. The sounds are not ‘fixed.’”³⁸ The *Midler* court, correctly considering a voice to be something inextricably linked to the intangible property rights of one’s identity and distinct from what may be protected sufficiently by copyright law, had found that a voice was not a work of authorship fixed in any tangible medium of expression, and therefore was not copyrightable subject matter.³⁹ Thus, since the elements of identity and likeness that are protected by the right of publicity do not fall within the subject matter of federal copyright law, the federal law does not preclude a celebrity from recovering for an infringement of his or her publicity rights.⁴⁰

In addition, a state right is not equivalent to copyright, and thus is not subject to preemption, if the state cause of action contains an element that is absent from the cause of action for copyright infringement.⁴¹ The court in *Waits* went even further than *Midler* had gone, stating that “the evolving common law rights of privacy, publicity and trade secrets . . . remain unaffected [by the preemption provision] as long as the causes of action contain elements, such as invasion of personal rights . . . that are different in kind from copyright infringement.”⁴² As the California right of publicity cause of action (in addition to being infringed by reproduction, distribution or display) also requires a minimum demonstration that the defendant profited by injuring the plaintiff’s intangible, publicly recognized identity, the right of publicity requires extra elements beyond those of copyright law, and therefore evades preemption.⁴³

Finally, Waits’ claim focused on whether the defendants had misappropriated Waits’ voice itself and not simply his style, and whether Waits’ voice was widely

known to give him protectable right in its use. Therefore, since these elements were different in kind from those in a copyright infringement case challenging the unauthorized use of a song or recording, Waits’ claim was not preempted by federal law.

Thus, the fact that voice is not a copyrightable subject matter, coupled with the fact that the California right of publicity requires elements beyond those required for infringement of copyright, proves that the California right of publicity is not preempted by federal law.

“The jury awarded \$2.5 million to a man who would have received only \$100,000 had he actually done the commercial himself.”

Expanding *Midler*: Damages

The *Waits* decision is much more than a sequel to *Midler*. In addition to extending the right of publicity to protect lesser-known performers from voice misappropriation, the damages award in *Waits* presents the greatest departure from the *Midler* decision. In *Midler*, the court propounded that a voice has economic value, and thus limited Bette Midler’s damage award to the market value of her voice.⁴⁴ In contrast, *Waits* broadened the scope of the damages spectrum and considered the propriety of “mental distress” damages.⁴⁵ *Waits* held that a right of publicity claim for damages results when the “appropriation of the identity of a celebrity . . . induce[s] . . . humiliation, embarrassment, and mental distress.”⁴⁶ In a show of compassion towards Waits and the mortification and humiliation that he suffered, the Ninth Circuit affirmed the compensatory damages awarded by the jury.⁴⁷

The Ninth Circuit also upheld the jury’s punitive damages award, noting that *Midler* provided notice to the defendants that professional singers have the right to control the commercial use of their distinctive voices. The jury awarded \$2.5 million to a man who would have received only \$100,000 had he actually done the commercial himself.⁴⁸ *Waits* reveals the Ninth Circuit’s continuing intent to broaden the areas of protection relating to a celebrity’s identity or persona.⁴⁹

Expanding *Midler*: The Nature of the Use

The *Waits* decision also represents a dramatic expansion of the publicity right defined in *Midler*. In the *Midler* case, Ford admitted that it tried to imitate Midler in a version of a song that she had made into a hit.⁵⁰ In *Waits*, Frito-Lay, like Ford, could not use the singer who had inspired the commercial idea. Unlike Ford, howev-

er, Frito-Lay's sound-alike was given an original tune to sing, a tune never associated with the plaintiff.⁵¹ In essence, the court expanded the publicity right in voice beyond association with a particular song to an association with a particular artist's distinctive voice.

In doing so, the court created a loophole by failing to identify with any certainty the aspect of a celebrity persona that has been infringed when another vocalist sings in a style that reminds a number of people of the celebrity.⁵² The prudent advertiser can avoid a right of publicity claim by simply saying that it wanted to hire someone who sang in a popular music style, with the kind of tone, color, style and verve appropriate for the musical composition.⁵³ Certainly, Tom Waits cannot sue everyone who sings in a "gravelly style" voice. If that were the case, then the singer that Frito-Lay rejected because his voice was too "bluesy" could sue Tom Waits, should Waits choose to sing in a "bluesy" voice.⁵⁴ This would also serve to restrain Waits from any experimentation with his style for fear of losing the court's protection.

Expanding *Midler*: Which Voices Are Protectable?

The *Midler* court focused on the "widely known" prong of the test, whereas the *Waits* court shifted the emphasis to the "distinctive" factor to decide which voices are protectable.⁵⁵ *Waits* held that a voice is distinctive if it is "distinguishable from the voices of other singers" and "has particular qualities or characteristics that identify it with a particular singer."⁵⁶ As a result, a plaintiff need only prove that the defendant imitated his or her "distinctive" voice to maintain a successful cause of action. In sum, *Waits* rendered the *Midler* test boundless, and paved the way for "disproportionate awards for cult celebrities."⁵⁷

The court in both cases took special notice of the fact that both *Midler* and *Waits* were asked to participate in the respective commercials but refused. However, it appears that even if *Waits* and *Midler* had not been invited to be in the commercials the court still would have found the defendants liable because they misappropriated voices that were "distinctive" and "widely known."⁵⁸ The court recognized in *Midler* that the circumstances surrounding the defendants' use may not matter "as long as the voice is a sufficient indicia of the celebrity's identity."⁵⁹ Thus, the fact as to whether or not the plaintiff was asked to be in the commercial, while important to the court in *Waits* and *Midler*, is not a crucial fact as long as the voice that is misappropriated is "distinctive" and "widely known."

Practical Concerns

There are many practical concerns arising from the *Waits* court's expansion of *Midler*. Bette Midler was

awarded \$400,000 in damages by the Ninth Circuit. Only four years later, Tom Waits was awarded \$2 million in punitive damages for voice misappropriation. Accordingly, the verdicts will discourage advertisers from using a previously common promotional tool.⁶⁰ Certainly, the size of *Waits*' judgment and the surprising development of the protection in vocal style justifies the caution of commercial producers and advertising agencies.

In addition, most popular artists are not as reluctant as *Midler* and *Waits* were to exploit their voices for uses with commercial products. Commercial endorsement contracts can involve millions of dollars and may represent a royalty stream far larger than that earned merely through performing. "It is reasonable to suppose that record companies and agents would at least consider the economic incentive of such potential commercial possibilities when deciding which artists to hire and promote."⁶¹ Thus, if Tom Waits has the sole right to use a "gravelly style" when singing, it is possible that agents and producers would avoid bringing artists into territory already staked out by a celebrity rather than run the risk of a lawsuit, which would result in fewer opportunities for vocalists whose styles are reminiscent of anyone famous.

While the First Amendment is unlikely to afford the defendant's commercial speech any protection in the typical right-of-publicity action, the Ninth Circuit briefly entertained the notion that a First Amendment defense might be available for the media when it reproduces likenesses or sounds, depending on the media's purpose behind using a person's identity.⁶² When the defendant's goods or services carry a message of public or social interest or constitute a form of entertainment, the defendant may have an argument that its usage of the plaintiff's identity is constitutionally protected.⁶³ Similarly, where the primary purpose of the defendant's goods or services is to disseminate information or ideas "concerning newsworthy events or matters of public interest," the First Amendment may provide immunity for the unauthorized use of a celebrity's identity.⁶⁴ However, if a celebrity's picture or persona is used merely to attract attention, "rather than in connection with a legitimate comment upon him or a subject of public interest with which he is associated," such use is not protected by the First Amendment.⁶⁵

Does Tom Waits Lose in New York?

What is most interesting about this case is that if it was brought in New York (the *other* entertainment capital of the world and the home of most major advertising agencies), Tom Waits might have lost. Under the New York approach to right-of-publicity cases, as codified in § 50 and § 51 of the New York Civil Rights Law, the statutory remedy is deemed exclusive—only appropri-

tions of an individual's name, portrait, picture, or voice are actionable under the right-of-publicity rubric.⁶⁶ In addition, at least one court has acknowledged that other characteristics existed—notably voice—by which one may readily identify a celebrity, but which the New York State Legislature had not included in the statute.⁶⁷

In contrast, California has enacted legislation which prohibits the misappropriation of an individual's "voice" or "likeness" for advertising or selling without the individual's consent.⁶⁸ Section 3344 of the California Civil Code provides that "any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising or selling . . . goods or services, without such person's prior consent . . . shall be liable."⁶⁹

"What is most interesting about this case is that if it was brought in New York (the other entertainment capital of the world and the home of most major advertising agencies), Tom Waits might have lost."

Under the California approach, the statutory remedy is not exclusive. California courts have reasoned that, "because advertising has evolved from its almost exclusive emphasis on pictures, print, and visual stimuli to its present electronic incarnation directed towards a myriad of senses, the right of publicity must be modernized as well."⁷⁰ As a result, a person's identity has increasingly been defined by these courts as encompassing any trait or characteristic that identifies a person, no matter how it is manifested.

Conclusion

Although one commentator called the Ninth Circuit's decision "starstruck and out-of-the-mainstream,"⁷¹ the decision in *Tom Waits v. Frito-Lay, Inc.* is a logical step in the evolution of intellectual property law, establishing a clear standard that protects musical performers from having their public personae appropriated and used by others for monetary gain.⁷²

At the same time, commercial interests are still left with a plethora of legitimate options in using popular music to advertise products. As long as such interests recognize and respect the media image rights of the performer, advertisers will have no fear of incurring liability. One might say the *Waits* decision represents a "step right up" in modern intellectual property law.

Endnotes

1. *Waits v. Frito-Lay Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).

2. *See id.* at 1093.
3. *See id.* at 1097. Also described as a "snappy patter song that bopped through an animated parody of trite phrases used for peddling commercial products."
4. *See id.* at 1098. The commercial's musical director warned Carter that he probably would not get the job because he sounded *too* much like Waits, which would pose legal problems (emphasis added). *See id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988), cert. denied, 503 U.S. 951 (1992).
9. 433 U.S. 562 (1977).
10. *Id.* at 573, 576–78.
11. *See id.* at 574.
12. *Id.*
13. *Id.* at 565.
14. *Id.* at 577.
15. *Rogers v. Grimaldi*, 702 F.2d 165 (2d Cir. 1982).
16. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).
17. *See id.* at 463.
18. *Id.* at 461–63. Midler did not bring a claim under the Lanham Act.
19. *See* Richard McEwen, *The Frito Bandito's Last Stand: Waits Rocks Performers' Rights into the Media Age*, 14 J.L. & Com. 123, 125 (1994).
20. *See id.* at 126.
21. *Midler*, 849 F.2d at 463.
22. *See* McEwen, *supra* note 19, at 127. *See also* 849 F.2d at 463.
23. Keith E. Lurie, *Waits v. Frito-Lay: The Song Remains The Same*, 13 Cardozo Arts & Ent. L.J. 187 (1994).
24. *See* Jennifer L. Howell, Comment, *When the Lifeblood of Competition Creates a Likelihood of Confusion: Waits v. Frito-Lay, Inc.*, 1 J. Intell. Prop. L. 353 (1994).
25. *See id.* at 367–68.
26. *Id.*
27. *Id.*
28. Paul Feldman, *Tom Waits Wins \$2 Million In Voice Theft Suit*, L.A. Times, May 9, 1990, at B1.
29. *Id.*
30. *See* Richard Harrington, *On The Beat—The Music Industry's Court Hits*, Wash. Post, May 30, 1990, at C7.
31. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992). The court rejected an instruction proposed by the defendants, which reflected their contention that Waits is a "prestige" artist, known only to music insiders and to a small but loyal group of fans. *Id.* While Waits may fall short of the super-stardom that Bette Midler has achieved, the court found that Waits has recorded more than seventeen albums and has toured extensively, playing to sold-out shows throughout the United States, Canada, Europe, Japan and Australia. In 1987, Waits received *Rolling Stone* magazine's Critic's Award for Best Live Performance and *SPIN* magazine listed him in its March 1990 issue as one of the ten most interesting recording artists of the last five years. *Id.* at 1097.
32. *Id.* at 1102.
33. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).
34. *Waits*, 978 F.2d at 1102. *See supra*, note 31.
35. *See* Patrick Buckley, Comment, *The Implications of Waits v. Frito-Lay for Advertisers Who Use Celebrity Sound-Alikes*, 68 St. John's L. Rev. 241 (1994).

36. *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982).
37. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 577–78 n.13 (citing *Kewanee Oil v. Bicorn Corp.*, 416 U.S. 470, 479 (1974)).
38. *Waits v. Frito-Lay, Inc.*, 978 F.2d at 1100.
39. See Sean Elliott, Comment, *Dancing Promotions, Dodging Preemption, and Defending Personas: Why Preempting the Right of Publicity Deprives Talent the Publicity Protection They Deserve*, 73 Notre Dame L. Rev. 1625 (1998). “The sounds are not fixed. What is put forward as protectable here is more personal than any work of authorship.” *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988). “A voice is as distinctive and personal as a face.” *Id.*
40. See Elliott, *supra* note 39, at 1648–49.
41. *Waits*, 978 F.2d at 1100.
42. *Id.*
43. See Elliott, *supra* note 39, at 1644.
44. *Midler*, 849 F.2d at 463.
45. See Lurie, *supra* note 23, at 190. Waits testified that when he heard the commercial, “this corn chip sermon,” he was shocked and very angry. *Waits*, 978 F.2d at 1103. These feelings “grew and grew over a period of a couple of days” because of his strong public opposition to doing commercials. *Id.* Waits testified, “It embarrassed me. I had to call all my friends, that if they hear this thing, please be informed this is not me. I was on the phone for days. I also had people calling me saying, Gee, Tom, I heard the new Doritos ad.” *Id.* Added to this evidence of Waits’ shock, anger, and embarrassment is the strong inference that, because of his outspoken public stance against doing commercial endorsements, the Doritos commercial humiliated Waits by making him an apparent hypocrite. *Id.*
46. *Waits*, 978 F.2d at 1103 (quoting *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 n.11 (9th Cir. 1974)).
47. See Lurie, *supra* note 23, at 189.
48. See *id.* at 190.
49. See *id.* at 189.
50. *Midler v. Ford Motor Co.*, 849 F.2d at 460.
51. See Russell A. Staments, Note & Comment, *Ain’t Nothin’ Like The Real Thing, Baby: The Right of Publicity and the Singing Voice*, 46 Fed. Comm. L.J. 347 (1994).
52. See *id.*
53. See *id.*
54. Waits has recorded a number of songs that are blues in nature.
55. *Midler v. Ford Motor Co.*, 849 F.2d at 463. See also Lurie, *supra* note 23, at 217–18.
56. *Waits v. Frito-Lay, Inc.*, 978 F.2d at 1101.
57. Lurie, *supra* note 23, at 218.
58. *Waits*, 978 F.2d at 1098.
59. *Midler*, 849 F.2d at 463.
60. Suzan Bibisi, *Vocal Theft Leaves Ad World Speechless*, San Diego Union-Trib., Jan. 27, 1993, at E-8.
61. Staments, *supra* note 51, at 368–69.
62. *Midler v. Ford Motor Co.*, 849 F.2d at 462.
63. Bruce P. Keller & David H. Bernstein, Comment, *The Right of Publicity: Towards a Federal Statute?*, 532 PLI/Pat 413, 439–41 (1998).
64. *Id.* at 441.
65. *Id.*
66. N.Y. Civ. Rights Law §§ 55-51 (McKinney 1976). See Keller & Bernstein, *supra* note 63, at 438.
67. *Onassis v. Christian Dior-New York*, 122 Misc. 2d 603, 472 N.Y.S.2d 254, 261 (Sup. Ct., N.Y. Co. 1984).
68. Cal. Civ. Code § 3344 (West Supp. 1989).
69. *Id.*
70. *Id.*
71. Felix H. Kent, *California Court Expands Celebrities’ Rights*, N.Y.L.J., Oct. 30, 1992, p. 3.
72. See McEwen, *supra* note 19, at 139–40.

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Publication, Restoration and Reliance Parties: A Tale of Art and Statutory Construction in the Southern District of New York

By Robert W. Clarida

In his recent decision in *Hoepker v. Kruger*,¹ Judge Alvin Hellerstein of the Southern District of New York applied the Copyright Act to hold that noted artist Barbara Kruger did not infringe the copyright in a 1960 German photograph by plaintiff Thomas Hoepker, despite incorporating a large portion of the Hoepker work into her 1990 silk screen, “Untitled 1990 (It’s a small world but not if you have to clean it).” Moreover, the Whitney Museum, the M.I.T. Press, the Los Angeles Museum of Contemporary Art, Channel 13 (WNET) and other named defendants were absolved of liability with respect to their sale or display of the Kruger work, or of books or gift shop items reproducing the work. Unlike similar cases, however, the decision did not rest on the fair use defense or the First Amendment rights of artists, but on a seldom-litigated provision of the Copyright Act, § 104A, under which Kruger’s work was not even a technical violation of Hoepker’s U.S. copyright. This article will describe the doctrine of “simultaneous publication” which caused the Hoepker work to lapse into the public domain in 1989, the restoration of Hoepker’s U.S. copyright in 1996 under § 104A and the dispositive effect of § 104A(d), which, notwithstanding restoration, provided the defendants in *Kruger* with a complete defense to the allegations of infringement.

ACT I: Simultaneous Publication

The *Kruger* court found that the plaintiff’s allegations, even if true, did not state a cause of action for copyright infringement and dismissed the claim with prejudice. The complaint alleged that the Hoepker photo was first published in *Foto Prisma*, a German magazine, in or about 1960, “in strict conformity with the provisions and all laws governing copyright in the United States and Germany.”² There was no allegation, however, that Hoepker had registered or renewed the work in the U.S. Copyright Office prior to commencing the action in 2000. The work was never published in the United States. From these allegations alone, it was established as a matter of law that the Hoepker work fell into the public domain in the U.S. at the end of 1988, under the doctrine of simultaneous publication.

Because Germany and the U.S. were both members of the Universal Copyright Convention (U.C.C.) at the time of the publication of the Hoepker photograph,³ the

plaintiff’s photograph was deemed simultaneously published in the United States under Article II(1) of the U.C.C., which provides that “[p]ublished works of nationals of any Contracting State and works first published in that State shall enjoy in each Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.”

Thus Judge Hellerstein explained that

in 1960, when Hoepker gained a German copyright, he simultaneously gained a copyright in the United States. . . . [The U.S. copyright] ran for a term of 28 years. Hoepker undisputedly did not renew that copyright before the end of 1988. American copyright protection ended at that point, and the work lapsed into the public domain in the United States.⁴

This conclusion follows directly from the result reached by Judge Batts of the Southern District in *Barris v. Hamilton*.⁵ In *Barris*, the plaintiff’s Marilyn Monroe photographs were first published in the U.K. in 1962, in a newspaper which the court presumed to have carried proper U.S. notice. The court noted that because the U.S. and the U.K. were both members of the Universal Copyright Convention in 1962, publication in the U.K. had the same effect as domestic publication—for example, it triggered statutory protection under the U.S. Act and caused the 28-year renewal clock to begin running.

Unfortunately, the plaintiff in *Barris* failed to file for renewal in 1990, thus permitting the copyright to lapse. The plaintiff argued that his failure to renew in 1990 should not be to his detriment, however, because in 1986, prior to the end of the term, he had registered the photos with the U.S. Copyright Office. This “premature renewal” was rejected by the court as untimely under the 1909 Act, which only allowed renewal to occur in the final year of the first term: “That plaintiff was premature, as opposed to delinquent or totally remiss, does not alter the outcome.”⁶ Accordingly, the plaintiff’s copyright infringement claim was dismissed on summary judgment.⁷ In *Kruger* the status of plaintiff Hoepker’s work was identical: He did not allege that any U.S. copyright renewal was filed in or before the end of 1988. Therefore the work fell into the public domain in the U.S. at that time.

ACT II: Restoration

Thus, as of January 1, 1989, the Hoepker photo was in the public domain in the U.S. and, under the law then in effect, could not ever again be subject to copyright protection in this country. When Barbara Kruger created her 1990 silk screen, therefore, she had as much right to incorporate Hoepker's photo as to incorporate the Mona Lisa.

On December 8, 1994, however, President Clinton signed the Uruguay Round Agreements Act (the Act),⁸ which was the implementing legislation for the international trade agreement known as the General Agreement on Tariffs and Trade (GATT). There were three substantive copyright provisions in the Act, but by far the most significant was one added as 17 U.S.C. § 104A, which automatically restored copyright in thousands, if not millions, of foreign works that had previously been in the public domain in the U.S.

The statute defines a "restored work" as an original work of authorship that is *not* in the public domain in its source country due to expiration of term, but *is* in the public domain in the U.S. due to

- (a) noncompliance with U.S. formalities, including failure to renew, lack of proper notice or non-compliance with manufacturing requirements; or
- (b) lack of subject matter protection in the case of sound recordings fixed before February 15, 1972; or
- (c) lack of national eligibility when first published; *and*
- (d) which has at least one author or rights holder who was, at the time of creation, a national or domiciliary of a country which is a member of the Berne Convention ("Berne") or the World Trade Organization (WTO).

If the work is published, it must have been first published in a Berne or WTO country *and not* published in the U.S. during the 30 days following publication in such country.

Hoepker's photograph fits this definition. As of the relevant date, it was in the public domain in the U.S. for lack of timely renewal, but was still under copyright in its country of origin (Germany) which is a Berne/WTO member. Finally, the complaint itself alleged that the work was first published in Germany and never published in the U.S.

A recent comment on *Kruger* in the *Copyright Law Journal*⁹ faults the *Kruger* court for applying the restoration provision of § 104A to any work deemed "simultaneously published" in the U.S., as Hoepker's was, opining that such simultaneous publication under the

U.C.C. is inconsistent with restoration under § 104A. This observation seems to miss the distinction between "publishing" a work in the U.S., which is defined under § 101 as the distribution of copies to the public, and the doctrine of "simultaneous publication" under the U.C.C., which merely grants to published works from member states "the *same protection* as [the member country] accords to works of its nationals first published in its own territory."¹⁰ Thus Judge Hellerstein explained that "in 1960, when Hoepker gained a German copyright, he simultaneously *gained a copyright* in the United States,"¹¹ not that the Hoepker work was actually published here at that time, for purposes of § 104A.¹²

Hoepker's work was therefore restored to copyright automatically on January 1, 1996, with no need for any filing or other action on Hoepker's part, and was restored to the term it would have had if it had not entered the public domain in the U.S. Because the work was initially published in 1960, that translates into a valid U.S. copyright in the image until 2055.

ACT III: Reliance Parties

If Hoepker has a valid U.S. copyright until 2055, why was his infringement action dismissed? The short answer is that Kruger, and all of the other defendants using her image with her consent, were "reliance parties" under § 104A, entitled to continue making use of the Hoepker work despite its restoration. Under § 104A, enforcement of newly-restored copyrights differs, depending on whether the owners seek to enforce them against a new infringer or against a so-called "reliance party." Against new infringers, who acquired or began exploiting the restored work after the new law was adopted, a restored copyright is indistinguishable from any other copyright and the owner has exactly the same rights and remedies as with any other protected work.

Parties who began exploiting the restored work prior to the date of enactment of § 104A, however, or who prepared a derivative work prior to that date, are termed "reliance parties" under the Act. Against reliance parties, the owner of the work must file a Notice of Intent to Enforce the restored copyright (NIE) before pursuing an infringement action. If the owner of the restored work filed an NIE with the Copyright Office during 1996 or 1997, that filing constitutes constructive notice against any reliance party, known or unknown. If no such filing was made in those two years, actual notice may be served on a particular reliance party at any time.

Upon receiving notice, whether directly or through the Federal Register, the reliance party must cease *reproducing* the restored work. The reliance party may continue to sell off stock of the work, however, or publicly perform or display the work, for 12 months after the

receipt of the NIE. Under § 104A(d)(3), an additional provision is made for reliance parties, like Barbara Kruger, who create and exploit *derivative* works based on or incorporating the restored works, where the derivative works were created prior to the end of 1994.¹³ After receiving notice, and even after the 12-month grace period has expired, these parties may continue to exploit their derivative works for the entire duration of the restored copyright, upon payment of “reasonable compensation” to the owner of the work, to be determined by agreement of the parties.

Moreover, the statute and its legislative history clearly establish that Kruger’s reliance party status, both before and after the service of any NIE, also inures to the benefit of all of the other named defendants in the action, because all were her licensees, using the Kruger derivative work with her consent.¹⁴

Finally, it was undisputed in *Kruger* that plaintiff Hoepker had never served or filed an NIE against any of the defendants with respect to his restored copyright. As this goes to press, he still has not done so. Therefore, the court found that Hoepker could not maintain an action for copyright infringement with respect to any of the defendants. Because the accused work is a pre-1994 derivative work, it is also clear that any possible future action, after the service of a proper NIE, would be limited to a claim for “reasonable compensation” under § 104A(d)(3).

Conclusion

The treaties and statutes at issue in *Kruger* are not the stuff of everyday copyright litigation, but the result is fully consistent with the equitable considerations built into the restoration provisions of § 104A. A reliance party like Kruger, having created a derivative work at a time when the underlying matter was in the public domain, should not be precluded from fully exploiting that derivative work after restoration. Such exploitation, moreover, should not be restricted to the media in which Kruger herself can work effectively, but should extend to projects carried out by Kruger’s licensees, such as the museums and publishers named in the action. In interpreting the statute to arrive at this conclusion, the court reached a result, which should serve as a model for future disputes of this kind.

Endnotes

1. *Hoepker v. Kruger*, 2001 U.S. Dist. LEXIS 13043 (S.D.N.Y. Aug. 28, 2001).
2. Complaint at ¶ 24.
3. Universal Copyright Convention at Geneva, Sept. 6, 1952. Entered into force Sept. 16, 1955. TIAS 3324; 6 UST 2731. *See also* Arpad Bogsch: *The Law of Copyright Under the Universal Copyright Convention* (3d ed., R.R. Bowker Co., New York, 1972) at 327 (Germany) and 636 (United States).
4. 2001 U.S. Dist. LEXIS 13043, at *4-5.
5. *Barris v. Hamilton*, 51 U.S.P.Q.2d 1191 (S.D.N.Y. 1999).
6. *Id.* at 1195.
7. The plaintiff’s attorneys in *Kruger* also represented the plaintiff in *Barris*.
8. P.L. 103-465.
9. Vol. XV No. 6 at 71-72 (November-December 2001).
10. 2001 U.S. Dist. LEXIS 13043, at *4 (emphasis added), quoting U.C.C. Art. (II)(1).
11. *Id.* (emphasis added).
12. If the comment’s points were accepted, moreover, Hoepker would be left with no U.S. rights at all in his photo, rather than the limited rights he enjoys for his restored U.S. copyright under § 104A.
13. The *Copyright Law Journal* comment, *id.*, also faults the *Kruger* decision for finding that Barbara Kruger’s reliance party status was determined as of the end of 1994, noting that “the effective date of copyright restoration is January 1, 1996.” While 1996 is indeed the effective date of restoration, after which the owner of a restored copyright can begin enforcing it, § 104A(d)(3) states that a reliance party who creates a derivative work “before the date of the enactment” of § 104A is entitled to a special exemption from normal enforcement. The date of enactment of § 104A was December 8, 1994. This “early cutoff” of reliance party status was designed to ensure that pirates were not given a free pass to begin creating new derivative works in the period between the end of 1994 and the start of 1996.
14. *See* § 104A(h)(4)(C) (any “successor, assignee or licensee” of a reliance party is also a reliance party); Statement of Administrative Action, House Document No. 103-316 at 997 (even after receiving NIE, any reliance party may “sell off previously manufactured stock, publicly perform or publicly display the work, or authorize others to conduct these activities”) (emphasis added).

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Cameras in the Federal and New York Courts—Still Unavailable

By Douglas P. Jacobs and Jennifer Ramo

Seeking to vindicate the right of the press to access the federal judicial system, Court TV (later joined by C-Span) petitioned the U.S. District Court for the Eastern District of Virginia to intervene in the proceedings against suspected 20th hijacker Zacarias Moussaoui,¹ and to permit Court TV to record and broadcast the trial. To accomplish this, Court TV asked Judge Leonie M. Brinkema to find Rule 53 of the Federal Rules of Criminal Procedure (FRCP)² and Local Rule 83.3 unconstitutional.³

While permitting intervention, Judge Brinkema denied the request to televise the proceedings. The court held that the rules were not only constitutional, but that they gave her no discretion to permit cameras in the courtroom. The court also concluded that, even if the governing rule was unconstitutional and if she had the discretion to allow cameras, the danger of harm to the proceedings and participants far outweighed any gain the public might accrue as a result of viewing the trial. Finally, in *dicta*, Judge Brinkema stated that the issue itself was a political and social question that would be best left to the Congress and the Federal Judicial Conference. Though Court TV lost this battle, it hopes to win the long, and now historical, war.

Cameras in Federal Courts

As the Supreme Court stated in *Globe Newspaper Company*,⁴ the right of access to trials rests on the necessity that in a democracy, the public, with the press as its surrogate, knows as much as is possible about how the judicial process functions.⁵ Given that those constitutional principles have been embedded in First Amendment jurisprudence for two decades, Court TV asked of the *Moussaoui* court what possible basis there could be for distinguishing in every single case between television cameras, the tools of Court TV; and pens, pencils, banks of reporters and sketch artists (with pads as large as furniture); the tools of the other media.

Though the answer in the *Moussaoui* case was only that television cameras are different, the general movement has been leaning towards seeing cameras as real tools of the press. In addition, the broadcast itself is becoming a necessary extension of the courtroom, expanding it beyond its physical capacity.

The assertion of generalized fears as a basis for prohibiting the press from covering trials has long been deemed unconstitutional.⁶ The result should be no different in the context of television.⁷ As the Court has

said, the press' role in the judicial process is crucial. It acts as a "surrogate" for the people who cannot attend,⁸ and its presence and its ability to transmit what occurs in the courtroom are essential to vindicating the overall goal—in the information age—of keeping the courtroom "public property."⁹

The precedent for banning cameras in federal courts was set in 1965, in *Estes*, when the Supreme Court held that the First Amendment right of access did not extend to protecting television access to criminal trials.¹⁰ However, in Justice Harlan's concurring opinion, he explicitly raised the possibility that with improvements in technology, the Court might extend access in the future. The ruling noted that a large part of the reluctance to allow television cameras into courts had to do with the unwieldy nature of the medium. In the mid-1960s, the televising of a courtroom proceeding would have required a camera weighing several pounds with a large boom microphone, a soundman and lights. Today, in contrast, technology allows for a trial to be covered with a remote-controlled camera located discreetly in the back of a courtroom, with no lights required and microphones as small as a witness's thumb.

But for a brief experiment in the mid-1990s and except for the federal courts in New York, generally the situation in the federal courts has remained unchanged since 1965. In 1996, both the Eastern and Southern Districts of New York ruled that the Federal Judicial Conference did not have statutory authority to decide whether cameras could be permitted in federal trial courts.¹¹ On the authority of the then Rule 7 of the Southern and Eastern Districts of New York, cameras were permitted in civil proceedings, which included trials. (Criminal proceedings are covered by Rule 53 of the Federal Rules of Criminal Procedure, a rule authorized by Congress, which bars televised criminal trials.) Currently, however, Rule 1.8 of the Southern and Eastern Districts of New York permits judges to decide for themselves on a case-by-case basis as to whether to permit the presence of cameras in their civil trials. However, this situation is unique to the locale.

The answer to whether access to television cameras will ultimately be permitted in the courtroom apparently rests with Congress. In its last two sessions, the House passed legislation permitting camera access, subject to certain rules and guidelines, but the Senate did not follow suit. In this session, however, the Senate Judiciary Committee has favorably voted out of com-

mittee S. 986, which would give federal district judges discretion to allow particular trials to be televised. Similar legislation is pending in the House, H.R. 2519, but it is unlikely to be acted upon until the Senate passes S. 986.¹²

Cameras in State Courts

In 1965, when *Estes* was decided, 49 states had provisions, such as § 52 of the New York State Civil Rights Law, that banned cameras in courtrooms. Today, the situation is all but reversed. Cameras are permitted in courts, in one form or another, in all 50 states. Forty states permit trials to be televised and 38 of them permit criminal trials to be televised. Indeed, the experience of New York's experiments has been played out in numerous other jurisdictions.

In the past two-and-a-half decades, 29 jurisdictions have formally studied and evaluated the effects of televising legal proceedings, and some have conducted more than one such evaluation. As with the studies from New York, they have examined the impact of televised trials on the dignity of the proceedings, the administration of justice and the effect of the cameras on trial participants, including witnesses, jurors, attorneys, judges and other interested parties. The evidence assembled by all of these studies leads to the same conclusion as the four conducted in New York: Televised trials do not disrupt proceedings or impair the administration of justice, and they provide substantial benefits to the public.

Take, for example, the Florida system, for which constitutionality was upheld by the Supreme Court in *Chandler*. In 1977, the Florida Supreme Court initiated a pilot program allowing "the electronic media [to] televise and photograph" civil and criminal judicial proceedings in all courts of the state of Florida, subject to specific restrictions on types of equipment, light and noise levels, camera placement and audio pickup, and subject to the "reasonable orders and direction of the presiding trial judge in any such proceeding."¹³ In conjunction with the Florida experiment, "all media participants in the program, all parties hereto, and all participants and judges" were requested to furnish to the Florida Supreme Court a "report of their experience under the program."

When the Florida experiment ended on June 30, 1978, the Florida Supreme Court received and reviewed briefs, reports, letters, resolutions, comments and exhibits. The court conducted its own independent, separate surveys of witnesses, jurors, court personnel (excluding judges) and attorneys. Responses were sought from individuals who had participated in or were associated with trials in which audio-visual coverage had been permitted, and all responses were to remain anonymous. Prior to their distribution, the ques-

tionnaires were reviewed by the Supreme Court, the Judicial Planning Unit of the Office of the State Courts Administrator and interested academicians. Finally, the Florida Conference of Circuit Judges conducted a separate survey of trial court judges who had participated in televised proceedings.¹⁴

After reviewing this material, the Florida Supreme Court concluded that the Florida Code of Judicial Conduct should be amended to permit access to the courtrooms of the state by electronic media subject to standards adopted by the Court and subject also to the authority of the presiding judge at all times to control the conduct of the proceedings before him to ensure a fair trial to the litigants.¹⁵

Cameras in New York State

Despite the prior decade of successful experiments, cameras have been banned from New York's trial courts for over four years. Section 52 of the state Civil Rights Law bars "the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory processes is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state." As the statute prohibits the televised coverage of any proceeding in which compelled testimony "may" be taken, and because all trials involve the potential for such testimony, § 52 constitutes a *per se* ban on cameras in New York's trial courts. Violation of the statute is a misdemeanor, and so carries with it the possibility of imprisonment.

Between 1987 and 1996, the New York legislature lifted the ban of § 52 and permitted a series of "experiments"¹⁶ in which trial court proceedings were televised through the creation of § 218 of the Judiciary Law. In reports that were commissioned by the legislature, those experiments were declared to have been unqualified successes. However, for reasons more to do with politics than principle, the legislature decided against doing away with § 52 permanently. On July 1, 1997, pursuant to the sunset provision of § 218, New York trials could no longer be televised.

On September 4, 2001, Court TV took the long-simmering battle for cameras in New York State trial courts to the next—and, if it succeeds, final—level. It filed a Declaratory Judgment action against the state, the only avenue left. In its lawsuit against the state (filed in the Supreme Court of New York County, and also naming as defendants the Governor, the Attorney General and the District Attorney of New York County), Court TV asserts that § 52 is unconstitutional under Article 1, § 8 of the New York State Constitution and the First Amendment of the United States Constitution.¹⁷ The central point of the lawsuit is as simple as it is common-

sensical: At the dawn of the 21st century, where New York citizens obtain most of their information about government from television, it is simply absurd—and unconstitutional—to permit ourselves to be governed by a statute that was enacted a decade before the Nixon-Kennedy debates—a statute that bars the televising of every trial, in every instance.

Court TV's filing of a lawsuit is not the first time it or other members of the press have sought to establish a constitutional right to televise trials. In 2000, after more than two years without a single trial televised in New York, four New York City police officers were accused of murdering New York City resident and West African immigrant Amadou Diallo.¹⁸ (The trial was transferred to Albany County to avoid the effect of pre-trial publicity.) Joseph Teresi, the presiding judge, realized not only the societal importance of the case, but also the need for public assurance of integrity in the judicial process. He granted Court TV permission to intervene in the criminal case and allowed the filing of an application to broadcast the trial. In granting the application to televise the proceedings, Judge Teresi—as he had to do in order to permit the case to be televised—declared § 52 unconstitutional, thus removing the bar to his ability to use his discretion to allow a camera in his courtroom.

Judge Teresi vehemently underscored his views on § 52 by portraying the continued existence of that statute, and the death of § 218, as “the failure of the Legislature to maximize the press and the public’s legitimate constitutional access to the courts.”¹⁹ However, while the door was opened for the return of cameras to New York courts, the conclusion was not unanimous. Judges throughout the state thereafter independently reached their own conclusions about § 52, with some declaring it unconstitutional and others upholding it.

Why, then, did Court TV sue the state of New York? Following Justice Teresi’s decision, Judge William Bristol of Rochester County Court also struck down § 52 and granted a request to televise one of the early death penalty cases in New York. However, on appeal, the Appellate Division reversed.²⁰ It ruled that (a) no court had ever held that a constitutional right to broadcast trials existed—the court ignored, or deemed illegitimate, Justice Teresi’s decision—and (b) because that was so, those seeking to televise had no standing to intervene to ask permission to do so.

This procedural ruling, which the New York Court of Appeals declined to consider, removed the central method used by the New York press, albeit on a case-by-case basis, to obtain consideration of its requests for access. (It was, in fact, an implicit rejection of the manner in which the press always obtains access to proceedings, not merely televised access. The same procedure was followed in *Moussaoui*.) Further, the *Santiago*

court held that the only method to challenge § 52’s constitutionality was via a declaratory judgment action against the state, a procedure set up by the legislature itself. Court TV, in effect, was invited to bring its lawsuit. Moreover, if it wanted to recapture the principle of open trials vindicated by Judge Teresi’s decision in the *Diallo* case, it had no choice.

The Future of Camera Access in New York and Federal Courts

Based on its failure to resolve this debate since 1996, it would be more than optimistic to expect the New York legislature to act on this issue. The future of camera access in this state is likely going to be written by the courts. Quite the reverse is true in the federal system. With the federal rules firmly set against cameras, and with the courts expressing no interest in changing those rules (even individual Justices of the Supreme Court have repeatedly expressed their negative views of camera access), change at the federal level must come from Congress. With the Senate Judiciary Committee’s recent approval of S. 986, which gives federal judges the power to permit photography, electronic recording, broadcasting and the televising of court proceedings, it appears that progress is being made. Though the bill, if made into law, would lapse after several years, it would constitute an important gain for camera access advocates.

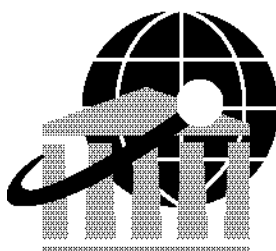
While the presence of cameras in federal courtrooms remains extremely limited, one can see legislative and judicial movement on both the federal and state fronts. We can only hope that as technology improves, the perceived dangers of widespread publication of the judicial process will diminish. Then we will be able to fully exonerate the public’s right to fully access that which goes on in our courtrooms.

Endnotes

1. *United States v. Moussaoui*, __ F. Supp. 2d __, 205 F.R.D. 183 (2002).
2. FRCP 53 currently bars electronic and photographic coverage of “judicial proceedings from the courtroom” in criminal cases.
3. E.D. Va. R. Crim. P. 83.3(a) entitled “Photographing, Broadcasting, and Televising in Courtroom and Environs,” provides that “[t]he taking of photographs and operation of tape recorders in the Courtroom or its environs, and radio or television broadcasting from the Courtroom or its environs during the progress or in connection with judicial proceedings . . . is prohibited. . . .”
4. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).
5. “[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole And in the broadest terms, public access to criminal trials permits the public to participate in and serves as a check upon the judicial process—an essential component in our structure of self-government.” *Id.*

6. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) (The “First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant” of a fair trial).
7. To be sure, the presumptive right to televise must be weighed against the sanctity and fragility of the judicial process, and the right of the participants to a fair and unaltered proceeding.
8. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980).
9. *Craig v. Harney*, 331 U.S. 367, 374 (1947).
10. *Estes v. Texas*, 381 US 532, (1965).
11. See, e.g., *Marisol A. v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996); *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).
12. See H.R. 2519 (int. July 17, 2001); S. 986 (int. June 5, 2001).
13. *In re Petition of Post-Newsweek Stations*, 347 So. 2d 402, 403 (1977).
14. *In re Petition of Post-Newsweek Stations*, 370 So. 2d 764, 767-68 (1979).
15. Numerous other studies by and of other jurisdictions’ experience with courtroom cameras have reached results similar to those of Florida, including California (in 1981 and again in 1996 after the trial of O.J. Simpson). Among them are: Alaska (1988), Arizona (1983), Arkansas (1982), Connecticut (1983), Delaware (1981), Hawaii (1982, 1985), Illinois (1988), Iowa (1984), Kansas (1984, 1985), Louisiana (1979), Maine (1993), Maryland (1980), Massachusetts (1982), Michigan (1977, 1989), Minnesota (1982), Montana (1977), Nevada (1981), New Jersey (1985, 1991), North Carolina (1985), Ohio (1978, 1980, 1990), Oklahoma (1978), Rhode Island (1981, 1983), Vermont (1984), Washington (1975, 1978) and Wisconsin (1979).
16. See, e.g., *Report of the Chief Administrative Judge to the Legislature, the Governor, and the Chief Judge of the State of New York on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings*, March 1999; *In re Petition of Post-Newsweek Stations, Inc.*, 370 So. 2d 768, 775 (Fla. 1979) (finding that, after a one-year experiment, concern that cameras in the courtroom would negatively affect lawyers, judges, witnesses or jurors was “unsupported by any evidence”).
17. Court TV asserts the argument that Rule 52 is unconstitutional, if anything, and stronger under the New York State Constitution versus the United States Constitution. *Immuno AB v. Moore-Jankowski*, 77 N.Y.2d 235 (1991). It grants the right to “freely speak, write, and publish” and bars any state action that serves to “restrain or abridge the liberty of speech or of the press.” *O’Neill v. Oakgrove Construction Inc.*, 71 N.Y.2d 521, 529 n.3, 528 N.Y.S.2d 1, 523 N.E.2d 277 (1988). This “expansive language” and “the consistent tradition in this State of providing the broadest possible protection to the ‘sensitive role of gathering and disseminating news of public events’” have led the New York Court of Appeals to rule that Article I, § 8 “is often broader than the minimum required by the First Amendment,” calling for “particular vigilance by the courts of this State in safeguarding the free press against undue interference.” *Id.*
18. *People v. Boss*, 261 A.D.2d 1; 701 N.Y.S.2d 342 (1999).
19. 701 N.Y.S.2d at 893, 895.
20. *Santiago v. Bristol*, 273 A.D.2d 813, 814, 709 N.Y.S.2d 724, 726 (4th Dep’t 2000).

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Folklore: Has Its Time Come?

By Alan J. Hartnick

Diversity has expanded beyond Western horizons. The theory is that there is no predominant and superior culture. Therefore, there is no longer any hierarchy among diverse cultures because the prevailing attitude is that *all* cultures have equivalent aesthetic values. Diversity, then, has called Western values into question. More important, multiculturalism has revised old patterns of exclusion and brought voices into the mainstream that have not been there before.

If uncopyrightable databases may be protected, as the developed nations believe, then why not protect “folklore,” as the developing nations believe? In the absence of armies, the poaching of the white colonial elephant hunter is over!

What is “folklore” or “traditional knowledge”? Is it an elastic term that will cause endless disputes and litigation? Is the “public domain” gone? Is a children’s book based on Ashanti myths covered? Must Paul Simon pay royalties on a South African native beat that he incorporated in the album *Graceland*?

The African group, in a submission to the World Intellectual Property Organization (WIPO),¹ defined traditional knowledge as “that held by members of a distinct culture and/or sometimes acquired by means of inquiry peculiar to that culture, and concerning the culture itself and the local environment in which it exists.” According to such definition, indigenous knowledge fits neatly in the traditional knowledge category, but traditional knowledge is not necessarily indigenous.

Traditional knowledge is therefore dynamic and is transmitted from generation to generation. It is, as the Africans say, the totality of all knowledge and practices, whether implicit or explicit, used in the management of the socioeconomic and ecological facets of life. Folklore, representing the artistic heritage developed by the community, is part of traditional knowledge.

It is difficult to be precise with such a laundry list definition. Notwithstanding, there has been international recognition of traditional knowledge before an enlarged audience, whatever traditional knowledge may be.

International Recognition

One hundred and eighty-one nations have signed the 1992 Convention on Biological Diversity.² The United States has signed but has not ratified. Article 8(j) contains the provision that each Contracting Party shall, as far as possible, “subject to its national legislation, respect, preserve, and maintain knowledge, innovations

and practices of indigenous and local communities embodying traditional lifestyles as is.”

There are a number of limitations in Article 8(j). The protection is subject to national legislation, and requires “respect” of such knowledge, rather than full protection. Even though indigenous and local communities have no rights in traditional knowledge, this does represent the beginning of a consensus.

The December 1996 WIPO Performance and Phonogram Treaty, acceded to by the United States, represents another consensus. In Article 2, Definitions,³ “performers” are defined as actors and other persons “who act, sing, . . . or otherwise perform literary or artistic works or expressions of folklore.” Again, “folklore” has been recognized.

In the preparatory meetings for the World Trade Organization Seattle Ministerial Conference of 1999, a number of groups of countries submitted proposals that would allow *sui generis* protection for the traditional knowledge of local or indigenous communities.⁴ This again elevated to an international level the national precedents for such protection, such as the laws of Ghana, Nigeria, Tunisia, Venezuela, Brazil and the Philippines.

The Merck Agreement

In 1991, there began a collaboration between Merck & Co., Inc. and Costa Rica’s National Biodiversity Institute (INBio).⁵

The terms of the agreement gave Merck access to a limited number of plant, fungal and environmental (soils, sediments, vegetation, water, insects and dung) samples from Costa Rica’s protected areas for scientific analysis to determine their viability as potential drug candidates. In turn, INBio received financial resources to support its ongoing effort to identify and classify Costa Rica’s diverse biological species and to demonstrate the socioeconomic importance of biodiversity conservation.

If any samples result in a marketed product, INBio and the Costa Rican government will share in the royalties. Although the formal agreement has expired, Merck continues to maintain a positive relationship with INBio. This agreement represents a significant breakthrough in the sharing of the benefits that result from the cooperation of positively exploiting local resources.

The United States government agency that has taken the lead in bioprospecting is the National Cancer Institute (NCI) of the National Institutes of Health. The NCI is involved in several ongoing overseas bioprospecting

efforts, including collaborative projects in Brazil, Cameroon and Suriname. Countries hosting these projects can expect financial rewards for their citizens, investment in the research of priority diseases, a share in royalties from the sales of drugs and the strengthening of local institutions engaged in research and traditional medicine. This policy matches the U.S. government's bioprospecting policy concerning Yellowstone Park, in which the U.S. received payment from Diversa, Inc. for sample collecting and collaborative research.

The hit rate from bioprospecting, according to a paper entitled "United States Bioprospecting Policy" by Dr. Robert Wolkow of Pfizer, Inc., is extremely low, while the transaction costs are quite high. The Philippines have developed clear guidelines for bioprospecting activities, while other countries, like Brazil and Columbia, have increased regulations, thereby hardening their positions and discouraging foreign interest. The future of bioprospecting may be made more secure under the umbrella of the United Nations Conference on Trade and Development.

Current Developments

In 1998 and 1999, WIPO conducted fact-finding missions in 28 countries to identify the intellectual property needs and expectations of traditional knowledge holders. At WIPO's 26th General Assembly Session in the Fall of 2000, member states established a special body, the Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, to discuss intellectual property issues relating to generic resources, traditional knowledge and folklore. This body held its two sessions in Geneva from April 30 to May 3, and from December 10–12, 2001. The WIPO Report of the first session runs to 74 pages!⁶

It is noteworthy that the official position of the delegation from the United States is that "there were so many different expectations, goals, and native systems for approaching ownership and the transgression of ownership of traditional knowledge that a useful, enforceable global system would be virtually impossible to create."

Notwithstanding such an official position, something indeed is happening. Lawyers in the U.S. must beware of a completely revolutionary approach, to us, of protection of what we believe is public domain material. It is quite possible that the United States can be outvoted by the developing nations. *That* may be another price of globalization!

To the developing world, traditional knowledge may have no limit. To the Western world, it represents the public domain knowledge that belongs to no one. However, if one pays for oil, why then not traditional knowledge? Is not Merck paying for traditional knowledge?

The open matters are:

- (a) the proper definition of the subject matter to be protected;
- (b) the acts against which a possible protection should apply;
- (c) the beneficiaries of the protection; and
- (d) the nature and scope of such protection, including to what extent the existing intellectual property protection systems could apply.

Consideration may be given to a regime comparable to the *domaine public payant* (fee-paying public domain), and also to systems for the collective management of the exploitation of knowledge, including the creation of funds in which the proceeds from economic exploitation would be deposited. This presents quite an agenda. Although compromise may be difficult, statesmanship may provide workable definitions and rules, as well as diminished expectations.

There is now increasing international recognition that indigenous and local communities do not share, at least in a fair and equitable manner, benefits arising from the appropriation of their knowledge and its subsequent commercial use. The possibility of protecting traditional knowledge and folklore is becoming legitimized.

To those readers shaking their heads, be aware that the European Community is committed to participate actively in the discussions on how to establish proper protection of expressions of folklore.⁷ Brave New World!

Endnotes

1. WIPO/GRTKF/IC/10, May 1, 2001, Annex, 1–2.
2. Convention on Biological Diversity, Text and Annexes, United Nations Environment Programme, November, 1994.
3. The WIPO Performances and Phonograms Treaty was adopted by a WIPO Diplomatic Conference on December 20, 1996. The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 is Title I of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860.
4. Document submitted by GRULAC, WIPO/GRTKF/IC/1/5, March 16, 2001, Annex 1, p. 4.
5. Merck Press Release dated February 4, 1997 and Dow Jones News, February 5, 1997.
6. WIPO/GRTKF/IC/1/13 Prov., May 3, 2001.
7. See *supra*, at paragraph 20, p. 7.

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Who Owns the Law?

By Kent E. Basson

Although § 105 of the Copyright Act of 1976 clearly prohibits copyrighting works of the federal government,¹ the Act gives no direction regarding works of state and local governments. In addition, there is ambiguity as to what constitutes a government “work.” The adoption of privately developed building codes by state and local governments presents an especially thorny issue. Forbidding copyright protection allows maximum access to these codes, but reduces the incentive to create the codes in the first place.

There are at least two significant arguments for the noncopyrightability of government works. The first of these arguments is that government works are created at public expense and the public should not be forced to pay for the work twice—first in taxes to produce the work and second in the purchase price of the work.² A second argument is that forbidding copyrights in government works promotes an informed public through free dissemination of information.³

Related to the free dissemination argument against copyright of government works is the claim that such copyrights would allow a government body to charge exorbitant prices for information, including compilations of law not subject to market competition.⁴ Government bodies could also award exclusive licenses to publishers, allowing the publishers to profit handsomely from their government-granted monopolies. Between pure government works and private works are privately developed codes and standards adopted by governments. The government adoption of these privately developed codes creates a conflict between the policies against copyright of government works and the purpose of copyright, “[t]o promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings . . .”⁵

Private developers of codes and standards such as the American Society of Civil Engineers⁶ (ASCE) and the National Electrical Manufacturers Association (NEMA)⁷ encourage governmental entities to adopt their products by incorporating the codes and standards by reference into statutes, ordinances and regulations.⁸ These organizations often support themselves by selling copies of their standards.⁹ Many of the same arguments for denying copyright protection for government works also apply to privately developed, government-adopted standards. However, denying copyright protection for these standards would deprive the private standards organizations of much of their financial support and possibly threaten the organizations’ existence.

This article will discuss the legal and policy issues involved in copyright protection of privately developed codes and standards incorporated by reference into state and local law. The issues addressed by the Court of Appeals for the Fifth Circuit in the most recent decision on copyrightability of building codes, *Veeck v. Southern Bldg. Code Congress Int’l Inc.*,¹⁰ will be analyzed. Finally, I will propose guidelines for determining when copyright protection should be provided for privately developed codes and standards.

Legal Considerations

Copyrightability of Judicial Opinions

In its first copyright decision, *Wheaton v. Peters*,¹¹ the Supreme Court held that opinions of the Court are not copyrightable. Subsequent cases expand upon the *Wheaton* decision, holding that neither court decisions nor statutes can be copyrighted by individuals or the government.¹² Unfortunately, the Court did not elaborate on its logic in the *Wheaton* decision in that the Copyright Act of 1790 allowed copyrights in any “map, chart, book or books. . . .”¹³ It is unclear as to why the Court’s own former reporter, Wheaton, was not entitled to a copyright in his *Reports* on that basis alone.

Fifty years passed before the Supreme Court again addressed the issue of copyrightability of court reporters. In 1888, the Court struck down a copyright claimed by the state of Ohio in published opinions of the supreme court of Ohio in *Banks v. Manchester*.¹⁴ In the same year, the Court addressed which portions of a commercially published court reporter are copyrightable in *Callaghan v. Myers*.¹⁵

In *Banks*, a publisher of court decisions, operating under an exclusive contract with the state, sued a competing publisher who had reprinted the decisions of the supreme court of Ohio.¹⁶ The circuit court in *Banks* had broken the materials in the original reporters into two parts: The uncopyrightable portion authored by the court itself and the copyrightable work of the reporter (indices, tables of cases and summaries of counsels’ arguments).¹⁷ The Supreme Court agreed with the conclusions of the circuit court, finding that:

Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their labor. This

extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves. . . . The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. . . . What a court, or a judge, cannot confer on a reporter as the basis of a copyright in him, they cannot confer in any other person or on the State.¹⁸

Although the Court said that “[w]hether the State could take out a copyright for itself . . . is a question not involved in the present case,” it noted that copyrights were available to citizens or residents of the United States, that the state fit neither category and, therefore, could not hold a copyright.¹⁹

Callaghan involved the scope of copyright protection for court reporters rather than copyrightability of the decisions themselves. The defendant, Callaghan, claimed that it had edited only the public domain matter from plaintiff Myers’ reporters and therefore Callaghan’s reporters were independent works of its own employees.²⁰ Upon comparing the Myers and Callaghan volumes, the Court found that Callaghan had indeed infringed on copyrightable aspects of the Myers reporters.²¹ The Court noted that not only “the title page, table of cases, head-notes, statement of facts, arguments of counsel, and index” were copyrightable, but also

the order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions, (where such table is made), and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist.²²

In 1986, the United States Court of Appeals for the Eighth Circuit addressed the issue of copyrightability of the arrangement and pagination of legal reports in *West Publishing Co. v. Mead Data Central, Inc.*²³ The court in *Mead* found that West’s case arrangements were protected by copyright because they were the “result of considerable labor, talent, and judgment.”²⁴ The court also found that Mead’s use of West’s page numbers infringed West’s copyright because,

[w]ith MDC’s star pagination, consumers would no longer need to purchase West’s reporters to get every aspect of West’s arrangement. Since knowledge of the location of opinions and parts of opinions within West’s arrangement is a large part of the reason one would purchase West’s volumes, the LEXIS star pagination feature would adversely affect West’s market position.²⁵

In *Matthew Bender & Co., Inc. v. West Publishing Co.*,²⁶ the United States Court of Appeals for the Second Circuit found that court reporter volume and page numbers did not meet the creativity standard necessary to merit copyright protection.²⁷ *Matthew Bender* can be distinguished from *Callaghan* in the way page numbers and page breaks were assigned. The court noted that “West concedes that the pagination of its volumes—i.e., the insertion of page breaks and page numbers—is determined by an automatic computer program, and West does not seriously claim that there is anything original or creative in that process.”²⁸

The Second Circuit found that the automatic computer assignment of page numbers eliminated any creativity in the process that the *Myers* court relied upon in finding copyrightability of page numbering in court reporters. The conflicting results of *Bender* and *Mead* are a result of the intervening Supreme Court decision, *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,²⁹ in which the scope of the “sweat of the brow” doctrine was significantly reduced.³⁰

What Constitutes a “Government Work”?

The Copyright Act denies copyright protection “for any work of the United States Government.”³¹ The Act defines a “work of the United States Government” as “a work prepared by an officer or employee of the United States Government as part of that person’s official duties.”³² Although these definitions would seem to exclude works made on commission by government contract or grant, such a conclusion is unwarranted based on the legislative history of the Copyright Act.³³

The House Report on the 1976 Copyright Act states that “[a]lthough the wording of the definition ‘work of the United States Government’ differs somewhat from that of the definition of ‘work made for hire’, the concepts are intended to be construed in the same way.”³⁴ The report further explains that each government agency “could determine in each case whether to allow an independent contractor” to obtain a copyright in government commissioned works.³⁵ The report states that copyright protection should be withheld from a work commissioned by an agency for its own purposes, if the work was contracted out “merely as an alterna-

tive to having one of its own employees prepare the work.”³⁶

Congress further noted that “[t]here are almost certainly . . . cases where the denial of copyright protection would be unfair or hamper the production and publication of important works.”³⁷ The 1909 Copyright Act contained a “saving clause” preventing a private work from losing its copyright protection due to government publication.³⁸ The House determined that such language was unnecessary in the 1976 Act because “(1) [t]here is nothing in § 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright in any way.”³⁹

The thrust of the House Report in regard to the copyrightability of published works seems to be that copyright protection is not allowed in “official records and documents.”⁴⁰ This allows for the protection of privately authored works that are not normally considered to be a product of government.

One of the most obvious examples of government commissioned or subsidized works eligible for copyright protection is programming on the Public Broadcast System. Television programming in many countries is controlled and produced by the government. In contrast, most programming in the United States is controlled and produced by private entities. Thus, television programming in the United States is not generally considered to be a product or responsibility of government. The attitude that programming is generally a private function entitles even government commissioned or subsidized television programs to copyright protection. A less obvious example of government-related works eligible for copyright protection is publication of the results of scientific investigation.

In the 1970s, Congress became concerned that foreign and private entities were getting a free ride due to government-published scientific reports being in the public domain.⁴¹ The National Technical Information Service (NTIS) of the Department of Commerce is supposed to support itself by selling government publications, but private and foreign entities were simply copying the publications for themselves, cutting into the NTIS’s revenue.⁴² In order to discourage such copying, Congress informally granted NTIS the right to copyright its publications for a five-year term, to begin upon the date of first publication.⁴³ A more difficult problem was determining the copyrightability of privately developed material that the federal government mandated as a standard.

The Physician’s Current Procedural Terminology (CPT) is a coding system, developed by the American Medical Association (AMA) that allows medical personnel to identify medical procedures with precision.⁴⁴ In

1977, when Congress instructed the Health Care Financing Administration (HCFA) to establish a code for use in completing Medicare and Medicaid claim forms, the HCFA contracted with the AMA to use the CPT.⁴⁵ Practice Management Information Corp., a publisher of medical books, filed a lawsuit seeking:

A declaratory judgment that the AMA’s copyright in the CPT was invalid for two reasons: (1) the CPT became uncopyrightable law when the HCFA adopted the regulation mandating use of CPT code numbers in applications for Medicaid reimbursement, and (2) the AMA misused its copyright by entering into the agreement that HCFA would require use of the CPT to the exclusion of any other code.⁴⁶

In *Practice Management Information Corp. v. American Medical Ass’n*, the United States Court of Appeals for the Ninth Circuit found that the AMA did not lose its copyright in the CPT due to its adoption by the HCFA.⁴⁷ However, the court found that, by licensing the CPT to HCFA on the condition that the HCFA not use another coding system, the AMA had abused its copyright because the agreement “gave the AMA a substantial and unfair advantage over its competitors.”⁴⁸

Although § 105 of the 1976 Copyright Act refers only to the federal government in denying copyright protection to government works, the rationale behind the provision also applies to state and local governments. The United States Court of Appeals for the Ninth Circuit relied heavily upon *CCC Information Servs., Inc. v. MacLean Hunter Market Reports*⁴⁹ in its *Practice Management* decision.⁵⁰ In *CCC*, a computer database provider challenged the copyrightability of the “Red Book,” a publisher’s compilation of used car valuations.⁵¹ Among other reasons the plaintiff offered for copyrightability of the Red Book was that state insurance statutes and regulations mandating insurance payments tied to Red Book values had caused the Red Book to pass into the public domain.⁵² According to the plaintiff, “the public must have free access to the content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.”⁵³

In response to this argument, the United States Court of Appeals for the Second Circuit compared state-mandated use of the Red Book with state adoption of copyrighted textbooks for use in mandatory school curriculums and pointed out that “a rule that adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.”⁵⁴

State and local adoption of privately developed building codes usually falls somewhere between the situations present in *Practice Management* and CCC in that the developers of the codes actively encourage the adoption of their products.⁵⁵ Local governments that adopt model building codes make copies of the codes available at the appropriate city hall, county courthouse or other government office.⁵⁶ Much of the income of the organizations responsible for development of these model codes comes from selling additional copies of the codes to building contractors, insurance providers and other interested parties.⁵⁷

Challenges to Validity of Privately Developed Building Codes

There have been a number of challenges to the incorporation of privately developed building codes into statutes and ordinances. These challenges relate not only to copyrights, but also to the validity of the adoption of the codes at all. While most authorities support the validity of government adoption of codes, the minority view is that such adoption is open to the objection of being indefinite and uncertain.⁵⁸

In *State v. Crawford*,⁵⁹ the supreme court of Kansas addressed the adoption of the National Electric Code (NEC) by the legislature. The court pointed out that the NEC is revised every two years and found that:

The laws of this state to which our people owe obedience must be officially published. The people may learn what these laws are, and they are privileged to meet legislative committees and petition the Legislature for amendment, improvement, and amelioration of the laws. . . . If the Legislature desires to adopt a rule of the National Electric Code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the Senate and the House of Representatives by a constitutional majority, and give the Governor a chance to approve or veto it, and then hand it over to the secretary of state for publication.⁶⁰

The *Crawford* court did not want Kansans to be subject “to some voluntary and unofficial conference of underwriters and electricians, which occasionally meets here, there or anywhere in North America for redress of grievances.”⁶¹ The problems with such an arrangement were “so obvious that elaborate illustration or discussion of its infirmities is unnecessary.”⁶²

Despite the *Crawford* court’s assertion that elaboration on the shortcomings of adoption by reference of private codes is unnecessary, it described a potential

scenario as a result of a general policy of incorporation by reference:

If assent to such a doctrine could be given, a situation would arise where owners of property with considerable persistence might learn what all these Code rules were, and incur the expense of making their property conform thereto, only to find that the National Fire Protective Association had reconvened in Chicago, New York, or New Orleans, and had revised the Code, and that the work and expense had to be undertaken anew. And there would be no end of such a state of affairs. Furthermore, there is no official way, indeed no practical way, for the average property owner to know what these Code rules are.⁶³

Although the general public has much easier access to codes than when the court spoke in 1919, it is true that codes and standards are in a constant state of flux and that various adopted codes might conflict. However, these shortcomings are not limited to privately developed codes.

Incorporation by reference of the NEC was once again at issue in *City of Tucson v. Stewart*.⁶⁴ In that case, the Supreme Court of Arizona distinguished it from *Crawford*, in that it was the City of Tucson, rather than the state legislature, that adopted the NEC.⁶⁵ Although the court held that the ordinance at issue in *City of Tucson* was invalid as “discriminatory, arbitrary, oppressive, and unreasonable,”⁶⁶ it reversed the lower court’s judgment that “the ordinance [was] invalid because the electrical code was not published and posted.”⁶⁷

Adoption of the NEC by local governments continued to be a source of controversy into the 1950s. A California court held that the adoption of the NEC was invalid in *Agnew v. City of Culver City*.⁶⁸ In language reminiscent of *Crawford*, the *Culver City* court found that:

[Adoption of the NEC by city ordinances] constitute[s] an unlawful delegation of power. [The ordinances] leave it entirely to the opinion of the persons who formulate the National Electrical Code, to various private and public bodies, and to the license inspector to determine the character and quality of various electrical installations, and confer on them the power to create an offense to which criminal sanctions are attached. The regulations can be changed at any time at the will of such

parties and at the whim of the license inspector, whoever he might be. They fix no ascertainable standard whereby an electrical contractor may be governed.⁶⁹

Challenges to Copyrights in Privately Developed Building Codes

Rather than attempt to develop their own building codes with limited resources and expertise, many local governments have adopted privately developed standard building codes. At least two of the developers of these standard codes, Building Officials and Code Administrators International, Inc. (BOCA) and the Southern Building Code Congress International, Inc. (SBCCI), have seen the copyrights to their products challenged as a result of incorporation by reference by local governments. As with challenges based on indefiniteness and uncertainty, the copyright challenges have met with mixed results.

In *Building Officials & Code Adm. v. Code Technology, Inc.*,⁷⁰ the United States Court of Appeals for the First Circuit addressed copyright protection of model building codes after adoption by a state government. The First Circuit held that BOCA failed to establish a likelihood of success on the merits on the issue as to whether a state's adoption by reference of a building code resulted in the code becoming part of the public domain.⁷¹ Despite its ruling against BOCA, the court found that:

Groups such as BOCA serve an important public function; arguably they do a better job than could the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available. Since the rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances than do these technical regulatory codes, we think BOCA should at least be allowed to argue its position fully on the basis of the evidentiary record, into which testimony and materials shedding light on the policy issues discussed herein may be placed.⁷²

In *Georgia v. The Harrison Co.*,⁷³ the state of Georgia sued for preliminary injunction against a publisher that sold copies of its code. The state had granted The Michie Company a contract to publish the code of Georgia, for which it claimed copyright protection.⁷⁴ The United States District Court for the Northern District of Georgia relied heavily on BOCA in denying the injunction against Harrison, finding that the "enactment by reference had the effect of putting the statutory portion of the codification in the public domain."⁷⁵

In *Rand McNally & Co. v. Fleet Management Systems, Inc.*,⁷⁶ Rand McNally accused Fleet Management of infringing the copyrights of a highway mileage guide.⁷⁷ The defendant maintained that when the Interstate Commerce Commission allowed Rand McNally's mileage guide to be used in determining common carrier charges, the guide entered the public domain.⁷⁸ The District Court for the Northern District of Illinois found that "[t]he government cannot be said to have adopted the *Mileage Guide*, since the regulations leave to private choice what type of distance information, if any, should be on file."⁷⁹ The court further pointed out that if the defendant's contentions were correct, "a private party's choice of a map or mileage guide would automatically move otherwise copyrightable material into the public domain. While a state actor may be able to do so, see *Building Officials*, it is questionable whether a private person may do so."⁸⁰

The United States Court of Appeals for the Fifth Circuit addressed a situation very similar to *BOCA in Veeck v. Southern Building Code Congress Int'l, Inc.*⁸¹ Veeck operated a Web site, called RegionalWeb and provided information about news, sports and entertainment in North Texas and Oklahoma.⁸² At least three of the towns in Veeck's coverage area had adopted SBCCI model building codes.⁸³ Upon learning of the cities' adoption of the SBCCI codes, Veeck ordered electronic copies of the codes from SBCCI and placed them on his Web site, despite the software license and copyright notice included with the software.⁸⁴ Disregarding the cease and desist orders which SBCCI sent when it learned about the posting of the codes, Veeck filed a declaratory judgment action in an attempt to have the federal district court rule that he did not violate the Copyright Act.⁸⁵ SBCCI counterclaimed, asserting copyright infringement, unfair competition and breach of contract.⁸⁶

The Fifth Circuit affirmed the district court's judgment in favor of SBCCI.⁸⁷ The judgment held that SBCCI's copyrights were valid and found five instances of copyright infringement against Veeck.⁸⁸ The court pointed out that copies of the code were readily available not only at the city offices in the adopting towns as required by due process considerations, but also available "in bookstores, public libraries, and directly from SBCCI."⁸⁹

The *Veeck* court found that the reasons that judicial opinions are not copyrightable do not apply to privately developed model building codes.⁹⁰ These reasons are generally held to be that (1) the public has already paid for the decisions when it paid the judges who authored the opinions and (2) the public interest is served by free access to the law.⁹¹ Addressing the first rationale, the Fifth Circuit said that:

In this case SBCCI is asserting a viable proprietary interest because it created the model codes using its own, private resources. . . . We believe that if code writing groups like SBCCI lose their incentives to craft and update model codes and thus cease to publish, the foreseeable outcome is that state and local governments would have to fill the void directly, resulting in increased governmental costs as well as loss of consistency and quality to which standard codes aspire.⁹²

Addressing the second rationale in *CCC Info. Servs.*, the Fifth Circuit relied on the reasoning of the Second Circuit.⁹³ The Fifth Circuit found that the encouragement of innovation through copyright took precedence over the free access argument in the “narrow set of facts” of the case and that “no court has held to the contrary.”⁹⁴ The court further noted that *Veeck* had presented no evidence of anyone being denied access to the SBCCI’s codes or being forbidden to photocopy portions of the municipal codes derived from the Southern Building Codes.⁹⁵

The *Veeck* court also addressed the contention that “SBCCI’s building codes, once enacted by reference into law, became a *fact* which can be *expressed* in only one way.”⁹⁶ The court pointed out that a building code could be written in many ways and that, in fact, “there are at least two other sets of building codes that compete with SBCCI’s,” those of BOCA and the Uniform Codes published by the International Conference of Building Officials.⁹⁷ Further, the court found that the purpose of the merger doctrine,⁹⁸ preventing copyright protection of ideas, did not apply to model building codes because “[i]n this circuit, the merger doctrine has been applied to the question whether a work was copy-rightable at the time of its creation, preventing a copy-right from attaching in the first place, rather than as an infringement defense focusing on merger at the time of copying.”⁹⁹

Because the merger “doctrine applies only when there are few or no other ways of expressing a particular idea,” the doctrine should not be applied to building codes.¹⁰⁰ There are many ways of expressing the ideas of any building code. The Fifth Circuit in *Veeck* found that “SBCCI’s building codes are infused with the opinions of their authors, from the requirements chosen in the codes to their arrangement, level of detail, and grammatical style.”¹⁰¹

The pioneering copyright decision, *Baker v. Selden*,¹⁰² addressed merger issues similar to those presented in the copyrightability of model building codes. The Court in *Selden* found that, while *Selden*’s book explaining double entry bookkeeping was copy-

rightable, the method itself and the ledger sheets required for the method’s implementation were ideas not subject to copyright protection.¹⁰³ Likewise, SBCCI cannot copyright the requirements of its building codes, but only the manner in which those requirements are expressed.¹⁰⁴

Policy Considerations

Privately Developed Codes and Standards in the United States

Americans, in comparison to Europeans, tend to be leery of centralized power.¹⁰⁵ James Madison argued that promoting a large number of competing factions protects minorities from domination by majority factions.¹⁰⁶ In keeping with this spirit, the original American standards organizations were private.¹⁰⁷

The United States Pharmacopial Convention was the earliest American standards organization and was set up in 1829 to establish uniform standards for drugs.¹⁰⁸ The 1850s saw the establishment of the American Iron and Steel Institute (AISI)¹⁰⁹ and the American Society of Civil Engineers (ASCE).¹¹⁰ The greatest accomplishment of private American standard setting may have been the development of railroad standards in the late 19th century, allowing over 1,100 independent railroads and 240,000 miles of track with little government assistance.¹¹¹ The railroads also privately developed standardized time.¹¹² Despite the proliferation of government regulatory bodies, private standards organizations are still plentiful in the United States.

There are approximately 400 organizations within the United States standards community.¹¹³ There are five different types of standards organizations: Trade associations, professional societies, general membership organizations, third-party certifiers and consortia.¹¹⁴

Trade associations are made up of companies within a given industry such as the American Petroleum Institute (API)¹¹⁵ and the National Electrical Manufacturers Association (NEMA).¹¹⁶ Membership dues are the primary means of financing these organizations, but sales of standards are also a major source of revenue.¹¹⁷

Professional societies, such as the Institute of Electrical and Electronic Engineers (IEEE)¹¹⁸ are made up of individual members of professions rather than industry representatives.¹¹⁹ These societies often receive much of their financial support from selling standards.¹²⁰

General membership organizations, such as the American Society of Testing Materials (ASTM)¹²¹ and National Fire Protection Association (NFPA),¹²² have memberships representing a wide variety of backgrounds and interests. Among the 69,000 members of the NFPA are architects, engineers, firefighters, manufacturers, insurance company representatives, and gov-

ernment and union members.¹²³ All members are allowed to vote in making standards.¹²⁴ Sales of standards can make up as much as 80 percent of a general membership organization's income.¹²⁵

Third-party certifiers are mainly supported by manufacturers who pay the organizations to test their products for conformance with standards.¹²⁶ Underwriters Laboratories (UL) is probably the most familiar of these organizations.¹²⁷

Consortia are groups that have emerged in recent years to develop pioneering standards in such fields as information and communication technologies.¹²⁸ They are not generally included among standards developers and operate mainly without input from nonmembers.¹²⁹

The confidence of Americans in a market economy is demonstrated by the proliferation of private standards development. The purposes of these standards include:

- **Commercial Communication:** Standardization provides shortcuts and reduces transaction costs for consumers searching for products with certain characteristics. A consumer buying batteries for a portable radio has only to look at the radio to determine whether it needs, e.g., A, AA or D size batteries and then picks the appropriate batteries from the sales rack.
- **Technology Diffusion:** The use of personal computers expanded rapidly once IBM provided a widely adopted standard.
- **Production Efficiency:** Henry Ford made automobiles affordable to the masses by producing the Model T with standardized parts and scale in production.
- **Enhanced Competition:** Octane ratings on gasoline make price comparison between similar products easier.
- **Compatibility:** Stereo and computer equipment use standard cables and jacks that allow interconnection of components produced by different manufacturers.
- **Process Management:** Standard computer languages allow rapid reconfiguration of numerically controlled tools.
- **Public Welfare:** Standard building codes backed up by inspections allow buyers of homes and office buildings to feel confident in the safety of the finished product.¹³⁰

One advantage of privately developed standards over government created and mandated standards is that the privately developed standards are more likely to reflect market realities and achieve the desired

results. Consumer dissatisfaction with federally imposed standards requiring toilets to use no more than 1.6 gallons per flush have resulted in Americans buying American-made old-style 3.5 gallons per flush toilets in Canada and reimporting them into the United States for installation in their homes.¹³¹ Seventy-two percent of respondents to a 1998 membership survey by the National Association of Homebuilders said that the low-flow toilets were a problem, leading to this creative but inefficient method of avoiding the standard.¹³²

Federally mandated Corporate Average Fuel Economy (CAFE) requirements were intended to reduce fuel consumption by making cars lighter and more efficient. Instead, the standards are believed to be one of the main factors in increased popularity of trucks and SUVs, with a resulting *increase* in average vehicle weight and an increase in deaths as a result of collisions between trucks and automobiles.¹³³ The standards also put American automakers at a disadvantage to foreign—especially Japanese—manufacturers that specialized in smaller cars.¹³⁴ Unlike politically motivated, government mandated requirements, privately developed standards must be responsive to consumer preferences.

Building codes are not only imposed by local governments, but compliance with such codes is also often required by construction contracts in areas not otherwise subject to building codes. The provision for building code compliance in private contracts reflects the fact that the codes are responsive to the requirements of construction companies, building owners and construction lenders.

As mentioned earlier, SBCCI is a not-for-profit professional society standards developer that provides codes that “cover the entire scope of the building industry.”¹³⁵ SBCCI was founded in 1940 and approximately 2,200 communities, primarily in the Sunbelt, have adopted its codes by reference.¹³⁶ Although SBCCI's standards staff is made up of only ten employees, 5,500 members are active in standards activities and SBCCI holds public hearings twice a year to update codes.¹³⁷ Any interested party may participate in the public hearings and submit proposed changes.¹³⁸

SBCCI has six membership categories, with members ranging from governmental units and agencies to students and information subscribers.¹³⁹ Rather than developing their own codes, state and local governments can incorporate portions of the SBCCI's standard codes and receive support from SBCCI for an annual membership fee.¹⁴⁰ The annual membership fees for governmental units range from \$40 for communities with populations under 5,000 to \$250 for populations over 300,000.¹⁴¹ These memberships include a set of codes, free code interpretations accessible by a toll-free

number and unlimited use of SBCCI administrative, technical and educational support services.¹⁴²

SBCCI is only one of at least four organizations writing model building codes.¹⁴³ The other three organizations are BOCA, the International Conference of Building Officials (ICBO) and the Council of American Building Officials (CABO).¹⁴⁴ One particular code is generally favored by local governments throughout a given region.¹⁴⁵ The regional favoritism is partly a reflection of different climatic, soil and other conditions particular to a given region.¹⁴⁶ The predominance of a particular code within a region also means that builders and inspectors can count on some uniformity in building practices if they work in more than one municipality.¹⁴⁷

The Risk of a Private Monopoly on Publishing of Law Compilations

According to one theory, the public creates, and thus owns, the law.¹⁴⁸ This theory is reflected in the Printing Law of 1895,¹⁴⁹ which provided for the sale of printing plates used to print government documents, with the condition that works printed with the plates could not be copyrighted.¹⁵⁰

Another justification for denying copyright protection to court reports and compilations of statutes is that "citizens must have free access to the laws which govern them."¹⁵¹ Copyright protection of the law would limit access, causing the public to be deprived of "the notice to which due process entitles" them.¹⁵² The same concept of right to free access of the law arguably applies to regulations such as building codes.¹⁵³

Copyright protection of laws and regulations presents several potential problems. One problem is that a copyright holder could restrict access to politically favored individuals or groups.¹⁵⁴ While blatant attempts to deny access to certain groups would clearly violate constitutional principles such as equal protection, a marginally creative copyright holder could develop facially neutral licensing conditions that would disadvantage certain groups of individuals.¹⁵⁵

Holders of copyrights in the law or regulations would also be able to charge monopoly prices for their products.¹⁵⁶ A building code developer could induce state and local officials to incorporate its standards and then charge builders with no alternative monopolistic prices for its codes.

The Risk of Government Copyrights in Law Compilations

The U.S. policy against government copyright is far from universal. Both the United Kingdom and Canada have a tradition of Crown copyright, including copyrighting of government regulations.¹⁵⁷ The policy of

allowing government copyrights can have far more serious consequences than a policy allowing copyrights in model building codes.

A government copyright holder can use political or other discriminatory criteria to determine which violations to prosecute.¹⁵⁸ An incident in Great Britain demonstrates the mischief that can result from government copyrights and how such power can be used to control or punish those out of favor.¹⁵⁹ In 1993, the Queen of England sued a British newspaper for copyright infringement for publishing the text of her annual Christmas message.¹⁶⁰ The offending newspaper also found that its press accreditation to photograph the royal family attending Christmas day church services had been withdrawn.¹⁶¹ The Queen was reportedly angry over press reports concerning the marital difficulties of her children.¹⁶² The Queen dropped the suit when the newspaper agreed to print a front-page apology, donate about \$280,000 to charity and pay the Queen's legal costs.¹⁶³

Although the incident with the Queen did not involve access to laws or regulations, it demonstrated how control of access to *any* government information can be used against those out of favor.¹⁶⁴ In addition to its discretion in prosecuting infringement of government copyrights, a bureaucratic organization can use complex, time-consuming and expensive procedures to control access to its copyrighted material.¹⁶⁵ The copyright holder could offer favored users a much easier path through the bureaucratic maze than the disfavored would be forced to endure.¹⁶⁶

One of the contentions of the plaintiff in *Veeck* was that allowing copyrights in model building codes adopted by local governments restricted the public's access to the building codes.¹⁶⁷ The court pointed out that ironically, Veeck was unable to buy copies of complete building codes in approximately 20 towns he visited in North Texas (not all of which building codes had been produced by SBCCI or based on SBCCI codes), but was able to order copies of the model codes from SBCCI with a choice of electronic or hard-copy formats.¹⁶⁸

An Analogy to the Doctrine of Sovereign Immunity

In questions of sovereign immunity from tort actions, many courts first determine whether the act or function giving rise to the injury can be described as governmental or proprietary in nature.¹⁶⁹ The Supreme Court distinguished governmental and proprietary activities of local governments in *Trenton v. New Jersey*:

It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the pro-

tection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class.¹⁷⁰

The difficulty in distinguishing governmental and proprietary functions becomes clear in that, almost 80 years later, most Americans would probably consider "the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump" to be governmental functions, while many states leave "the inspection of steam boilers" to private organizations.

The distinction between governmental and proprietary functions derived from the doctrine of sovereign immunity may provide useful guidelines in determining whether model building codes should lose copyright protection upon adoption by local governments. As with many functions carried out by government bodies, whether the development and enforcement of building codes is properly considered a government or proprietary function is subject to debate.¹⁷¹

Most Americans, if asked, would probably respond that development and enforcement of building codes is a government function. However, for most of American history, private organizations have taken the lead in development of codes and standards, as described above. In addition, insurance companies have been a driving force in enforcement of building codes and standards.¹⁷²

In 1625, the Dutch West India Company established rules governing types and locations of houses that could be built by colonists in New Amsterdam.¹⁷³ Extensive laws governing construction, sanitation and fire prevention were in effect by 1674.¹⁷⁴ Despite the early regulations on building, New York City did not have a "Superintendent of Buildings" until 1860 and

did not have an independent "Buildings Department" until 1892.¹⁷⁵

Government involvement in building regulation came much later in California than in New York City. The National Board of Fire Underwriters began promoting a "Recommended National Building Code" in 1905.¹⁷⁶ It was 1909 before California enacted its first public building law, the State Tenement Housing Act.¹⁷⁷ In 1913, the state of California created the State Division of Immigration and Housing, and the State Division of Safety.¹⁷⁸ This resulted in confusion as each department responded individually to building problems with little coordination between the departments.¹⁷⁹

A private group, the Pacific Coast Building Officials, established uniformity of building codes in California by publishing the first Uniform Building Code (UBC) in 1927.¹⁸⁰ The Pacific Coast Building Officials became the International Conference of Building Officials (ICBO) and most local governments in California have either adopted the ICBO family of codes by reference or used the codes as a pattern.¹⁸¹

For more than 165 years, Factory Mutual has worked with industrial customers in setting standards and preventing and controlling property loss.¹⁸² Factory Mutual is only one of many insurance- and loss prevention-related organizations engaged in research and standard setting for various fields.

The development of standards is much more complicated than passing a law. Economist Ludwig von Mises pointed out the importance of protecting intellectual property in promoting technological progress:

[I]t is obvious that handing down knowledge to the rising generation and familiarizing the acting individuals with the amount of knowledge they need for the realization of their plans requires textbooks, manuals, handbooks, and other nonfiction works. It is unlikely that people would undertake the laborious task of writing such publications if everyone were free to reproduce them. This is still more manifest in the field of technological invention and discovery. The extensive experimentation necessary for such achievements is often very expensive. It is very probable that technological progress would be seriously retarded if, for the inventor and for those who defray the expenses incurred by his experimentation, the results obtained were nothing but external economies.¹⁸³

Supporting the proposition that standards development and enforcement should be considered a propri-

etary, rather than governmental function, is the fact that the loss prevention function of building codes is of great interest to both property owners and insurance providers. Insurance providers are looking to reduce potential losses by requiring compliance with standards, while owners are looking to reduce losses and insurance premiums. In addition, in areas where there are no government building codes, building contracts often require compliance with model building codes as a means of ensuring quality, uniformity and safety in the finished product.

Do Model Building Codes Actually Increase Access to the Law?

In 1949, a report to the California State Legislature said that:

The state has no one agency concerned principally with building regulations. There are at least ten state agencies having some degree of authority in this field, and not one of them is responsible for taking the lead in coordinating the activity of all of them. This produces two kinds of confusion—conflict between state agencies themselves and too many kinds of relationships between state and local agencies. There is no consistent pattern for defining the relative responsibility of the state and local agencies in enforcing state regulations.¹⁸⁴

Not only were multiple state agencies responsible for producing and enforcing building regulations, but the standards were dispersed throughout the various titles and over 30,000 pages (as of 1953) of the California Administrative Code.¹⁸⁵

The accessibility of the standards building codes developed by SBCCI, BOCA, ICBO and CABO presents quite a contrast to the difficulty involved in sifting through the California Administrative Code. Nonmembers can order a copy of the latest SBCCI Standard Building Code for \$82.50 and a "Standard Code Discount Package, 1997," containing 1997 editions of Building, Plumbing, Fire Prevention and Gas Codes, is available for \$262.50.¹⁸⁶ SBCCI also provides copies of the standard codes to member local governments¹⁸⁷ and concedes that copying of portions of the codes for personal use constitutes fair use.¹⁸⁸ Further, for \$25 per year, an individual can become an "Information Subscription Member" of SBCCI, entitling her to "unlimited use of most SBCCI administrative, computer, educational, and technical support services and member prices for publications and educational courses."¹⁸⁹ Some membership categories of SBCCI include free code interpretations via a toll-free number.¹⁹⁰

Buying a copy of a standard building code may well be the simplest and least expensive thing a builder can do. The purchase is certainly simpler and cheaper than overcoming the obstacles put in place by federal, state and local governments.¹⁹¹

A simple addition to a home can involve obtaining permissions from the Planning and Zoning Commission, Conversation Commission and Health District.¹⁹² It can take years to obtain all of the appropriate permissions—if permission can be obtained at all.¹⁹³ Government officials responsible for making these decisions are little affected by market forces and the safest course for them often is delaying the project until it fades away.¹⁹⁴ No one can accuse an official of being wrong if a decision can be avoided entirely.¹⁹⁵

Unlike the arbitrary bureaucrat, standard building codes are definite (although obviously open to some interpretation) and accessible to anyone. One motive for making the law freely available is so that citizens do not violate it because they are unaware of it. With the multitude of government controls on building, a building code violation is not something a typical citizen will commit due to lack of access to knowledge—unless one is already violating other laws and regulations by building without the appropriate permits.

There are four nationally known producers of building codes. Unlike local governments, they must compete in the marketplace and offer their products at a competitive price. A city can charge any price it wants for building permits and officials can use the bureaucratic process to deny permission to those out of favor. Builders relying on a standard code can obtain interpretations of provisions from the code authors themselves, instead of being at the mercy of local enforcement officials.

Conclusion

The primary rationale for denying copyright protection to court decisions and statutory compilations—that the public has already paid for the decision when it paid the judge who wrote the decision or the legislators who wrote and passed the statute—does not apply to privately developed building codes. The organizations developing the codes offer them to government entities for a fraction of the price at which a municipality could develop its own code.

One rationale for denying copyright protection to building codes is that a copyright holder could restrict access or charge exorbitant prices for copies of its code(s). Although municipalities within a given region tend to adopt the same building code, limiting the effects of competition between the code authors, this has not been shown to be a problem. The popularity of a particular code enhances its availability far beyond

what would be expected of a city-specific and locally developed code. In addition, local governments have copies of model codes available for the public's use during normal working hours and the code developers agree that copying for personal use constitutes fair use.

Upon adoption of a complete model code, a city would arguably be within its rights to offer its citizens access to the code by posting a complete copy of the code on a Web site or making copies available on request. This situation is easily distinguished from *Veck* in that Veck posted the entire model code rather than the code as adopted by local communities, posted the code on a commercial site and reproduced it without permission from SBCCI. This ability to copy a local government's volumes of the codes effectively limits what code authors can charge for their products.

Unlike laws regulating primary behavior, citizens are unlikely to violate building codes unknowingly. Building is usually done by people with expertise in the construction field who are aware of the codes. Local governments put many obstacles in the way of those wanting to build on private property: Zoning restrictions, taxes and the requirement of easements. Unlike these restrictions, which can be exercised arbitrarily by local politicians, building codes are known factors for would-be builders.

Finally, the production of building codes has not historically been a government function in the United States. As such, the codes should not be considered "government works," ineligible for copyright protection.

Denying copyright protection to privately developed building codes would significantly reduce incentives to code authors as they witnessed their incomes drop from code sales. This reduction in income could lead to code authors going out of business or seriously reducing support staffs. It could also result in slower revisions to codes with technological advances.

Despite the claim that allowing copyright protection of building codes restricts access to the law, the evidence shows that privately developed building codes are much more accessible than locally authored statutes and local ordinances. In addition, such codes provide uniformity that would be difficult to obtain with each local government producing its own code. Until the problems anticipated by critics of copyright protection for building codes become reality, we would do well to allow such protection to continue.

Endnotes

1. 17 U.S.C. § 105 (1994). "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving

and holding copyrights transferred to it by assignment, bequest, or otherwise."

2. Marvin J. Nodiff, *Copyrightability of Works of the Federal and State Governments Under the 1976 Act*, 29 St. Louis U. L.J. 91, 93 (1984).
3. *Id.*
4. Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information*, 45 Syracuse L. Rev. 999, 1008 (1995).
5. U.S. Const. art. I, § 8, cl. 8.
6. See ASCE—About ASCE (visited March 1, 2001) <<http://www.asce.org/aboutasce/allabout.html>>.
7. See NEMA Government Affairs (visited June 18, 2001) <<http://www.nema.org/government/>>.
8. E.g., in July 1991, the American National Standards Institute (ANSI) proposed that the federal government establish a "memorandum of understanding" with ANSI. U.S. Congress, Office of Technology Assessment, *Global Standards: Building Blocks for the Future* 23 (1992) [Building Blocks].
9. *Id.* at 50.
10. 241 F.3d 398 (5th Cir. 2001).
11. 33 U.S. (8 Pet.) 591 (1834).
12. See, e.g., *Banks v. Manchester*, 128 U.S. 244 (1888) (recognizing the public's right to access to opinions of state court judges), *Callaghan v. Myers*, 128 U.S. 617 (1888) (limiting copyrightable elements of court reports to the "result of the [Reporter's] intellectual labor" such as "the title page, table of cases, headnotes, statement of facts, arguments of counsel, and index), and *Banks Law Publishing Co. v. Lawyers' Co-operative Publishing Co.*, 169 F. 386 (2d Cir. 1909) (finding defendant not liable for copyright infringement of court report despite copying of case sequence, paging and distribution into volumes).
13. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (*repealed by* Act of Feb. 3, 1831, ch. 16-74, 4 Stat. 436, 439).
14. 128 U.S. 244 (1888).
15. 128 U.S. 617 (1888).
16. 128 U.S. at 245-48.
17. *Id.* at 250.
18. *Id.* at 253-54.
19. *Id.* at 252-53.
20. "[Callaghan] also averred that the titles of the volumes of the defendants were so different from those claimed by the plaintiff that they could not be mistaken therefore even by a casual purchaser or observer; and that the volumes of the defendants were new and original tables of cases, head-notes, statements of facts, abstracts of briefs of counsel, corrected opinions, foot-notes, and indexes, and were in no manner copies of, or infringements upon, the volumes of the plaintiff." 128 U.S. at 630.
21. "[I]t appears from the evidence that all the volumes of Mr. Freeman [from whom Myers had purchased the proprietary rights in the reporters] were used in thus editing or annotating; and although it may have been their intention to make an independent work, it is apparent, from a comparison of the Freeman volumes and those of defendants, that the former were used throughout by the defendants." *Id.* at 660.
22. *Id.* at 649.
23. 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).
24. *Id.* at 1226. The court distinguished *Banks*, *supra* note 12, by pointing out that the copyright was denied in *Banks* because of

- the reporter's official status and the modern trend of requiring less intellectual creativity to merit copyright protection.
25. *Id.* at 1228.
 26. 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999).
 27. *Id.* at 699.
 28. *Id.*
 29. 499 U.S. 340 (1991).
 30. In *Feist*, the Court addressed the copyrightability of an alphabetized phone directory. The Court found that an alphabetized listing was obvious and thus, the directory was not a creative work meriting copyright protection. The "sweat of the brow" doctrine allowed all effort involved in producing a work to be considered in copyrightability rather than creative effort alone. *Id.*
 31. 17 U.S.C. § 105 (Law. Co-op. 1994).
 32. 17 U.S.C. § 101 (Law. Co-op. 1994). The word "officer" of the United States government replaced the word "employee" to make it clear that elected officials are included in the prohibition on copyright protection. Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.06(b)(1) n.8 at 5-83 (December 2000).
 33. Nimmer & Nimmer, *supra* note 32 at § 5.06(B)(2) at 5-84.
 34. H.R. Rep. No. 94-1476, at 58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5672.
 35. *Id.* at 59.
 36. *Id.*
 37. *Id.*
 38. *Id.* at 60.
 39. *Id.*
 40. Nimmer & Nimmer, *supra* note 32 at 5-81.
 41. H.R. Conf. Rep. No. 94-1733, at 69-70, *reprinted in* 1976 U.S.C.C.A.N. 5810-11.
 42. *Id.* The House of Representatives' original version of the 1976 Copyright Act retained the general prohibition against copyright in government works, but made an exception in favor of NTIS publications. This exception would have allowed the Secretary of Commerce to secure copyright in NTIS works, on behalf of the United States as author or copyright owner, for a limited term not to exceed five years. The Senate's version of § 105, excluding both published and unpublished government works from copyright protection, became law and Congress has not yet readdressed the issue.
 43. *Id.*
 44. *Practice Management Info. Corp. v. American Med. Ass'n*, 121 F.2d 516, 517 (9th Cir. 1997).
 45. *Id.*
 46. *Id.* at 518.
 47. *Id.* at 521.
 48. *Id.*
 49. 44 F.3d 61 (2d Cir. 1994).
 50. 121 F.2d at 520.
 51. 44 F.3d at 64.
 52. *Id.*
 53. *Id.*
 54. *Id.* at 74.
 55. *See, e.g., Veeck v. Southern Bldg. Code Congress Int'l, Inc.*, 241 F.3d 398.
 56. *Id.*
 57. *Id.*
 58. *See, e.g., State v. Crawford*, 177 P. 360 (Kan. 1919).
 59. *Id.*
 60. *Id.* at 361. Many local governments avoid the problem of uncertainty due to constant revision by adopting a certain version of a code. For example, the Southern Building Code Congress International Inc. (SBCCI) sells 1994, 1997 and 1999 versions of many of its codes. *Codes and Comment Price List* (visited June 10, 2001) <<http://www.sbcci.org/Orders/codes&com.htm>>.
 61. *Crawford*, 177 P. at 361.
 62. *Id.*
 63. *Id.*
 64. 40 P.2d 72 (Ariz. 1935).
 65. *Id.* at 80.
 66. *Id.* at 81.
 67. *Id.* The court found that the ordinance was invalid due to other provisions which required that electricians conform with "approved methods," and giving a city electrician "final say as to whether the construction conforms with approved methods." The court considered these provisions to be too vague and to allow too much discretion to a city official. *Id.* at 80.
 68. 304 P.2d 788 (Cal. Ct. App. 1956).
 69. *Id.* at 797.
 70. 628 F.2d 730 (1st Cir. 1980).
 71. *Id.* at 736.
 72. *Id.*
 73. 548 F. Supp. 110 (N.D. Ga. 1982).
 74. *Id.* at 111-13.
 75. *Id.* at 115.
 76. 591 F. Supp. 726 (N.D. Ill. 1983).
 77. *Id.* at 728.
 78. *Id.* at 729.
 79. *Id.* at 736.
 80. *Id.* n.9.
 81. 241 F.3d 398.
 82. *Id.* at 401.
 83. *Id.*
 84. *Id.*
 85. *Id.*
 86. *Id.* SBCCI did not assert violation of the software's shrinkwrap agreement. This is possibly because the 5th Circuit, in *Vault v. Quaid*, 847 F.2d 255, 269-70 (5th Cir. 1988), found that a license agreement for software was preempted by federal copyright law and was therefore unenforceable.
 87. *Id.*
 88. *Id.* at 402.
 89. *Id.* at 403 n.17.
 90. *Id.* at 405.
 91. *Id.*
 92. *Id.*
 93. 44 F.3d at 68.
 94. 241 F.3d at 405.
 95. *Id.* at 407.
 96. *Id.*
 97. *Id.*

98. *Veck* maintained that “the adoption of SBCCI’s code into law was a transformative event that instantly denuded the work of copyright protection” and that “there can only be one expression of the law: Once adopted by the government, the model code merged into the body of the law,” leaving “no other correct way to express the building code law. . . .” *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. 101 U.S. 99 (1879).
103. “[W]e observe that Charles Selden, by his books, explained and described a peculiar system of book-keeping, and illustrated his method by means of ruled lines and blank columns, with proper headings on a page or on successive pages. Now, whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.”
Id. at 104.
104. 241 F.3d at 407–08
105. Building Blocks 44, *supra* note 8.
106. The Federalist No. 10 (James Madison).
107. Building Blocks 46, *supra* note 8.
108. *Id.*
109. AISI was founded in 1855 as American Iron and Associates. The name was changed to American Iron and Steel Association in 1864 and the American Iron and Steel Association merged into the American Iron and Steel Institute in 1908. *History of the American Iron and Steel Institute* (visited June 18, 2001) <<http://www.steel.org/about/history.htm>>.
110. ASCE has more than 123,000 members and was founded in 1852. *ASCE: 150 Years of Civil Engineering* (visited March 3, 2001) <<http://www.asce.org/150/150years.html>>.
111. At the beginning of the Civil War more than 20 rail gauges were in use, ranging from 3 feet to 6 feet. Some major railroads ran multiple tracks in parallel with various gauges to facilitate interchange between lines. In 1867 representatives of at least 29 railroads met in Altoona, Pennsylvania to form the Master Car Builders Association (MCBA). The MCBA’s first goal was to standardize gauges throughout the country. The organization recommended a standard gauge of 4 feet 8 1/2 inches to match the English standard because locomotives were imported into the United States from Britain. Congress required a standard gauge in the Pacific railroads, but it was not until 1886 that the last major holdouts adopted the standard gauge. The MCBA also encouraged the development and installation of automatic air brakes and automatic couplers, and worked to standardize rolling stock specifications. Robert L. Frey, *The Encyclopedia of American Business History and Biography: Railroads in the Nineteenth Century* 333 (1988).
112. The General Superintendents for the Arrangement of a Summer Time Schedule was formed in 1872 with the goal of reducing the chaos resulting from the use of more than 70 time zones in the United States. In 1886 the General Superintendents changed its name to the General Time Convention and was the catalyst in persuading Congress in 1918 to establish the system of four time zones. The group also pushed for standardization of train signals, train orders, car movement reports and car rental payment rules. Because of the expanded interests of the group, it changed its name again in 1891, to the American Railway Association. *Id.* at 334.
113. Building Blocks 49, *supra* note 8.
114. *Id.*
115. “API has developed some 500 equipment and operating standards used around the world” and “distributes more than 200,000 publications each year.” *American Petroleum Institute in Brief* (visited June 18, 2001) <<http://www.api.org/about/aboutindex.htm>>.
116. “The primary reason behind the formation of NEMA in 1926 was to provide a forum for the standardization of electrical equipment. The standardization process benefits the user by making products that are available globally, delivered locally, competitively priced, able to perform predictably, and are safe and environmentally sound.” *NEMA Electrical Standards* (visited March 3, 2001) <<http://www.nema.org/standards/>>.
117. Building Blocks 50, *supra* note 8.
118. The IEEE has over 366,000 members, making it the world’s largest professional society. The society was founded in 1884 and its “earliest efforts were directed toward standardizing units, definitions, and nomenclature relating to basic electrical science.” *IEEE News Briefs* (visited March 3, 2001) <<http://www.ieee.org/newsinfo/briefs.htm>>, *History of the IEEE* (visited June 18, 2001) <http://www.ieee.org/organizations/history_center/historical_articles/history_of_ieee.html>.
119. Building Blocks 50, *supra* note 8.
120. *Id.*
121. ASTM was organized in 1898 and has more than 32,000 members from over 100 countries. Over 10,000 ASTM standards are published each year in 73 volumes of the Annual Book of ASTM Standards. *What is ASTM?* (visited June 18, 2001) <<http://www.astm.org/FAQ/1.html>>.
122. NFPA was established in 1896 and its membership totals more than 75,000 individuals and more than 80 national trade and professional organizations. “NFPA is a worldwide leader in providing fire, electrical, and life safety to the public.” *About NFPA* (visited June 18, 2001) <http://www.nfpa.org/About_NFPA/about_nfpa.html>.
123. Building Blocks 51, *supra* note 8.
124. *Id.*
125. *Id.*
126. *Id.*
127. UL was founded in 1894 and has a staff of almost 6,000. Almost 62,000 manufacturers in 92 countries produce UL certified products. It currently has 776 standards. *About UL* (visited June 18, 2001) <<http://www.ul.com/about/index.html>>.
128. Building Blocks 51, *supra* note 8.
129. *Id.*
130. International Standards, Conformity Assessment, and U.S. Trade Policy Project Committee, National Research Council; Standards, Conformity Assessment, and Trade: Into the 21st Century, 11–17 (1995).
131. James Brooke, *Canada is Flush with American Toilet Shoppers*, *Times Union* (Albany, NY), Aug. 6, 2000, at A22.
132. *Id.*
133. When CAFE requirements were put into effect, only about 25% of personal vehicle sales were of trucks and vans. As the lower mileage requirement increased, automakers were forced to reduce the size of cars. Trucks and vans now make up more than 50% of American personal vehicle sales. The hard points on trucks, SUVs and vans are also higher than the hard points on cars, resulting in more damage and higher injury and death rates in automobiles hit by trucks—especially when an automobile is hit on the side by a truck. Bob McElwaine, *Farewell, Vans and SUVs? Proposed Corporate Average Fuel Economy Standards for*

- Vans and Sports Utility Vehicles*, Ward's Dealer Business, December, 1996, at 17.
134. The standards allow manufacturers to accumulate credits for exceeding the mileage requirements that can be used to offset failure to meet the requirements in future years. Since Japanese manufacturers produced almost nothing but small cars at the time the standards were put into effect, they were able to use the credits to move into the market for larger cars as American manufacturers struggled to meet the requirements by selling their compact cars at losses. Pietro S. Nivola & Robert W. Crandall, *The Extra Mile* 30 (1995).
 135. Office of Standards Services, National Institute of Standards and Technology, U.S. Dep't of Commerce, Special Pub. No. 806, *Standards Activities of Organizations in the United States* 514 (1996).
 136. *Id.* "One Model Code is generally favored by municipalities throughout a given region. For example, some version of SBCCI Standard Building Code is adopted by the states south of the Mason-Dixon line and east of the Mississippi River."
 137. *Id.*
 138. *Id.*
 139. *Membership Information* (visited June 18, 2001) <<http://www.sbcci.org/membershipservices/mbrinfo.htm>>.
 140. The Standard Codes consist of the Standard Building, Plumbing, Mechanical, Fire Prevention, Gas, Housing, Existing Building and Swimming Pool Codes. SBCCI also develops and offers International Codes covering many areas, including Energy Conservation, Private Sewage Disposal and Zoning. *Id.*
 141. *Id.*
 142. *Id.*
 143. *Building Codes* (visited June 18, 2001) <<http://www.umass.edu/bmatwt/codes.html>>.
 144. *Id.*
 145. *Id.*
 146. *Id.*
 147. *Id.*
 148. Andrea Simon, Note, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 Colum. L. Rev. 425, 429 (1984).
 149. Ch. 23, 28 Stat. 601 (amended 1976).
 150. *Id.*
 151. BOCA, 628 F.2d at 734.
 152. *Id.*
 153. *Id.* at 735.
 154. Gellman, *supra* note 4, at 1008.
 155. *Id.*

The creative bureaucrat or politician who is also a copyright holder has a broad range of options available that allow for considerably more subtlety than a crude political standard. For some information (*e.g.*, criticism of a Republican Administration), only Democrats might have a political incentive to reproduce it. It would be easy to deny a license to everyone while only adversely affecting Democrats. For other information, the terms under which reproduction is permitted would be more welcomed by some than by others.
 156. *Id.*
 157. *Id.* at 1002.
 158. *Id.* at 1009. "[T]he federal government should not be permitted to use copyright as a tool for censoring the publication of embarrassing information appearing in government documents." Paul Goldstein, Copyright § 2.5.2, at 2:44 (2d ed. 1996 and Supp. 2001).
 159. Alan Hamilton, *Editor Links BBC Worker to Leak of Royal Speech*, *The Times* (London), Feb. 16, 1993.
 160. *Id.*
 161. *Id.*
 162. Gellman, *supra* note 4, at 1000.
 163. *Id.*
 164. Unlike the Queen, a U.S. president cannot copyright works created as a result of his official duties. The definition of "official duties" is broadly defined. In addition, the newsworthiness of purely political speeches ensures that the fair-use doctrine will be broadly defined. Thus, contrary to the situation with Royal speeches, the circumstances under which a news outlet can be sued for quoting the president are extremely limited. *Id.* note 5, at 1001.
 165. *Id.* at 1011.
 166. *Id.*
 167. 241 F.3d at 403.
 168. *Id.*
 169. *See, e.g., Trenton v. New Jersey*, 262 U.S. 182 (1923).
 170. *Id.* at 191–92.
 171. Ludwig von Mises on the role of government in regulating commercial activity:

There are, for instance, people who argue thus: It is obvious that traffic regulations on the public roads are necessary. Nobody objects to the government's interference with the car driver's conduct. The advocates of laissez faire contradict themselves in fighting government interference with market prices and yet not advocating the abolition of government traffic regulation.

The fallacy of this argument is manifest. The regulation of traffic on a road is one of the tasks that is incumbent upon the agency that operates the road. If this agency is the government or the municipality, it is bound to attend to this task. It is the task of a railroad's management to fix the timetable of the trains and it is the task of a hotel's management to decide whether or not there should be music in the dining room. If the government operates a railroad or a hotel, it is the government's task to regulate these things. It is not an instance of government interference with the operation of the market economy that the postmaster general chooses the pattern and color of the postage stamps. With a state opera the government decides which operas should be produced and which not; it is a non sequitur to deduce from this fact that it is also a task of the government to decide these things for a nongovernmental opera.

Ludwig Von Mises, *Human Action* 718–19 (1st ed. 1949).
 172. *See, e.g., FM Global: Research, Standards & Testing* (visited Feb. 9, 2001) <http://www.factorymutual.com/research_standard_testing/index.html>.
 173. *DOB Introduction* (visited Feb. 13, 2001) <<http://www.ci.nyc.ny.us/html/introd.html>>.
 174. *Id.*

175. *Id.*
176. *California Building Standards Commission Historical Information* (visited June 18, 2001) <<http://www.bsc.ca.gov/AboutUs/Historical.html>>.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *FM Global: Research, Standards & Testing* (visited Feb. 9, 2001) <http://www.factorymutual.com/research_standard_testing/index.html>.
183. *Mises*, *supra* note 171, at 657–58.
184. *California Building Standards Commission Historical Information*, *supra* note 176.
185. *Id.*
186. *Codes & Comment Price List* (visited June 18, 2001) <<http://www.sbcci.org/Orders/codes&com.htm>>.
187. *Membership Information*, *supra* note 139.
188. SBCCI pointed out that libraries and building officials routinely give out or allow copying of sections of its Standard Building Code with SBCCI's knowledge and consent. In addition, SBCCI conceded that a city adopting the Code would probably have a fair-use defense were it to post the Code on a Web site or hand out copies to citizens. SBCCI distinguished *Veck*'s posting of the Code in that he had no fair-use defense as a private individual. Transcript of oral argument at 8–10, *Veck v. Southern Bldg Code Congress Int'l Inc.* (5th Cir. 2001) (No. 99-40632) (visited Dec. 20, 2000) <<http://regionalweb.texoma.net/cr/appealtranscript.html>>.
189. *Membership Information*, *supra* note 139.
190. *Id.*
191. *See, e.g.,* Gene Callahan, *Shaky Ground: Why Flexible Rules and Reasonable Regulators Are a Builder's Worst Nightmare*, *Reason*, Jan. 2001, at 41.
192. *Id.* at 42.
193. *Id.* at 43.
194. Callahan notes that one California property owner spent over \$600,000 and three-and-a-half years to get permission to build a home on a 1.1 acre lot. *Id.*
195. *Id.*

Kent Basson is a 2001 graduate of Washington & Lee University School of Law in Lexington, Virginia, and is a first-year associate at Pennie & Edmonds LLP in Washington, DC. Prior to attending law school, Kent worked as an engineer for almost twenty years—including five years as nuclear submarine officer in the U.S. Navy and thirteen years in the engineering/construction industry. A version of this article was awarded an ASCAP 2001 Nathan Burkan Memorial award.



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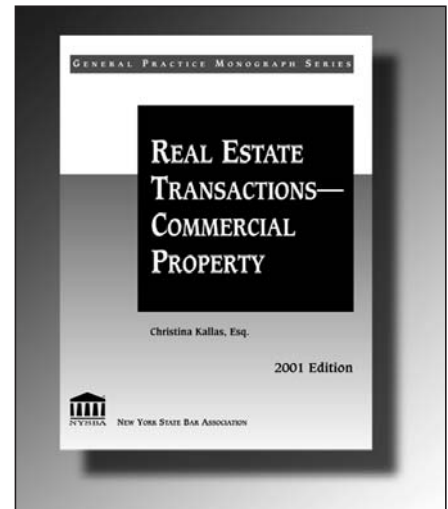
Real Estate Transactions— Commercial Property*

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. *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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Systems of Internal Control and Auditability of Digital Transmissions

By Phil Teplitzky

The marketing and selling of music has undergone a major revolution in the last few years. Traditionally, one purchased an album, CD or some form of physical reproduction of the music. This was the way it had been since Edison invented the Gramophone. However, with the introduction of the Internet and the shift to downloading of bits, that has changed. The industry has morphed from the acquisition of the tangible to the download of the intangible. The proof of this change is in the numbers. In the last year, the number of requests for licenses for digital transmissions has increased dramatically.

This revolution in the music delivery business has resulted in a number of new rules and regulations. In the 1990s, Congress passed laws that reaffirmed that the Copyright Act is just as applicable to the Internet as it is to the physical world, and that it is illegal to download music without obtaining the appropriate license authority and without making the proper royalty payments to the copyright owners. Such legislation provides the creators with fair and equitable protection for their works, reasonable and acceptable compensation and continues the principles laid down by the founding fathers that the genius of creators is theirs to control. It should be noted that one of the first laws enacted by the new United States of America was that of Copyright protection of creative works. Creativity has to be protected and rewarded if we want to keep it thriving.

A similar revolution is happening in the laws and processes that protect the financial rights of copyright owners. The courts have upheld the principle that copyright holders have a financial right in the music downloaded from the Internet. This right is protected by the issuance of licenses and the collection of royalties associated with those licenses. Just as the rights of shareholders are protected by legislation, and just as there is a requirement for publicly traded companies to issue certified audits of their financial positions, so too must digital music companies provide the licensor of music with audits of the number of downloads that have occurred and an accurate and complete record of what royalty payments are owed, based on the terms and conditions of the licenses.

This article encompasses the issues raised above, and addresses the following questions:

- 1) What constitutes an adequate System of Internal Control (SIC) for digital transmissions; and
- 2) How does one audit that SIC to ensure that it is accurate, complete and timely?

Without answers to these two questions, rights holders, like those with financial interests in a company, will have no way of knowing if their rights are being protected.

Digital Transmissions

Many of the musical compositions that one hears via digital transmission were originally recorded in analog rather than digital form. The transformation to digital format is done at the time when a CD is made. The analog to digital transformation is made possible by sampling the analog sound reproduction and recording the numerical value of the sound. All sound waves can be represented by a digital number. The quality of the digital reproduction is a function of how often one samples, the number of times a second that one calculates the value of the sound wave and the number of tracks sampled. Many of the original sound recordings were done in analog mode but on multiple tracks, with each track representing a different component of the composition and the

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175111897	897591075917	7519751659156	59817516561989	7195619658	91856	679879879855	
71571758	quality of the equipment doing the sampling. In other words, the quality of the recording depended on how fast and accurate the algorithms were. The digital representation can then be either stored in its entirety, or compressed to save space.						71654
18974016							979
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12234567	The MP3 and MPG formats are examples of compressed representation of original music. The reason as to why music can be compressed, and why the number of bits (i.e., the number of discrete sampling data points) may be reduced is that the human ear has a latency period. The ear does not refresh the sound for a finite period. If the sound is reproduced at a rate greater than the ear's ability to refresh, quality is lost. However, since the ear cannot respond fast enough to notice, that does not matter. Compression algorithms and standards take advantage of this phenomenon. They reduce the number of samples. They also save space on the CD and reduce the amount of time it takes to download and store a song. In fact this technology goes even further, as modern signal processing algorithms and hardware are able to fill in the gaps. They can determine what the value of the missing bits should be based on; an analysis of the difference in values between the current bit rate, the bits just played and by looking ahead to see what the upcoming bits are. The processor can then fill in the missing pieces and smooth the curve. Thus although the number and quality of the music is improved, less information is sent, and therefore less time is needed to download.						9797
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90845928							987895
14-18057							9797
12234567							9879333
90845928							21687
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19781751	The major formats for music downloads are MP3 and WAV. However, these will soon be replaced by new compression standards that will provide better quality with fewer or the same number of bits.						98798798
71571758							71654
18974016							979
12234567							54
90845928							98787
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12234567	Digital Rights Management (DRM)						987987
90845928	In the early days of Internet music downloading (two years ago or, in Internet terms, nine territorial years), the trade in music was wide open. There were no controls or regulation. Since then, providers have introduced the concept of Digital Rights Management (DRM). DRMs encrypt the bits and render them unplayable. The end user has to purchase a key to unlock the bits from the provider. No key, no music—it is that simple. DRMs provide for several different types of protection for songs that are downloaded and played:						216899
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19781751	What Are the Issues?						98798798
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- How do you know how many downloads have occurred?
- When does a download actually happen: When it starts, or when it finishes? What about partial downloads?
- How do you know that a downloaded song has not been given to someone else?
- What happens when you want to back up and/or replace your hard drive and/or computer? Do you still have the bits?
- What happens when you transfer the song to your portable player and/or computer? Do you have the right to do this and play the song?
- Can you give the song to someone else (like you can with a CD)?
- If it is a limited download, how do you know that the time has expired or when the user has reached the limit on the number of plays?

These are just some of the issues that the music industry is wrestling with. Tools and techniques have been developed to address each case method. The mission of this article is not to discuss the effectiveness or appropriateness of the various approaches, but to determine what reliance can be placed on the information they generate. To put it in a somewhat different way, let us suspend disbelief and say that all of the tools, methods and techniques work perfectly. How then do we know that they are operating, operating consistently and that the information they are producing is accurate, complete and authorized? We do this by establishing an SIC.

What Is a System of Internal Control (SIC)?

SICs are the tools, methods and techniques that management employs to ensure that data is:

- **Accurate:** An SIC can show that a company that claims to have sold \$500,000 worth of widgets in a year in fact has sold that amount.
- **Complete:** An SIC can show that all of the data is there and that no transactions have been missed.
- **Authorized:** An SIC can show that only those transactions that are legitimate have been recorded and that no unauthorized, rogue or otherwise unapproved transactions have occurred.
- **Secure:** An SIC can show that only authorized and authenticated employees have accessed the system and made changes.
- **Timely:** An SIC can show that the system operates in a way that is consistent with the cycles it is intended to control. (For example, if changes are made on a real-time basis then batch control tools and techniques are not appropriate.)
- **Evidence of use:** There has to be some way of determining whether the controls have in fact been doing what they are intended to do. (An example of this would be the use of a security system that prevents unauthorized access and creates an audit trail of unauthorized attempts to use the system.)

SICs have many individual tools and methods that can be used to achieve control objectives. For example, to ensure that a system is secure, some of the methods, tools and techniques that might be employed include:

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- use of a locked computer room and physical security;
- sign-in and sign-out record sheets, physical security and evidence of use;
- SSL secure connection;
- password protection of servers;
- password protected computers with a mandatory change of passwords every 30 days;
- password protected environments for development, testing and operations with only limited access ability to the operational environment; and
- encrypted password files.

All of the above are part of an SIC aimed at enhancing and maintaining the security of the environment.

Characteristics and Attributes of an SIC

SICs may be applied to many dimensions of the environment. There are two main types of controls: financial and operational. Financial controls are aimed at keeping the books and records of a company in agreement with actual sales and purchases. Financial controls are often reflected in a financial report issued by a company at the end of the year. The numbers in the report can be regarded as accurate, since an audit firm has evaluated the SIC and found it to be adequate. Investors, banks and other people with a monetary interest in a company rely on these numbers to give an accurate and fair representation of a company's financial health. Operational controls address how a company does business. These controls include the sending of goods, receipt of goods, warehousing and the sales and ordering process. They also include the processes and methods used to develop and deploy computerized systems. In an era where the only product that a company may produce is information, as with digital music services, the SIC associated with the development and deployment of computer systems is often more important than any other. How systems are developed, tested, deployed and maintained is of major concern. There needs to be an SIC established in this area, just as there exists in the more traditional financial area.

What Is Auditability?

An audit is a way to determine if the SIC is operating effectively, consistently and constantly. In effect, an audit is a way to have some level of assurance that the controls that were implemented are in fact doing their job. Generally, an auditor, be it internal or external, using a set of audit tools, methods and techniques, reviews and tests the SIC to determine if the system is operating properly; and more important, if it is meeting the control objectives for which it was originally implemented. It is possible to have a very well designed, operational SIC, but not have it meet the control objectives for which it was designed. SICs must be appropriate for the operational and technological environment in which they live. Batch controls, which are designed for a main-frame environment, while perfectly conceived, may be very inappropriate for an online, Internet-enabled environment. Therefore, not only must the controls work, but they also have to be matched to the environment. Audits are a way to have an expert render an opinion as to the adequacy and appropriateness of the SIC. To do this, auditors use an assortment of audit tools, methods and techniques.

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The basic audit process can be divided into two types:

1. **Substantive Review:** This is often colloquially referred to as "counting the beans." In the case of a financial audit, it may be possible to re-compute or reconstruct the financial position of the company by adding up all of the receipts (sales) and purchases (expenses) and recalculating the financial position of the company. Sometimes this process is shortened by using statistical sampling techniques that permit the auditor to reduce the number of transactions that he has to redo in order to achieve a reasonable level of correctness.
2. **Compliance Review:** In this case, the auditor reviews the SIC that has been put in place and, via reviews and tests, determines if the SIC is operating effectively and meets the control objectives for which it was designed. One of the major control techniques on which an external auditor may rely is an internal audit group that performs substantive tests throughout the year. Compliance reviews are generally the only kind of audit that can be done in a highly automated, information-intensive environment.

What Is Different About the Digital World?

Therefore, the inevitable question must be asked: What is there about digital music transmission systems that make them different from other systems? Without treading on the sublime, the answer is everything and nothing! In terms of the general control and audit objectives, digital music systems are the same as any other system. However, in terms of the specific control tools, methods and techniques that have to be used, and by inference, the audit tools, methods and techniques, everything is different. As was stated earlier, many of these issues have yet to be addressed. For example, no one as yet determined how to control backups, portability, reacquisition of content (either due to crashed hard drives or the replacement of computers), DRM management and associated public and private key management and replication of content to portable devices, for people who do not have Internet access. In the digital music world where the bits are the product, there is no way to conduct a substantive operational audit. It may be possible to conduct such an audit on the revenue side, but not on the side that deals with the bits. All of the controls and audit techniques must be compliance-oriented and by inference, would need to be conducted through the computer and contemporaneously with actual operations. It would be awfully embarrassing to find out that the SIC did not work, but that such failure was only discovered several days later because the audit approach chosen was not contemporaneous with the speed at which the business operated. As the digital transmission world is one of real-time operation, it is important that the SIC and audit reviews also be operative in real time.

Conclusion

In this article, I have identified and defined some of the issues and challenges that will face digital transmission companies in the areas of control and auditability. This is only a survey of the issues. Each of the topics identified is of such breadth and magnitude that each one warrants an article of its own. What I hope to have done is make the reader sensitive to the issues, and start you on the road to consider what to do next. These issues must be resolved if digital music providers are to be successful. A good operational and reliable SIC is essential for corporate stability and confidence. The recent events at Enron only make more apparent the need for control and auditability!

Philip H. Teplitzky is Senior Vice President and Chief Information Officer of The Harry Fox Agency, Inc. Prior to joining HFA, he started, managed and built a successful Information Technology Consulting Practice; was the Managing Director of Technology for Technology and the New York 911 Project; and managed the creation and growth of several start-up IT departments.

Business/Corporate Law and Practice*

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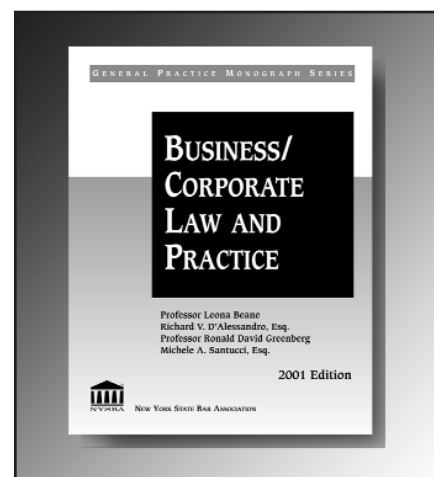
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