NYSBA SUMMER 2000 | VOLUME 11 | NO. 1

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

Our Section is embarking on a season of profound change. That it is also the beginning of a new millennium is appropriate—but incidental. What is *not* incidental is that we are undertaking initiatives to accommodate the demands of the ever-evolving present. What are some of these initiatives?

To start with the obvious, you have for the first time elected a female Chair. As such, I feel an abiding responsibility to seek out, wherever possible, qualified women and qualified minorities to fill vacancies as they arise on our Executive Committee. In that respect, I'm pleased that **Edna Cowan**, our former Young Entertainment Lawyers Chair, is now serving as Secretary to the Section. That seat is now filled by **Jennifer Unter**, whom we welcome to the Section. Our new Programs Chair—one who has ably served this Section in the past in numerous capacities—is **Mary Ann Zimmer.** We have also filled a long-standing vacancy in our Motion Pictures Committee with **Donna L. Bascom**, and look forward to some interesting speakers sponsored by this Committee. As continuing legal education accreditation for attorneys has now become compulsory in New York State, EASL intends to provide quality CLE-accredited programs for its Section members. To implement this objective, we are pleased to have **Judith B. Prowda** as our CLE Compliance Officer**.** We also welcome **Joshua R. Bressler** (no relation to your Chair) to our Section as the new Chair of the Rights of Publicity, Privacy & Merchandising Committee, taking the place of **John Reichman**, who has so ably filled the Chair for a number of years. Thank you John! Finally, a welcome, as well, to our new Broadcasting and Cable Committee Chair, **Douglas T. Jacobs,** who is taking the reins so long and finely held by **Michael Rose.**

I would also like to note that our Publications Chair, **Jeff Sanders**, who has served us well by editing and overseeing the publication of some extremely fine EASL *Journal*s will be turning over the Chair to a new attorney from the Young Lawyers Committee. **Jeff** will introduce her in his *Journal* comments. Meanwhile, many thanks to **Jeff** for his past devotion, service to EASL and his able product.

As an accommodation to the impact the Internet has already had on our varied practices, and to its even greater potential, we propose to modify our Section

Inside

NYSBA

name to **EAS & *e*-Law**. I look forward to bringing this up and voting on it at our Annual Meeting on Friday, January 26, 2001.

Another new change for us is the added amenity of a Section Listserv. An electronic listserv is basically an e-mail distribution system which delivers any message sent to the listserv e-mail address to everyone who is subscribed to the listserv. This could—and should—be an invaluable tool for networking and exchanging information pertinent to our various (but related) legal practices. I'd like to give special thanks to **Michael Rose** and to **Jay Kogan** for their vision and for their initiative in creating this potential asset, and to **Michael** and to **John Nicoletta** for setting it up.

As to Section programs, our two spring events were major successes! The first, on March 23, was a 2½ CLE-accredited program, *Ethical Issues that Arise in Entertainment, Arts and Sports Law*, presented in conjunction with the New York County Lawyers' Association. Among the nine panelists at this sold-out program were **Jeffrey Rosenthal,** our new Vice-Chair and Co-Chair, along with **Jeffrey Gewirtz**, of the Professional Sports Committee, **Ralph Lerner**, our Fine Arts Chair, and **Philip M. Cowan**, a former and esteemed Section Chair.

The second spring program, *Art Law for the Millennium,* was also sold out—and enormously successful. This was a marathon 7-CLE-credit program held in Philadelphia on April 27 in conjunction with the Philadelphia Volunteer Lawyers for the Arts. Among our Section panelists were **Kenneth Swezey**, our New Technologies Chair, **Ralph Lerner**, and myself.

Other Section CLE programs in the offing are an Art & Appraiser program (also a day-long marathon) to be held in New York on Thursday, November 9, and a sports-oriented program to be held in New York on Friday, November 10th. You will be receiving more particulars about these exciting, informative programs in the near future!

CLE offerings by our Section, a practice so thoroughly implemented by my predecessor, **Tim DeBaets**, will become standard. We will ensure this through the efforts of our CLE Compliance Officer, a new and responsible position created by **Tim**, who will coordinate our endeavors with Albany. Speaking of **Tim,** it's going to be hard to fill his shoes, and I'm glad he's still around. (Do you hear me Tim?) As my predecessor, **Tim** was a vigorous and innovative Chair. During his term, he initiated numerous co-productions with other NYSBA Sections as well as with other professional associations. Most recently, under his leadership, was our Section's highly successful joint venture in January with New York Women in Film and Television and the *Fordham Intellectual Property, Media and Entertainment Law Journal*. Additionally, under the guidance of **Tim** and of **Joanna Kyd**, his Programs Chair, we had an instructional and highly provocative and altogether terrific Annual Meeting focusing on hate Web sites, regulation, and the First Amendment. We thank **Joanna** for her splendid endeavors over the years as Programs Chair. Our Annual Meeting was enhanced by speaker **Stan Soocher**, who enlightened us at lunch with his comprehensive annual summary of developments in entertainment law. Special thanks goes to **Alan Hartnick**, Chair of the Copyright and Trademark Committee, for arranging to have Stan speak.

In closing, I'd like to say that no one could possibly have a more terrific team: with **Jeff** as Vice-Chair, **Edna** as Secretary, **Alan Barson** continuing as Assistant Secretary, and **Stephen Rodner** staying on as Treasurer, along with **Steve Richman—**Legislation Chair, **Peter Herbert—**Litigation Chair, **Howard Singer—**Membership Chair, **Ronald Bienstock** and **Gary Roth,—**Music and Recording Co-Chairs, and **Peter Cane—**Theater and Performing Arts Chair, together with the valued input of our former Chairs, **Phil, Marc Jacobson, Eric Roper, Howard Siegel, John Kettle, Samuel Pinkus,** and, of course, **Tim,** our Section can accomplish great things! Here's to change!

Judith Bresler

Editor's Note

Echoing the Chair's celebration of change, this issue occasions two very significant introductions. First, I welcome to **Judith Bresler** as new Chair of the Section. Judith is well known to many of you from her tireless work as Section Vice-Chair, Co-Chair of the Committee on Fine Arts, and from her prodigious writing—not the least of which include articles that have appeared in this publication. In her first six months as Section Chair, Judith's commitment to the Section has been exemplified by an ambitious slate of CLE offerings and Section programs, many new faces on the Executive Committee (along with coincident new energy) and increased outreach to the membership. The downside of Judith's arrival is the departure of her predecessor, **Tim DeBaetts**, who served this Section with distinction during his tenure.

Second, it is my pleasure to welcome **Elissa Hecker** as the incoming Editor of this *Journal*. Elissa is Associate Counsel to the Harry Fox Agency, where her responsibilities cover legal, educational and policy matters. Significantly, Elissa's assistance in completing this issue was invaluable. It is with great confidence that I hand off the future of this publication to Elissa.

On a personal note, I want to thank the Section for the opportunity to have served as Editor for the past three years, and for its support during my tenure. Without the submissions and referrals from the membership the high-quality coverage of cutting-edge issues with which the *Journal* has come to be associated would not have been possible. Thanks are also in order to **Brian Hartstein**, who served as Associate Editor for the past two years; the Section Chairs under whom I served—in reverse chronological order—Judith, Tim, and **Sam Pinkus**; **Howard Siegel**, who recruited me into this position; my two employers during the relevant time period (also in reverse chronological order) Winstar New Media and Pryor Cashman Sherman & Flynn, each of which indulged the significant diversion of my professional time that was necessary to edit the *Journal*; and the exceptionally talented newsletter staff at NYSBA—Dan McMahon, Wendy Pike and Lyn Curtis.

Turning to the text between the remaining pages, this issue features **Emily Bass**'s continued analysis of digital publishing rights, viewed through the highly relevant filter of her appellate victory in the *Tasini* case; **Bill Baroni**'s article on the ever-expanding right of publicity; **Ched Harris**'s overview of the digital music landscape; and **Alan Hartnick**'s thoughts on public domain implications of the new media.

On a truly final note, I renew my call for Section members to write for the *Journal*. I know that Elissa looks forward to new submissions and ideas for submissions, and can most easily be reached at ehecker@harryfox.com.

Jeff Sanders

Request for Articles

If you have written an article, or have an idea for one, please contact
Entertainment, Arts and Sports Law Journal Editor
Elissa D. Hecker, Esq.
The Harry Fox Agency, Inc.
711 3rd Avenue
New York, NY 10017
ehecker@harryfox.com

Articles should be submitted on a 3-1/2" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Tasini v. New York Times: Scourge? Or, Straightforward Statutory Construction?

By Emily Bass

To hear defendants and their colleagues talk about it, the Second Circuit's decision in *Tasini v. New York Times Co.*[1] poses problems for the burgeoning cyber-industry that makes Y2K pale by comparison. Is there anything to what the defendants say? Will the application of traditional copyright principles to the electronic info-world really destroy it? Is *Tasini* really a scourge? Or, as the authors and freelancers claim, simply a straightforward construction of the statute?

To decide, we take a look at what the parties claimed, what the Courts decided, and what the publishing world is saying in the aftermath of the Second Circuit's decision.

The Parties' Claims and Defenses

Originally, there were 11 plaintiffs and six defendants in the *Tasini* casefour print publishers and two database producers. The publishers included the companies that published the *New York Times, Newsday, Sports Illustrated* and the *Atlantic Monthly*. The database producers included the Mead Corporation, which produced LEXIS/NEXIS, and University Microfilms International, which produced a variety of CD-ROMS.[2] The plaintiffs were freelancers who had written for the four publications.[3]

The essence of plaintiffs' claims were that the defendants had made their freelance articles available on-line or as part of CD-ROM without consent and without negotiating additional compensation. Three of the defendants claimed that they *had* obtained the plaintiffs' consent—at least tacitly—and the fourth defendant, Sports Illustrated, claimed that it did not need the plaintiffs' consent.

Sports Illustrated claimed that, by entering into a contract, it was given "first publication rights," where the author had granted the right to publish his article "first" in any and all media. The Atlantic Monthly Company made a similar argument based upon the language in its contract.[4] Newsday Inc. also claimed that by negotiating checks that had the following legend stamped on the back, the authors had given up electronic rights:

> Signature required. Check void if this endorsement altered. This check accepted as full payment for first-time publication rights (or all rights, if agreement is for all rights) to material described on face of check in all editions published by Newsday and for the right to include such material in electronic library archives.

All of the defendants claimed that even if they were wrong and they had not obtained a contractual transfer of any rights, they were nonetheless authorized to do what they had done by § 201(c) of the Copyright Act.[5] That section provides:

> *Contributions to collective works.* Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of
>
> (i) that particular collective work (the so-called "first clause" of the privilege),[6]
>
> (ii) any revision of that collective work (the so-called "second clause"), and
>
> (iii) any later collective work in the same series (the so-called "third clause").

The first sentence in the subsection simply reiterates and applies a generally recognized principle.[7] The second sentence then establishes a default rule that applies where the publisher of a collective work is given a freelance contribution,[8] but there is no express transfer of any "rights." This part of the subsection that is divided into three clauses and is referred to as "the privilege" became the focus of the litigation. Defendants claimed that they obtained the right to license plaintiffs' articles for inclusion in databases by virtue of the "second clause" of the privilege.

More specifically, they claimed that by sending plaintiffs' articles on to LEXIS/NEXIS and UMI for incorporation into electronic products, all they had done was exercise the privilege afforded them by the second clause to include plaintiffs' works in an electronic version or "revision" of a day's issue of a newspaper.

They further claimed that the electronic "revisions" in which they were included were sent to the defendants' databases, and then added to them, as intact collective works. In other words, they portrayed each of the databases at issue in the litigation as containing tens of thousands of collective-work-building-blocks, each of which was the electronic equivalent of a revised issue of a particular day's publication.

Plaintiffs demonstrated to the Second Circuit that none of these contentions were true. That is, they demonstrated that:

(1) far from preserving the integrity of their collective works, the print publishers took great pains to dismantle them;

(2) they placed each contribution that had appeared in a collective work in a separate electronic envelope;

(3) they assigned keywords, symbols and topic identifiers to each contribution that corresponded with its subject matter;

(4) they transmitted the contributions to the database producers as discrete electronic files;

(5) each contribution was then further encoded so that it could be accessed and retrieved separately from all other contributions that had originally appeared together with it in an issue;

(6) at this juncture, each contribution was assigned a unique "accession number," and, finally,

(7) the contributions were then added to the defendants' databases in such a fashion that they were interspersed among and intermingled with millions of other contributions from other collective works.

Not only do the contributions from a particular issue not remain together physically, they are so encoded that, in most instances, the retrieval of one does not result in the retrieval of others. Indeed, as *both* the Circuit and District Courts agreed, in most instances the opposite will be the case. That is, a search will typically yield a variety of articles from *different* issues and publications.[9] Which publications articles will hail from in any given instance will depend upon the publications that supply the source material.

In the case of NEXIS, for instance, a search will typically result in the retrieval of discrete articles from a wide variety of publications. In the case of the "New York Times OnDisc," a search will typically result in the retrieval of discrete articles from different issues of the *New York Times*. In the case of the "General Periodicals OnDisc" database, a search will typically result in the retrieval of discrete pages from a variety of publications.

Tasini I: The District Court's First Decision[10]

On August 13, 1997, the United States District Court for the Southern District of New York issued its opinion. It ruled that plaintiffs had not consented to the incorporation of their works into databases and that the defendants had not obtained the express transfer of electronic rights by check, by letter or by contract.

Thus, in the case of the contract between plaintiff David Whitford and defendant Time, Inc., the Court held that the grant of the right to "first" publish plaintiff's story in a print magazine did not carry with it a second and subsidiary right to publish plaintiff's story on NEXIS. First publication rights, the Court held, meant precisely what it indicated, and did not include "second" or subsequent publication rights.

It took a similar position with respect to Newsday. That is, it held that Newsday did not obtain the right to incorporate plaintiffs' works into NEXIS by stamping a legend on the back of its checks, allegedly giving it the right to include plaintiffs' articles in its "electronic library archives." The phrase "electronic library archives" could not be said to unambiguously refer to LEXIS/NEXIS, the Court found, for two reasons. First, because Newsday already had an internal archive to which the legend could be presumed to refer and second, in any event, because NEXIS wasn't an "archive" in the true sense.[11] Of equal importance, the Court also found that the legend did not refer back to or memorialize a prior agreement respecting electronic rights.

Regarding the question of whether the defendants automatically obtained electronic rights pursuant to § 201(c), the Court ruled four-square in the defendants' favor. That is, it reached *the result* that the defendants wanted it to reach, although, in the opinion of this author, it rejected their factual assertions and analysis.

Rather than find, as the defendants had urged it to find, that the databases *contained* second clause-type "revisions," the Court found that each database as a whole *constituted* a "revision" within the meaning of § 201(c)'s second clause. It based this conclusion on two fundamental findings: (1) That all of the articles that had appeared together in an issue of a newspaper or magazine were present somewhere in the database;[12] and (2) that, upon being retrieved from the database, each inevitably bore a legend identifying the issue of the newspaper or magazine in which it had originally appeared.[13]

Interpreting the term "revision" to mean something that resembles something else and finding that a newspaper is 'defined' by its articles,[14] the Court ruled, as a matter of law, that since each of the databases contains all of the articles that once appeared together in an issue,[15] each database necessarily resembles each periodical issue whose articles it contains.

Consistent with this analysis—and with the conclusion that each of the databases at issue in the litigation was a "revision" of particular collective works—the Court found that the defendants had done no more than they were statutorily entitled to do by virtue of § 201(c). The fact that plaintiffs had not authorized their actions was, therefore, irrelevant. The Court found that the statute automatically gave the defendants all the rights they needed.

Although it lamented the fact that the defendants would reap a "windfall" as a result of this construction,[16] it entered judgment in accordance with its Opinion for the defendants on every claim.

Plaintiffs Move for Reargument and Reconsideration

Perplexed by the fact that the District Court had ruled in Whitford's favor on the question of 'first publication rights,' but had entered summary judgment in the defendants' favor, plaintiffs moved for reconsideration. They pointed out:

- That § 201(c) only applies "in the absence of an express transfer of the copyright or of any rights under it,";
- That it, therefore, did not apply in the case of Whitford's claim against *Sports Illustrated*'s publisher ("Time");
- That where, as in that claim, there was an express transfer of rights, the terms of the license governed,
- That the Court had already rejected the claim that Time obtained electronic rights pursuant to subclause (a) of the license,[17] and that that was the only clause under which Time had claimed to have obtained such rights;
- That it followed that Time must have exercised rights that it had not been granted by the license; and, finally,
- That it further followed, as a matter of law, not only that Time was liable for copyright infringement, but that summary judgment should have been entered in David Whitford's favor rather than in favor of the defendants.

Tasini II: The District Court's Second Decision[18]

On October 29, 1997, the District Court issued a second opinion in the *Tasini* case. In it, the District Court went beyond simply adhering to its previous interpretation of § 201(c). Instead, it accorded the provision both a wider berth and broader application than even the defendants had argued for. Thus, it interpreted § 201(c) as applying not simply "in the absence of an express transfer," but also in the presence of one. In other words, the statute could operate to grant rights as a matter of law even where the parties had entered into a contract that expressly granted certain rights to a publisher. Of even greater significance, perhaps, it interpreted the provision as establishing a floor rather than a ceiling in terms of the rights publishers would be presumed to have obtained. In other words, it held that unless an author could demonstrate that the parties had agreed by contract that a publisher would not have certain rights, he would be deemed to have obtained them statutorily, by dint of § 201(c).

As far as Whitford's claim was concerned, the Court ruled that, even though neither Time nor LEXIS/NEXIS had made such a claim, sub-clauses (b) and (c) of the Whitford/Time agreement had given them electronic rights.[19] The Court said that all Whitford had was a breach of contract claim and not a claim for copyright infringement. It further followed, according to the Court, that defendants were entitled to judgment on that claim since Whitford had not pleaded breach of contract.

The Decision of the Second Circuit

On each of the claims on which the District Court ruled against the plaintiffs, the Second Circuit reversed.[20]

Thus, it held that

- Section 201(c) represents a default provision or "default allocation of rights,"
- "[p]ublishers and authors are free to contract around the statutory [default provision],"
- In the absence of such a contract, § 201(c) represents the most that a publisher will be presumed to have been granted from an author rather than the least, and
- The databases at issue in the appeal neither constituted nor contained "revisions" of individual print periodical issues.[21]

Stated otherwise, the Second Circuit rejected both the District Court's and defendants' arguments.

The conclusion that none of the databases constituted "revisions" was based upon a straightforward analysis of the statute. The appellate court began that analysis, appropriately, "with the language of the statute." It recognized that "the second clause [of the privilege] must be read in the context of the first and third clauses" and that the first clause "set the floor, so to speak, of the privilege" and the third clause, "the outer limit or ceiling on the privilege." The furthest extent to which a publisher could go, therefore, without an express transfer of exclusive rights, would be to include a freelance contribution in "a later collective work in the same series." "Perhaps because the 'same series' clause might be construed broadly," the Second Circuit noted, the principal House Report on the Act made the ramifications of this outer limit explicit. It made it clear "that the 'revision' clause in § 201(c) was not intended to permit the inclusion of previously published freelance contributions 'in a new anthology or an entirely different magazine or other collective work,' i.e., in later collective works not in the same series."

"Reading 'revision of that collective work' as broadly as appellees suggest," the Court concluded, would therefore have at least two unintended consequences. It would render the third clause of the privilege "superfluous," and cause the overall exception codified in the privilege "to swallow the rule."[22] Read in context, on the other hand, the meaning of the second clause was clear:

> The most natural reading of the "revision" of "that collective work" clause is that the Section 201(c) privilege protects only later editions of a particular issue of a periodical, such as the final edition of a newspaper. Because later editions are not identical to earlier editions, use of the individual contributions in the later editions might not be protected under the preceding clause. Given the context provided by the surrounding clauses, this interpretation makes perfect sense. It protects the use of an individual contribution in a collective work that is somewhat altered from the original in which the copyrighted article was first published, but that is not in any ordinary sense of language a "later" work in the "same series."[23]

In addition to concluding that databases do not *constitute* "revisions," the Court also concluded that they do not *contain* revisions:

> NEXIS is a database comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals. It can hardly be deemed a "revision" of each edition of every periodical that it contains.
>
> Moreover, NEXIS does almost nothing to preserve the copyrightable aspects of the Publishers' collective works, "as distinguished from the preexisting material employed in the work." 17 U.S.C. § 103(b). The aspects of a collective work that make it "an original work of authorship" are the selection, coordination, and arrangement of the preexisting materials. (citations omitted) However, as described above, in placing an edition of a periodical such as the August 16, 1999 New York Times, in NEXIS, some of the paper's content, and perhaps most of its arrangement are lost. Even if a NEXIS user so desired, he or she would have a hard time recapturing much of "the material contributed by the author of such [collective] work." 17 U.S.C. § 103(b). In this context, it is significant that neither the Publishers nor NEXIS evince any intent to compel, or even to permit, an end user to retrieve an individual work only in connection with other works from the edition in which it ran. Quite the contrary, The New York Times actually forbids NEXIS from producing "facsimile reproductions" of particular editions. (citation omitted) What the end user can easily access, of course, are the preexisting materials that belong to the individual author under Sections 201(c) and 103(b).[24]

An inescapable consequence of the Court's conclusions was its direction that, on remand, judgment be entered against the defendants for copyright infringement.

Defendants and Their Friends React

The defendants' rejoinder was rapid and extreme. By Tuesday, September 28, 1999, an article appeared in the *New York Times*, predicting the end of civilization as we know it. "Devastating," said E. Leonard Rubin, a former Playboy Enterprises General Counsel. "Very problematic," averred New York Times Company Assistant General Counsel George Freeman, who predicted that tremendous amounts of material would be required to be removed from electronic databases, thereby creating gaps in "the historical archive."

This same theme was echoed shortly thereafter in two filings with the Court: (1) a petition by the defendants for rehearing and/or rehearing en banc, and (2) an amicus brief filed in support of that petition by 30 large media companies and organizations. In their brief, the media companies disclaimed any intention of addressing the legal issues before the Court,[25] confining themselves, instead, to what they saw as the practical consequences of the Second Circuit's decision.[26]

They painted these consequences in the most catastrophic and alarmist terms possible, claiming, (1) that it would be tremendously time-consuming and difficult to identify and locate the freelancers whose material they placed on-line;[27] (2) that it would be similarly time-consuming and difficult to figure how much they should pay for exercising or having exercised rights in such material;[28] and (3) that publishers will more likely opt for self-mutilation than undertake to accomplish either of these tasks. Of course, the amici did not even admit that the publishers had a choice in the matter.[29] They pretended that the Courts were forcing them to dismantle or despoil their databases:[30]

> The likely result [of the Second Circuit's Opinion] will be a decision by publishers to purge all works not written by identifiable staff writers—and an over-broad purging at that, with all doubts resolved against retaining articles of uncertain parentage. . . . Many amici report that their plans are along those lines, unless the panel's decision is vacated and the judgment below affirmed.[31]

Even a cursory examination of the course the publishing world has set for itself (the removal of materials) reveals that it will not accomplish the ends that it was allegedly designed to accomplish. It will not save publishers from having to identify the freelancers whose material they put on-line. (They will have to do this, in any event, in order to identify the material they say they need to purge.) It will not save publishers from having to pay for past infringements. (They will have to do this in any event if freelancers sue over past infringements.[32]) And, finally, it will not save publishers, prospectively, from having to pay amounts across the board for the use of articles that are out of all proportion to their value. (The answer to this perceived problem is to implement one or another of the available technologies that will enable publishers to determine how many times and by whom individual articles in a database have been accessed.)

About the only thing that removing materials from a database *might* accomplish is initially saving publishers the cost of *locating* affected freelancers. It is hard to believe that cost is so astronomical that electronic publishers would opt to "perish" rather than "publish."

So, what is the point? Why are the publishers threatening to commit hari-kari—or, at the very least, to indulge in a little self-mutilation? What is their motivation?

Could it just be that the publishing world thinks that it might be more successful frightening the Courts with the imagined ramifications of the decision than it would be challenging the Circuit's staightforward statutory construction? That it thinks that if it can only convince the Courts that certain law review articles and student notes might have to be pulled[33] that it will frighten the Courts into changing their views on the law?

While it is hard to believe that the publishing world would actually entertain such thoughts, in the opinion of undersigned counsel, it is also hard to explain their *amici curiae* briefs in any other way. After all, what other reason could there be for laying out one's fears before a Court, except that one hopes that the Court will be swayed by them?[34]

A Postscript: Reality—Virtual and Otherwise

Over the past few years, the United States has demonstrated its concern about the appropriation and misappropriation of intellectual property abroad. The *Tasini* case demonstrated that there is cause for concern about the misappropriation of intellectual property right here at home.

Three of the United States' biggest periodical publishers have for ten, 15 and 17 years, respectively, been misappropriating freelancers' work, re-using it electronically, reaping considerable profits from their electronic spare-parts business, and paying those freelancers who own some of the parts nothing for their re-use. Rather than negotiate fair but modest compensation, the publishers have then—at least metaphorically—hoisted Jolly Rogers up their mastheads and said to the courts: (1) these electronic rights belong to us because we have taken them, (2) if you find otherwise, you will not only force us to dismantle our databases and bring technology to a halt, but you will hand a victory to the Luddites.

The hyperbole aside, there are two fundamental problems with the defendants' perspective: (1) one cannot acquire copyright by adverse possession; and (2) it is really *the defendants* who are impeding progress. They will only permit the implementation of certain technological advances if they *alone* profit from them.

What plaintiffs seek is very simple: not to smash machines, not to turn back the clock, but solely and simply to avail themselves of the copyright in their contributions that both Congress and the Constitution have secured to them.

Endnotes

1. 206 F.3d 161 (2d Cir. 2000).
2. During the course of the litigation, LEXIS/NEXIS was purchased by Reed Elsevier, and University Microfilms became the UMI Company.

3. Of the 20 articles still at issue at the time the parties filed their cross-motions for summary judgment, 12 had been written for the *New York Times*, seven for *Newsday* and one for *Sports Illustrated*. Each had been written on a freelance basis and not as a "work for hire."

4. The claim against the *Atlantic Monthly* was settled prior to the cross-motions for summary judgment.

5. 17 U.S.C. § 201.

6. These clauses are neither separately set out nor numbered in the statute. We set them out separately here so that we can more easily distinguish between the first, second and third clauses of the privilege.

7. That is, the principle codified in § 201(a) of the Act to the effect that copyright in a work "vests initially in the author or authors of the work."

8. "Contributions" to a collective work could include an individual article, photograph or graphic.

9. As the Second Circuit observed, "the Authors' works are now available to the public on one or more electronic databases and may be retrieved individually or in combination with other pieces originally published in different editions of the periodical or in different periodicals."

10. *Tasini v. New York Times,* 972 F. Supp.804 (S.D.N.Y. 1997) ("*Tasini I*").

11. Plaintiffs submitted an affidavit from an archivist in support of their motion for summary judgment, explaining why the NEXIS and CD-ROM databases couldn't be considered legitimate archives.

12. Although its legal conclusions were at odds with the conclusions that plaintiffs had urged upon the Court, its findings of fact were very much in keeping with the facts as plaintiffs saw them. Thus, the Court recognized that while all of the articles might be "present," they were dispersed throughout the database.

13. 972 F. Supp. at 821-24.

14. *Id.* at 823, wherein the District Court concluded that "[o]ne of the defining original aspects of the publisher defendants' periodicals" was "the selection of articles included in those works."

15. Actually, the first proposition has to be qualified somewhat since the "GPO" database did not contain all articles that appeared in Sunday's *New York Times*. It only contained the articles that had appeared in two sections—i.e., the Magazine and Book Review sections. This was enough in the District Court's view, however, to constitute GPO a "revision" of the whole issue.

16. 972 F. Supp. at 827 ("[P]laintiffs insist that the framers of Section 201(c) never intended the windfall for publishers permitted under this Court's ruling. This may well be. . . . Congress is of course free to revise that provision to achieve a more equitable result. Until and unless this happens, however, the courts must apply Section 201(c) according to its terms . . .").

17. That was the first publication rights clause.

18. *Tasini v. New York Times*, 981 F. Supp. 841 (S.D.N.Y. 1997) ("*Tasini II*").

19. Clauses (b) and (c) provided for Time to exercise certain rights in exchange for paying compensation.

20. 206 F.3d 161.

21. As far as David Whitford's claim was concerned, the Court held that the only subclause of the contract under which the publisher had even claimed electronic rights was subclause (a), and that the District Court had properly rejected that claim. It followed that plaintiff had properly alleged infringement of his copyright, as opposed to breach of an agreement, and that it was Whitford who was entitled to summary judgment, rather than the defendants.

22. The Court characterized the privilege as representing "an exception to the general rule that copyright vests initially in the author of the individual contribution." *Id.* at 168.

23. *Id.* at 167.

24. *Id.* at 168-69.

25. The *amici* expressly "rel[ied]" on appellees' Petition to "demonstrat[e] . . . that the panel's decision misreads the law."

26. As the United States Supreme Court has clearly recognized, this is not an appropriate focus or goal for an *amicus* brief. *See Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("The stated desires of *amici* concerning the outcome of this or any litigation are no substitute for a class action, are not evidence in the case, and do not influence our decision; we examine an *amicus curiae* brief solely for whatever aid it provides in analyzing the legal questions before us").

27. *Amici* refer to this as "[t]he impracticality of locating all freelance contributors potentially affected by the panel opinion. . . ." Amicus at 10.

28. Even "[i]f Jane Doe could be found," the *amici* say, "and if she insisted on payment, it would be impossible to reasonably assess the value of the right to retain her work . . . in the archive." Amicus at 10.

29. Obviously, they could opt, instead, to pay reasonable compensation.

30. Lest the reader think that this is an exaggeration, the following statements are excerpted verbatim from the *amici*'s brief:

    (1) "[T]he panel's decision will harm the public interest . . ., gratuitously"; (2) "As a practical matter, the panel's decision will cause publishers to delete freelance contributions from the electronic and microform versions of their old newspapers and magazines on a wholesale basis . . .;" (3) "The panel's decision threatens to immediately and severely degrade this valuable public resource;" (4) "The publishers' continued ability to make their collective works accessible electronically . . . depends on this case." (5) "[T]he panels' decision is likely not just to return things to the 'way they were' before the advent of electronic media, but to make them worse." (6) "The Panel's decision would . . . turn a comprehensive, accurate, national archive into a collection of local ones, riddled with holes like Swiss cheese." @sxwww.trade

31. *Amici Curiae* Brief at page 10 (material in brackets added).

32. The fact that a publisher removes material prospectively doesn't absolve it of responsibility for past infringements.

33. The *Amici* Brief actually raises this spectre.

34. If this article is correct about the publishing world's motivations, the publishing world is likely to make sure that some of those predictions come to pass. Otherwise, they would lack persuasive force.

Publicity Wars Heat Up: Battle of the Celebrity Clones

By Michael L. Baroni

Dustin Hoffman has won a $3 million verdict against *Los Angeles Magazine* (the "Magazine") for the Magazine's violation of his publicity rights under California law.[1] The Magazine pilfered Hoffman's facial image from the 1982 film "Tootsie" (in which Hoffman's character dresses as a woman to obtain a soap opera role), and—through the magic of digital technology—transplanted Hoffman's Tootsie-head onto the body of a cross-dressing man for use in a Magazine layout.

Facial Facts of the *Hoffman* Case

The Magazine's March 1997 issue contains a fashion spread entitled "Grand Illusion," in which still photographs of celebrities (live and deceased) from classic films were digitally combined with body models wearing Spring 1997 fashions. The Magazine did not receive permission to use the celebrity images, nor did it seek it.[2]

"The diverse protection standards state to state can be extremely confusing and difficult to navigate for celebrity lawyers and licensing representatives attempting to exploit and protect a celebrity's persona."

The key fact in the case's outcome is that the essence of "Grand Illusions" was to promote fashions; the celebrities were used merely to attract attention and lend commercial appeal to the clothing and their designers. Jane Russel, for example, is portrayed in her famous scene from the 1943 film, "The Outlaw," where she sensuously lies back across a haystack—only now, Ms. Russel is adorned in a Versace top (with digitally enhanced nipples). Cary Grant (shown ducking the plane in "North by Northwest") is now labeled a "runway model, wearing a suit from Moschino's Spring collection." Dustin Hoffman's Tootsie head is displayed atop a man's body, beside text that reads, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler, and Ralph Lauren heels." Each designer, in fact, received prominent credit (and note that the designers are regular advertisers in the Magazine). "Grand Illusions" also references a "Shopping Guide" that provides price and store information for the clothing displayed therein. In addition, the Editor-In-Chief's column stated, "The movie stills in our refashioned spectacular . . . [are] some of the most famous images in Hollywood history. . . . Who could resist the opportunity to present a 1997 fashion show with mannequins who have such classic looks?"

Hoffman brought suit in District Court for the Central District of California, asserting claims under: (1) California's common law right of publicity; (2) § 43(a) of the Lanham Act; (3) unfair competition; and (4) California Civil Code § 3344 (California's "right of publicity" statute).[3] The relevant portions of that statute state that "any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."

Overview of the Right of Publicity

The right of publicity balances First Amendment[4] concerns with the public policy benefits of encouraging creativity by preventing the unauthorized, commercial use of an individual's identity, name, image, or likeness, or other recognizable aspects of his or her persona. It allows an individual to control the commercial licensing and use of his or her identity, and seeks to prevent the unjust enrichment of those who trade off the commercial marketability of another. Because celebrities equate attributes of their personas with personal-commercial muscle, publicity law almost exclusively applies to them.

There is no federal protection for the right of publicity[5]; publicity rights are a state-created intellectual property right powered by common law and/or statute. As of the writing of this article, only 26 states have some form of explicit publicity protection.[6] Furthermore, publicity rights for deceased celebrities vary state to state between no protection (New York), to 100 years (Indiana), to perpetual protection (Tennessee, provided the rights are exercised every ten years).[7]

The diverse protection standards state to state can be extremely confusing and difficult to navigate for celebrity lawyers and licensing representatives attempting to exploit and protect a celebrity's persona.

New York Publicity Law

In New York State, Civil Rights Law §§ 50-51—officially known as a right of privacy statute—is used to protect against the unauthorized exploitation of a celebrity's persona. There is technically no right of publicity in New York. Section 51, however, allows one to recover for the unauthorized[8] use of one's "name, portrait, picture, or voice"[9] when used within New York State for "advertising purposes or for the purposes of trade."[10]

The right of publicity, applying New York law, was originally recognized in 1953 by the Court of Appeals for the Second Circuit in *Haelan Laboratories v. Topps Chewing Gum, Inc*.[11] The New York Court of Appeals, however, has since ruled that there is no common law right of publicity in New York.[12]

Section 51 has never been successfully wielded against a publication where the context of the use is purely newsworthy or of public interest—and newsworthiness is liberally construed in favor of the publisher. As the Court of Appeals has stated, "newsworthiness [is] better left to reasonable editorial judgment and discretion" rather than being left to the courts to decide, and should be "liberally applied."[13]

There are, however, three exceptions which can negate the newsworthiness defense: (1) where the use bears "no real relationship to the article"[14]; (2) the use is "an advertisement in disguise"[15]; or (3) the use is "infected with material and substantial falsification."[16]

A recent New York case, *Messenger v. Gruner + Jahr*,[17] bears striking resemblance to *Hoffman*. In the trial level decision in *Messenger*, the magazine *Young Miss*, better known as "*YM*," published a photo of then-14-year-old model Jamie Messenger—next to a caption that read, "I got trashed and had sex with three guys," as part of *YM*'s "Love Crisis" page which includes letters to the editor. The editor's reply stated that the girl had made a "major mistake" and she should get checked for sexually transmitted diseases. The young model had no relation whatsoever to the piece.[18]

As in *Hoffman*, the magazine did not receive or seek permission to use the photo in such a manner. As in *Hoffman*, a central issue in *Messenger* is the fictionalization, or the false impression created by, the publication's use of the respective plaintiff's images. The key difference is that the *Hoffman* court found a complete lack of editorial comment, whereas *Messenger* held there was obvious First Amendment-protected newsworthiness (i.e., teenage sex and its consequences).

Messenger won at the district court level, where a jury awarded her $100,000 in damages. On appeal, the Second Circuit certified to the New York Court of Appeals the question of whether or not a plaintiff may recover under §§ 50-51 where a publisher uses plaintiff's image in a substantially fictionalized manner, but to illustrate a newsworthy piece.[19] The Court of Appeals answered in the negative,[20] holding *YM*'s use to have been newsworthy, and that Messenger was not entitled to recover under §§ 50 and 51 "regardless of any false implication that might reasonably be drawn from the use of her photographs to illustrate the article."[21] Subsequently, the Second Circuit reversed the district court's decision.[22] Thus, the fictionalization issue under New York law that had been left conspicuously open under prior New York decisions[23] was resolved contrary to the court's application of California law in *Hoffman*.[24]

Finally, with regard to New York, there are no post-mortem publicity rights, so the "Jail House Rock"-ing Elvis image digitally redressed in a Polo Ralph Lauren tennis outfit and used in "Grand Illusions" would be permissible under New York's §§ 50-51, but actionable under California law.

Choice of Law Issues

As noted, publicity rights vary greatly from state to state. Some states offer statutory protection, others utilize the common law, some offer both, and others do not recognize any right of publicity.

Choice of law can therefore alter, or determine, the outcome of a case.

Commercial Use

A violation of one's publicity rights must always involve a commercial use. In *Hoffman*, the facts supported a clear finding that "Grand Illusions" was merely a plug for certain designer fashions at the expense of the celebrities.

As Judge Dickran Tevrizian stated, the Magazine used Hoffman as a "runway model" in order to "endorse and promote articles of clothing designed by Richard Tyler and Ralph Lauren."[25] The layout lacked any true editorial content which might deserve First Amendment protection. As an implied endorsement for the fashions, such a use could dilute or destroy Hoffman's professional reputation as a serious actor and his ability to exploit his own image, potentially putting at risk the millions of dollars that Hoffman would normally command in acting, endorsement and modeling fees.

Hoffman, unlike many other celebrities, has, since his career's inception (i.e., after "The Graduate" made him famous), refused to lend his name, image or likeness to any commercial endorsement whatsoever, thereby solidifying his non-commercial reputation and increasing his commercial publicity value should he ever decide to promote a product, a service, or a dress and high-heels. This fact was weighed heavily against the Magazine in the damage assessment.[26]

Defense Arguments

a. First Amendment

The Magazine's primary argument was that the First Amendment protects its use of Hoffman's head under the doctrine of editorial comment, which allows for publications to utilize portions of another's copyrighted material in order to offer critical comment on it, or for purposes of parody.

The Judge flatly rejected the First Amendment argument, stating that "The First Amendment provides extremely broad protection but does not permit unbridled exploitive speech at the expense of Mr. Hoffman and his distinguished career."[27] The Judge noted that there was a complete lack of editorial comment in "Grand Illusions" (such as, by way of example, stating that a "particular style of clothes is in vogue," or that a "particular color is becoming popular.").[28]

"An actor need not own the copyright to a given image (or other tangible medium of expression), in order to sue and win for a violation of his or her publicity rights."

The Judge reasoned that the use of Hoffman's persona was entirely unnecessary to whatever First-Amendment-worthy message the Magazine could claim to be making because it bore no relationship to the fashions themselves, but "only serve[d] to attract attention to the magazine."[29] Even in the case of a bona fide news or public affairs report, one may only borrow from another's persona to the extent reasonably required to convey the news to the public.[30]

The Judge also noted that "the First Amendment does not protect knowingly false speech."[31] The Magazine, however, had intentionally fabricated an image of Hoffman using another man's body, knowing that Hoffman had never worn the clothes depicted or posed for such a shot. The Magazine even admitted it had *intended* to create the false impression in the mind of the public "that they were seeing Mr. Hoffman's body."[32]

b. Copyright Preemption

The Magazine argued that the federal Copyright Act preempted Hoffman's state publicity claims. The Judge held preemption did not apply, however, on the grounds that Hoffman's suit sought redress for the damage done to his persona—and one's persona is not a "work of authorship" under the Copyright Act.[33]

Copyright is also a separate issue which is unattached from the right of publicity. An actor need not own the copyright to a given image (or other tangible medium of expression), in order to sue and win for a violation of his or her publicity rights.[34]

c. Fair Use

The Magazine argued that the use of Hoffman's facial image was merely a descriptive representation of the entire original *Tootsie* image, and therefore a fair use under the Copyright Act. The court disagreed. Clearly, the use pirated the core significance of the original image, and falsely suggested Hoffman's sponsorship. Fair use never protects such a purely commercially exploitive, false representation.[35]

Publicity Power—The Tootsie Legacy

Publicity rights have gained strength since the great studio days. Whereas 50 or more years ago, the laws packed less punch or were non-existent, and celebrities tended to be more flattered for added publicity, today's stars are clamping down on unauthorized exploitation of their personas.[36]

The change in attitude is due in part to the fact that modern technology allows theft of persona to be so pervasive, defamatory uses in particular have proliferated, and therefore potentially damaging to one's image and diluting to one's marketability; whereas stars used to have that untouchable aura of fantasy. Now with the Internet, stars are common people, where every aspect of their lives (along with many lies and inaccuracies), are revealed to millions on a daily basis.

The fierce protectionism is also due to the fact that there is more money at stake than ever before to be made from exploiting celebrity personas, even long after one is deceased, an estimated $28 billion is generated in annual celebrity licensing fees. The Elvis estate alone is said to make $75 million a year.

In April of this year, California's Senate overwhelmingly passed a bill giving celebrity estates greater control over their publicity rights. The vote was a backlash to a California court decision that held it was legal for a dance studio to issue video tapes utilizing clips of the late, great Fred Astaire and to advertise the tapes with the slogan, "Fred Astaire teaches you to dirty dance." Despite a 50-year period of post-mortem protection in California, the state's film exception allowed for such a use. Robyn Astaire, the dancer's widow, is lobbying to change that. The bill would eliminate all exceptions (leaving it to a defendant to prove First Amendment protection), increase post-mortem protections to 70 years, and allow heirs to sue in California even if the celebrity did not live there.

Global Icons (a celebrity licensing firm) has stirred up the publicity topic with its Virtual Celebrity Productions technology. This software is used to create life-like moving-picture images of its deceased clients, like the commercial where John Wayne tips his hat to a can of Coors. Soon we may see all sorts of deceased celebrities resurrected in commercials, hosting game shows or special events, even starring in new films. Such technology has opened the doors for limitless possibilities to exploit a celebrity's image, dead or alive. As the availability of such technology flourishes, so too may the violations of publicity.

Although the current publicity landscape is anything but consistent, *Hoffman* puts a dent in the First Amendment shield for publisher-defendants. The case has shocked some Hollywood attorneys, publishers and merchandisers, who view the Magazine's fashion spread as an obvious joke, not to be taken seriously as an ad for the clothing, and that no reasonable person would have thought that any of the stars actually endorsed the layout or gave permission. Such viewpoints see *Hoffman* as a frightening precedent of publicity laws over editorial freedoms. Others view *Hoffman* as vindication of a celebrity's right to control their image when others seek to hide their sleazy, exploitive, and damaging actions behind the First Amendment shield.

". . . Hoffman *is a warning to publishers to tread carefully, by ensuring that the use is always cast in a truthful light and enwrapped in First Amendment-protected newsworthiness or public interest."*

In any case, *Hoffman* is a warning to publishers to tread carefully, by ensuring that the use is always cast in a truthful light and enwrapped in First Amendment-protected newsworthiness or public interest. First Amendment freedoms given to publications are not absolute. The trend toward greater protection of publicity rights is clearly building momentum.

Endnotes

1. *Hoffman v. Capital Cities/ABC, Inc., Fairchild Publications, Inc. and Los Angeles Magazine, Inc.*, 33 F. Supp. 2d 867 (C.D.Cal. 2000). Hoffman was awarded $1.5 million in compensatory damages, $1.5 million in punitive damages, and legal fees of $270,000. The Magazine (owned by The Walt Disney Company) has announced plans to appeal.
2. As the Court pointed out, the Magazine did not seek permission because it knew or should have known that the celebrities would either refuse permission or demand payment. *Id.* at 871.
3. This article only addresses the publicity claims (although Hoffman was successful on all counts). Depending on case-specific facts, and the state law being applied, a celebrity who has been injured by a violation of publicity may seek redress under numerous other theories, including defamation; privacy; copyright and trademark infringement (including common law trademark and § 43(a) Lanham Act violations); false attribution, advertising or endorsement; false light; unfair competition; misappropriation; negligence; intentional or negligent infliction of emotional distress; and breach of contract.

   Section 43(a) of the Lanham Act (the federal trademark statute), has been of particular use to celebrities; *see, e.g.*, *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (where Woody Allen sued successfully on a Lanham Act 43(a) claim for use of a look-alike in video store advertisements).
4. The typical First Amendment concerns at issue are editorial comment (i.e., freedom of the press), parody (allowing one to utilize limited portions of another's copyrighted material or persona in order to poke fun at that material or persona), and fair use (e.g., incidental, or non-profit use; fair use is codified in § 107 of the 1976 Copyright Act).

   In *Cardtoons v. National Player's Association*, 95 F.3d 959 (10th Cir. 1996), for example, the court held that baseball cards with caricatures of players and humorous commentary about their lifestyles, careers and enormous salaries was a First Amendment, protected parody (largely because the parody was central to the product itself).

   Courts may quickly dismiss a First Amendment defense, however, where the First Amendment concerns seem incidental to the defendant's commercial objective. *See White v. Samsung Electronics America, Inc.*, where a parody defense did not save the defendant from a $403,000 verdict; the court held that Vanna White's publicity rights were violated where an advertisement included a robotic Vanna White look-alike beside a set that resembled the Wheel of Fortune game show. 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993).
5. Some industry representatives have been seeking to clarify the rights of publicity by pushing for federalization, but progress is not imminently pending.
6. Eighteen states offer common law publicity protection: CA, CT, FL, GA, HW, IL, KY, MI, MN, MS, NJ, OH, PA, TN, TX, UT, WA, WS. Sixteen offer statutory protection: CA, FL, IN, KY, MA, NB, NY, NV, OK, RI, TN, TX, UT, VA, WS, WA.
7. Post-mortem publicity rights exist in ten states: CA, FL, IN, KY, NB, NV, OK, TN, TX, VA.
8. The authorization must be in writing.
9. The reference to "voice" was included in a 1995 amendment. L.1995, c. 674, § 1, eff. Nov. 1, 1995.
10. Note that New York courts have never held "advertising" or "purposes of trade" to include newsworthy or public-interest publications. Publications have traditionally been granted great leeway in deciding for themselves what is newsworthy or of public interest, particularly in New York's publisher-friendly forum.
11. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).
12. *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 485 N.Y.S.2d 220 (1984); *see also Arrington v. New York Times Co.*, 55 N.Y.2d 433, 449 N.Y.S.2d 941 (1982), *cert. denied*, 459 U.S. 1146 (1983).
13. *Finger v. Omni Publications Int'l,* 77 N.Y.2d 138, at 143, 566 N.E. 2d 141, at 144, 564 N.Y.S.2d 1014, at 1017 (1990) (internal citations and quotes omitted) (holding that *Omni's* use of a family photo to illustrate an article about fertilization treatment that the family had never used was permissible under the newsworthiness exception).

    Also see, *e.g.*, *New York Magazine v. Metropolitan Transportation Authority,* 1997 U.S. Dist. LEXIS 19060 (1997 S.D.N.Y.), 1998

U.S.App. LEXIS 1452 (2nd Cir. 1998). Mayor Rudolph "Rudy" Giuliani of New York City ordered the MTA to pull *New York Magazine* advertisements off of city buses, which carried the *New York Magazine* logo and stated, "Possibly the only good thing in New York Rudy hasn't taken credit for." The magazine sued. The court barred the removal of the ad, holding for the magazine's First Amendment right to advertise such a political satire, and thus reaffirming that a publication is always allowed to use the names of its story subjects to sell itself.

14. *Finger, supra* note 13, 77 N.Y.2d at 142, 566 N.E.2d at 143, 564 N.Y.S.2d at 1016.
15. *Id.* at 142, 566 N.E.2d at 143, 564 N.Y.2d at 1016.
16. *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124, at 127, 233 N.E.2d 840, at 842, 286 N.Y.2d 832, at 834 (1967). *See also Lerman v. Flynt Distrib. Co.* 745 F.2d 123, at 132-33 (2d Cir. 1984), *cert. denied,* 471 U.S. 1054 (1985) (applying the substantial falsity limitation).
17. *Messenger v. Gruner + Jahr USA Publ'g*, 208 F.3d 122 (2d Cir. 2000) (*Messenger IV*).
18. *Messenger v. Gruner + Jahr USA Publ'g*, 944 F. Supp. 525 (S.D.N.Y. 1998) (*Messenger I*), *rev'd. Messenger IV*, 208 F.3d 122.
19. *Messenger v. Gruner + Jahr USA Publ'g*, 175 F.3d 262 (2d Cir. 1999) (*Messenger II*).
20. *Messenger v. Gruner + Jahr USA Publ'g*, 94 N.Y.2d 436 (N.Y. 2000) (*Messenger III*).
21. *Id*.
22. 208 F.3d at 123.
23. *See Finger,* 77 N.Y.2d at 141-43, 566 N.E.2d at 143-44, 564 N.Y.S.2d at 1016-17. Note, however, that New York courts have traditionally not permitted a publisher to shield itself behind First Amendment newsworthiness where the use is "infected with material and substantial falsity" or fictionalization. *See Lerman, supra* note 16, 745 F.2d at 132-33.
24. Notwithstanding the *Messenger* court's rejection of a fictionalization exception to the newsworthiness defense, a court applying New York law may very well have reached the same decision in deciding *Hoffman* as did the California district court. Under New York law, the newsworthiness defense is inapplicable where the subject use is really an advertisement in disguise. *See Messenger III,* 94 N.Y.2d at 436.
25. *Hoffman*, 1999 U.S. Dist. LEXIS 506, at *13, 14.
26. Note that a publication's aim of selling itself is never "commercial" in and of itself; to hold otherwise would violate the First Amendment.
27. *Id.* at *15.
28. *Id.* at *21.
29. *Id.* at *23.
30. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L.Ed. 2d 965 (1977) (a television news broadcast of a performer's entire human-cannonball act violated plaintiff's rights to publicity).
31. *Hoffman* U.S. Dist. LEXIS 506, at *21-22, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964).
32. *Hoffman*, 1999 U.S. Dist. LEXIS 506, at *22.
33. *See* the 1976 Copyright Act, 17 U.S.C. § 301. Some performers would like to think of their performance persona as a copyrightable work of art, but no court has ever recognized persona to be copyrightable.
34. To further illustrate, one may acquire the rights to a celebrity photograph from the copyright proprietor. One may still not freely exploit that celebrity's photograph on tee-shirts, calendars and coffee mugs throughout the U.S., however, because that would violate publicity. Permission from the celebrity (or their estate) is necessary.
35. This is a simplistic statement on fair use, which is a complex, flexible standard that considers all factors relating to the use. Fair use is codified in the 1976 Copyright Act, 17 U.S.C. § 107.
36. Tiger Woods, for example, is suing an artist for selling paintings of his likeness, and has brought several similar suits in the last two years. The artist formerly known as Prince has sued at least nine Web sites for posting his "likeness" (in his case, the symbol he now claims to be his legal name).

Michael L. Baroni is a senior attorney at Metromedia. He has previously worked as in-house counsel to General Media (magazine publisher) and as head of legal at Henry Holt and Company (literary book publishers). He has published dozens of articles on entertainment and legal topics, including several Internet-related pieces for the *New York Times*.

Digital Music: Will the Music Industry Be Left Behind?

By Ched Harris

With the arrival of the millennium, the Internet presents both revolutionary opportunities and potent threats to the music industry. Until recently, sound recordings have been available to consumers in forms controlled exclusively by their copyright owners, primarily record labels and the writers, publishers and performers who own underlying rights in such recordings. Emerging technology—currently the Moving Picture Experts Group—Layer 3 (MP3) format—now enables consumers to create and distribute high-quality digital copies of sound recordings without the participation of the recording industry. As the industry knows all too well, MP3 files can be easily copied, transferred, sold and shared across the Internet at the speed of a double mouse click. More often then not, such transfers occur without authorization of or compensation to the owners of copyright in such sound recordings. Yet, the same technology enables the music industry to identify its consumers and acquire information about their habits, representing unprecedented opportunities to market and sell directly to its consumers.

> *"Currently, consumers can download music digitally over the Internet directly from the artist or record label without ever having to sell a physical object."*

Anyone with an adequate Internet connection can easily download, at no cost and within minutes, software to play MP3 files, programs to convert music from CDs into MP3 files, and MP3 files containing the music itself. This technology facilitates the distribution of pirated copies of copyrighted music from the Internet. Thus, the Internet's ability to skirt the traditional channels of distribution and dissemination of entertainment and information will change the traditional manner in which business is conducted forever.[1]

For the music industry, this deviates from the long-standing paradigm where a few major record labels act as monopolies regulating the circulation of music from artists to the consumers. In the new model that appears to be emerging[2]—artists and small independent labels will have direct contact with the public and thus, minimal need for an intermediary to manufacture and distribute music.[3] However, the advent of this new model does not translate into the complete obliteration of the traditional retail or marketing model. Indeed, certain aspects of shopping for music in Tower Records, HMV or a Virgin Mega Store cannot be replicated by perusing music in cyberspace. There is a human component and "energy" which is central to the experience of shopping in a store and which transcends surfing on the Web.[4] The new model does translate, however, into the simple fact that the music industry must take a more nuanced approach to the marketing, promotion and retail sale of music in order to remain consistent with changing times.

Currently, consumers can download music digitally over the Internet directly from the artist or record label without ever having to sell a physical object. Musicians, even neophytes, can distribute their music directly from their own Web sites to the individual consumer. "By simply uploading a digital version of a work onto their server for consumer downloading [which will decrease in time due to increased bandwidth], cutting-edge bands and small independent record labels are changing the face of the music industry forever."[5] Accordingly, this article will argue that fervid promotion and marketing efforts on the Internet represent not only prudent business practice but are imperative to the traditional music industry's continued vitality as well.[6]

The Demographics and Statistics

According to the RIAA, music purchases by 15- to 24-year-olds declined in 1998.[7] The report speculated that the rise of the Internet as a free entertainment center and the accompanying availability of free MP3 music files could be contributing factors. College students, the core of this demographic, have some of the best access to high-speed computer networks that facilitate quick music downloads from the Internet.[8]

College students are not alone in embracing online music.[9] In fact, there is a growing trend among many office workers to spend their leisure time or breaks at work downloading MP3 files.[10] Like their younger counterparts, these young professionals are receptive to the idea of using the Internet as a means to access their favorite genres of music. As a practical matter it makes sense for office workers and people at home to resort to the Net for music consumption and scanning. Issues concerning lengthy download times due to low bandwidth will gradually disappear with more advanced technology.[11] The continual expansion of bandwidth capabilities through the use of fiber optics, wireless, cable and satellite technology will guarantee virtually immediate transmissions of large files over the Web.

As for current download estimates, a standard three-minute-30 second (3:30) song in MP3 format takes 3.7 minutes to download over an ISDN line, 19 seconds over a T1, and only three seconds using a cable modem.

As society's insatiable appetite for quicker data services—or stated alternatively, convenience—continues to expand, many companies are setting their sights on the skies as the next frontier to deliver high-speed access to the Internet, especially where fiber optic links are uncommon.[12] Teledesic Network, an advanced 288 global satellite system currently in development and tentatively called "Internet in the Sky," claims that it will deliver the same song for less than half a second from the first day of the network's service.[13] The company plans to place its satellites only 850 miles above Earth in contrast to the customary 22,000 miles of standard geostationary satellites.[14] By placing the satellites in such close proximity to the earth, Teledesic claims that it will be able to provide two-way communications with rapid and efficient speed.[15]

> *"Recent events support the notion that a range of online companies recognize the value of the Internet as a dynamic force that can and will change business models in the music industry."*

Recent data strongly suggest that the record industry take the Internet seriously. Online music sales approached $110 million at the close of 1998—triple the $36.6 million in 1997. Jupiter Communications, a new media research authority, has predicted that online music sales will balloon to $1.3 billion in the U.S. by 2002.[16] This increase will be fueled by an increasing rate of Internet use, which shows no signs of abating. In early 1997, there were only 50 million Web users worldwide; by May 1998, there were 55 million users in the U.S. alone. One hundred and fifty million users are projected worldwide by 2002. Nielson/Net Ratings estimates that the current worldwide Internet population is 97.1 million, including 36% of the total U.S. population, an increase of 43% from the 24.5 million households with Internet access estimated in the first quarter of 1998.[17]

These users are receptive to buying their music online. A Forrester Research study concluded that 30% of 13 million online shoppers were willing to download music, and another 35% could easily be converted in coming years to MP3 and/or its inevitable successor technologies.[18] Perhaps even more illustrative of the economic import of the Internet on the music industry is the following: of the current $40 billion global music industry, a scant 0.3% of music buyers made purchases via the Internet in 1997. By 2001 the global music industry is expected to grow to $60 billion. If only five to ten percent of it is distributed digitally, that amounts to a $3 to $6 billion online music business within the next year.[19]

A Virtual Free-For-All on the Web: Seizing Opportunities

For the industry, the most immediate applications of digital music technology appear to be promotional. The case of LiveConcerts.com is illustrative. Due to inexpensive production costs, LiveConcerts.com has built a business of webcasting live music events. Initially, the site featured one or two webcasted concerts per week, and currently offers five. A LiveConcert production allows a record label or artist to duplicate and surpass the promotional features of a music video. Each production can be (1) webcast live, (2) simultaneously as a live audio feed to radio stations for broadcast, (3) archived as audio recording for future promotional or commercial use, and (4) archived a multi-camera video shoot for web streaming or in other contexts. The cost is a mere $10,000 to $15,000, which compares favorably to music video budgets, which can easily exceed $200,000. Unlike a music video, these events enable an array of interactions between users and artists, and allow artists and/or their labels to capture proprietary data about their fans. Such information can be the basis for direct-to-consumer promotions that use e-mail or instant messaging technology that can encourage return visits and purchases in the future.[20] Sponsoring these cross-platform promotions will enable record labels to leverage their position in a landscape where Internet users shop at their "preferred virtual stores" or sites.[21]

Recent events support the notion that a range of online companies recognize the value of the Internet as a dynamic force that can and will change business models in the music industry. As these entities vie to acquire a foothold in cyberspace through a loyal fan base, their efforts will reflect a desire to make themselves unique in this new arena. As a point of reference, traditional record labels customarily offer artists a royalty of 5% to 15% of the suggested retail list price of records sold. In contrast, the emerging norm among independent digitally distributed labels is to share profits equally between label and artist after the deduction of expenses.[22]

AMP3.com has elected to court potential new artists through a talent search contest which will award the winner with one million dollars and a recording contract.[23] Venture capital groups Sequoia Capital and idealab! invested $11 million in the parent company of MP3.com. With the investment, the site will aim to strengthen its technology so that it can add more songs to its roster of 10,000+ songs and 4,000 artists. The company will also engage in more off-line promotion and marketing of artists whose music the company hosts on the site.[24]

In an example of major label use of digital distribution for promotion, Dreamworks made Hole's single, Celebrity Skin, available for free downloading in exchange for the user's e-mail address. This enabled the company to build a database of fans, each of whom Dreamworks will notify of new releases—at minimal cost. To prevent cannibalization of its record revenues, the download expired and became unusable after a short period of time, ensuring it could not be endlessly copied and distributed.[25]

Similarly, a free download of an outtake from the Other Ones (former members of the Grateful Dead) release, Strange Remain, was made available to promote an Other Ones live event. The group added 3,000 names to its mailing list, more than 2,000 participated in the live chat, and 1,226 concurrent audio/video streams were being delivered at the event's peak. Since the launch of the Web site, fans have downloaded about 30,000 free song files.[26]

A Tom Petty promotion demonstrates the potential for tension between artists and their labels. Last March, more than 150,000 fans downloaded from MP3.com a free file of Petty's new single, Free Girl Now, before the file was removed from the site, reportedly at the request of Petty's label, Warner Bros. Records.[27] At a NARM panel discussion, Jim Wagner, a Warner executive, said the company responded to have the file removed because the offer set a "bad precedent." The "bad precedent" is arguably the Internet's ability to empower artists' entrepreneurship—an anathema to the traditional relationship between a label and an artist where the latter usually relinquishes control or rights in exchange for support and money. According to MP3.com founder Michael Robertson, the Petty promotion was able to garner an impressive 157,699 downloads within 48 hours without any pre-publicity or advance notice.[28] This is significant because Tom Petty's manager possesses the email addresses of the individuals who participated in this promotion. Through the direct and expedient use of email, Petty can now communicate directly with his fans, opening the door for direct commerce in the future without Warner as an intermediary.[29]

Rapid Evolution and Proliferation of Technology

Facilitating consumer acceptance of digital music is the proliferation of devices that retrieve and play music files from the Internet. From the recording industry's perspective, the debacle started when Diamond Multimedia introduced the two-ounce Rio to a receptive public.[30] The Rio plays music tracks which are initially stored on a PC as MP3 files. The MP3 file compresses a traditional sound file to about one-twelfth its original size while maintaining comparable sound quality.[31] Because these files are smaller, almost 60 minutes of digital quality music can be transferred from a PC onto flash memory computer chips embedded in the Rio. Not only can these tracks be downloaded from the Internet, they can be converted from audio CDs using software provided by Diamond.[32] The Rio is selling briskly, and despite increasing production to more than 10,000 units a week, Diamond is still unable to satisfy consumer demand.[33]

a. The Facilitation of Piracy and its Consequences

The popularity of the MP3 format and the coincident introduction of stand-alone playing devices has engendered much controversy. As a free, easy-to-use system that provides high-quality sound and video for streaming and downloading, the MP3 format is indisputably the preferred choice for digital pirates and legitimate businesses alike.[34] However, in spite of the technology's obvious benefit as an online audio distribution medium, Internet users have latched onto MP3 as a means of illegally exchanging copyrighted music. According to Hilary Rosen, representative of the Recording Industry Association of America (RIAA), approximately 95 percent of the MP3 downloads on the Internet are illegal.[35]

Not surprisingly, the RIAA sought to enjoin the manufacture and distribution of the Rio. The Association's motion for an injunction was denied, and the suit was resolved in a settlement that permitted Diamond to continue distributing the Rio, provided that it incorporated anti-piracy technology in future releases of its products.

The denial of the industry's preliminary injunction against Diamond Multimedia has paved the way for other companies to enter into the playing device field.[36] Creative Technology introduced two versions of its portable player—the 32 MB and 64 MB—which include voice recording, FM tuners, LCD screens with scrolling text for artist name and song title, desktop docking stations and support for the MP3 audio format.[37] Entitled the Nomad, the device is the size of a cigarette pack and stores as much as an audio CD, which it can replay with the same quality.[38] Aware that MP3 is likely to be replaced by other formats that offer greater compression structures and higher quality audio, Creative Technology maintains that it intends to support all popular formats for digital audio playback Internet music and digital audio.[39] Samsung Electronics followed suit and announced that it would release its product, the Yepp, to the U.S. market sometime in 2000.[40] The Yepp, a portable digital audio player using MP3 compressed digital audio format, is a PC peripheral equipped to download music files stored on a PC.[41] That the Yepp is highly distinctive is predicated upon several factors: the product has the smallest of all the stand-alone devices; it has a magnesium outer casing which allows it to withstand hard use; and its LCD display supports 16 characters enabling it to display music title and other information.[42]

AT&T's a2bmusic has introduced the newest version of its digital music player which it claims facilitates better sound and 25% faster downloads than both its previous offerings.[43] Meanwhile, Microsoft recently announced its entry into the business of downloading and streaming music from the Internet through its Windows Media Technologies 4.0.[44] Finally, UK-based Empeg has designed the first MP3 devise for automobile use.[45] To load the Empeg device with music, a user removes it from her car, attaches it to her PC and downloads files from the Internet or burns them in from a CD player. Industry analysts predict that an accompanying home audio market will grow with consumers purchasing at least one million devices for playing MP3-format music in the home.[46] Assuredly, digital downloading has become a fiercely competitive business. "Who wins the format and player battles depends on two things: amassing good music by well-known performers and becoming popular with computer users."[47]

b. The Counter Response: The Secure Digital Music Initiative

Determined to enter safely and profitably into the era of Internet delivery of music, the recording industry devised the Secure Digital Music Initiative last December. It is an initiative of the recording industry associations of North America, Japan and Europe to create uniform standards for the distribution of digital music.[48] The technical challenge is to do so in a manner that protects copyright holders or remunerates authors while also impeding audio pirates who copy and distribute digital music illegally.[49] In February 1999, Dr. Leonardo Chiariglione was selected to head the SDMI at a meeting attended by 200 top executives in the music and technology industries.[50] Undaunted by the challenge of bringing together the diverse interests of the recording and various technology industries, Dr. Chiariglione announced that the Initiative would release preliminary standards by June 1999 to ensure that an industry-supported format would be approved in time for the holiday season.

Instead, conflicting interests have resulted in a logjam. Although the group has released a Phase I standard, only one manufacturer, Sony, has implemented the technology in a consumer product. Consumer acceptance has been lackluster—why purchase products that limit the ability to duplicate and transfer files, when competitive products impose no such limitations? Earlier this year, Dr. Chiagliarone admonished the group for its lack of cooperation:

> The executive director is very concerned by the veto power that some industries in SDMI exert in SDMI because it enables some business models and disenables others. . . . [I] consider this behavior against the terms of participation, which explicitly say that the purpose of the SDMI specification is to enable multiple business models.[51]

Industry Adoption of New Technologies

Despite initial missteps, the industry will inevitably accept digital technology due to low cost of entry, ease of deployment, control over the retail process, one-to-one marketing, consumer convenience and access to an infinite and growing number of consumers in perpetuity. Cognizant of these factors, Al Teller, former head of MCA and former president of CBS Records, founded Atomic Pop, a web platform which is targeted to music buyers who are younger than 30 years old, and aims to bring artists closer to their audience by partnering them to promote, market, sell and distribute their music online.[52] Mr. Teller displayed a certain degree of prescience when, in a 1993 *Musician* magazine cover story, he stated that digital music distribution was inescapable, dismissing technical arguments against viability by opining: "Let's not get hung up on storage capabilities. Whatever they are today, two years from now that limitation will be ancient history."[53]

Like Mr. Teller, the major record labels appreciate the potential of the Internet. Universal Music and BMG, the nation's two largest record companies, recently formed a joint venture to create a series of Internet sites to promote and sell music. This venture includes existing BMG sites that have been populated with content from Universal artists. The labels are poised to take advantage of this opportunity because as record companies, "they have access to better [and more thorough] information about the artists than other retail sites."[54] More importantly, these sites will link directly to Getmusic.com, a proprietary service of the venture which, like its better known competitors Amazon.com and CDNow.com, also sells third-party recordings. Getmusic also allows BMG and Universal to collect user data, enabling each label to sell directly to its customers.

Universal's promotion of Britney Spears underscores the leverage of the venture. Eight months before Spears' last release, the venture's Peeps.com site offered free song clips. It collected 100,000 names from the promotion and, according to Universal, more than 80 percent of these individuals bought the album when it was released.[55]

The venture is prepared for the day when its customers will be equipped to download digital versions of records directly to their computers or to players. At the press conference announcing the venture, Edgar Bronfman predicted that "[p]eople will buy digital music across retail channels. They will use kiosks in stores, push a 'buy now' button on their Internet radio stations, and they will buy using new devices" like portable digital players which allow people to download music.[56]

Apparently, other executives at the major labels are in accord with Mr. Bronfman and have conceded the Internet's potential in developing acts. One label president has plans to offer a full-length release by a developing act in the near future.[57] That the release will be free to the user does not pose a problem for the label because it will enable it to build interest in the next release.[58] Similarly, Capitol and Virgin Records regularly provide access to full-length streaming songs on their Web sites as a means of promoting music and offering an alternative to ubiquitous unauthorized MP3 files.[59] They realize that although piracy is virtually impossible to prevent, they can at least provide legitimate music and exercise a degree of control over the access to the artist.[60]

Two critical implications of digital music distribution will force the development of new business models in the recording industry:

- On the economic side, record companies will be able to reduce the costs of manufacturing, distribution, freight and similar physical costs, thus significantly improving profit margins.[61]
- Because the costs associated with such physical factors will no longer be as relevant, anyone can in effect become a "record company" and start disseminating music. A generation of artists will have the resources to get recordings directly to fans without having record company executives exert control over creative and marketing choices. This will give artists more bargaining leverage vis-à-vis labels. Emerging artists may forego signing with major labels early in their careers, and will have the option of waiting until they have matured creatively and developed a fan base that is loyal to their independent visions. When such artists decide to sign with labels, such arrangements may include shorter terms and other deal points that give artists more autonomy, shifting the power balance between artist and label.[62]

Despite valid and important concerns over music piracy, it is clear that the new media will become a common fixture in our lives and those of subsequent generations. Undoubtedly, advanced technology has forever changed the manner in which consumers will receive and enjoy music. The industry is responding to the new technology by using the using the Web for "promotion first, commerce later." Notwithstanding the legal issues surrounding piracy and serial recording on the Internet, the recording industry, like all businesses, must embrace changing trends in order to formulate a competitive strategy. While cynics may contend that MP3 and the Internet spell the demise of the recording industry—at least as we know it—optimists and innovative thinkers can readily discern the opportunities that this new medium presents.[63] Fortunately, the industry has seemingly embraced the succinct comments of a writer who expressed his views in an interview recently with Dr. Chiariglione. He admonished, "If you are a player in the chain and you simply stand still and don't do anything, you are bound to be wiped out. But if you are bright . . . you will reinvent yourself and your role, perhaps even enhancing your role."[64]

"Despite valid and important concerns over music piracy, it is clear that the new media will become a common fixture in our lives and those of subsequent generations."

Endnotes

1. Robin Gross, *The New Music Industry*, (visited April 5, 1999) <http://www.degrees.com/melon/newmusic.html>.
2. *Frequently Asked Questions* <http://www.riaa.com/tech/techans.htm> stating,

   > The Internet is an exciting addition to the mix of choices available to the recording industry, the artists and the consumer. Record companies promote their artists on the Web now, while artists' web sites are developing into online fan clubs. "Cyber communities" are growing around sites devoted to a particular genre or musical style. These sites combine artists, music and related content that support a certain lifestyle and musical preference. The RIAA and the recording industry see the Internet as an opportunity to expose music to a wider audience than ever before. It's an effective way to nurture artists who may not have a mass appeal but who are appreciated by a narrower but enthusiastic following. Traditional distribution methods will never be replaced, but the Internet is enlivening old, new and unusual music and making it easier to find than ever before.

3. *Id.*
4. A parallel can be drawn to the brouhaha in the book publishing world where industry insiders predicted that books would eventually become obsolete due to their availability in digital form. While there is some merit in this opinion—especially as it pertains to younger people and successive generations who will grow up in an exceedingly technological world—it fails to take into account that for a large segment of the population, purchasing the actual physical book is the preferred choice of purchase.
5. Gross, *supra* note 1, at *2.

6. Interview with Heinz Canibol, Managing Director/Vice President, GSA Universal; Bernd Dopp, Managing Director WEA; Rudiger Fleige, President GSA EMI Electrola; Jens Geisemeyer, Managing Director, EDEL; Udo Lange, Managing Director, Virgin; Jochen Leuschner, Senior VP GSA Sony Music. Music Bus. Int'l, Aug. 1, 1998 Q&A available in 1998 WL 11090829.

7. The Recording Industry Association of America <http://www.riaa.com>; *See also* P.J. Huffstutter, *A Musical Free-for-All on the Net with the keystrokes 'MP3,' legions of pirates copy CD-quality material on the Web*, L.A. Times, Feb. 8, 1999, at A1 stating,

> For fans like 16 year-old "Filter," collecting MP3 music is an obsession. He is a member of Phree-mp3, one of several self-described MP3 gangs that troll the Net in search of the latest, greatest tune. These gangs adhere to a simple goal: To gather and distribute more music than the next guy. . . . For these groups, the emphasis is on quantity, not quality, and their members fall into two categories: The "uploaders" spend hours collecting pirated files off the Net, or take audio CDs and transfer the songs to the MP3 format. The "servers," like Filter, are in charge of giving these songs to as many people as possible.

8. Article, *RIAA Study: Younger Consumers Taking Advantage of Free Web Music,* (Mar. 24, 1999) <http://news.webnoize.com/cgi-bin/n/item.rq?ID=3958>; *See also* Jason Chervokas, *New Computer Technology Allows Hackers to Pirate CDs*, San Diego Union & Trib. Apr. 12, 1999, at E10 stating

> [Brian] Matiash is part of a thriving underground network of digital music scavengers, mostly college students, who tap the high bandwidth available through university networks to copy and trade music files globally over the Internet. . . . They will trade files, often complete albums, with one another. They will create compilation CDS for acquaintances, much in the way friends make cassette tapes of favorite tunes for one another.

9. Neil Strauss, *Free Web Music Spreads From Campus to Office*, (Apr. 5, 1999) <http://search.nytimes.com/search/d...?getdoc+site+site+66888+2+wAAA+MP3>.

10. *Id*., stating,

> Robertson of MP3.com . . . has noticed that the peak time that music is listened to on his site is 1 P.M. on weekdays. . . . This, he said, suggests workers are looking for music during lunch. . . . This is a trend confirmed by another popular site for music downloads, a2b music, which uses a more sophisticated digital compression system. Educational servers have dropped to just 7 percent of traffic, and peak downloading hours are from 11 A.M. to 2 P.M. on weekdays, a spokeswoman said.

11. Doug Reece, *Industry Grapples With MP3 Dilemma*, Billboard, July 18, 1998 available in 1999 WL 10914096 stating, "Still, with the merger of TeleCommunications, Inc. (TCI) and AT&T and the forthcoming launch of Sprint's Integrated On-Demand Network, the likelihood of widespread broad-band availability is gaining momentum."

12. Seth Schiesel, *Motorola Joins 'Internet in Sky' Project*, (May 22, 1998) <http://search.nytimes.com/search/d...0+2+wAAA+Internet%7Ein%7Ethe%7ESky>.

13. *Id.,* stating, "Teledesic intends to build a network of 288 advanced communications satellites that can begin to provide high-speed, or 'broadband,' access to the Internet and other data services in 2003."

14. *Id.*

15. *Id*.

16. Steve Traiman, *NARM Chief Addresses Online Dist. At. Meet*., Billboard, Dec. 26, 1998 available in 1998 WL 22606767.

17. Article, *First Nielson/Net Ratings Report Released, Summarizes Stats for February*, (Mar. 24, 1999) <http://webnoize.com/cgi-bin/n/item.rq?ID=3961>.

18. Strauss, *supra* note 9.

19. Robin D. Gross, *The New Music Industry*, (visited April 5, 1999) <http://www.degrees.com/melon/newmusic.html>.

20. Article, *Anatomy of a Promotion*, (Mar. 10, 1999) <http://news.webnoize.com/cgi-bin/n/item.rq?ID=3888>, stating, "[r]egular events also drive habituation by encouraging regular visits and building a sense of activity and change within the site."

21. *Id*., quoting Jon Luini of Evolve Internet Solutions.

22. *See* Article, *New MP3.com Initiative Offers Artists 50% Sales Royalties*, (Sept. 2, 1998) <http://news.webnoize.com/cgi-in/n/item.rq?ID=2850> discussing the Digital Automatic Music (DAM) which is free of signup fees, administrative costs or other charges, and enables artists to complete a contract at the website, select the tracks they want to upload and then permit MP3.com to execute the rest. The contract is designed so that if MP3.com is not delivering value to the artist, he or she can exit and lose nothing.

23. *Id.* quoting Michael Sharp, AMP3 president, as stating "AMP3.com intends to create the first Internet 'star.' We expect the winner of the contest to become as famous and popular as any of today's major recording stars."

24. "MP3.com will continue to move forward and give consumers more choices, and to give artists a new place to sell their wares. . . . With this investment, Sequoia and idealab! are sending a message to the music industry that MP3 is a mainstream technology that has moved beyond curiosity status, and that digital music and the Internet represent the future of the industry." Article, *MP3.com To Expand Marketing, Download Strategies with $11M Investment*, (Jan. 15, 1999) <http://news.webnoize.com/cgi-bin/n/item.rq?ID=3627>.

25. Article, *Turning direct delivery into profit still a distant prospect*, Music. Bus. Int'l, Oct. 1, 1998 available in 1998 WL 11090886.

26. Article, *Anatomy of a Promotion*, (Mar. 10, 1999) <http://news.webnoize.com/cgi-bin/n/item.rq?ID=3888>.

27. Article, *Warner Bros.' Not-So-Petty Complaint*, (Mar. 12, 1999) <http://news.webnoize.com/cgi-bin/m/item.rq?ID=3914>.

28. *Id.*

29. *See also* Jon Pareles, *Musicians Want an Internet Revolution*, (Mar. 9, 1999) <http://www.nytimes.com/library/tech/99/03/biztech/articles/08conf.html> discussing Alanis Morrissette who made a new song available through AT&T's a2b Music, which did not allow copying. The free song was downloaded 285,000 times while links to the song sold in excess of 22,000 tickets for her concert tour.

30. Michael S. Mensik and Jeffrey C. Giroulx, *From the Lightweight 'Rio' Flows Heavyweight Battle*, Nat'l L.J., Dec. 14, 1998 at B5.

31. *Id*.

32. *Id*.

33. Michelle V. Rafter, *Popularity of MP3 Music Format Soars With Internet Fans*, Chi. Trib., Feb. 22, 1999 at 9A.

34. *Id.,* stating, "MP3.com, a San Diego-based distributor of free MP3 music, is registering about 200,000 visitors a day to its Web site."

35. Jay Dougherty, *Internet Music Revolution Drums Up Controversy*, Deutsche Presse-Agentur, Feb. 4, 1999 at 1; *See also* Tracey Snell,

MP3 Player Comes to UK as US Legal Fight Begins RIOMP3 Player, Music Wk. 6, Oct. 24, 1998 available in 1998 WL 11882859 stating, "In one afternoon, the RIAA says it uncovered 80 MP3 sites containing more than 20,000 MP3 files, virtually all of which are illegal recordings by big-name artists."

36. *RIAA v. Diamond Multimedia Sys., Inc.*, No. 98-8247 ABC RZX (C.D.Ca. 1998).

37. Article, *Creative's MP3 Portable Hits Market*, (Apr. 12, 1999) <http://news.webnoize.com/cgi-bin/n/item.rq?ID=4038>.

38. *Id.*

39. *Id.*

40. *Id.*

41. Press Release, *Samsung Electronics' Yepp: Q&A*, (Jan. 7, 1999) <http://www.samsung.com/news.yepp_qna.html>.

42. *Id.*

43. Article, *With Impeccable Timing, a2b music Unveils New Player*, (Apr. 13, 1999) <http://news.webnoize.com/cgi-bin/n/item.rq?ID=4046>.

44. Neil Strauss, *Technology You Can Dance To*, N.Y. Times, Apr. 15, 1999 at E1.

45. Matt Richtel, *News Watch: New Car Stereo Packs Plenty of Road Music*, N.Y. Times, Mar. 11, 1999, at G3.

46. Strauss, *supra* note 9.

47. *Id*.

48. Neil Strauss, *Expert to Help Devise Format for Delivering Music on Internet*, (Mar. 1, 1999) <http://www.nytimes.com/library/tech/99/03/biztech/articles/01tune.html>.

49. *Id.*

50. *Id.*

51. Christopher Jones, *SDMI: Shape Up or Ship Out* (April 28, 2000) Wired.com.

52. Interview, *Ric Dube, Webnoize Interview: Al Teller*, (Feb. 23, 1999) <http://webnoize.com/cgi-bin/n/item.rq?ID=3825> stating, "[t]hat would make Atomic Pop a diverse enterprise, combining all that comes with existing simultaneously as a label, a distributor, an entertainment destination, and an e-commerce channel."

53. *Id.*

54. *Id.*

55. *Id.* quoting statement attributed to Lawrence Kenswil, President of Electronic Commerce at Universal Music: "[i]t is this capability to gain direct access to customers that brought Universal into the venture . . . . People aren't our customers directly. . . . At the end of the day, we need information about that that *sic* is not filtered by third parties."

56. Saul Hansell, *BMG and Universal Said to Form Internet Venture,* N.Y. Times, Apr. 7, 1999 at C1. *See also* Howard Siegel, *Digital Distribution of Music: How Current Trends Affect Industry*, Multimedia & Web Strategist L. Fin & Bus., Oct. 1998, at 6 stating,

> the music industry is beginning to reconsider its traditional modes of distribution. Record companies are confronted with a consuming public that can literally manufacture its own albums based on the material that is beamed into households from remote sources . . . many established record companies are looking at small start-up operations as instructive prototypes.

57. Brett Atwood, *Labels, Artists Clash Over MP3*, Billboard, May 1, 1999 at 74.

58. *Id*., stating, "Geiger, [ARTISTdirect/Ultimate Band List CEO] says that many artists are eager to stay in better touch with their audiences through E-mail and the Internet. In addition, he says that this direct communication will ultimately result in higher record sales—whether through traditional retail outlets or digitally distributed via the Internet."

59. *Id.*

60. *Id.* stating "We know that we can't stop piracy online, but at least this way we have some control over how our artists' music is played . . . I'd rather have the music fans get it from our site than elsewhere."

61. Siegel, *supra* note 56 discussing the convenience and profitability of digital distribution and the all-in-one record label, sound recording manufacturer and record store.

62. Donald S. Passman, All You Need to Know About the Music Business, (3rd ed. 1997) at 378; *See also* Hansell, *supra* note 56, stating, "People buy artists, they don't buy labels. So you will buy your Cher disk from Virginmega.com or from Cher.com. You won't buy it from the label because you don't know who the label is."

63. *See, e.g.*, Doug Reece, *Industry Grapples With MP3 Dilemma*, Billboard, July 18, 1998 available in 1998 WL 10914096, stating,

> Ram Samurdala, a postdoctoral fellow at Stanford University with a burgeoning profile in MP3 circles . . . advocates other means by which labels might be able to find compensation. Among those, he suggests switching to an advertising model, whereby music is given away to consumers and income from ads purchased on the Web site or a built-in piracy tariff like the one imposed on DAT purchasers. This could be attached to computer costs or electronics devices such as the MPMan.

See also Article, *Turning Direct Delivery into Profit Still a Distant Prospect*, Music Bus. Int'l 37, Oct. 1, 1998 available in 1998 WL 11090886 stating,

> Some operators are already looking to exploit the marketing potential of direct download. A2b music has developed a2bMail and Play Media has Song Mail. Both systems allow audio to be e-mailed and listened to without the need to download a player . . . Such systems offer enormous potential for tapping into a form of marketing that has been hitherto under-exploited: using music consumers to disseminate information themselves. The basic premise is that fans across the globe will happily distribute e-mail clips to their friends, resulting in effective and inexpensive direct marketing of an artist's latest material.

64. Interview, *The Webnoize Interview: SDMI Executive Director Dr. Leonardo Chiariglione,* (Apr. 6, 1999) <http://news.webnoize.com/cgi-bin/n/item.rq?ID=4014>.

"New Uses" and the Public Domain

By Alan J. Hartnick

The emergence of the "information age" has thrust into sharp focus the enduring tension between the expansion of intellectual property rights and the public domain. There is great currency to the notion is that there is an unfettered right to sell one's product, free of government control or predatory competitive practices, that is, the price the market will bear. This is inherently at odds with a trend that has previously enjoyed currency—the notion of the public domain, with information free for all, upon which other information may be built and thereafter protected.

In the information society, lawyers and businesspeople are relying on increasingly expanding interpretations of and novel interrelationships between traditional intellectual property doctrines to establish protection for products and services. For example, while the U.S. does not have an industrial property law that protects designs for a limited period, courts have relied on trade dress doctrine to extend perpetual protection for some designs—under the arguably fictitious theory that they indicate source of origin. Trademark, dilution, copyright, patents, design patents, contractual arrangements, term extension, copyright restoration, publicity, state misappropriation law, trade secret statutes, § 43(a) of the Lanham Act and the new proposed Collection of Information Anti-Piracy Act are all used to protect a variety of intangible products. Nothing is free.

To quote from a book review by Patrick Parrinder:[1]

> This expansion of intellectual property has taken place virtually without opposition, and with very little public comment outside specialized law journals. How many people realize, I wonder, just how inconceivable an art like Andy Warhol's would be today? Forty years ago, the conventional reaction to his Campbell's soup tin and Marilyn Monroe images was astonishment that such banal icons were granted space on gallery walls. Nowadays the proprietors of Campbell's and the owners of the celebrity rights in Monroe and her successors would lose no time in killing off Pop Art at birth. . . .

Is it all too much? If a work is not protected by state or federal law, it is then in the public domain, and may be copied and used. For the potential rights owner, the public domain means the loss of control. On the other hand, Justice Brandeis reminds us that the noblest of human productions ". . . become, after voluntary communication to others, free as the air to common use."[2] We have a philosophical dilemma.

"Tarzan" is an interesting well-known character, and, most recently, was the protagonist of an animated Disney feature. Is the Tarzan like Ulysses—a public domain character that is free for all; or, is he more like Scarlett O'Hara, still protected by Margaret Mitchell's 1936 copyright?

A book review in *New York Times* of July 5, 1914, reviewed "Tarzan of the Apes" by Edgar Rice Burroughs. The review stated ". . . With adventures and perils the book is replete, nor is a strange love story wanting. It closed with a great renunciation, but with the promise of another Tarzan book. . . . There are few [readers] who will not look forward eagerly to the promised sequel."[3]

"In the information society, lawyers and businesspeople are relying on increasingly expanding interpretations of and novel interrelationships between traditional intellectual property doctrines to establish protection for products and services."

In fact, Tarzan was first published in the October 1912 issue of *The All Story Magazine*. So, as a copyrighted character, it could be argued that Tarzan entered the public domain in the U.S. in about 1987. Judge Newman in *Burroughs v. MGM, Inc.*,[4] wrote that the character of Tarzan was sufficiently delineated in his first 1912 appearance for the term of copyright to have commenced at that time. And Leslie A. Fiedler, in his famous essay on Tarzan,[5] wrote: ". . . the myth, which like all authentic myths, has passed into the public domain and must be embodied in whatever vulgar commercial form has preempted the popular imagination."

But is Tarzan in the public domain? No.

Under trademark law, it can be argued that the character, Tarzan, is protected for all time against any meaningful use that might be made by someone other than the rights "owner." It can be also argued that extending protection in this manner produces a net social loss by restricting over-all use of such public domain material.

The increasingly voluble complaint from rights holders these days is that there is too much piracy, and that greater information is necessary for consumers to understand the importance of protecting intellectual property. I suspect that something else is involved. All "pirates" are not crooks, and, indeed, sometimes our children are "pirates" (despite limited privileges for home audio recording). There is a dirty little secret embedded in current public attitudes—many Americans not only tolerate piracy but take part in it. Not only is there public assent to piracy, there is a silent revolution. Why?

The public perception is that intellectual property law now legitimizes the efforts of owners to limit access for the many in the interest of profit for the few. Removing material from the public domain works a huge uncompensated wealth transfer from ordinary citizens, and the public may not believe that it receives a *quid pro quo*. Ask librarians how they feel. You may be shocked!

The core problem that has emerged with the extension of intellectual property to new communications technology is the conflict between two basic policies of American society—free speech and the free market.[6] Judge Birch and Professor Patterson consider that, "If the goal of free speech is an informed citizenry, free speech encompasses the right of access as a matter of irrefutable logic." The criminalization of accepted behavior can only produce further disdain for law.

I suggest the remedy for this tension does not require expanding intellectual property laws or increasing piracy enforcement. Instead, courts and legislatures must be sensitized to the possibility that we may be over-protecting intellectual property. And today's diminution of the public domain may mean the death of tomorrow's intellectual property. The consumer "pirate" is acting as a victim of the proprietary culture. I suggest that intellectual property owners must realize that intellectual property is less a subset of property law than a subset of public domain law. There must be a give-back to the public, or, at least, the perception of a give-back if the public is to accept and abide by intellectual property laws.

Without a countervailing trend, the public is creating and will continue to create its own public domain, without limits. And the Internet is the battleground. Digital media can be a free-for-all where property rights may be easily disregarded.

The social contract requires that intellectual property be disclosed and made accessible to the public after a fixed time, with the exception of sources indicating trademarks and trade secrets. Without such disclosure and access, the intellectual property owners view their marketing rights as absolute, thus raising fears of monopoly. Piracy may be seen as a public outcry against apparent excessive monopoly power.

Is the "thrust into the public domain" theory only an excuse for lawless conduct against the rule of law? Certainly protecting intellectual property at the expense of the public domain aids the American balance of trade. Leaving the question of who creates the law, there is no doubt that there are those who profit unlawfully from the innovations of others. Such a theory suggests that there may be additional reasons for what appears to be public acceptance or indifference of such piratical conduct. There is societal disapproval of shoplifting, yet there is tacit approval, and even affirmative acceptance, of bootleg sound recordings. In this context, is "piracy" more like violating Prohibition than shoplifting?

"There must be a give-back to the public, or, at least, the perception of a give-back if the public is to accept and abide by intellectual property laws."

Proprietor-owners behave as if they have natural law fee simple ownership rights in intellectual property. However, the policy underlying intellectual property laws directs only a limited statutory monopoly for the purpose of providing economic incentives to innovators for the public good. If intellectual property is a subset of the public domain, the public trust doctrine holds that government may not transfer the public property into private hands in the absence of any public benefit in exchange. The perception of overreaching is the symptom that the public considers that there is no public benefit, which in turn justifies the complicity with piracy. This is not a pretty picture, but may explain, in part, the worldwide problem of piracy.

Perhaps we are the problem, or part of the problem, not they. The ancient Greeks have another lesson for us: nothing in excess.

Endnotes

1. N.Y. Times, Literary Supplement, March 12, 1999, reviewing Coombe's The Cultural Life of Intellectual Properties.
2. *International News Service v. Associated Press*, 248 U.S. 215 (1918) (Brandeis, J., dissenting).
3. Books of the Century 29 (Time Books 1998).
4. 683 F.2d 610, 631 (2nd Cir. 1992).
5. Books of the Century, *supra* note 3 at 286.
6. Speech, Birch and Patterson, A Unified Theory of Copyright, presented February 20, 1999 at the Mid-Winter Meeting of the Copyright Society in Atlanta, Georgia.

Section Committees & Chairpersons

The Entertainment, Arts and Sports Law Section encourages members to participate in its programs and to contact the Section Officers listed on the back page or the Committee Chairs for further information.

Broadcasting and Cable
Douglas P. Jacobs
600 Third Avenue
New York, NY 10016
(212) 973-8910

Copyright and Trademark
Alan J. Hartnick
150 East 42nd Street, 26th Floor
New York, NY 10017
(212) 949-9022

Fine Arts
Ralph E. Lerner
875 Third Avenue, 14th Floor
New York, NY 10022
(212) 906-2355

Legislation
Steven H. Richman
32 Broadway, 7th Floor
New York, NY 10004
(212) 487-5338

Literary Works & Related Rights
Jay Kogan
1700 Broadway
New York, NY 10019
(212) 636-5465

Litigation
Peter A. Herbert
500 5th Avenue
New York, NY 10110
(212) 921-8399

Membership
Howard A. Singer
295 Madison Avenue, 19th Floor
New York, NY 10017
(212) 532-3590

Motion Pictures
Donna L. Bascom
250 West 57th Street, Suite 2420
New York, NY 10107
(212) 582-0555

Music and Recording Industry
Ronald S. Bienstock (Co-Chair)
250 West 57th Street, Suite 1917
New York, NY 10107
(212) 399-0099

Gary F. Roth (Co-Chair)
320 West 57th Street
New York, NY 10019
(212) 830-2521

New Technologies
Kenneth Neal Swezey
40 West 57th Street, 21st Floor
New York, NY 10019
(212) 974-7474

Professional Sports
Jeffrey B. Gewirtz (Co-Chair)
3491 Buckhead Loop NE, Apt. 1611
Atlanta, GA 30326
(404) 262-6313

Jeffrey A. Rosenthal (Co-Chair)
One Liberty Plaza
New York, NY 10006
(212) 225-2086

Programs
Mary Ann Zimmer
40 West 57th Street, Suite 2104
New York, NY 10019
(212) 974-7474

Publications
Elissa D. Hecker
711 3rd Avenue
New York, NY 10017
(212) 834-0156

Rights of Publicity, Privacy & Merchandising
Joshua R. Bressler
900 Third Avenue
New York, NY 10022
(212) 756-2002

Theatre and Performing Arts
Peter S. Cane
230 Park Avenue, 4th Floor
New York, NY 10169
(212) 922-9800

Young Entertainment Lawyers
Jennifer Unter
42 West 72nd Street
New York, NY 10019
(212) 541-8641

NEW YORK STATE BAR ASSOCIATION ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

The New York State Bar Association's Entertainment, Arts and Sports Law Section offers many ways to enhance your knowledge and expertise through committee involvement. Committee work allows you to network with other attorneys from across the state and gives you the opportunity both to research issues and to have a real impact upon the law. Committees are also outstanding avenues to achieve professional growth and recognition for your efforts.

☐ Please consider me for appointment to the Entertainment, Arts and Sports Law Section Committees as indicated below.

☐ Please send me information on membership in the Entertainment, Arts and Sports Law Section.

Committee Assignment Request

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

___ Broadcasting and Cable

___ Copyright and Trademark

___ Fine Arts

___ Legislation

___ Literary Works & Related Rights

___ Litigation

___ Membership

___ Motion Pictures

___ Music and Recording Industry

___ New Technologies

___ Professional Sports

___ Programs

___ Publications

___ Rights of Publicity, Privacy & Merchandising

___ Theatre & Performing Arts

___ Young Entertainment Lawyers

Name ____

Firm ____

Office Address ____

Home Address ____

Office Phone No. ______________ Office Fax ______________ Home Phone No. ______________

E-mail address ____

Please return this application to: **Membership Services Department**
New York State Bar Association
One Elk Street
Albany, NY 12207
Telephone: 518/463-3200, ext. 5573

The reviews are in . . .

"Howard's book is an authoritative guide for navigating the often complicated terrain of entertainment law. Presented in a clear, accessible format, Entertainment Law *is packed with information and insights that can help its readers survive and flourish in today's fast-paced entertainment industry."*

Michael Greene
Recording Academy President/CEO

". . . the definitive text in the burgeoning field of entertainment law. It provides an in-depth analysis of the key issues currently confronting the practitioners of its various specialties. For both its breadth and depth, I highly recommend Enter-tainment Law *to students, academics and professionals alike."*

Allen J. Grubman, Esq.
Senior Partner, Grubman Indursky Schindler & Goldstein, PC
New York City

"In Entertainment Law *Howard Siegel has put together the whole package. Noel L. Silverman's tour through the labyrinth of a motion picture deal was particularly useful to me. Whether you're planning a deal, engaged in a deal or just wondering how you got jobbed out of your profits on the last deal,* Entertainment Law *is an invaluable tool."*

John Sayles
Movie Producer

"Howard Siegel's advice has always been helpful. With Entertainment Law, *I have a wonderful reference book I can flip through while negotiating—it makes me appear very smart. Thank you, Howard."*

Don Buchwald
Don Buchwald & Associates, Inc.

"Every Rock and Roll home should have one."

Bill Wyman
Founding Member of the Rolling Stones
Author, *Stone Alone*

"Entertainment Law *is an excellent review of the entire entertainment industry and its business practices."*

Donald S. Passman
Partner, Gang, Tyre, Ramer & Brown, Inc.
Beverly Hills
Author, *All You Need to Know About the Music Business*

"Entertainment Law *is an excellent review of the entire entertainment industry and its business practices."*

Donald S. Passman
Partner, Gang, Tyre, Ramer & Brown, Inc.
Beverly Hills
Author, *All You Need to Know About the Music Business*

"Howard Siegel and his collection of talented authors had better be careful; as more of their clients read this book, the less dependent we are bound to become on their expertise. Entertainment Law *goes a long way in explaining the many mysteries of our business."*

Carly Simon

"It looks to be an even better work than its truly excellent predecessor."

Donald Biederman
Exec. Vice President, Business Affairs
Warner/Chappell Music, Inc.
Co-author of *Law and Business of the Entertainment Industries*

"Oh, the legal fees I could have saved if I'd known this stuff when I first entered the business—and by 'the business,' of course, I mean 'the industry.'"

Paul Shaffer
Late Show with David Letterman

"It is the definitive work on the subject and belongs in every professional library."

Morton L. Janklow, Esq.
Of Counsel
Newborn & Ashley
New York City

". . . this is a must for anyone who is seriously involved in the entertainment business."

Martin Bandier
Chairman and Chief Executive Officer
EMI Music Publishing

To order

Call 1-800-582-2452
Source code: cl1188

New York State Bar Association

NYSBA

Publication of Articles

The *Journal* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted on a 3 1/2" diskette (preferably in WordPerfect or Microsoft Word) along with a laser-printed originals and biographical information. Please submit articles to:

Elissa D. Hecker
The Harry Fox Agency, Inc.
711 3rd Avenue
New York, NY 10017
ehecker@harryfox.com

Entertainment, Arts and Sports Law Journal

Editor
Jeff Sanders
Winstar New Media Company, Inc.
The Winstar Building
685 Third Avenue, 6th Floor
New York, New York 10017

This *Journal* is published twice a year for members of the Entertainment, Arts and Sports Law Section of the New York State Bar Association. Members of the Section receive the *Journal* without charge. The views expressed in articles published in this *Journal* represent those of the authors only, and not necessarily the views of the Editor, the Entertainment, Arts and Sports Law Section or the New York State Bar Association.

ISSN 1090-8730

NYSBA

Entertainment, Arts and Sports Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155