

Epilogue

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PROPERTY RIGHTS "ON-LINE"

Several recent information law cases raise issues of the property rights of those who create and own information available for retrieval on computer online networks. Other cases involve patents that have been granted which could stifle innovation among developers of the information superhighway. Writers, artists, and developers of the technology are looking to the courts for legal definitions of what constitutes "fair use" when users have the ability to retrieve and rearrange massive quantities of text, visual, and audio data.

One suit, filed December 16, 1993, by a group of freelance writers alleges copyright infringement by several newspapers, magazines, and electronic information providers. Plaintiffs claim that their articles have been sold to databases and CD-ROM makers without permission. The suit names as defendants The New York Times Co., Newsday Inc., The Time Inc. Magazine Co., Mead Data Central Inc., and University Microfilms International.

A New York-based music publisher, Frank Music Corp., filed a class action suit on November 29, 1993, on behalf of 140 publishers, claiming that more than 550 of their copyrighted songs have been distributed via CompuServe Inc., an online service of Columbus, Ohio. Subscribers of CompuServe can download the songs into their computers by means of musical instrument digital interface and later upload into the system. The publishers maintain that this is copying material without permission, even though the copying is done in a different way. In a similar case involving trademark, a U.S. District court in Florida on December 9, 1993, found for Playboy Enterprises that its copyright and trademark had been infringed by a computerized bulletin board service that distributed the publisher's images to its subscribers.

The award of a patent in November 1993 to Compton's NewMedia of Carlsbad, California, involving the accessing and searching of a multimedia data base could mean that makers of interactive programming software that combines voice, animation, and text would have to pay a royalty to the company. Patent commissioner Bruce Lehman has instituted a reexamination of Compton's patent. Josh Hyatt, *Highway Robbery; The information superhighway has not yet reached homes, but the legal issues it raises are already generating traffic in the courts*, BOSTON GLOBE, Jan. 2, 1994, (Economy) at 29.

STUDIO PREVAILS IN "BATMAN" SUIT

On January 24, 1994, Los Angeles Superior Court Judge David Yaffe dismissed Benjamin Melniker's and Michael Uslan's breach of contract suit against Warner Bros. and PolyGram Pictures. Melniker and Uslan, executive producers of the film "Batman," claimed that Warner Bros. and PolyGram cheated them

out of their fair share of the film's gross profits. The film has earned the studio more than \$300 million, but has not yet shown net profits. Those who had gross participation contracts, such as PolyGram and the film's producers Peter Guber and Jon Peters, have each received \$4 million and \$8 million. Melniker and Uslan maintained they were "partners" in the project with PolyGram, Guber and Peters, and were contractually entitled to 40 percent of whatever their "partners" got from the film's profits, whether net or gross. Judge Yaffe ruled that Melniker and Uslan were contractually entitled to a share of the film's net profits, and since there were none, they are not entitled to a monetary judgment. Yaffe also ruled that Polymer had breached its contract with Melniker and Uslan when it failed to consult with them during the filming of "Batman" and when it changed their producer titles to executive producer credits, but these breaches did not involve monetary claims. Tom Girardi, attorney for Melniker and Uslan, is planning to file an appeal with the California Court of Appeals. David Robb, *Warners Wins 'Total Victory' in 'Batman' Suit*, THE HOLLYWOOD REP., Jan. 25, 1994.

COUNTY MUSIC INDUSTRY MAY BOOST ROYALTIES

The Nashville Songwriters Assn. International is petitioning the major recording companies to drop controlled composition clauses from the contracts of artists signed to their labels. The first letters have been sent to the CEO's of Sony, owner of the Columbia and Epic labels, and Matsushita, owner of MCA.

Controlled composition clauses, common in this country, require newer artists who record their own songs to accept only 75 percent of the mechanical royalty rate accorded to them by law. The substandard rate is passed on to the artist/songwriter's co-writers, leaving them with reduced rates as well. Publishers, which are sometimes tied corporately to the major labels, routinely accept the reduced rate for their writers.

The focus of NSAI's campaign is to free co-writers from the contractual demand that they reduce their rates. NSAI aims to free all songwriters from the controlled composition handicap, but no other songwriter associations are presently involved in the request. Edward Morris, *NSAI Blasts Controlled Composition Clause; Group Seeks Full Royalties For Songwriters*, BILLBOARD, Jan. 15, 1994, (Artists and Music) at 8.

CABLE T.V. TARGETS VIOLENCE

Cable TV executives and network broadcasters have announced separate plans to limit violent TV programming. Both segments of the industry agreed to form an independent monitoring board to assess and report on the amount of violence in entertainment programming. Additionally, cable TV will begin rating its programs for violence, thereby supporting technology which permits parents to block violent programs from their home TV. Network broadcasters do not support a rating system or the blocking chip technology because they fear advertisers might shy away from programming which is deemed too violent.

Rep. Ed Markey (D-Mass.), chairman of the House telecommunications sub-

committee, warned that legislation could still be enacted to regulate TV violence. His bill would require manufacturers to install a chip in new TV sets to allow blocking of programs with a violence "V" rating. Rep. John Bryant (D-Tex.) continues to sponsor his bill calling for the Federal Communications Commission to set formal violence standards for programming. Sen. Paul Simon (D-Ill.), a leading proponent for Congressional action to reduce TV violence, has backed off his legislation for now. Daniel Cerone and Jube Shivers, Jr., *Cable, Networks Offer Different Violence Plans*, LOS ANGELES TIMES, Feb. 2, 1994, (Business, Financial Desk) at 3.

F.C.C. QUASHES CHALLENGE TO INDECENT LANGUAGE NEWSCAST

The United States Court of Appeals for the District of Columbia Circuit dismissed a radio listener's Petition for Review of an Order of the Federal Communications Commission not to take action against National Public Radio ("NPR") for allegedly broadcasting indecent language during a newscast. The newsreport in question was a story on the trial of an alleged crime syndicate leader, featuring a tape recording of a wiretapped phone conversation between the leader and an associate. The phone conversation included ten uses of an indecent expression, normally offensive to persons of ordinary sensibility. Upon petitioner's complaint, the Mass Media Bureau of the FCC decided that the broadcast was not "actionably indecent." On appeal to the FCC, the commission affirmed the Bureau. The Appellate Court held that the petitioner lacked standing to challenge the FCC's decision.

Reviewing the requirements to establish standing under Article III of the Constitution of the United States, the court found that the petitioner had not alleged a personal injury-in-fact, traceable to respondent's conduct, which was redressable by the relief requested. Petitioner requested the imposition of a sanction on NPR to preclude the possibility of another offensive broadcast of indecent words, but did not request damages or relief for the harm allegedly caused by the broadcast. Reversal of the FCC order and the imposition of a sanction on NPR, the court reasoned, was unlikely to have an effect on the possibility that petitioner would be exposed to future broadcast indecency. The court found that the mere possibility of another offensive broadcast was too remote and attenuated to establish actual or imminent injury. *Peter Branton, Petitioner v. Federal Communications Commission and United States of America, Respondents*, 993 F.2d 906 (D.C. Cir. 1993).

NBA SCORES BIG IN TRADEMARK INFRINGEMENT ACTION

In November 1993 the U.S. District Court for the Northern District of Illinois granted NBA Properties, Inc., summary judgment in counts I and II of a complaint against YMG, Inc., alleging trademark infringement and unfair competition. The court denied NBA's motion for summary judgment against Mohammed Gaffar ("Gaffar"), YMG's president.

In early 1993 NBA Properties seized t-shirts, sweatshirts, silkscreens, NBA “Official Licensed Product” labels and business records from YMG pursuant to a court order of seizure. Although the merchandise bore NBA registered trademarks and purported to be “officially licensed” merchandise, YMG was not licensed to embroider, distribute, or sell merchandise bearing reproductions of the NBA trademark.

In granting NBA Properties’ motion for summary judgment on the trademark infringement count, the court found that NBA Properties proved the required elements. Initially the court held that because the NBA’s trademark was federally registered, there was prima facie evidence that the NBA holds a valid trademark. Second, the photographs of the materials seized from YMG show that YMG’s merchandise contained reproductions or copies of NBA Properties’ registered trademark. Third, YMG admits it was not licensed to distribute merchandise bearing NBA trademarks. Fourth, the trademark was used in commerce by YMG when an NBA investigator ordered and received sweatshirts purporting to be Chicago Bulls sweatshirts from YMG. Lastly, YMG’s use of a tag stating “NBA Officially Licensed Product” was held to result in a great likelihood of confusion and deceit of the public.

NBA Properties also sought summary judgment of the willful infringement count (trademark counterfeiting). Because YMG knew it was producing merchandise bearing NBA trademarks and knew that it was not licensed to do so, the court found that YMG knew the marks were counterfeit, and therefore granted summary judgment for NBA Properties on Count II also.

The court denied summary judgment against Mohammed Gaffar because it found his control of the operations of the company to be an issue of material fact. In order to establish personal liability for trademark infringement and unfair competition, the officer must be a “moving, active force behind the corporation’s infringement.” Although Gaffar admitted to being president of YMG, he denied that he was the owner or that he was in control of the business operations. Therefore, the court denied summary judgment, finding that whether Gaffar retained the requisite control over the corporation’s infringement was an issue of material fact. *NBA Properties, Inc., Plaintiff, v. YMG, Inc., and Mohammed Gaffar, Defendants*, 1993 WL 462836 (N.D. Ill.).

MORAL RIGHTS ISSUES STALL BRITISH NOVEL PUBLICATION

Viking is cancelling publication of *While England Sleeps*, a novel by David Leavitt, because of a copyright infringement lawsuit filed against the author. The suit was filed in England by the English poet, Sir Stephen Spender. Spender also alleged that Leavitt’s novel violated his “moral right” to control the presentation of his own work, a new and controversial British copyright law untested by the courts. Leavitt’s novel recounts a doomed homosexual love affair set during the Spanish Civil War, which is similar to part of Spender’s memoir, *World Within World*, published in 1951, both in its general drift and in some of its details.

Martin Garbus, counsel for Viking, stated he did not believe Leavitt’s book

violated either British or American copyright law, but that a settlement was expedient in view of the current state of flux of the law. Viking is not recalling Leavitt's work from bookstores but copies currently in warehouses will be destroyed, and a Viking spokesman said Leavitt is rewriting the book as well as composing an introduction detailing what he's learned from these events. David Streitfeld, *Publisher Kills Novel Over Pilfered Plot; Suit by Poet Stephen Spender Claimed Author Used His Life Story*, WASH. POST, Feb. 17, 1994, § 1, at A1.

ATTORNEYS FEES IN INFRINGEMENT CASES

The U.S. Supreme Court invalidated a federal appeals court rule which required prevailing defendants in copyright infringement cases to prove the losing plaintiff's suit was frivolous or brought in bad faith in order to collect attorney's fees. The Court ruled that lower courts must treat defendants and plaintiffs evenhandedly in awarding attorney's fees and rejected arguments that the winning party should be awarded fees automatically, ruling that both parties are to be awarded attorney's fees only as a matter of the court's discretion. The new ruling makes it easier for defendants who win copyright infringement cases to collect attorney's fees from losing plaintiffs. *Court Levels Playing Field for Lawyer Fees in John Fogerty Copyright Case*, CHI. TRIB., Mar. 2, 1994 (Business) at 3.

NEW YORK CITY SUBWAYS BAN VIOLENT FILMING

Officials of the New York City Transit Authority are restricting film producers from filming violent scenes in the subway system. Jared Lebow, a Transit Authority spokesman, explained that while there is no written policy on what kind of scenes the Authority will allow to be filmed in the subways, the Authority is concerned with promoting the image of a safe system and increasing ridership. Officials recently refused to allow filming of a movie about a mob chief who was headquartered in the subways because it gave the impression that the Authority didn't know what was going on in the system.

Film producer Richard Brick, formerly commissioner of the mayor's Office of Film, Theatre and Broadcasting, said the Transit Authority should not be making judgments based on script content. He feels their only concern should be with issues of safety as a condition of their cooperation.

The Authority's restriction could help other cities win movie business and harm New York's \$1 billion film industry. Lebow said that while the Authority is sensitive to economic concerns of the city, they feel they have a responsibility to preserve a realistic portrait of the system. Matthew Purdy, *Officials Say "Cut!" to Subway Violence on Film*, NEW YORK TIMES, Feb. 24, 1994, § B, at 1.

ELECTRONIC ARTS CONTRACT PROVIDES INDUSTRY STANDARD

The American Federation of Television and Radio Artists, the Union for performers in TV shows, radio, recording and commercials, has signed a contract with software marketer Electronic Arts Productions. This is the first comprehensive contract covering all on-camera and off-camera performers working in all interactive media productions worked on by Electronic Arts. There are currently no industrywide employment standards for interactive programming, as there are relatively few companies producing interactive programming. The Electronic Arts contract may become the prototype for other agreements. The biggest issue in negotiating this contract was that compensation per viewing didn't apply to the interactive media business. The contract set the minimum day rate for performers in interactive productions at \$485, which is comparable to the rate for performers in prime-time network TV shows. Marcy Magiera, *Actors' Union Inks Deal for Interactive*, ADVERTISING AGE, Feb. 14, 1994 (Media & Marketing) at 16.

HOUSE AND SENATE STUDY GANGSTA REPERCUSSIONS

A congressional panel, the House Subcommittee on Commerce, Consumer Protection and Competitiveness, has begun investigating the effects of gangsta music on inner-city youth. Rap artists, critics and record company officials expressed their views to the panel on the gangsta rap phenomenon.

Gangsta and hardcore rap frequently include violent and misogynistic themes. Critics argue that rap lyrics degrade women and erode community values. C. DeLores Tucker, chairwoman of the National Political Congress of Black Women, called for industry regulation. One witness urged for a rating system for recordings similar to the rating system for movies. Others, for instance rap artist Yo Yo and executive for Rush Associatd Labels/Def Jam Recordings David Harelston, feel that this criticism is myopic, and argue that rap should not be made the scapegoat for a violent society. There is currently no legislation against gangsta rap lyrics before Congress. Brooks Boliek, *Gangsta Rap Faces Critics in Congress*, HOLLYWOOD REP., Febr. 14, 1994.

FREE SPEECH V. INDECENT TV

On February 16, 1994, the U.S. Court of Appeals for the District of Columbia ordered two circuit court decisions set aside, thereby allowing the government to argue on rehearing that restrictions on indecent TV programming do not violate free speech. The regulations the court held unconstitutional were a ban on indecent TV and radio broadcasts between 6 a.m. and midnight, and an FCC regulation allowing cable TV operators to ban what they deemed indecent programming from leased access channels. The FCC had issued the regulations under Congressional legislation. The court ruled that the 6 a.m. to midnight ban was not narrowly tailored to advance the asserted governmental interest without unnecessary abridgement of First Amendment rights. The court directed the FCC to

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rewrite the regulation allowing cable operators to segregate leased-access channels carrying sexually explicit programs so that subscribers can only view them by written request. Both decisions will be reconsidered after a new hearing by the full court. *New Hearing for TV Decency Rules*, CHI. TRIB., Feb. 19, 1994 (Business) at 1.

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