Legislative Epilogue

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LEGISLATIVE EPILOGUE

CRIMINAL COPYRIGHT IMPROVEMENT ACT OF 1995, S. 1122

This Act seeks to amend federal copyright law to provide greater copyright protection by broadening the scope of the criminal copyright provisions. The Act, currently pending approval by the Senate Judiciary Committee, was introduced by Senator Patrick J. Leahy (D-VT). To date, the Act has not attracted any bi-partisan support.

The Act seeks to punish anyone who infringes a copyrighted work for “financial gain,” which, under the Act, is defined as the receipt of anything of value, including the receipt of other copyrighted works. Courts have previously interpreted “financial gain” to include only monetary gain by the alleged infringer. By broadening the definition, the Act significantly extends copyright protection for potential plaintiffs. In keeping with the broader scope of protection, plaintiffs will have five years, rather than the current three year statute of limitations, in which to file suit in federal court.

Punishment under the Act is also more severe. The proposed Act provides for a fine and up to five years of imprisonment for infringing a copyright for purposes of commercial advantage. Anyone convicted under the new Act could face up to ten years of imprisonment for a subsequent act of infringement. However, incarceration under the proposal is limited to infringements of copyrighted works which have a retail value of more than $5,000. Not many copyrighted works, taken individually, meet this valuation requirement. Thus, it seems that this proposal is aimed at the infringer who engages in mass-reproduction and distribution of copyrighted works. With the development of the internet and other comparable technological devices, this behavior could become more frequent.

The Act also authorizes the United States Sentencing Commission to alter the sentencing guidelines to insure that copyrighted works are adequately protected. The Act specifically requires that the punishment for defendants convicted under the new Act must be “sufficiently stringent” to deter future infringements and must adequately reflect the retail value and quantity of the infringed works. To insure the punishment accurately reflects the injury to the plaintiff’s work, the Act permits the copyright owner to submit a victim impact statement to identify the scope and extent of the injury and loss due to the defendant’s actions.

FAIRNESS IN MUSICAL LICENSING ACT OF 1995, H.R. 789

This Act, currently awaiting approval from the House Judiciary Committee, has drawn wide bi-partisan support. The proposal seeks to clarify the “home-owner exception” to the public performance rights of the copyright owner in a sound recording. The Act revises federal copyright law to provide that communication by electronic device does not constitute copyright infringement unless an
admission fee is charged to see or hear the transmission or the transmission is not properly licensed. Moreover, a performance or display in a commercial establishment does not constitute infringement if it is incidental to the “main purpose” of the establishment.

The Act allows a “performance rights society,” such as BMI or ASCAP, to set an appropriate fee for the licensing of its copyrighted works. If the parties are unable to agree on the fee to be paid for the users’ past or future performance of musical works, the user is entitled to binding arbitration of the disagreement pursuant to the rules of the American Arbitration Association in lieu of any other dispute resolution mechanism. The Arbitrator must determine a fair and reasonable fee and impose a penalty for any infringement of the copyright owner’s rights. The Act specifically provides that the Arbitrator’s decision is binding on both parties and, therefore, the plaintiff will be estopped from seeking judicially determined remedies if he/she opts for the Arbitration process.

The Act also attempts to reduce the amount of litigation over blanket licensing fees frequently offered by performing rights societies. According to the proposal, blanket fees can no longer be the exclusive means by which a broadcaster can purchase rights to perform or broadcast works in a society’s repertoire. The performing rights society must offer the broadcaster a per programming license to perform nondramatic musical works. The license must be offered on terms on conditions that provide for an economically and administratively viable alternative to blanket licenses. The performing rights society cannot compel a broadcaster to report every performance of nondramatic musical works to the society, but the Act permits a broadcaster to bring an action in federal court to require compliance with the reporting requirement.

One of the most significant revisions of existing copyright law is the Act’s requirement that each performing rights society make available free online computer access to copyright and licensing information for each work in its repertoire. To ensure compliance with this mandate, the Act directs the performing rights society to publish a semi-annual printed directory of each title in its repertoire and provide copies of the publication to anyone who requests such information. The Attorney General must report annually to Congress on the activities relating to the supervision and enforcement of the Act.

**Florida Senate Bill No. 72**

This Bill, which is not yet titled, provides several penalties for desecrating a United States flag. The Bill makes such an act punishable as a first-degree misdemeanor to any person who knowingly casts contempt upon any flag by publicly mutilating, defacing, defiling, burning, or trampling upon a United States flag. The Bill further specifies that a “flag” includes any color, symbol, picture, or representation which, to the average person, would denote the flag of the United States of America.
The Bill seeks to amend New York State civil rights law by adding a new section identifying a specific right of publicity. The Bill provides that the right of publicity is a property right that every natural person owns, and unauthorized use of this right gives rise to a cause of action. The Bill was passed to the Assembly Committee on Governmental Operations on January 3, 1996, where it has drawn multiple sponsors.

The Bill codifies common law jurisprudence regarding the descendability and free alienation of the right of publicity. Moreover, the Bill recognizes that a right of publicity can exist in a person's name, voice, signature, photograph, or visual image, and the individual or successor-in-interest may maintain an action in New York State Supreme Court to prevent and retrain any unauthorized use. The plaintiff may also recover a civil penalty of at least $750 for any injuries sustained by reason of such use. If the plaintiff can prove that the defendant knowingly and intentionally violated the plaintiff's right of publicity, the jury has discretion to award punitive damages and attorney's fees to the prevailing party.

However, the Bill also limits an individual's right of publicity. First, the Bill specifically provides that the right of publicity expires fifty years from the person's date of death, regardless of whether the person commercially exploited the right during his/her lifetime. For example, this provision would allow an advertising company to use a celebrity's voice fifty years after the individual's death without seeking permission from the successor-in-interest. With respect to a commercial use, the Bill provides that the user must obtain consent if the use is "so directly connected with the commercial sponsorship or the paid advertising for a product or service."

The Bill also addresses the recent controversy California courts have confronted with determining the extent of the right of publicity when an advertiser uses a simulation or impersonation of a celebrity. The Bill explicitly requires the user to obtain consent, even if the commercial contains a disclaimer stating that the representation is a simulation and not the actual celebrity. Therefore, the new Bill precludes the potential for an advertiser to circumvent an individual's right of publicity by using an impersonation of that individual. In this manner, the Bill vindicates the rights of celebrities while also encouraging a more informed public.

1. See, e.g., White v. Samsung Electronics, 971 F.2d 1395 (9th Cir. 1992) (holding that an advertiser violated Vanna White's right of publicity by broadcasting a commercial featuring a robot wearing a blond wig situated on a game show set resembling the "Wheel of Fortune" television show on which White is a co-host.) But c.f. Wendt v. Host Int'l, 50 F.3d 18 (9th Cir. 1995) (the same court, three years later, held that the right of publicity of the plaintiffs, two stars of the now-syndicated television sit-com "Cheers," was not violated when the defendants used two robots in its franchise of airport bars).
NEW YORK ASSEMBLY BILL 9632

This Bill, commonly referred to as the “anti-moshing statute,” seeks to establish a cause of action for persons injured by moshing-related activities. The Bill, introduced on March 26, 1996, is currently awaiting approval from the New York State Senate Committee on the Judiciary.

The Bill proposes to amend general obligations law by adding a new section 11-106. Section Two of the Bill defines “moshing” broadly as any of several activities occurring within one hundred feet of the area in which a musical group is performing. These activities include, but are not limited to, kicking, pushing, hitting, shoving, jumping onto other persons, and colliding with other persons. The legislature clearly leaves open the possibility that other activities may also constitute moshing, leaving it up to the judicial system to define the contours of the law.

Should the Bill pass in its current form, concert goers and other persons injured by moshing activities will have a cause of action against the person causing the injuries and the owner of the premises in which the musical group performed. More drastically, the Bill explicitly allows the recovery of compensatory damages, including those for loss of property, means of support, and personal injuries, as well as exemplary damages. Additionally, the right to recover transcends the death of either the moshing “victim” or the defendant. The family of the victim may bring suit for wrongful death against the mosher, and conversely, victims may recover from the estate of a deceased defendant.

MISSISSIPPI HOUSE BILL NO. 671

Currently awaiting approval by the Mississippi House Ways and Means Committee, this Bill establishes a sports fund injury board to place a minimum surcharge on the cost of admission to school athletic events to be deposited into a sports injury trust fund. The fund would be used to help injured students pay certain health care costs resulting from sports-related accidents.

The surcharge would apply to athletic events held at all public educational institutions, but private schools may elect to impose the surcharge. All institutions that choose to or are required to impose the surcharge must charge an additional ten cents per ticket which will be sent to the State Tax Commission to be placed in the special fund. Disbursements will only be made to students who suffer permanent impairment of physical functions causing or resulting from traumatic injury while participating in school-sponsored athletic events.

The Bill also establishes a Sports Fund Injury Board to oversee the proper execution and collection of the ticket surcharge. The Board is to consist of three members: one representative elected from the State Board of Education, one member of the State Board for Community and Junior Colleges, and one member of the Board of Trustees of the State Institutions of Higher Learning. The Board must establish rules and an application process for the distribution of funds to cover the medical costs to student athletes resulting from certain injuries remaining after personal health care insurance and all other health care assistance have been denied or exhausted.
The Bill, introduced on January 10, 1996, and currently pending approval from the House Committee on Ways and Means, requires an institution of higher education to allow the recipient of an athletic scholarship sponsored by the National Collegiate Athletic Association ("NCAA") to pay a specified amount of his/her education costs. The Bill only applies to students who attend a public college or university who, during at least three academic years at the institution, receive a NCAA athletic scholarship and terminate enrollment at the school prior to obtaining a degree.

If a student meeting the above requirement discontinues enrollment at the school before completing the institution’s degree requirement and, during the period following termination, does not engage in conduct that would preclude readmission, that student must be reinstated as a regular full- or part-time student at the institution. The student must receive financial credit from the school in an amount equivalent to the lesser of the tuition for a resident student for two academic years or the amount needed to pay for the academic credits needed to complete the student’s degree requirements.

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