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# ENTERTAINMENT AND SPORTS LAWYER

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## Is Virtual Kiddie Porn a Crime?

By Joseph J. Beard

**O**peration Candyman,""Operation Avalanche,""Operation Cathedral" — code names for military actions? In a way, they are. The war, however, is not between nations but, rather, nations against national and international child pornography rings.

In 1998, a worldwide raid under the auspices of Interpol targeted members of the pedophile *Wonderland Club*. In 2001, police in 19 countries took part in a coordinated crackdown on pedophile traffic on the Internet. In March 2002, "Operation Candyman" closed down an Internet-based child pornography ring in the United States and, most recently, in "Operation Ore," British authorities arrested users of a child Internet pornography site that offered files with names like "Child Rape" and "Russian Underage." These are but four examples of the continuing war being waged against child pornographers around the world.

The Internet has made possible the global distribution of child pornography on a scale unimaginable in the analog world of photographs transmitted by mail or other conventional means. The digital technology that has made the Net a reality has also raised the possibility of digitally

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## Copyright vs. Consumers

By Niels Schaumann

**F**rom the beginning, copyright has been driven by subversive technology. The forerunners of today's copyright laws go back to the invention of the printing press, with its unprecedented potential for spreading heresy and rebellion. Within our century, too, technology has had a tendency to undermine the established order.

But rather than government or the church, today it is the content industries that are threatened. Film, radio, photocopiers, analog tape recorders, videocassette recorders, digital audio tape, CD burners, MP3 players — all have produced handwringing and predictions of imminent doom. And technological change is accelerating, making content industries wish they could set back the technology clock.

They have some reason to be concerned. It's quite obvious that copying in the digital world has become much easier, requiring only a mouse-click. More dangerous still, multiple generations of copies don't degrade; a copy of a copy is indistinguishable from the original. But in spite of all the recent attention paid to copying,

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## Rap Music and the Culture of Fear

By Barry Glassner

**W**hy are so many fears in the air and so many of them unfounded? Why, as crime rates plunged throughout the 1990s, did two-thirds of Americans believe they were soaring? How did it come about that by the mid-1990s, 62 percent of us described ourselves as "truly desperate" about crime — almost twice as many as in the late 1980s, when crime rates were higher? Why, on a survey in 1997, when the crime rate had already fallen for a half dozen consecutive years, did more than half of us disagree with the statement "This country is finally beginning to make some progress in solving the crime problem"?

In the late 1990s, the number of drug users had decreased by half compared to a decade earlier; almost two-thirds of high school seniors had never used any illegal drugs, even marijuana. So why did a majority of adults rank drug abuse as the great-

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## The Art Question

**M**ost of our clients see themselves as artists. But, what does being an artist really mean? Have you ever asked yourself that *Art Question?* It is an elemental question we should all know the answer to, yet few of us have thought through in any meaningful way.

Fortunately, there is a crash course available from Nigel Warburton, who tackles this tough topic in a tiny, charming and concise 147-page book (*The Art Question*, Routledge, 2003). The “art question” challenges the very essence of whom our clients are — and what we as lawyers are trying to accomplish as we assist artists in reaching their full potential.

Warburton takes us on a fast moving “art idea” roller coaster — together with lively discussions of Clive Bell’s formalist theory (that all art of all ages has a common denominator); R.G. Collingwood’s theory (that all art has as its common core a form of emotional expression); the Wittgenstein follower’s view (that art is incapable of definition because it is a concept beyond common denominators and is merely a “family resemblance language term);” the institutional theory; and defining art historically.

One need not be a student of philosophy nor an art historian to get a great deal out of this beautifully constructed little book. In fact its target reader is not the philosophy of art expert, but rather those who simply love art, and work with artists every day.

To understand present-day art is often both taxing and stimulating. To explain the transformation of everyday objects, animals, machine-made bits and pieces, sounds, movement and people into “art” requires a flexibility of mind that is often beyond the casual observer’s stamina. Nevertheless, how one “sees” the world is inextricably connected to the art question. Many contemporary thinkers argue that how one *sees* the world dictates how one *acts* in it — and if everyone were trained in seeing the world as artists see it, much in this world would change. In fact, without artistic vision, mankind might be figuratively blind.

Warburton’s discussion of the Institutional Theory of art is particularly fascinating and it is an excellent example of how asking the art question challenges us to think in new ways about everything. This theory’s answer to the art question says that it is not the look, sound or feel of a work, but rather its context that defines it as art, namely how it has been treated by whoever created it, and by those who exhibit and appreciate it. This “procedural” theory of art focuses on the social practices toward a work that transform its status from nonart into art.

Thus, the *Brillo Boxes* painted by Andy Warhol, boxes that are visually indistinguishable from Brillo boxes on supermarket shelves, are transformed into art by the context of their presentation. Therefore, a work of art is not something that shares common elements — it is merely an artifact that has had conferred on it the status of art by some person or persons acting on behalf of a certain social institution, that is to say, the art world.

I expect that many of our clients might have difficulty accepting this understanding of their work, unless of course, they have already had conferred on their work the status of art by the art world and are no longer on the outside looking in.

Answering the art question can help us better understand our clients’ work.

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# What's in a Name: Dealing with Cybersquatting

By Jonathan H. Anshell and John J. Lucas

If the Internet is an information superhighway, its highwaymen are so-called “cybersquatters,” online rogues who register celebrity names and famous trademarks as domain names and then exploit those domain names for profit. In this article, we review the history of the cybersquatting phenomenon and the available means of recovering disputed domain names, both in the federal courts and under the arbitration regime established by the Internet’s international governing body.

## The Internet’s oldest profession

Cybersquatting dates back to the mid-1990s, when the Internet was undergoing a drastic transformation from the province of techies and academics to the World Wide Web as we know it today.<sup>1</sup> One of the first cybersquatters to be brought to the attention of the courts was Dennis Toeppen, who by 1995 had registered domain names comprised of the names of Panavision, Delta Airlines, Neiman Marcus, Eddie Bauer, Lufthansa and more than 100 other business and celebrity names.<sup>2</sup>

After Panavision wrote to Toeppen to request that he relinquish the domain name Panavision.com, Toeppen claimed that he had the right to retain the domain name — unless Panavision was willing to pay him to relinquish it: “If your lawyer has advised you otherwise, he is trying to screw you. He wants to blaze new trails in the legal frontier at your expense. Why do you want to fund your lawyer’s purchase of a new boat (or whatever) when you can facilitate the acquisition of Panavision.com cheaply and simply instead?”<sup>3</sup>

Apparently willing to risk funding its lawyer’s new boat (or whatever), Panavision sued for trademark dilution. The U.S. District Court for the Central District of California entered summary judgment in Panavision’s favor and Toeppen appealed. While affirming the judgment for Panavision, the Ninth Circuit nevertheless articulated limits on a plaintiff’s ability to obtain redress for

cybersquatting under the federal Trademark Dilution Act.

First, the *Panavision* court considered the issue of personal jurisdiction in California over Toeppen, who was not a California resident. At the outset of its jurisdictional analysis, the court observed that “simply registering someone else’s trademark as a domain name and posting a Web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another . . . there must be ‘something more’ to demonstrate that the defendant directed his activity toward the forum state.”<sup>4</sup> The court found that Toeppen’s scheme to extort money from Panavision, which

## Was the registration in bad faith?

entailed his sending a letter to Panavision in California demanding \$13,000 to relinquish the Panavision.com domain name, satisfied this jurisdictional standard.<sup>5</sup>

Next, the court considered the merits of Panavision’s trademark dilution claim — a claim that requires commercial use of the plaintiff’s mark to establish liability.<sup>6</sup> The court began its discussion of the dilution claim by noting that “[r]egistration of a trade [mark] as a domain name, without more, is not a commercial use of the trademark and therefore is not within the provisions of the [Trademark Dilution] Act.”<sup>7</sup> Here again, however, the court found that Toeppen had taken the step required to support the judgment in Panavision’s favor, by going beyond mere registration to engage in a concerted attempt to sell the domain names he had registered.<sup>8</sup>

While redressing an early instance of cybersquatting, *Panavision* left open the possibility that a cybersquatter could

register a famous name as a domain name and then simply wait to be offered money to relinquish it, arguably avoiding the conduct that both subjected Toeppen to personal jurisdiction and comprised the commercial activity supporting *Panavision*’s judgment on the merits.

## The empire strikes back: Congress gets involved

In the late 1990s, cybersquatters were quick to capitalize on the loopholes left by *Panavision* and similar cases. Reflecting on the proliferation of this more passive breed of cybersquatter, one court observed: “New legislation was required to address this situation because then-current law did not expressly prohibit the act of cybersquatting and cybersquatters had started to take the necessary precautions to insulate themselves from liability under the Federal Trademark Dilution Act.”<sup>9</sup>

Enter the Anticybersquatting Consumer Protection Act (ACPA). Enacted in 1999, the ACPA was born of congressional recognition of “a new form of piracy on the Internet caused by . . . the deliberate, bad-faith and abusive registration of domain names in violation of the rights of trademark owners.”<sup>10</sup> The ACPA allows for the imposition of civil liability against anyone who registers a famous or distinctive mark (including a personal name) belonging to someone else as an Internet domain name, with a bad faith intent to profit from doing so.<sup>11</sup>

To guide the courts in determining whether a defendant has the bad faith intent required for liability to be imposed, the ACPA sets forth a nonexclusive list of factors to be considered. Included among these factors are the defendant’s offer to sell or transfer the domain name, the defendant’s intent to divert online traffic away from the plaintiff’s own Web site or to harm the plaintiff’s goodwill and the defendant’s registration or acquisition of a number of domain names that are similar to the famous personal names or trademarks of others.<sup>12</sup>

Notably absent from the ACPA is the requirement of commercial use, which allowed a number of cybersquatters in the pre-ACPA era to escape liability under the Trademark Dilution Act.<sup>13</sup> The ACPA also addresses the difficulty some plaintiffs encountered in establishing

personal jurisdiction under the Trademark Dilution Act<sup>14</sup>, by allowing in rem jurisdiction against the domain name itself.<sup>15</sup> This provision allows a plaintiff to commence a civil action under the ACPA in the judicial district in which the service that registered the domain name is located, if it is not possible to locate or establish jurisdiction over a defendant cybersquatter.<sup>16</sup> Thus, in practice, if a foreign cybersquatter registers a disputed domain name with Yahoo!, Network Solutions or another commercial domain name registration service, a plaintiff may bring an action under the ACPA in the judicial district in which that service is located.

The remedies available to a prevailing plaintiff under the ACPA include “the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.”<sup>17</sup> A court considering a claim under the ACPA also has discretion to award statutory damages “in the amount of not less than \$1,000 and not more than \$100,000 per domain name, as the court considers just.”<sup>18</sup>

Case law under the ACPA reveals the courts’ willingness both to impose liability and to impose monetary damages, albeit toward the lower end of the statutory damages spectrum. One such case involved Joseph Shields, also known as “Joe Cartoon,” the creator of a number of well-known animations, including one involving a frog in a blender.<sup>19</sup> Shields sued the registrant of a number of domain names similar to his “Joe Cartoon” mark and joecartoon.com Web site, including joescartoon.com and joe-cartoons.com.

The *Shields* court considered and rejected a defense based on the slight difference in spelling between the name “Joe Cartoon” and the domain names the defendant registered. The court explained that the ACPA’s protection against domain names that are either identical or “confusingly similar” to a famous name or mark was intended precisely for conduct like the defendant’s — “intentional registration of domain names that are misspellings of distinctive or famous names, causing an Internet user who makes a slight typing or spelling error to reach an unintended site.”<sup>20</sup> The potential for such spelling or typing mistakes appeared to be central to the defendant’s domain name registra-

tion strategy. By his own admission, the defendant had previously registered a number of misspellings of celebrity names, such as gwenythpaltrow.com, rikymartin.com and britineyspears.com.<sup>21</sup>

The court in *Shields* also rejected the defendant’s contention that the addition of commentary on his Web site regarding the “Joe Cartoon” animations — such as his statement that “joecartoon.com is a Web site that depicts the mutilation and killing of animals” — protected his domain name registrations as political expression under the First Amendment: “We are aware of no authority providing that a defendant’s ‘fair use’ of offending domain names for ‘political protest’ only after the filing of a complaint . . . can absolve that

## ACPA can bring imposition of damages.

defendant of liability for his earlier unlawful activities.”<sup>22</sup> Thus, the appellate court in *Shields* affirmed the trial court’s order that the defendant relinquish the disputed domain names, as well as the trial court’s award of monetary damages of \$10,000 for each of the offending registrations.<sup>23</sup>

The ACPA’s protection against domain names consisting of a slight deviation from a famous name is not unlimited, as the manufacturer of the popular “Beanie Babies” toys learned in a more recent decision, *Ty Inc. v. Perryman*.<sup>24</sup> There, the court held that the defendant’s use of the domain name bargainbeanies.com was not cybersquatting. Central to the court’s decision was the principle that the popularity of a product, like the popularity of a celebrity, almost inevitably leads to “the creation of a secondary market, like the secondary market in works of art . . . that market is unlikely to operate efficiently if sellers who specialize in serving it cannot use ‘Beanies’ to identify their merchandise.”<sup>25</sup>

Thus, while the *Shields* decision protects domain names that target the potential for misspelling of common celebrity names, *Ty Inc.* leaves open the possibility for those names to be used as

part of a domain name, where the use is tied to the truthful advertising of related products or memorabilia.

Recent cases decided under the ACPA also reflect that the statute has not entirely eliminated the jurisdictional impediments to the prosecution of cybersquatting cases in the federal courts. In *Spacey v. Burgar*, the U.S. District Court for the Central District of California rejected actor Kevin Spacey’s attempt to establish personal jurisdiction over the registrant of kevin-spacey.com, who linked that domain name to a commercial Web site, celebrity1000.com, that carries commercial advertising.<sup>26</sup> Spacey argued that the Web site’s posting of advertising for businesses based in Southern California, coupled with the fact that the entertainment industry and its most voracious consumers are concentrated in Southern California, supported the exercise of jurisdiction.<sup>27</sup> The court disagreed:

While the court acknowledges that the entertainment industry is a major employer in Southern California, the desire for information about show business celebrities — however frivolous an interest that may be — extends even to the hinterlands where television has been available for going on six decades. Though the site contains information about many who live and work in the media center of New York and Los Angeles, its appeal undoubtedly extends far beyond those locales.<sup>28</sup>

As explained below, the ACPA is not the only means for celebrities and other owners of famous names to seek redress for cybersquatting. The Internet’s own regime for the resolution of domain name disputes eliminates some of the procedural impediments to litigation in the federal courts and has led to favorable results for Spacey and many other entertainers.

### We can work it out: Arbitration procedures

There is one principle governing body for the Internet at large: The Internet Corporation for Assigned Names and Numbers (ICANN). In its own words, ICANN “is a private sector initiative to assume responsibility for overseeing the technical coordination of the

Domain Name System (DNS), which allows Internet addresses (for example, Web pages and e-mail accounts) to be found by easy-to-remember names, instead of numbers.”<sup>29</sup> ICANN is a non-profit, completely nongovernmental corporation designed to make decisions on the basis of Internet community consensus. ICANN is, however, more than just an administrative organization.

ICANN also governs online disputes, which it regulates through various agencies that offer several options in the way of dispute resolution. Specifically, a complainant can pursue redress for cybersquatting grievances through any of these organizations: (1) The Asian Domain Name Dispute Resolution Centre (ADNDRC); (2) The CPR (Center for Public Resources) Institute for Dispute Resolution; (3) eResolution (which has not accepted any proceedings begun after Nov. 30, 2001); (4) The National Arbitration Forum (NAF); and (5) The World Intellectual Property Organization (WIPO).<sup>30</sup>

Each of these organizations offers similar services and each is an international forum for dispute resolution via arbitrations. They all govern, among other things, trademark and cybersquatting disputes regarding domain names with “.com,” “.org,” “.biz,” etc.

All of ICANN’s recognized vehicles for international intellectual property arbitration subscribe to the Uniform Domain Name Dispute Resolution Policy (UDNDRP), a set of rules established by ICANN to govern the various issues associated with these kinds of disputes. In addition, each of the centers has its own set of specific rules that augment the UDNDRP. The UDNDRP contains rules regarding topics ranging from jurisdictional concerns to substantive claims, such as cybersquatting. For example, Section 4(b)(i) of the UDNDRP states:

circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name.

As described above, this provision of the UDNDRP outlines the typical fact pattern for cybersquatters and is the umbrella under which many domain name disputes fall.

Of the five recognized dispute resolution centers, one of the most commonly used methods is WIPO.<sup>31</sup> WIPO is based in Geneva, Switzerland, and was formed in order to offer arbitration and mediation services to resolve international commercial disputes between private parties, with a focus on the Internet and electronic commerce. In fact, WIPO is recognized as the leading dispute resolution service provider for disputes arising out of the registration and use of Internet domain names.<sup>32</sup>

Resolving domain name disputes through WIPO is a viable alternative to pursuing judicial resolution in U.S.

## WIPO is world leader in resolving domain name disputes.

courts. First, arbitrating through WIPO is significantly less expensive than in-court litigation. Rather than clear procedural hurdles associated with filing and serving a complaint in a U.S. district court, the complainant can draft and submit the complaint online, e-mail the complaint to the respondent and the Internet registrar and simply mail hard copies to WIPO in Geneva.

Second, the process of preparing the complaint is much simpler. Instead of requiring drafting extensive pleadings from scratch, WIPO’s Web site offers a form complaint that can easily be completed. If the complainant so desires, however, in lieu of the WIPO form complaint, the complainant may draft a complaint and attach it to an e-mail to WIPO.

Third, resolution of a dispute before WIPO is much more expeditious than it would otherwise be through litigation in the federal courts. Once the complaint is submitted to WIPO and the respondent is notified, the respondent has 20 days in which to file a response. After the 20 days, each side submits a list of its preferred panelists<sup>33</sup> (the complainant or

respondent can choose either a one or three-member panel) and WIPO assembles the panel depending on factors such as the panelists’ availability. When the panel has been confirmed, the matter is submitted and the panel renders a decision shortly thereafter.

Finally, arbitrating before WIPO is advantageous because its decisions are binding. Because offenses committed on the Internet are not always subject to traditional judicial jurisdiction, those who avail themselves of the benefits of the Internet also subject themselves to the regulations created by ICANN. Thus, when a WIPO panel renders a decision, the registrars of the domain names at issue (that is, the services such as Yahoo! or Network Solutions, through which the domain names were registered) must follow the panel’s order, whatever it may be.

### Leading cases

In recent years, when faced with cybersquatting dilemmas, many celebrities have used the services that ICANN offers. For example, in two recent cases brought before WIPO on behalf of author, screenwriter and director Michael Crichton, the panel directed that two different Web sites be transferred to Crichton from two individuals who had engaged in a textbook example of cybersquatting.<sup>34</sup> In the Crichton cases, the respondents (WIPO’s term for defendants) had registered the Web sites, but neither site contained any information whatsoever regarding Crichton. Specifically, one of the Web sites, michaelcrichton.com, linked directly to a site called celebrity1000.com, which is ostensibly a celebrity fan network Web site.<sup>35</sup> The second Web address, michaelcrichton.com, linked directly to a site called ebuzz.com, a similar entertainment news site.<sup>36</sup>

Against this factual backdrop, the international three-person WIPO panel resolved both claims in Crichton’s favor. The panels found that respondents’ use of the domain names as portals that led directly to commercial sites that had nothing to do with Crichton was not a bona fide use of the domain names.<sup>37</sup> In addition, the panel held that “Respondent has used the disputed domain name intentionally to attempt to attract, for commercial gain, Internauts to its Web site by creating a likelihood of

confusion with [Crichton]'s mark as to the source, sponsorship, affiliation or endorsement of its Web site."<sup>38</sup>

Like Michael Crichton, other celebrities in recent years have sought redress for cybersquatting in front of WIPO. For example, luminaries such as Madonna, Julia Roberts, Celine Dion, Venus and Serena Williams, Kevin Spacey and Bruce Springsteen have all looked to ICANN for a solution to their cybersquatting woes. All but Kevin Spacey resolved their disputes before WIPO and all but Bruce Springsteen were victorious (Springsteen's decision is discussed in more detail immediately below).

In the summer of 2000, Madonna filed a complaint before WIPO in an attempt to gain control of a Web site entitled, simply enough, *madonna.com*.<sup>39</sup> The respondent had purchased the registration and domain name for \$20,000, had registered the site as a trademark in Tunisia and had operated the site as an "adult entertainment portal Web site."<sup>40</sup> The site contained sexually explicit photographs and text but also contained a notice stating that the site was not affiliated with or endorsed by, among other things, "Madonna the singer."<sup>41</sup> Notwithstanding the disclaimer, a three-member panel found in Madonna's favor and directed that the Web site be transferred to her. The panel found that the respondent had purchased and registered the site in bad faith and had endeavored to "trade on the fame of [Madonna]'s name and mark for commercial gain."<sup>42</sup>

The WIPO decisions in which the panel has found in favor of celebrity complainants are typically grounded in the same reasoning as that applied to Madonna's claims. Another illustration is Julia Roberts' case.<sup>43</sup> On similar facts, a three-member panel found in favor of Roberts and directed the site in question, *juliaroberts.com*, be transferred to her.<sup>44</sup> The respondent in this case was a prime example of today's cybersquatter. Mr. Boyd, whose e-mail address was *mickjagger@home.com*, had registered more than 50 other domain names, including names of other celebrities, such as *madeleinestowe.com* and *alpino.com*.<sup>45</sup> The panel highlighted this fact in their opinion and apparently realized the motives of Boyd were not simply those of an avid fan.<sup>46</sup>

Several months ago, after having his

federal court case dismissed for lack of subject matter jurisdiction, Kevin Spacey looked to ICANN to resolve his cybersquatting predicament.<sup>47</sup> Spacey elected to use the National Arbitration Forum (NAF).<sup>48</sup> The NAF, which is headquartered in Minnesota, is the largest provider of domain name dispute resolution in North America.<sup>49</sup>

Spacey sought to gain ownership of the domain name *kevinspacey.com* from a Canadian company that had previously been sued successfully for cybersquatting.<sup>50</sup> The panel found that the respondent had a history of cybersquatting based on these purported "fan sites" and accordingly, the NAF panel awarded him

## ICANN brought victory to Kevin Spacey.

the domain name.<sup>51</sup> Thus, ICANN, through one of its recognized dispute resolution organizations, was able to provide satisfaction of Spacey's claims where, because of jurisdictional roadblocks, the federal courts could not.

### Dancing in the dark: About the Boss

Despite the line of ICANN cybersquatting cases favoring celebrity claimants, ICANN's mechanisms are not foolproof. In November of 2000, singer Bruce Springsteen sought resolution of a cybersquatting dispute nearly identical to those discussed above.<sup>52</sup> However, unlike his celebrity brethren, even though the facts of Springsteen's case were analogous to the cases discussed above, two members of the three-member WIPO panel surprisingly found in favor of the respondent.

Springsteen brought the claim against repeat offender Jeff Bugar, who has been sued not only by Crichton and Spacey, but others as well. Bugar had registered the domain name *bruce-springsteen.com*, but the address acted as a direct link to *celebrity1000.com*.<sup>53</sup> Springsteen's official fan site is located at *bruce-springsteen.net* and the panel found that, because Bugar did not block Springsteen's registration of *bruce-springsteen.net* or *bruce-springsteen.org*, he did not act in bad faith.<sup>54</sup> That seems an odd

rationale, in light of the fact that *bruce-springsteen.com* was a direct link to *celebrity1000.com* and its commercial ads, a fact that led other WIPO panels in some of the above-discussed cases to find that the registration was in bad faith.

The panel further found that there could be no likelihood of confusion between Springsteen's official site and Bugar's site, even though Springsteen's name was essentially the only element of the Web address on Bugar's site.<sup>55</sup> Finally, the panel found that there could be no confusion between the sites even though Bugar had registered *bruce-springsteen.com* under the name "Bruce Springsteen Club."<sup>56</sup> Consequently, two of the members of the panel found in favor of Bugar and refused to direct the transfer of the domain name to Springsteen.

One of the panelists, Richard Page, dissented from the decision. Page wrote that most Internet users would indeed be confused by the link to *celebrity1000.com* because the average person would not, as the majority suggested, sift through thousands of Web sites in search of Bruce Springsteen's official site.<sup>57</sup> Despite Mr. Page's dissent, the Springsteen decision sounds a note of uncertainty for celebrity claimants seeking relief through WIPO.

### To catch a thief: Some practical tips

As in any litigation, the first step in prosecuting a cybersquatting case before WIPO is filing the complaint. Although the preparation and submission of the complaint are fairly simple and straightforward procedures, navigating through WIPO's Web pages can be complicated. The following is a brief, step-by-step guide to arbitrating a case before WIPO.

The complainant can prepare the actual text of the complaint in one of three ways: (1) fill in the spaces in the electronic filing complaint form provided on the site; <http://arbiter.wipo.int/domains/filing/udrp/index.html><sup>58</sup> (2) download and complete the form as a Microsoft Word document and attach it to an e-mail to WIPO at [domain-disputes@wipo.int](mailto:domain-disputes@wipo.int); <mailto:domain-disputes@wipo.int> or (3) draft a complaint modeled after the electronic filing form and include all of the headings that are on the form and attach that as a Microsoft Word document to an e-mail to WIPO.

In addition to the e-mailed complaint, the complainant must submit the signed original and four (4) copies of the complaint and all annexes (exhibits to the complaint), to WIPO by either express mail or courier service.<sup>59</sup>

Contact information for anyone who has registered a domain name is publicly available. Anyone seeking to file a complaint before WIPO can obtain this information through publicly accessible Web sites such as [networksolutions.com](http://networksolutions.com), which offers a "who is?" function that will list all relevant information for both the registrant and the registrar of the domain name.

The complaint must be served on the respondent (defendant) by either 1) fax; 2) postal or courier service; or 3) e-mail, unless the respondent has specified the method to be used for case-related communications. When sending the complaint to the respondent, the complainant must also include the "Complaint Transmittal Coversheet," a sample of which is also located at the Web site link for the complaint form. The coversheet can be downloaded as an Acrobat file or as a Microsoft Word document. The complaint must also be sent to the registrar (the entity with which the respondent has registered the disputed domain name). When serving the complaint on the registrar, also include the "Complaint Transmittal Coversheet."

There are four accepted methods of payment available.<sup>60</sup> They are: (1) bank transfer;<sup>61</sup> (2) check;<sup>62</sup> (3) deduction from an existing WIPO account; or (4) credit card (American Express, Visa, MasterCard). Costs vary depending on how many domain names are at issue in the arbitration and how many panelists are chosen. Unless otherwise requested, WIPO will assign one panelist to arbitrate. A panel consisting of three arbitrators also is an available option, but must be requested in the complaint (either party may insist on three panelists).

The payment to WIPO (which includes an amount to be retained by WIPO as an administrative fee and an amount to be paid to each panelist) must be submitted to WIPO along with the hard copies of the complaint. The fee is borne by the complainant (unless the respondent insists on a three-member panel, in which case, the respondent bears one half the fixed fee for the three-member panel).

Once the panel is chosen, it reviews the papers and decide the case expeditiously. If the panel renders its decision in favor of the complainant, the panel will issue an order directing the registrar to transfer the domain name to the complainant. At that point, the registrar must comply with the order and the case is resolved.

#### The times, they are a changin'

Over a short period of time, the resolution of Internet domain name disputes has undergone significant change —

## Resolution of domain name disputes has come a long way.

from a relative legal vacuum, to the enactment of the ACPA, to the emergence of ICANN's dispute resolution regime as the preeminent mechanism to redress cybersquatting. Despite the development of organizational infrastructure and a body of applicable legal standards, it is all but certain that evolving technologies and their exploitation by cybersquatters will continue to present new challenges to the protection of names and likenesses in cyberspace.

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#### Endnotes

1. The history of the Internet and the World Wide Web is recounted in T. Berners-Lee, *Weaving The Web* (Harper Collins 1999) and on the Web site maintained by the World Wide Web consortium at [www.w3c.org](http://www.w3c.org).

2. *Panavision Int'l, L.P. v. Toeppen*, 141 F3d 1316, 1319 (9th Cir. 1998).

3. *Id.*

4. *Id.* at 1322, quoting *Cybersell Inc. v.*

*Cybersell Inc.*, 130 F3d 414, 418 (9th Cir. 1997).

5. *Id.* at 1325.

6. 15 U.S.C. § 1125(c).

7. *Panavision*, *supra* note 2, at 1324.

8. *Id.* at 1326-27.

9. *Virtual Works Inc. v. Volkswagen of Am. Inc.*, 238 F3d 264, 267 (4th Cir. 2001).

10. Senate Report No. 106-140, at 4 (1999).

11. 15 U.S.C. § 1125(d)(1).

12. 15 U.S.C. § 1125(d)(1)(B)(i).

13. *See, for example, Acad. of Motion Picture Arts & Sciences v. Network Solutions Inc.*, 989 F.Supp. 1276 (C.D. Cal. 1997) (holding that registration of domain name consisting of someone else's famous name or trademark does not, by itself, constitute commercial use of a mark establishing liability under the Trademark Dilution Act).

14. *See, for example, Cybersell*, *supra* note 4 (operation of Web site based in Florida could not subject operator to jurisdiction in Arizona).

15. 15 U.S.C. § 1125(d)(2)(A).

16. *Id.*

17. 15 U.S.C. § 1125(d)(1)(C).

18. 15 U.S.C. § 1117(d).

19. *Shields v. Zuccarini*, 254 F3d 476 (3d Cir. 2001).

20. *Id.* at 484.

21. *Id.* at 485 n.5.

22. *Id.* at 486.

23. *Id.* at 487.

24. *Ty Inc. v. Perryman*, 306 F3d 509 (7th Cir. 2002).

25. *Id.* at 513.

26. *Spacey v. Bugar*, 207 F.Supp. 2d 1037 (C.D. Cal. 2002).

27. *Id.*

28. *Id.*

29. *See*

<http://www.icann.org/general/background.htm#2>.

30. The list of these dispute resolution centers can be found on the Internet at <http://www.icann.org/dndr/udrp/approved-providers.htm>.

31. *See* <http://www.wipo.org>.

32. *See*

<http://arbitrator.wipo.int/center/background.html>.

33. WIPO's Web site provides an array of domain name panelists from around the globe. That list of panelists can be found at <http://arbitrator.wipo.int/domains/panel/panelists.html>. The parties can also investigate all the panelists' backgrounds and experience at this site by simply clicking on their names.

34. The two cases on behalf of Crichton involved nearly identical facts. One of the illegally registered Web sites was "michaelcrichton.com" while the other was "michael-crichton.com." *See generally Crichton v. Alberta Hot Rods*, WIPO Case No. D2002-0872; *Crichton v. In Stealth Mode*, WIPO Case No. D2002-0874.

35. *See Alberta Hot Rods*, *supra* note 34.

36. *See In Stealth Mode*, *supra* note 34.

37. *See id.*

38. *See id.*

Continued on page 10

# Ensuring IP Protection through Escrow

By Jeremy Lewis and Andrew Moore

**L**awyers and their clients often use copyright and trade secrets laws to protect interests in intellectual property, but in the high-tech industry, these methods — by themselves — are inadequate. Using copyright and trade secret laws in conjunction with technology escrow can remedy those deficiencies. A technology escrow agent protects the interests of both technology licensors and licensees as a trusted, neutral third party.

## Protection of licensor assets

Copyright and trade secrets laws do not always provide the irrefutable proof of ownership that may be required to prevail in an infringement dispute.

If a client uses trade secret practices as the preferred form of protection, it may be difficult to prove that the client has been treating its material as proprietary. Legal counsel could engage in a lengthy, rigorous and ultimately expensive due diligence process.

But if the material was placed into a technology escrow account, it would have been dated and time-stamped on arrival by the escrow company, providing irrefutable, neutral, third-party evidence as to the date of proof of ownership and origination. As such, material secured within an escrow company's vaults is incontrovertible evidence of a determined attempt to keep a trade secret from becoming public knowledge.

For software developers, escrow is not a substitute for traditional methods of intellectual property protection. Rather, it serves to strengthen and support these methods.

## Protection of licensee assets

Some lawyers recommend technology escrow as a form of intellectual property protection for clients who are licensing software. In these situations, the client would be the beneficiary in an escrow arrangement.

Of course, a licensee with enough leverage to negotiate access to the application source code as part of the original license agreement has no need for further protection. However, the reality is that most software vendors are extremely protective of their source code and are unlikely to freely award them to licensees.

Although the other alternatives can seem tempting, such as obtaining an exclusive license to software custom-designed for the user or simply relying on a general license agreement to protect a client's assets, an escrow account with the client as the beneficiary affords the client the greatest protection.

The escrow agent is given specific instructions on which events (or nonevents) give rise to the release of the materials to the client, such as the bankruptcy or discontinuation of the business of the owner of the materials. If one of these events (or nonevents) occurs, the client is protected as the materials in escrow are released to the client without need for extended negotiations or judicial proceedings in most cases.

Contrary to the belief of some, license agreements alone do not provide adequate protection for the licensee. License agree-

ments give licensees the right to use the software application and possibly the right to share it with their staff. They do not give them copyright and other proprietary rights to the software, even in the case of an exclusive license for custom-designed software. Without access to the source code, it is virtually impossible to improve, fix or make modifications to the software.

Another form of protection some lawyers use is "computer software and services errors or omissions" insurance coverage. This coverage allows for monetary compensation for licensees who can prove that their technology providers performed negligent acts or omissions causing the technology to malfunction or fail. It can also protect against losses in technology support.

However, if a licensee makes a claim and is awarded monetary compensation, it is still left without the code needed to ensure business continuity. Although seemingly adequate, software insurance does not provide the asset protection that licensees need — a way to maintain their software if the vendor defaults on its obligations. Technology escrow, though, is designed to provide this specific service and protection for the licensee.

## 'Shortcuts' to escrow bank vaults

Many have considered one or more "shortcuts" to establishing a professional technology escrow, such as storing source code in a safe-deposit box. Bank vaulting — or storing critical intellectual property with any company that specializes in only vaulting services — invites the risk of improper storage of the property.

Banks and vaulting companies do not specialize in managing intellectual property. They do not have the administrative, maintenance or technical verification services required to properly manage an escrow account. For example, they cannot test the integrity of the materials deposited in escrow, nor do they provide regular notification on what is deposited and when. Thus, the licensee cannot be assured that the deposited materials match the version of software currently in use.

A technology escrow firm is obligated to administer escrow accounts carefully and thoroughly for all parties who have signed the agreement. As a result, a qualified escrow company will offer deposit verification services and distribute deposit confirmation and account status reports to each party to ensure that the intellectual property is managed properly and that all parties are aware of the status of their account.

Moreover, banks and most vaulting companies do not have storage facilities designed specifically for maintaining electronic media. A qualified escrow company will use secure vaults specially designed for storing electronic media.

## Self-directed escrow

Lastly, some lawyers draft escrow agreements for their clients and personally perform the duties normally handled by an escrow agent. To some, this may seem like a convenient and harmless solution, but if a dispute were to arise, the involvement of the lawyer's client would create a conflict of interest for the lawyer. As a neutral third party, an escrow agent works on behalf of all parties to the agreement, without bias toward or in favor of any one party.

In addition, lawyers who draft their own escrow agree-



ments may unknowingly omit terms critical to ensuring protection. Key issues that must be covered in any escrow agreement include the identification and format of the deposited materials, release conditions, the release process and the use rights with respect to released materials. Administrative concerns also need to be addressed, including procedures for providing deposit updates, term renewals, account history reports, audits, releases and terminations.

### Five tips to better escrow protection

When you enter into an escrow agreement — an essential part of any intellectual property protection program — it's not always easy to identify the most important issues and to focus your attention on them.

With the volatility of the high-tech industry leading to an increased demand for technology escrows, it might be timely to familiarize yourself with a few tips on what to look for in an escrow agreement. The agreement is usually between a vendor, its licensee and an escrow agent. It serves as a means for the licensee to gain access to the vendor's source code and other maintenance materials under specific circumstances, such as if the vendor (the escrow depositor) goes out of business or stops supporting the technology for other reasons. This enables the licensee (the escrow beneficiary) to maintain the technology in the absence of the vendor.

Vendors rely on escrow to ease customer concerns about future technical support and to protect their own IP. The escrow agent — a trusted, neutral third party — dates and time-stamps all material deposited into escrow, creating an audit trail of development for the technology. This documentation can be used in court as irrefutable proof of a vendor's ownership of the IP, if it is ever contested.

**1. Ensure that a complete deposit is secured in escrow.** An escrow account loses its value if the materials in deposit are incomplete. The beneficiary has little or no recourse if it receives unusable code from escrow. Meanwhile, the depositor that expects an escrow account to document the development of its technology may find the escrow to be ineffective if all the components needed to prove ownership are not part of the deposit.

For beneficiaries, the most reliable and effective way to ensure a complete escrow deposit is to check it. Many escrow agents offer deposit verification services for a fee. Many escrow agreements include a provision that explains the parties' rights to a verification of an escrow deposit. If such provisions are not included in the agreement and the parties wish to require a verification, they should add these terms to the agreement — including who will perform the verification and when, as well as who will pay for these services. Beneficiaries typically pay for technical verification services since the tests are performed for their benefit.

**2. Select the release conditions carefully.** Release conditions are events that trigger a release of the escrow materials to the beneficiary. Typical release conditions include vendor bankruptcy, product bankruptcy, a merger or acquisition of the vendor company and the vendor's loss of personnel critical to providing support for the technology. If any of these or other conditions are of concern to the parties during the life of the license agreement, they should be included in the escrow agreement.

At the same time, the depositor should make sure it can exercise its right to contest a release. This right should be clearly stated in the escrow agreement. As a neutral third party, the escrow agent is obligated to honor a beneficiary's request for a release of escrow materials unless it receives contrary instructions from the depositor.

In addition, parties should understand the escrow agent's deposit release process. A professional escrow agent will have established time-tested processes that protect all parties in the event of a release request and can help ensure that parties obtain deposit materials in a timely fashion. Points to consider include:

- The procedure for requesting a deposit release from the escrow agent. A phone request typically is not enough. A signed request is usually required.
- How parties are authorized to request or receive a release. Individuals' names should not be part of the agreement, in the event they leave the company or are otherwise unavailable at the time of a release. A well-written standard escrow agreement will not be specific as to whose signature is required to accept or deny an escrow release or, at most, will designate company representative titles, but not names.
- How long it will take for the IP to be delivered after the release request has been made. A reasonable timetable is 10 days. If you ask for a five-day turnaround, proper due diligence could be compromised. If you recommend 60 days, you might lessen the effectiveness of the escrow arrangement.

**3. Pay attention to deposit use rights.** The rights to use the released materials are generally defined in the original license agreement but often only address rights to object code and not source code. The escrow agreement presents the opportunity for the parties to confirm or further clarify these rights, such as the beneficiary's right to modify, improve on or resell the software.

**4. Trust the escrow agent.** As a neutral third party trusted to protect clients' IP, parties should feel confident in their escrow agent's ability to perform its obligations under the escrow agreement and to act in a reasonable and prudent manner with regard to the escrow arrangement. If the parties have any doubt about the agent's trustworthiness, they should select another agent. As such, as long as the escrow agent's obligations under its form agreements are fair and reasonable to both the depositor and the beneficiary, time and money should not be spent to negotiate changes that are not really necessary. A few examples of escrow provisions that should not be of major concern, so long as they are fair and reasonable, are as follows:

- *The mechanics of receiving the deposit materials and the updates:* An escrow agent will have a standard procedure for handling deposit materials, which includes providing written confirmation in a timely fashion of what has and has not been received.
- *Rights granted to the escrow agent:* Certain rights must be granted to the escrow agent to enable it to carry out its functions. For example, if there is more than one beneficiary enrolled to the escrow, the escrow agent must

have the right to make copies of the deposit materials. Otherwise, there will not be materials available for all of the beneficiaries.

- **Security and nondisclosure obligations:** Boilerplate nondisclosure language found in standard license agreements and other proprietary rights agreements should be avoided because they usually include restrictions that do not apply to technology escrows and they tend to omit important provisions. The security restrictions for a technology escrow should be clearly stated in a manner specifically applicable to the escrow arrangement.
- **Payment terms:** Payment terms should reasonably accommodate all the parties to the escrow. There must be adequate notice and right to cure so that the non-payment by one party does not end the escrow and unfairly take away the rights of another party. However, this must be balanced against the escrow agent's right to full and timely payment.
- **Indemnification of the escrow agent:** Compared to the overall value of most transactions from which escrows arise, escrow fees are relatively nominal. This relative valuation is important in determining the risks the escrow agent should assume.

**5. Pay attention to deposit updates.** It is often difficult for negotiators to continually monitor all the details of their completed agreements. The continuing integrity of the escrow arrangement may be at risk whenever the developer issues new releases. A well-written escrow agreement will give the licensee the option to retain any prior version of software when the developer updates the escrow account. This condition is important when:

- A technical verification of the original deposit has been previously performed and the company does not want to lose access to a known set of usable materials
- The licensee is not yet ready to install the new version of the software
- There is a need to prevent any attempt by a developer to render the escrow useless just before release.
- The escrow agent should be charged with the responsibility to contact the licensee whenever the developer requests the return or destruction of a prior deposit, thus assuring the licensee's retention rights.

Beneficiaries need to pay close attention to notices from the escrow agent that explain what is deposited into the escrow account. This is particularly important when there are multiple beneficiaries enrolled to a single escrow agreement and those beneficiaries use different versions. In this case, the beneficiaries should ensure that the escrow deposits are updated — rather than replaced — when new versions are released.

In addition, in order to create an indisputable audit trail of development for depositors, the escrow must contain proof of the depositor's ownership of the IP during each step of development. Adding subsequent versions of the technology to the original escrow deposit creates a complete genealogy of the technology and the depositor's involvement in its development. Replacing preceding deposits erases that record.

Following these tips will help ensure optimal intellectual property protection under a technology escrow agreement.

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## Dealing with Cybersquatting

Continued from page 7

39. See *Ciccone, p/k/a Madonna v. Parisi*, WIPO case No. D2000-0847.

40. See *id.*

41. See *id.*

42. See *id.*

43. See *Roberts v. Boyd*, WIPO Case No. D2000-0210.

44. See *id.*

45. See *id.*

46. Tennis stars Venus and Serena Williams were also victorious through WIPO on similar facts, garnering a transfer of the domain names [venusandserenawilliams.com](http://venusandserenawilliams.com), [venusandserenawilliams.net](http://venusandserenawilliams.net) and [venusandserenawilliams.org](http://venusandserenawilliams.org) from the cybersquatter in their case. Singer Celine Dion was also successful through WIPO and was awarded the domain name [celinedion.com](http://celinedion.com).

47. See *Spacey v. Alberta Hot Rods*, NAF

Case No. FA0205000114437.

48. The NAF can be found at <http://www.arbitration-forum.com>.

49. See

<http://www.arbforum.com/domains>.

50. The respondent in Spacey's case was Alberta Hot Rods, with which Jeff Bugar is associated, who operates the [celebrity1000.com](http://celebrity1000.com) Web site and who was also a respondent in one of Michael Crichton's cases, as well as Bruce Springsteen's case before WIPO.

51. See *id.*

52. See *Springsteen v. Bugar*, WIPO Case No. D2000-1532.

53. See *id.*

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. The electronic complaint form can be found on the WIPO site at <http://arbiter.wipo.int/domains/filing/udrp/index.html>.

59. The address is:

WIPO Arbitration and Mediation Center  
34 chemin des Colombettes  
1211 Geneva 20  
Switzerland

60. The accepted methods of payment can be found at <http://arbiter.wipo.int/domains/fees/index.html>.

61. The account information for a bank transfer to WIPO is as follows: Account OMPI No. CH52 0425 1063 0397 8200 0, Credit Suisse, 1211 Geneva 70, Switzerland, Swift Code: CRESCH ZZ12A

62. Make the check payable to:  
World Intellectual Property Organization (WIPO)  
Arbitration and Mediation Center  
34, chemin des Colombettes  
1211 Geneva 20  
Switzerland

American Bar Association  
Forum on the Entertainment and Sports Industries



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# The Yin and Yang of Sports Deals in China

By Jinshu "John" Zhang

**H**ouston Rockets center Yao Ming's remarkable NBA debut has once again thrown a spotlight on his home country of China as fertile ground not only for athletic talent but — more important for our clients — for the business of sports. This followed the selection in 2001 of Beijing as the site for the 2008 Summer Olympic Games, which had provided a welcome boost to a nation hell-bent on becoming an international giant in the arena of modern sports beyond just kung fu boxing.

Faced with a saturated domestic market and lukewarm acceptance in other affluent parts of the world, more and more American sports-business people have become gung ho on China, an enormous market populated by 1.3 billion people with almost a single-minded devotion to sports and increasingly palpable purchasing power.

Believing in China's vast potential as a sports market is one thing. Trying to figure out the yins and yangs of negotiating sports deals in China can, however, be quite another matter.

Before hopping on the next Shanghai-bound plane, a traveler with sports business in mind would get more bang for the travel buck by first taking a 10,000-foot overview of the Chinese sports landscape.

Ever since the founding of the People's Republic in 1949, sports have always enjoyed tremendous support and sponsorship from the government. Traditionally associated with military training, sports such as martial arts, swimming and long-distance jogging were systematically promoted as part of the national defense strategy during the heydays of the Cold War.

To improve the health of the people, the government also stipulated daily regimens of aerobic exercise for factory and office workers. Even today, although no longer mandated by the government, morning exercise involving gatherings of thousands of people performing breathing boxing at the same time still offers a

daily spectacle for the foreign tourist in many cities across the country.

Not quite unlike the former Eastern Bloc countries, China was gripped by a national fixation to gain sports dominance in international competitions, which was further fueled by a prevalent inferiority complex that had its roots in the country's semi-colonial past. Glowing about their recent ascent in athletic prowess, every Chinese will readily remind you that only in the not-so-remote past China was still being mocked as "the Sick Man in East Asia" (a ubiquitous quote presumably attributed to some imperialist power).

A Sick Man it is no more. For the last 20 years, China produced more than 1,000 champions in the Olympic Games, world championships of various sports and world cup games. Chinese athletes broke more than 800 world records. At the 2000 Olympic Games held in Sydney alone, the Chinese won 59 medals, trailing only the United States and Russia. As if on an orchestrated mission to reshape the image of the proverbial short Chinese, two more Chinese centers besides Yao Ming are playing with the NBA this season: Los Angeles Clippers' Wang Zhizhi and San Antonio Spurs' Mengke Bateer.

No longer satisfied with being a mere participant, China set out to become a major host country of international events, culminating in nabbing the 2008 Summer Olympic Games as the crown jewel.

After two decades of torrid economic development, the Chinese people have become increasingly cosmopolitan. Spectator sports have become a national pastime and the main fare runs from NBA games and European soccer matches to professional boxing events beamed from Madison Square Garden. Young urbanites would get up in the wee hours of the morning to catch a live broadcast game when it is prime time in the United States. Boxing bouts costing dozens of dollars on pay-per-view channels in the United States are broadcast on public-access channels in China for free (round card girls and all), building up a huge following.

Some Chinese companies have even started to place ads in U.S. stadiums for domestic consumption knowing that the games would be broadcast live to millions of pairs of eager eyes — sometimes still heavy with sleep — back home in China.

The opportunities for U.S. sports-business people are multifold.

- Product endorsements and corporate sponsorships are just starters.
- Promotion of major sports events featuring first-class teams and athletes from the United States can be lucrative, especially if a U.S. broadcaster is involved. (Don't expect the Chinese Central Television (CCTV) to cough up big bucks for the broadcasting rights — not just yet — as they are still used to getting everything for free. By the way, has anyone figured out how to take a regular-season game to China without shortchanging the season-ticket holders back home?)
- Sports agents can scout for the next Yao Mings and, conversely, get U.S. coaches and players to work for Chinese teams and clubs — state-sponsored or privately owned.
- Bidding on infrastructure and other projects surrounding the 2008 Olympic Games in Beijing is just heating up.
- With China's recent ascension to the World Trade Organization (WTO), the door may soon open for foreigners to form or otherwise have ownership interests in Chinese sports teams and leagues.
- Fee-charging training schools christened after big-time U.S. stars can be a huge draw for aspiring young talents.
- Marketers of sportswear and accessories, sports equipment, sports video and computer games, sports magazines and sports memorabilia may have their field days ahead.
- The Chinese sports market, estimated to be \$5 billion a year now, is simply expanding too fast for sports-business people from the United States to ignore.

## Who's the boss?

A newcomer to sports deals in China may be shocked to find — many toasts of fiery liquor and red-eye flights later — that the deal he or she is ready to ink still needs approval from the "Sports Commission."

The "Sports Commission" refers to, at the national level, the State General Administration of Sports of the People's Republic of China, a ministry-level govern-

ment bureau that oversees all the sports activities in the country. At the local level, it is the government body in charge of sports affairs in the relevant province, municipality, county or town.

Also in charge of sports affairs are the semi-official national and local Olympic committees and the All-China Sports Federation with its local branches.

Officials of the Sports Commission and the semi-official sports organizations are often selected from the ranks of former coaches and gold-medalists and they often hold simultaneous posts in more than one organization.

For example, the country's current sports czar, Yuan Weimin, minister in charge of the State General Administration of Sports, was formerly the head coach of the Chinese national women's volleyball team, whose consecutive gold-medal winnings at the World Cup, Olympic Games and World Championship have catapulted its coach and players into the spotlight. Yuan also serves as president of the Chinese Olympic Committee.

In the next few years leading to the all-critical 2008 Games, the Beijing Olympic Games Organizational Committee, headed by the city's party boss, will also figure prominently in the sports world.

No major sports event or activity can materialize without the blessing of the Sports Commission. That's why it is of utmost importance to have officials from the commission present at the initial meetings or obtain verifiable advance approval from the commission before one proceeds with any serious sports negotiation.

Gaining access too quickly to your target athlete, team or promoter without first checking in with the commission may be perceived as willful circumvention and only invites excruciating second-guessing or outright denial of approval. Getting a clear understanding with the Sports Commission beforehand also helps to prevent your negotiation counterpart from using possible difficulties with the commission as an excuse to gain unwarranted leverage or back out of a signed deal.

### We are equals

Partly due to its semi-colonial past, the Chinese can be particularly sensitive about how they are treated by their foreign business partners. While U.S. sports-business people are not necessarily

known back home for their humility, they should never appear patronizing, especially when in the presence of officials from the Sports Commission. However accustomed to big entourages of bodyguards and media mobs, champs from the United States are well advised to check their oversized egos at customs.

Mutual respect and mutual benefit are the cornerstones of successful business dealings with the Chinese. Profit-sharing (however skewed) always sounds better than one-way payment of royalties and purses. An unpublished criterion for the Sports Commission to bless any event jointly promoted by Chinese and foreign organizers is whether both sides share risks and revenues.

And don't try to sell yesterday's favorites or today's B-stars to the Chinese, who usually only watch the best games (except when it comes to the Houston

## The blessing of the Sports Commission is required.

Rockets and the ever-losing national soccer team) and therefore demand only the best. Long gone are the days when anything Western would guarantee a sell-out crowd.

### Show me the money

Since the sports organizations in China are not business enterprises, it may often be necessary to partner with a local promoter in order to make your sports deal a success. Unfortunately, given the short history of sports as a capitalist, money-making business in China, no one has a long and verifiable record when it comes to the business of sports. Sizing up your potential business partner can therefore be a challenge.

Attracted by the attendant fame and big money of sports, wannabe movers and shakers abound. Everyone claims to have the Sports Commission in their pocket. Everyone vows to be connected

with everyone else. And everyone swears that money is no object. Not everyone comes to the negotiating table with fraud on his mind, yet there are surely a lot of people who believe that it is never too late to go and look for the requisite funding and resources — after the deal is signed.

Having someone who is well versed in both languages and cultures on your team would go a long way in cutting through the linguistic mumbo jumbo and cultural miscues and weeding out the less than qualified. Requests for bank statements from your potential partner can be viewed as overly intrusive and, to the truly powerful, truly offensive. A better way to verify the sincerity as well as financial wherewithal of your business partner is to demand a large-enough deposit upfront — not necessarily wired to your account, but held in an escrow to alleviate unnecessary concerns.

### The devil is in the details

Because China is a newcomer to sports as a business, there are virtually no norms that can be implied in sports agreements. Both the Chinese and foreign parties to an agreement will be better served if they set forth as many details in the agreement as possible — even if it means clearly spelling out caps on mini-bar usage in the hotel room.

While most of the provisions would be universally applicable — such as event venue, postponement or cancellation, broadcasting and advertising rights, transportation and lodging and box-office revenue audit and sharing — careful thought should go into the crafting of certain provisions that are specific to China:

- Approvals need to be obtained from the State Administration of Foreign Currency Controls before payments can be wired outside the country (especially when the amounts are substantial).
- Before departure from China, the foreign performers may be asked to provide proof of tax payment (or exemption) on income earned in China.
- Choosing the right tribunal for dispute resolution may by itself deter a lot of disputes in the first place.
- Horror stories about outright piracy aside, many allegations of intellectu-

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# You Speak — Is Anyone Listening?

By David Dempsey

*Unless a speaker can interest his audience at once, his effort will be a failure.*

— Clarence Darrow

**T**he most critical portion of any presentation, whether you are speaking in the courtroom or the boardroom, to an audience of 12 or 1,200, is the opening. Your opening must immediately seize the attention of the audience and quickly persuade the audience members to listen intently.

You should never be hesitant, uncertain or disorganized in the opening because if you fail to hook the audience immediately, you may lose their fickle and fleeting attention for the duration of your presentation. Every word, every movement and every nuance of an opening should be carefully planned and designed to send an unmistakable message to the audience members or jurors: "You must listen to this!"

Unfortunately, rather than capitalizing

on those critical first seconds when audience members or jurors are most receptive, lawyers often begin by methodically organizing their notes, reflecting on what they will say, sipping water, clearing their throats or adjusting their clothing. During this ritual, the jurors' and audience members' patience and attention are quickly fading. In contrast, speakers who open with a bang enhance their chances that the audience will not only listen but, more important, will hear what they say. An excellent opening will also create rapport with the audience, focus your presentation and provide a road map for your listeners.

Spellbinding openings do not spontaneously materialize. They result from careful reflection and detailed preparation. Powerful, carefully crafted openings take inordinate effort at every stage — choosing the theme, refining the message and mastering the delivery. The opening is a unique opportunity to capture the hearts and minds of your listeners, so you must carefully prepare for it. Excellent lawyers capitalize on this opportunity.

Here are 10 tips lawyers should apply when crafting their opening comments.

## 1. Know your purpose.

Every time you speak, it is imperative

that you know exactly what you want to accomplish and clearly articulate that from the outset. Do not expect the audience to hack through a thicket of facts and details to decipher your message. Listeners today are accustomed to small, quick sound bites — they have neither the patience nor the inclination to patiently wait for you to get to the point.

Lawyers, however, regularly disregard this fact; they lack focus from the outset, launching into their presentations with no apparent direction or purpose. If you open your presentations in this fashion, your message will be greatly diluted at best, totally ineffective at worst. Know your purpose and draft an opening that will support your objective.

*He is one of those orators of whom it is well said, "Before they get up they do not know what they are going to say; when they are speaking, they do not know what they are saying; when they sit down, they do not know what they have said."*

— Winston Churchill

## 2. Capture attention immediately.

Lawyers can use any of the following openings to immediately grab the attention of the audience.

## In the News

### Supreme Court Narrows Trademark Protection

**I**n a 9-0 decision, the U.S. Supreme Court ruled that even if consumers recognize a word or phrase as a trademark, such mental association will not necessarily reduce the capacity of the famous mark to identify the goods of its owners. In this case, brought by Victoria's Secret against Victor's Little Secret under the Federal Trademark Dilution Act, the court said Victoria's Secret had not proven that the value of its trademark to identify its own stores or products had been diluted by the defendant's use.

### File Sharing Software Ruled Legal

A Los Angeles federal judge has ruled that Streamcast, parent of Morpheus Software and Grokster, was not liable for copyright infringement when file sharers used their software. The judge ruled that defendants distribute and support software, the users of which can and do choose to use it for both lawful and unlawful ends. Grokster and Streamcast are not significantly different from companies that sell home video recorders or copy machines, both of which can be used to infringe copyrights.

### U.S. Government Supports RIAA's View of DMCA

The U.S. government supported the Recording Industry Association of America in its dispute with Verizon Communications Inc. by saying that the Digital Millennium Copyright Act's provision permitting the RIAA to track down those sharing songs on the Internet is not a violation of the U.S. Constitution. In a filing with the U.S. District Court in Washington, the Department of Justice argued that the DMCA provisions do not violate free speech because the provisions merely target copyright infringement.

### Harry Potter Banned

The American Booksellers Foundation for Free Expression is fighting to keep *Harry Potter* books in classrooms and library shelves in response to an Arkansas school board that overruled a local library committee forcing local schools not to display *Harry Potter* and not to allow children to read the books without written permission from their parents.

### National Geographic Loses CD-ROM Photo Case

A federal jury in Miami has found that the National Geographic Society willfully violated the copyright of a freelance photographer by republishing photos in a CD-ROM

— *A quotation*: A captivating quote will engage your listeners, cause them to reflect on the words, spark their imaginations and enhance your credibility as a speaker.

— *A shocking statement*: An arresting or intriguing statement that relates to your topic will snap the audience members to attention. For example, opening by stating, "By 2005, 90 percent of the power in the recording industry will be centralized in one company," will pique the audience's interest immediately.

— *A brief story or anecdote*: A powerful story or anecdote can have a dramatic impact. It must be crisp, concise and germane to the speech and it should lay a foundation for the presentation. If your stories are lengthy or complex, they will confuse and frustrate the audience.

— *A question*: Ask a question and pause as if you genuinely want the audience members to ponder it and you will immediately engage your listeners. They will contemplate the question and begin to formulate their answers.

— *A teaser*: Your opening comments should tease the audience. Lawyers should use them to capture the imaginations of their listeners and to entice them to remain attentive. Do not reveal every detail of what you are going

to tell them, because if they already know everything, they have no reason to listen.

### 3. Practice.

There is no substitute for practicing your opening. You must deliver the opening crisply, smoothly, almost flawlessly. By the time you step in front of your audience or jurors, you must be completely comfortable with your opening comments. There should be no pensive moments while you contemplate what you will say. Know exactly what you will say and say it with conviction. Only detailed, repeated practice can instill that level of confidence.

*Practice is the best of all instructors.*

— *Publius Syrus*

### 4. Create drama.

Audience members and jurors are accustomed to drama because of what they see on television and in the movies, so if we want to hold their attention, we should strive to fulfill those expectations with our opening comments. If your message is suitable for dramatic treatment, draft your opening in a way that will be gripping and will involve the listeners.

### 5. Talk to your listeners.

If you want to convince your listeners that you are untrustworthy and evasive, do not look at them from the outset of your presentation. Allow your eyes to dart about the room. Look at your notes, the floor, the ceiling, the back wall — anywhere except the eyes of the audience members.

*However*, if you want to form a bond with the audience and gain their trust, focus on them immediately. Talk to them with sustained eye contact.

*Once a word has been allowed to escape, it cannot be recalled.*

— *Horace*

### 6. Convey confidence.

Most lawyers seem solemn, stern or indifferent when they speak. Your audience reads and reacts to this. If you seem disinterested, almost bored with your presentation, why should the audience members feel any differently? If you sound like your law school tax professor talking about like-kind exchanges when you deliver your opening words, your likelihood of persuading or reaching anyone in the audience is relatively small.

Your listeners are evaluating you from the moment they first see you.

anthology. The CD-ROM was found to constitute an entirely new product and not a compilation.

#### Nike Sues for Cybersquatting

Nike filed suit in U.S. District Court in Oregon against an apparel maker for cybersquatting and trademark infringement over the *Dri-fit* brand. Nike has been using the mark since 1990 and is asking for \$100,000 in damages. The defendant registered the domain name <http://www.dri-fit.com>.

#### Artist-Museum Partnership Act

The U.S. Senate passed the Artist-Museum Partnership Act. Under the act, authors and artists who donate manuscripts and other works that they create for nonprofit organizations would be able to make tax deductions for the appraised fair market value of the works instead of the costs to make the works.

#### Attorney General Bypassing Courts with Surveillance Actions

Under the Freedom of Information Act, information about the government's new surveillance powers was obtained in a lawsuit filed jointly by the Electronic Privacy Information Center, the American Booksellers Foundation for Free Expression and the Freedom to Read Foundation. The informa-

tion reveals that the attorney general is sending "National Security Letters" to compel production of records about U.S. citizens without probable cause that the person has committed any crime.

#### Proposal to Increase Webcast Royalties

A proposal was submitted to the U.S. Copyright Office requiring large Internet companies to pay 0.0762 cents for each song they Webcast over their Internet radio services. That is an increase from the 0.7 cent a song royalty established by the Librarian of Congress. The royalty is in addition to a rate of 1.17 cents per aggregate hour covering streaming services. The RIAA would also receive 10.9 percent of subscription revenue but not less than 27 cents a month per subscription.

#### University of California sues Walt Disney

The University of California sued Walt Disney Company's ESPN in federal court in Los Angeles for more than \$5 million in a suit claiming that the defendant used plaintiff's historic sports film without authorization in its "Sports Century" series. Plaintiff claims that defendant's use occurred after the expiration of a two-year license. The film was to have been returned not later than February 2000.

Approach the lectern with confidence and enthusiasm. Before you utter your first word, pause, look at the audience and act as if you relish this chance to speak. Your stance, your body language, your voice and your facial expressions must convey energy, confidence and enthusiasm. Your opening comments will set the tone for the entire presentation. They should not be delivered in a lifeless manner that may be factually accurate but dreadfully boring.

### 7. Choose “impact” words.

You make any presentation far more vivid by selecting impact words. “Slammed” is better than “hit,” “sweltering” is better than “hot,” and “shattered” is better than “broken.” The former are more concrete, specific and vivid. The latter are vague, bland and commonplace. Draft your opening comments to create vivid images that will float in the minds of the listeners. Make the opening sizzle by polishing and re-polishing the content.

*Embarrassed, obscure and feeble sentences are generally, if not always, the result of embarrassed, obscure and feeble thought.*

— Hugh Blair

### 8. Create show time.

In his excellent work, *“Power, Passion & Persuasion: Advocacy Inside & Out,”* lawyer Dominic J. Gianni emphasizes the importance of immediately engaging your listeners in a trial context: “The jurors expect the trial to be interesting and entertaining. However, the default state for jurors is a state of ‘noncaring.’ They do not care about you, your case or your client. They must be

made to care . . . they must be stimulated and entertained . . . People do not want to be bored and people do not want to work hard.” This applies to every presentation lawyers make.

Actors know that when the curtain rises, all eyes are on them. The rehearsals are over and they must be ready to perform. The same is true for you. From the moment you rise to speak, you should be ready to create an electric atmosphere. The audience members are focused on you. They want to hear from you. Be mentally, physically and emotionally ready to perform.

*A good beginning hath a good ending.*

— James Howell

### 9. Provide a road map.

It is imperative that your opening provides your listeners with a clear understanding of what they should expect. What is your message? What do you want to accomplish? Give them a preview of the story about to unfold. Rely on the formula that never fails: Tell them what you are going to tell them, tell them and tell them what you have told them.

### 10. Avoid the four deadly sisters.

Fight the urge to *ever* open any presentation in any of the following ways:

— *Reading your opening.* There is no more counterproductive manner to open a presentation than by reading it. It is typically fatal. Those loud clanging sounds you hear immediately after you begin reading your opening are the minds of the jurors slamming shut. Reading has a numbing effect and audi-

ence members feel that it is a colossal waste of their time.

— *An inapplicable joke.* Unless your joke is (1) very brief, (2) directly related to your topic and (3) guaranteed to provoke rousing laughter — and they seldom do — save it for your next dinner party. Jokes are typically greeted with awkward silence or puzzled looks from the audience, neither of which bode well for the remainder of the presentation. Humor is not a strength for lawyers and the opening is not the time to ply your trade as a stand-up comedian.

— *An admission.* Never admit that you are unprepared or that you do not have much to say. Admissions alert your listeners that you thought your time was too important to spend preparing to speak to them. Rest assured, the audience members will reciprocate by devoting very little of their precious time to listening to you.

— *A cliché.* Cliches make ineffective openings because the audience has probably heard them many times. There is nothing creative or captivating about clichés, so eliminate them.

The opening is crucial to the success of any presentation. Do not squander the opportunity to create a dynamic first impression. Immediately seize the audience’s attention with imagination, intrigue and energy and you will set the tone for a successful presentation.

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## Sports Deals in China

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al property rights violations arise from contractual ambiguities: If I am allowed to use the team logo for “promotional purposes,” can I print it on T-shirts, caps and napkins and sell them — presumably still for “promotional purposes”? Any use restriction on the Chinese translation of the team name when the team logo is not used in conjunction with it?

- Anyone doing business in China will sooner or later come across the word “chop,” not of chopsticks’ fame, but instead referring to the official seals of various governmental departments that are required for a deal to go through.

The Chinese party should be made to represent and warrant that the proposed sports deal would not run afoul of Chinese laws, regulations and policies (which may not always be available to the outsider despite diligent researches) and

to use its best efforts to obtain all requisite approvals from the relevant governmental bodies and agencies (the Sports Commission, the public security bureau, the public health bureau, the foreign currency control agency, the tax bureau, customs and so on).

Then you may be on your path to score touchdowns.

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## Rap Music

Continued from page 1

est danger to America's youth? Why did nine out of 10 believe the drug problem is out of control and only one in six believe the country was making progress?

Every few months for the past several years it seems we discover a new category of people to fear: government thugs in Waco, sadistic cops on Los Angeles freeways and in Brooklyn police stations, mass-murdering youths in small towns all over the country. A single anomalous event can provide us with multiple groups of people to fear.

We have managed to convince ourselves that just about every young American male is a potential mass murderer — a remarkable achievement, considering the steep downward trend in youth crime throughout the 1990s. Faced year after year with comforting statistics, we either ignore them — adult Americans estimate that people under 18 commit about half of all violent crimes when the actual number is 13 percent — or recast them as “The Lull Before the Storm” (*Newsweek* headline). “We know we've got about six years to turn this juvenile crime thing around or our country is going to be living with chaos,” Bill Clinton asserted in 1997, even while acknowledging that the youth violent crime rate had fallen 9.2 percent the previous year.

The more things improve the more pessimistic we become.

Television news programs survive on scares. On local newscasts, where producers live by the dictum “if it bleeds, it leads,” drug, crime and disaster stories make up most of the news portion of the broadcasts. Evening newscasts on the major networks are somewhat less bloody, but between 1990 and 1998, when the nation's murder rate declined by 20 percent, the number of murder stories on network newscasts increased 600 percent (not counting stories about O. J. Simpson).

After the dinnertime newscasts the networks broadcast newsmagazines, whose guiding principle seems to be that no danger is too small to magnify into a national nightmare. Some of the risks reported by such programs would be merely laughable were they not hyped with so much fanfare: “Don't miss

‘Dateline’ tonight or *you* could be the next victim!” Competing for ratings with drama programs and movies during prime-time evening hours, news-magazines feature story lines that would make a writer for “Homicide” or “ER” wince.

### The ruinous power of black rap music?

Fear mongers project onto black men precisely what slavery, poverty, educational deprivation and discrimination have ensured that they do not have — great power and influence.

After two white boys opened fire on students and teachers at a schoolyard in Jonesboro, Ark., in 1998, politicians, teachers and assorted self-designated experts suggested — with utter seriousness — that black rap musicians had inspired one of them to commit the crime. A fan of rappers such as the late Tupac Shakur, the 13-year-old emulated massacre-like killings described in some of their songs, we were told. Never mind that, according to a minister who knew him, the Jonesboro lad also loved religious music and sang for elderly residents at local nursing homes.

By the late 1990s, the ruinous power of rap was so taken for granted, people could blame rappers for almost any violent or misogynistic act anywhere.

So dangerous were so-called gangsta rappers taken to be, they could be imprisoned for the lyrics on their albums. Free speech and the First Amendment be damned — when Shawn Thomas, a rapper known to his fans as C-Bo, released his sixth album, he was promptly arrested and put behind bars for violating the terms of his parole for an earlier conviction. The parole condition he had violated required him not to make recordings that “promote the gang lifestyle or are anti-law enforcement.”

Thomas's album, “Til My Casket Drops,” contained powerful protest lyrics against California's then governor Pete Wilson. “Look how he did Polly Klaas/Used her death and her family name/So he can gain more votes and political fame/It's a shame that I'm the one they say is a monster.” The album also contained misogynistic and anti-police lyrics. Thomas refers to women as whores and bitches and he recom-

mends that if the police “try to pull you over, shoot 'em in the face.”

Lyrics like these have been the raw material for campaigns against rappers for more than a decade — campaigns that have resulted not only in the incarceration of individual rappers but also in commitments from leading entertainment conglomerates such as Time Warner and Disney, as well as the state of Texas, not to invest in companies that produce gangsta albums.

William Bennett and C. Delores Tucker, leaders of the antirap campaigns, have had no trouble finding antipolice and antiwomen lyrics to quote in support of their claim that “nothing less is at stake than civilization” if rappers are not rendered silent. So odious are the lyrics that rarely do politicians or journalists stop to ask what qualifies Bennett to lead a moralistic crusade on behalf of America's minority youth. Not only has he opposed funding for the nation's leader in quality children's programming (the Public Broadcasting Corp.), he has urged that “illegitimate” babies be taken from their mothers and put in orphanages.

What was Delores Tucker, a longtime Democratic Party activist, doing lending her name as coauthor to antirap articles that Bennett used to raise money for his right-wing advocacy group, Empower America? Tucker would have us believe, as she exclaimed in an interview in

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*Ebony*, that “as a direct result” of dirty rap lyrics, we have “little boys raping little girls.” But more reliable critics have rather a different take. For years they have been trying to call attention to the satiric and self-caricaturing side of rap’s salacious verses — what Nelson George, the music critic, calls “cartoon machismo.”

Back in 1990, following the release of “Nasty As They Wanna Be,” an album by 2 Live Crew and the band’s prosecution in Florida on obscenity charges, Henry Louis Gates confided in an op-ed in the *New York Times* that when he first heard the album he “bust out laughing.” Unlike *Newsweek* columnist George Will, who described the album as “extreme infantilism and menace . . . [a] slide into the sewer,” Gates viewed 2 Live Crew as “acting out, to lively dance music, a parodic exaggeration of the age-old stereotypes of the oversexed black female and male.” Gates noted that the album included some hilarious spoofs of blues songs, the black power movement and familiar advertising slogans of the period (“Tastes great!” “Less filling!”). The rap group’s lewd nursery rhymes were best understood, Gates argued, as continuing an age-old Western tradition of bawdy satire.

Not every informed and open-minded follower of rap has been as upbeat as Gates, of course. Some have strongly criticized him, in fact, for seeming to vindicate performers who refer to women as “cunts,” “bitches” and “hos,” or worse, who appear to justify their rape and murder, as did a track on the 2 Live Crew album that contained the boast, “I’ll . . . bust your pussy then break your backbone.”

Kimberlé Williams Crenshaw, a professor of law at UCLA, wrote in an essay that she was shocked rather than amused by “Nasty As They Wanna Be.” Black women should not have to tolerate misogyny, Crenshaw argued, whether or not the music is meant to be laughed at or has artistic value — both of which she granted about Nasty.

But something else also concerned Crenshaw: the singling out of black male performers for vilification. Attacks on rap artists at once reflect and reinforce deep and enduring fears about the sexuality and physical strength of black men, she suggests. How else, Crenshaw asks, can one explain why 2 Live Crew was the first group in the history of the nation to be prosecuted on obscenity charges for a

musical recording and one of only a few ever tried for a live performance?

Around this same time, she observes, Madonna acted out simulated group sex and the seduction of a priest on stage and in her music videos. On Home Box Office programs, the comic Andrew Dice Clay was making comments every bit as obscene and misogynistic as any rapper.

The hypocrisy of those who single out rap singers as especially sexist or violent was starkly — and comically — demonstrated when presidential candidate Bob Dole denounced various rap albums and movies that he considered obscene and then recommended certain films as wholesome, “friendly to the family” fare. Included among the latter was Arnold Schwarzenegger’s “True Lies,” in which every major female character is called a “bitch.”

While in real life Arnold may be a virtuous Republican, in the movie his wife strips and he puts her through hell when he thinks she might be cheating on him. In one gratuitous scene she is humiliated and tortured for 20 minutes of screen time. Schwarzenegger’s character also kills dozens of people in sequences more graphically violent than a rapper could describe with mere words.

Even within the confines of American popular music, rappers are far from the first violently sexist fictional heroes. Historians have pointed out that in country music, there is a long tradition of men doing awful things to women. Johnny Cash, in an adaptation of the frontier ballad “Banks of the Ohio,” declares, “I murdered the only woman I loved/Because she would not marry me.” In “Attitude Adjustment,” Hank Williams Jr. gives a girlfriend “adjustment on the top of her head.” Bobby Bare, in “If That Ain’t Love,” tells a woman, “I called you a name and I gave you a whack/Spit in your eye and gave your wrist a twist/And if that ain’t love, what is.”

Rock music too has had its share of men attacking women and not only in heavy metal songs. In “Down By the River” amiable Neil Young sings of shooting his “baby.” And the song “Run for Your Life,” in which a woman is stalked and threatened with death if she is caught with another man, was a Beatles hit.

After Tupac Shakur was gunned down in Las Vegas in 1996 at the age of 25, much of the coverage suggested he had been a victim of his own raps — even a deserving victim. “Rap Performer Who Personified Violence, Dies,” read a headline in the *New York Times*. “What Goes ‘Round . . .’: Superstar Rapper Tupac Shakur Is Gunned Down in an Ugly Scene Straight Out of His Lyrics,” the headline in *Time* declared.

In their stories, reporters recalled that Shakur’s lyrics, which had come under fire intermittently throughout his brief career by the likes of William Bennett, Delores Tucker and Bob Dole, had been directly implicated in two previous killings. In 1992, Vice President Dan Quayle cited an antipolice song by Shakur as a motivating force behind the shooting of a Texas state trooper. And in 1994, prosecutors in Milwaukee made the same claim after a police officer was murdered.

Why, when white men kill, doesn’t anyone do a J’accuse of Tennessee Ernie Ford or Johnny Cash, whose oddly violent classics are still played on country music stations? In “Sixteen Tons” Ford croons, “If you see me comin’/Better step aside/A lotta men didn’t/A lotta men died,” and in “Folsom Prison Blues” Cash crows, “I shot a man in Reno just to watch him die.” Yet no one has suggested, as journalists and politicians did about Shakur’s and 2 Live Crew’s lyrics, that these lines overpower all the others in Ford’s and Cash’s songbooks.

Any young rap fan who heard one of Shakur’s antipolice songs almost certainly also heard one or more of his antiviolence raps, in which he recounts the horrors of gangster life and calls for black men to stop killing. “And they say/It’s the white man I should fear/But it’s my own kind/Doin’ all the killin’ here,” Shakur laments in one of his songs.

Many of Shakur’s raps seemed designed to inspire responsibility rather than violence. One of his most popular, “Dear Mama,” was part thank-you letter to his mother for raising him on her own and part explanation of bad choices he had made as an adolescent. “All along I was looking for a father — he was gone/I hung around with the thugs/And even though they sold drugs/They showed a young

brother love,” Shakur rapped. In another of his hits, “Papa’z Song,” he recalled, all the more poignantly, having “had to play catch by myself/what a sorry sight.”

Shakur’s songs, taken collectively, reveal “a complex and sometimes contradictory figure,” as Jon Pereles, a music critic for the *New York Times*, wrote in an obituary. And while many mentioned that he had attended the High School of Performing Arts in Baltimore, few acknowledged the lasting effect of that education. “It influences all my work. I really like stuff like ‘Les Miserables’ and ‘Gospel at Colonus,’” Shakur told a *Los Angeles Times* interviewer in 1995. He described himself as “the kind of guy who is moved by a song like Don McLean’s ‘Vincent,’ that one about Van Gogh. The lyric on that song is so touching. That’s how I want to make my songs feel.”

After Tupac Shakur’s death, a writer in the *Washington Post* characterized him as “stupid” and “misguided” and accused him of having “committed the unpardonable sin of using his immense poetic talents to degrade and debase the very people who needed his positive words the most — his fans.” To judge by their loving tributes to him in calls to radio stations, prayer vigils and murals that appeared on walls in inner cities following his death, many of those fans apparently held a different view.

Ernest Hardy of the *L.A. Weekly*, an alternative paper, was probably closer to the mark when he wrote of Shakur: “What made him important and forged a bond with so many of his young black (especially black male) fans was that he was a signifier trying to figure out what he signified. He knew he lived in a society that still didn’t view him as human, that projected its worst fears onto him; he had to decide whether to battle that or to embrace it.”

Readers of the music magazine *Vibe* had seen Shakur himself describe this conflict in an interview not long before his death. “What are you at war with?” the interviewer asked. “Different things at different times,” Shakur replied. “My own heart sometimes. There’s two niggas inside me. One wants to live in peace and the other won’t die unless he’s free.”

It seems to me at once sad, inexcusable and entirely symptomatic of the culture of fear that the only version of Tupac Shakur many Americans knew was a frightening and unidimensional caricature. The opening lines from Ralph Ellison’s novel, *Invisible Man*, still ring true nearly a half century after its publication. “I am an invisible man,” Ellison wrote. “No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids — and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me.”

One of the paradoxes of a culture of fear is that serious problems remain widely ignored even though they give rise to precisely the dangers that the populace most abhors. Poverty, for example, correlates strongly with child abuse, crime and drug abuse. Income inequality is also associated with adverse outcomes for society as a

whole. The larger the gap between rich and poor in a society, the higher its overall death rates from heart disease, cancer and murder. Some social scientists argue that extreme inequality also threatens political stability in a nation such as the United States, where we think of ourselves not as “haves and have nots” but as “haves and will haves.”

“Unlike the citizens of most other nations, Americans have always been united less by a shared past than by the shared dreams of a better future. If we lose that common future,” the Brandeis University economist Robert Reich has suggested, “we lose the glue that holds our nation together.”

*Barry Glassner is professor of sociology at the University of Southern California. He is the author of seven books, including The Culture of Fear, from which this article was adapted and is used with permission from Perseus Books. Glassner’s work formed the foundation of Michael Moore’s documentary, “Bowling for Columbine.”*

## The Lighter Side



*“The man shown by the security camera is not a thief but rather a young man trying to break into film.”*

Courtesy the New Yorker. Copyright 2003 CartoonBank.com

## Virtual Kiddie Porn

Continued from page 1

created virtual humans, including the specter of virtual children in pornographic poses as well as the digital “morphing” of innocent pictures of children into pornographic portrayals.

Recently, Congress passed its latest response to child pornography: S. 151, The PROTECT Act. The act deals with pornography that involves depictions of real minors as well as depictions of virtual minors. The act was motivated, in part, by the decision of the U.S. Supreme Court in *Ashcroft v. The Free Speech Coalition*, which held that two provisions of 18 U.S.C. Section 2256 violate the Constitution.

This article will address only those provisions of the PROTECT Act that deal with depictions of computer-generated virtual minors and critique the constitutionality of the various proposed amendments to Title 18 of the U.S. Code involving virtual minors.

In the Child Pornography Prevention Act (CPPA) of 1996, Congress recognized the danger that digital child pornography production and distribution represented. The act targeted four categories of child pornography:

- the production of a visual depiction involving the use of a minor engaged in sexually explicit conduct [18 U.S.C. Section 2256(8)(A)].
- a visual depiction of or what *appears to be* a minor engaged in sexually explicit conduct. [18 U.S.C. Section 2256(8)(B)].
- a visual depiction that has been created, adapted or modified *to appear as* that of an identifiable minor engaged in sexually explicit conduct (the “morphing” provision) [18 U.S.C. Section 2256(8)(C)].
- a visual depiction advertised, promoted, presented, described or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaged in sexually explicit conduct [18 U.S.C. Section 2256(8)(D)].

In 1997, the Free Speech Coalition, an adult industry trade association, challenged the constitutionality of two provisions of the CPPA, 18 U.S.C. Section 2256(8)(B) and 18 U.S.C. Section 2256(8)(D). The challenge ultimately reached the U.S. Supreme Court, which held in *Ashcroft v. The Free Speech Coalition* that both Section 2256(8)(B) and Section 2256(8)(D) were overbroad and unconstitutional.

Two prior decisions of the U.S. Supreme Court are needed to understand the language of the CPPA and the Supreme Court’s conclusion that Section 2256(8)(B) and Section 2256(8)(D) of the CPPA are unconstitutional: *Miller v. California* and *New York v. Ferber*. *Miller* held that a pornographic work would be considered obscene only if (1) the work, taken as a whole, appeals to prurient interest, (2) is patently offensive in light of community standards and (3) lacks serious literary, artistic, political or scientific value. Whether images are of an adult or a child is not a *direct* consideration in assessing whether the image is obscene or not, though it is conceivable that it is an *indirect* factor.

*Ferber* held as constitutional a state statute criminalizing child pornography that would not be held as obscene under *Miller*. In *Ferber*, the Supreme Court concluded that states needed “greater leeway in the regulation of pornographic depictions of children” than provided under *Miller*. The court stated that “the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child,” that the distribution of child pornography is intrinsically related to the sexual abuse of children because it produces a permanent record of the child’s participation, exacerbated by their circulation and that the advertising sales and distribution networks encourage further production involving child sexual exploitation.

Finally, the Supreme Court stated that the value of “permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.” The court did comment, however, that “if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be used.” This language,

which might appear to be dicta at the time of the decision in *Ferber*, will later be held to be “a reason for supporting its holding” in *Ferber*.

With respect to child pornography, the Supreme Court adjusted the *Miller* formulation: “A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct be done so in a patently offensive manner and the material at issue need not be considered as a whole.”

Significantly, the court went on to state that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live

performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”

Against a backdrop of *Miller* and more particularly *Ferber*, Congress passed the Child Pornography Prevention Act, signed into law in 1996. While The Free Speech Coalition challenged Section 2256(8)(B) and (D) of the CPPA, it did not challenge Section 2256(8)(A) dealing with pornographic images of actual children, clearly supported by *Ferber* and Section 2256(8)(C), the morphing provision, not expressly addressed by *Ferber*, but apparently of no concern to the Free Speech Coalition.

The plaintiffs, The Free Speech Coalition, argued that the CPPA was overbroad, in that, by defining child pornography to include visual depictions of adults that appear to be minors, the CPPA effectively banned “a wide array of sexually explicit, nonobscene material that has serious literary, artistic, political and scientific value.” They also argued that the CPPA was unconstitutionally vague. The district court held that the CPPA was neither overbroad nor vague. However, the U.S. Court of Appeals for the Ninth Circuit reversed, finding the “appears to be a minor” language in 2256(8)(B) and “convey[s] the impression” language in Section 2256(8)(D) to be both unconstitutionally vague and overbroad.

The U.S. Supreme Court held Section 2256(8)(B) and (D) to be unconstitutionally overbroad and therefore found it unnecessary to address the vagueness issue. The court quoted its lan-

Some say it's a matter of free speech.

guage in *Ferber* “[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be used. *Simulation outside of the prohibition of the statute could provide another alternative.*” The court went on to say “*Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it . . . . *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.”

In response to the Supreme Court’s holding that Section 2256(8)(B) and (D) were unconstitutional, the Senate and House drafted bills in 2002 to address the issue: H.R. 4623, S. 2511 and S. 2520. These bills died with the demise of the 107<sup>th</sup> Congress. On Feb. 24, 2003, the Senate passed S.151. On March 6, 2003, the House introduced its own bill, H.R. 1161, the “Child Obscenity and Pornography Prevention Act of 2003.”

Subsequently, most of the provisions of H.R. 1161 were incorporated in H.R. 1104. The House then inserted the provisions of amended H.R. 1104 as a substitute in S. 151. A House-Senate Conference resolved the differences between the Senate and House bills and on April 10, 2003, the PROTECT Act was passed by the Congress and signed by the president on April 30, 2003.

In *Free Speech Coalition*, the government made several arguments in support of the provisions of the CPPA. It argued that virtual images could lead to actual instances of child abuse, that virtual child pornography might be used to seduce children and that virtual child pornography whets pedophiles’ appetites. Each of these arguments was rejected by the court.

Mindful of the failed arguments of the government in *Free Speech Coalition*, Congress took a different tack in its Findings to S. 151. The Findings focused on the fact that, at the time *Ferber* was decided, the technology did not exist to create computer-generated virtual minors that were indistinguishable from real children and that defendants might escape successful prosecution by claiming that actual images of real minors were, in fact, computer-generated.

While the Findings in support of the act may provide the basis for government arguments in support of a revised statute, it is the revisions themselves that must survive constitutional scrutiny. The balance of this article will focus on the congressional response to the criticism of the court in *Free Speech Coalition* with respect to the affirmative defense provision in Section 2252A(c), the language of Section 2256(8)(B) and Section 2256(8)(D) as well as, for the sake of completeness, an analysis of Section 2256(8)(A) and (C) though these two subsections were not addressed in *Free Speech Coalition*. This article will also address two new proposed provisions — Section 2252A(a)(6) and Section 1466A.

**Section 2252A(c)** — The CPPA provided an affirmative defense in Section 2252A(c) that the alleged child pornography was produced using an adult. In *Free Speech Coalition*, the Supreme Court stated that “[t]he government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.” The court went on to say, “Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and

insufficient even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production [that is, computer-generated virtual minors].”

The act amends Section 2252A(c) by expanding the defense to include alleged pornography not produced using an actual minor; that is, a computer-generated minor. This proposed expansion of the defense addresses the Supreme Court’s more narrow criticism of Section 2252A(c) as to its scope; but, there remains the court’s more general criticism that a criminal law that shifts the burden to the accused “raises serious constitutional difficulties.” It should be noted that the defense may not be asserted with respect to child pornography as described in Section 2256(8)(C), the “morphing” provision. This exception to the

defense is not problematic. As the activity addressed in Section 2256(8)(C) is the morphing of innocent images of real minors into sexually explicit depictions, the minor is not virtual — only the pose is.

**Section 2256(8)(A)** — Section 2256(8)(A) is unchanged by the PROTECT Act. The original Senate-passed version of S.151 had proposed a revised definition of “minor” negating any requirements of proof of the actual identity of the person. However, that proposal was not adopted by the conferees.

**Section 2256(8)(B)** — The act responds to the criticism of the Supreme Court with respect to Section 2256(8)(B) by deleting the “is or *appears to be of a minor*”

language of the act and substitutes in its place “is or is *indistinguishable* from, that of a minor.” “Indistinguishable” is defined as “*virtually indistinguishable.*” The “virtually indistinguishable” language is adopted from the dissent of Justice Sandra Day O’Connor in *Free Speech Coalition*. In her dissent, Justice O’Connor wrote that “virtually indistinguishable” would be sufficiently narrow to respond to the arguments raised by The Free Speech Coalition.

The act defines “virtually indistinguishable” in subsection (11): “the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor.” However, It is not clear that this modification from “appears to be” to “virtually indistinguishable” will meet the criticism in *Free Speech Coalition* in which Justice Kennedy stated that, “The government . . . [argued] . . . that the speech prohibited by the CPPA is *virtually indistinguishable* from child pornography . . . [but] . . . *Ferber* provided no support for a statute that eliminates the distinction [between actual and virtual child pornography].”

Furthermore, Justice Kennedy went on to state, “Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.” For purposes of Section 2256(8)(B), the definition of “sexually explicit conduct” that applies is the one contained in Section 2256(2)(B), which is somewhat narrower than the definition in Section 2256(2)(A), which applies only when a real minor is involved. Under Section 2256(2)(B), actual sexually explicit conduct is only actionable if it is “graphic” and simulated sexually explicit conduct is actionable only if it is “lascivious.”

## What if 'morphing' changes the picture?

Thus, while simulated sexual intercourse is “sexually explicit conduct” under Section 2256(2)(A), simulated sexual intercourse under Section 2256(2)(B) is “sexually explicit conduct” only where the simulation is “lascivious” and “the genitals, breast or pubic area” is exhibited. In addition, simulation of bestiality, masturbation or sadistic or masochistic abuse under Section 2256(2)(B) is limited to such simulation that is “lascivious.” Senators Leahy, Biden and Feingold have criticized this aspect of S. 151.

**Section 2256(8)(C)** — As previously mentioned, Section 2256(8)(C) was not challenged by the Free Speech Coalition, though, in its opinion, the Supreme Court did write that “although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*.” A proposed Senate revision of Section 2256(8)(C) was not adopted and the section remains as it was.

**Section 2256(8)(D)** — The act deletes Section 2256(8)(D) as such, but it transfers the “pandering” language of subsection (8)(D) albeit in modified form to Section 2252A in a revised subsection, (a)(3)(B):

(3) knowingly ...

(B) advertises, promotes, presents, distributes or solicits through the mails or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief or that is intended to cause another to believe, that the material or purported material is or contains —

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct....

It should be noted, however, that the “conveys the impression” language of the CPPA has been replaced by more narrowly circumscribed language in (3)(B). Subsection (B)(ii) makes reference to an *actual* minor whereas (B)(i) refers simply to a minor, which suggests (B)(i) would be applicable not only to an actual minor but to a virtual minor as well. Assuming that observation is correct, then as to a virtual minor what had been the scope of Section 2256 (8)(D) has been narrowed from pornographic depictions to only those depictions that are obscene.

This narrowing, however, adds nothing that wasn’t already available under *Miller*. Subsection (B)(ii) applies only to an actual minor engaged in sexually explicit conduct, activity that would be proscribed by *Ferber*. And, (B)(ii) is limited to depictions of an actual minor, thus eliminating the issue of nonobscene pornographic depictions of a virtual minor.

The Supreme Court criticized Section 2256(8)(D) because as one form of defined “child pornography,” a person who received possession of a mislabeled film knowing it was mislabeled would nonetheless be guilty of a crime under the CPPA. Congress addressed that concern by removing the “pandering” language from the child pornography definition and making it a separate subsection under Section 2252A, thus eliminating the pandering issue with respect to recipients under Section 2252A(a)(2).

However, the “*purported* material” language is troubling as presumably the language would apply where the material doesn’t exist at all or, if it does, it is nonpornographic.

**Section 2252A(a)(6)** — The act adds a new subsection to Section 2252A. Subsection (a)(6) proscribes knowingly distributing, etc., a visual depiction *to a minor* where such visual depiction is or *appears to be*, of a minor engaging in sexually explicit conduct, for purposes of inducing or persuading a minor to participate *in any activity that is illegal*. The “appears to be” language in Section 2252A(a)(6) is identical to the language in Section 2256(8)(B) of the CPPA that was declared unconstitutionally overbroad in *Free Speech Coalition*. The “appears to be” language in Section 2252A(a)(6) would include a virtual minor.

Moreover, the proposed defense that no actual minor was depicted in Section 2252A(c) of S. 151 is not available for a violation of Section 2252A(a)(6). Thus, a virtual minor depicted in sexually explicit conduct would trigger Section 2252A(a)(6) if (1) it was distributed, etc. to a minor and (2) for purposes of inducing or persuading the minor to participate in any illegal act. In *Free Speech Coalition*, the government had argued that the CPPA was necessary because “pedophiles may use virtual child pornography to seduce children.”

Justice Kennedy noted that many things, including candy, can be used for immoral purposes and that simply because otherwise legal activities may be so misused does not mean they can be prohibited. But, he went in to say that, “[t]he government ... may punish adults who provide unsuitable materials

to children,” citing *Ginsberg v. New York*. *Ginsberg* involved the sale of a so-called “girlie” picture magazine to a minor where the magazine was not obscene for adults. Thus, Section 2252A(a)(6) would be consistent with *Ginsberg* in that it is restricted to distribution, etc. to minors.

However, even if a court were to find the language in Section 2252A(a)(6) limiting the distribution, etc. to minors was a sufficient narrowing from the language of the CPPA, there remains the troubling language “for purposes of inducing or persuading a minor to participate in any activity that is illegal.” While, presumably, the illegal activity referred to in Section 2252A(a)(6) is particularly intended to deal with sexual abuse, read literally it applies to *any* illegal activity including illegal activities that have nothing to do with pedophiles. The purpose of Section 2252(A)(a)(6) is commendable but if the language chosen is overly broad, the goal of the provision will not be achieved.

**Section 1466A** — The act adds a new section, Section 1466A. Whatever else may be true with respect to the other proposed amendments, Section 1466A is an invitation to constitutional scrutiny. Of particular significance is the language of Subsection (c): “It is not a required element of any offense under this section that the minor depicted actually exist.” And, consistent with Subsection (c), Subsection (e), the affirmative defense provision, does not include a defense that a real minor was not used, a defense available under Section 2252A. Thus, criminal liability attaches under Section 1466A even where no real minor was depicted and the defendant could prove that.

If the depiction is obscene, of course, it would be irrelevant that a real minor wasn’t depicted — the depiction would be

## Can it be used to seduce children?

proscribed under the *Miller* test and *Ferber* would not implicate. But, as will be discussed, Section 1466A appears to apply even where the depiction does not fail the *Miller* test and the minor depicted is *virtual*, a scenario *Ferber* found to be a non-criminal alternative to nonobscene pornographic depictions of a minor.

Subsection (a) deals with knowingly producing, distributing, receiving or possessing with intent to distribute proscribed visual depictions including drawings, cartoons, sculpture and paintings as well as “photographic” images. Subsection (b) deals with knowingly possessing such proscribed depictions.

Subsection (a)(1) proscribes depictions of a minor engaged in sexually explicit conduct that is obscene. Likewise, Subsection (b)(1) proscribes depictions of a minor engaged in sexually explicit conduct that is obscene. Both Section 1466A(a)(1) and Section 1466A(b)(1) are consistent with *Miller* and are not constitutionally objectionable.

However, Section 1466A(a)(2) and Section 146A(b)(2), which are identical in language, would appear to raise constitutional concerns. Both Section 1466A(a)(2)(A) and Section 1466A(b)(2)(A) read as follows

(2)(A) depicts an image that is or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse or sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; and

(B) lacks serious literary, artistic, political or scientific value;

While both subsections narrow the types of sexually explicit conduct that would be violative of the statute, it must be remembered that Section 1466A(c) provides that, “It is not a required element of any offense under this section that the minor depicted actually exist.” Thus, Section 1466A(a)(2)(A) and Section 1466A(b)(2)(A) would be violated if a virtual, rather than a real minor, was involved and even though only one of the three tests for obscenity under *Miller* — lack of serious literary, artistic, political, political or scientific value — was explicitly satisfied. Given Justice Kennedy’s comments in *Free Speech Coalition*, the total absence of a defense that no real child was used where the depiction may not be obscene is unlikely to survive judicial scrutiny.

The protection of our children against sexual abuse and predatory pedophiles is of extraordinary importance. The Internet that has been a boon to humanity is unfortunately an evil weapon in the hands of pedophiles and those who cater to their warped desires. And, virtual human technology that will play an increasing role in entertainment, education and other worthy endeavors also, unfortunately, serves the appetites of child molesters.

Strong federal laws are needed but they, like all federal laws, must pass constitutional muster. The act needs to be revised if it is truly to be effective.

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## Old financial ways are over for record biz

By A. Barry Cappello

**A**fter years of intense pressure from recording artists, changes are finally occurring within the music industry’s accounting and royalty distribution practices. With such recording artists as the Dixie Chicks, Courtney Love, Incubus and Don Henley voicing their disgust over the industry’s royalty system and with rumblings in the California state legislature, the industry is being forced to take a hard look at its age-old accounting methods.

For decades, big record labels have tightly controlled record company-artist relationships. Recently, recording artists began speaking out about what they perceive as unfair record label tactics that they say cheat them of royalty payments and keep them in unrealistic long-term contracts. More and more, artists are challenging the validity of “standard” industry contracts that bind them to their record company for years. They claim that the number of records required by these contracts are usually unrealistic, meaning the artist would never be able to fulfill the terms of the contract and so would never be able to leave the record label. Some recording artists call it “indentured servitude.”

Under California Labor Code Section 2855, professional service providers, including actors and sports figures, are not required to remain under contract for their services for more than seven years (known as the “seven-year rule”). In 1987, record companies successfully lobbied California state legislators to make recording contracts exempt from Section 2855. While actors and athletes successfully manage their own careers and fates because of Section 2855, recording artists cannot.

Many recording artists believe that since they are being held captive by their record labels as a result of sometimes onerous contracts, their record companies are playing fast and loose with accounting practices that affect an artist’s bottom line. The California Senate Select Committee on the Entertainment Industry agreed with this assumption late last year when it held three public hearings and issued a report on the subject. The report warned the five largest record companies (Universal Music Group, BMG, Sony Music Entertainment, Warner Music Group and EMI Group) to clean up their accounting practices or be prepared to face legislative penalties.

Three of the top five record companies heeded the warnings and promised changes (numerous artist lawsuits and negative publicity were also contributing factors in hastening their response). The first to announce new accounting procedures were BMG and Universal Music Group in November 2002. Warner Music Group met with California state legislators in March 2003 to outline its new simplified accounting methods. These companies promised to eliminate deductions from royalties that

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artists have, in the past, complained were unfair. BMG and Universal also promised to open up their books so artists could examine how royalty payments are tabulated. These new accounting procedures will enable artists' accountants to check royalty records and point out errors or discrepancies.

In her lawsuit against Universal, Courtney Love argued that the record company gave her and her band "Hole" an advance on royalties but then required the band to pay out-of-pocket production and marketing costs that deeply cut into royalty payments. With the recording company controlling the collection, accounting and disbursement of royalties, Love argued that Universal manipulated royalty numbers to Hole's detriment. Her case was settled last year on the eve of trial.

As part of its new accounting practices, Universal agreed to give artists access to manufacturing documents, one of the key issues Love brought to light in her litigation. She argued that record companies were producing CDs that were sold overseas without the artist's knowledge and without artist

compensation. This concession by Universal will force the record company to better monitor the production and distribution of its products and, in turn, should produce more royalties for artists.

## Love argued Universal manipulated accounting to her detriment.

During the California Senate Select Committee public hearings attended by Love, Don Henley, LeAnn Rimes, other artists and industry accountants, Sen. Kevin Murray, chairman of the committee, chastised the record companies for including contract clauses that make record companies immune from penalties if their accounting practices are

found to be improper. The committee's report stated, "Each recording contract contains a clause that the record company, no matter how egregious their behavior, will never be liable for more than the amount of royalties due."

On Feb. 21, 2003, when it appeared that some music labels were not willing to change their ways on their own, Murray introduced two bills (SB 1032 and 1033) designed to clean up record label royalty and accounting practices. If the remaining two record labels (Sony Music Entertainment and EMI Group) voluntarily change their accounting and royalty payment procedures, the legislation may not be needed.

Still to be addressed, however, is the continued exclusion of recording artists from the California Labor Code's seven-year rule. What is certain is that the old ways of doing business in the recording industry are over. Recording artists now realize that by speaking out in a united voice against unfair business practices, real change can take place.

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## Copyright vs. Consumers

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especially by consumers, copying alone isn't such a big problem.

The bigger problem is that distribution has become as easy to accomplish as copying itself. Would anyone really care if consumers could make perfect generationless copies, if they couldn't distribute these copies to others? Not very much — any copying under such circumstances would be essentially invisible to content owners and would have minimal effect on their revenues. The real threat is that today, anyone — any consumer — can distribute content around the globe, essentially for free. Because distribution is costless, it can be (and is being) done without any profit motive.

So the main danger for content industries lies in the combination of effectively "generationless" copying, *plus* worldwide distribution at essentially no cost. This combination is profoundly subversive of content industries' business models. These models were carefully constructed around control of the channels of distribution and were protected by formidable barriers to entry erected by the large capital requirements of the traditional content business. Before the Internet, con-

tent distributors needed lots of money to compete. National distribution of tangible products requires warehouses, trucks, money and relationships; national broadcasting over the airwaves (previously the only means of distributing content without physical products) also requires an enormous investment.

Today, however, for about \$50 a month, anyone can use the Net to distribute content direct to the consumer. No middleman, no trucks, no warehouses, no broadcast facilities, no loans, no payroll. The danger to the content industries' business model is quite obvious.

Digital technology has challenged the law, too, ruthlessly exposing the Copyright Act's hidden reliance on the labor needed to copy and distribute content. Here's an example: If I physically give a million people each a CD of a popular song, it is clear that I have made a public "distribution" of phonorecords. But if I let a million people download the same song from my computer, I may not be engaging in "distribution" at all, because no tangible objects — with their associated costs — are changing hands.

So, the content industries confront a world in which their business models seem to be collapsing, while the Copyright Act seems hopelessly confused and incapable of dealing with



the new status quo. The — perhaps understandable — industry response has been to rush to Congress with its hand out, seeking new rights and new protections, to entrench the old ways of doing business.

But it's only fair to point out that content owners have taken full advantage of the leverage they have gained from the new potential for infringement. Few things promote a legislative agenda like a credible threat against an industry with legendary lobbying power. The content industries' deployment of lobbying muscle has made them the sole beneficiaries of recent dramatic expansions of copyright. Because the real threat faced by content industries is their technological obsolescence, copyright ultimately cannot protect them.

In the long run, content industries must adapt or die. But their short-term strategy of drastically expanding copyright restrictions can do serious (maybe permanent) damage to the public's rights.

Now, if I am correct about this, I should be able to show that recent changes in copyright have limited consumers' rights to do things with copyrighted works. This actually turns out to be surprisingly easy to do, as the rest of this article will demonstrate.

What kinds of things, then, do consumers do with copyrighted works? Let's begin with the most common: Reading (books), watching (movies) and listening (to music). To these activities we might add occasionally lending or selling a copy (of a book, movie or CD) to another and sometimes copying (for purposes of quotation, review and other traditional "fair uses"). In addition, although the record industry would like us to forget this, since 1992, consumers have had the right to copy music for personal use (Doubting Thomases can find the right in Section 1008 of the Copyright Act.).

Finally and most fundamentally, we must add the activities guaranteed by the Constitution: First, the right to make free use of works in the public domain (this, after all, is why copyright is only allowed a "limited term" in the Constitution); and, of course, the right to speak freely, protected in many cases by the First Amendment. The latter is obviously implicated by copyright, which directly limits permissible expression, albeit in a manner that is content-neutral.

Now let's look at how the law treats these consumer uses, beginning with the most common: Reading, watching and listening. In the pre-digital era, none of these uses required the "reproduction" of the work and no one argued that such activities involved copying. That is, in the pre-digital world, reading, listening and watching were the prerogative of the consumer, not the content owner. Once you bought the book, you could read it when, where and how often you chose; the publisher had no right or ability to control reading.

In the digital world, however, things are much different. A seriously flawed case from 1993<sup>1</sup> held that the moment a consumer uses a computer to access a work, a legal "copy" is made. Because the right to copy belongs to the content

owner, reading, watching or listening to a work in digital form requires the content owner's permission.

The reasons why the law views digital uses as "copies" are too lengthy for this article (and ultimately make no sense, anyway). Suffice it to say that for engineering reasons, all content made visible or audible to a computer user is copied into digital memory. The fact that the copy is volatile — to illustrate this, try kicking out the power cord of your computer without saving your document to hard disk — makes no legal difference.

In other words, a consumer cannot use digital technology to access a work, even for reading, listening or watching, without making a copy of the work. Merely reading a book in digital format is copying, as is browsing a Web page; similarly, merely listening to a popular song on your computer is copying.<sup>2</sup>

Consider the implications: In the pre-digital world, content owners never dreamed that they could control a consumer's reading (or listening to or watching) a work. Today, however, they can, simply because a court held that it was not possible to access a work by digital means without making a "copy" of the work. No legislation was required for this amputation of consumer rights and no public or private debate was held.

Do you doubt that such an extreme departure from copyright history would be enforced? Rest assured that it has already been done. A Utah district court held in 1999<sup>3</sup> that browsing a Web site containing infringing content was itself infringement, because browsing is copying. (That is like saying that reading an infringing book is itself infringement.) The same court went on to hold that linking to a Web site containing infringing material is contributory infringement, because it facilitates the infringement of those who follow the link and browse the infringing content. (This is like saying that publishing the address of a bookstore selling infringing books is infringement.)

Extending this completely into the ridiculous, in 2002 the Ninth Circuit held that linking to an image stored *on the content owner's Web site*, without permission, was infringement.<sup>4</sup> (This is like saying that publishing an address is infringement unless the addressee consents.)

So even the most common consumer uses of copyrighted works are now subject to the copyright owner's control. We shouldn't be surprised, then, to learn that the less-common uses are subject to the same encroachment by content owners. Let's begin with the consumer's right to sell or lend his or her copy to another: This activity, permitted under the Copyright Act's "first sale doctrine," reflected copyright's recognition that owning a *copyright* was not the same thing as owning the actual, physical *copy*. The owner of a copy could transfer it without affecting the rights of the copyright owner.

For digital content, however, this right has disappeared. Because the right hinges on "ownership" of a copy, content owners generally refuse to sell digital copies, opting instead

## Content industries must adapt or die.

to license the use of the content to the purchaser. The license terms, of course, expressly exclude any right to dispose of the work, even if no money changes hands.

Now, the disappearance of the first sale doctrine for digital works may be understandable, given the possibility of infringement — after all, the “loan” of software can easily result in its installation on another computer, without payment. But the more important point is that when content owners *license use*, rather than sell copies, consumers get only the specific rights licensed. These are often described in small print displayed in a tiny window at the time the content is installed. Most consumers are unaware of what exactly they have and content owners have taken advantage of this to include onerous conditions, some touching critical consumer rights.

For example, Microsoft was recently embroiled in a controversy when consumers discovered that the company had forbidden the use of its FrontPage software to create Web sites criticizing Microsoft.<sup>5</sup> This is the use of content ownership to dictate what speech is acceptable and although it may not violate the First Amendment (at least unless state power is used to enforce the right), it is an important infringement on the rights of consumers to speak freely.

Consumers’ right to use works in the public domain freely has fared no better. Indeed, the content industry has mounted a frontal assault on the very idea of the public domain. In 1994, Congress established “zombie” copyrights, creating Section 104A of the Copyright Act to remove works from the public domain. Four years later, following a massive lobbying effort by the content industry, Congress extended the term of all existing and future copyrights by 20 years. The effect is that no new works will enter the public domain for 20 years. The constitutionality of that extension is presently being challenged.<sup>6</sup>

Moreover, the 1998 enactment of the content industry wish-list called the Digital Millennium Copyright Act (DMCA) may restrict even further the use of works in the public domain. The DMCA prohibits accessing a copyrighted work if the work is protected by technological measures (such as encryption, with decryption provided for a price). By combining public domain work with new material (for example, advertising) the resulting work as a whole can be encrypted and unlicensed access to it prohibited, even though the only important portion of the work is in the public domain.

This leaves us with the consumer right of fair use. It, too, is threatened on a number of fronts. To begin with, fair use has never been an adequate substitute for statutorily delineated rights, because fair use is an affirmative defense, highly fact-specific and expensive to establish. Few consumers can afford to defend a claim of infringement on fair use grounds. Next, fair use may not survive the practice of licensing content. Because a license spells out what can and cannot be done with the licensed content, fair use may have no role left

to play — even a legally “fair” use may breach license terms.

The DMCA, too, has worked a great deal of mischief regarding fair use. As noted above, the DMCA prohibits accessing a work protected by technology. The key here is that accessing the work is a violation, even if it is done for fair use purposes. This gives the content industry the ability to exclude fair use altogether by using encryption to protect a work. If a consumer accesses such a work without the content owner’s permission, the violation is complete, even if the purpose of accessing the work is to make fair use of it. The *use* might not infringe copyright, but the *access* nevertheless violates the DMCA.

Finally, the content industry has succeeded in vastly expanding the universe of criminal infringement. Historically, copyright infringement became criminal only if it was done for profit. In 1997, however, Congress (at the behest of the content industries) changed this by passing the No Electronic Theft (NET) Act. Under the NET Act, any infringement of works with a retail value of \$1,000 or more became a federal felony. Enforcement of the NET Act, however, was spotty, because the FBI typically had more pressing concerns than noncommercial copyright infringement.

This may be changing. Recently, several members of Congress, prodded by the content industries, wrote to the Justice Department requesting more vigorous enforcement of criminal penalties against copyright infringers. Statements from the Justice Department indicate that it will respond favorably to this expression of industry concern.

The government has also attempted to enforce criminal penalties under the DMCA. In 2001, the FBI arrested Dmitri Sklyarov, a Russian computer programmer, at a conference in Las Vegas. Sklyarov worked for a Russian company, Elcomsoft, which had briefly marketed a program on the Internet enabling the user to make decrypted copies of e-Books, a proprietary (and access-controlled) format owned by Adobe Inc. After several weeks in jail, Sklyarov agreed to testify against his employer and was allowed to return to his wife and child in Russia.

At the trial, held in 2002, the company’s defense was based on the fact that its actions were not illegal in Russia and that it had no reason to know that such acts were illegal in the United States. Although neither ground seems to be a valid defense under the DMCA, the jury returned a verdict of not guilty, characterized by some as a “jury nullification” of the statute’s criminal provisions.

In sum, it is beyond argument that the rights of consumers to use copyrighted works, from reading to quoting, from watching to lending and even to use works in the public domain, have been severely limited in recent years. That is especially ironic considering that the principal purpose of copyright in the United States is to enhance public access to works of authorship. This goal is supposed to be accomplished by providing only the amount of economic incentive to authors necessary to maximize the public benefit.

## Consumers: Can they no longer speak freely?

The content industry has rather successfully obscured this purpose and hijacked copyright, refocusing it on the protection of vested industry interests. Although copyright was never intended to entrench the business models of established industries, it has recently been deployed for exactly that purpose.

Can copyright be reclaimed for the public? Perhaps. But current legislative initiatives continue to be heavily weighted away from consumers and toward the content industry. New legislation introduced in the 107<sup>th</sup> Congress, much of which will likely be reintroduced in the 108<sup>th</sup>, will limit consumer activities even more sharply.

Egregious examples abound. S. 2048, introduced by Sen. Hollings last year, would require all digital media devices to include security technologies that protect copyrighted works. "Digital media devices" include not only personal computers, but also any hardware or software that reproduces copyrighted works in digital form or converts copyrighted works in digital form into a form whereby the images and sounds are visible or audible. The content industries would "work with" the technology industries to develop standards for the security technologies; if they fail to agree on a standard within one year, then the FCC has one additional year to do so.

The Hollings bill is breathtakingly misguided. Not only is it a complete capitulation to the demands of the content industry with respect to digital technology, but it is immensely overbroad, requiring security technology to be built into any device that can play digital content. Such devices include, among other miracles of technology, the Barbie Travel Train, talking dog collars and the (in)famous Big Mouth Billy Bass. All of these devices play digital audio and are therefore "digital media devices" under the bill. (For a hilarious list of additional devices that qualify, visit [http://www.freedom-to-tinker.com/archives/cat\\_fritzs\\_hit\\_list.html](http://www.freedom-to-tinker.com/archives/cat_fritzs_hit_list.html).)

Forcing all devices that play digital content to adhere to a copy-protection standard is a Luddite attempt to protect the content industry by turning back the clock on technology. It's hard to imagine a worse technology policy. As Princeton computer scientist (and expert on copy protection) Edward Felten commented, "[A] standard for copy protection is as premature as a standard for teleportation."

Equally radical (and misguided) is the bill introduced last summer by Reps. Berman and Coble, H.R. 5211. This bill would amend the Copyright Act to permit content industry representatives to impair the trading of copyrighted files by hacking into the computers of file traders. Even noninfringing files may be damaged or impaired — without liability — if doing so is "reasonably necessary" to combat infringement. Insofar as this bill purports to give private parties the right to search property and to seize or impair information without a warrant, it gives content owners broader rights than those enjoyed by the attorney general of the United States. Apparently there are those who believe the content industry can do no wrong.

There has been, to be sure, some response to this unprecedented grab by the content industry. Last October, Rep. Boucher introduced the Digital Media Consumers' Rights Act of 2002, H.R. 5544, which would require record companies to notify CD purchasers of copy-protection included on the purchased CDs. Predictably, the content industry has objected even to this request not to misdescribe its products.

Rep. Lofgren has introduced a bill considerably more far-reaching, the Digital Choice and Freedom Act of 2002, H.R. 5522. The Freedom Act would, among other things: (1) make it clear that a consumer who owns a legal copy of a digital work is allowed to make a back-up copy and may perform or display it privately (in other words, use it for its intended purpose); (2) make nonnegotiable license terms unenforceable against consumers, to the extent that they violate restrictions imposed on content owners by the Copyright Act; (3) include a digital "first sale" doctrine, whereby a consumer who owns a legal copy may dispose of it if no copy is retained; and (4) provide an exception to the DMCA allowing consumers to circumvent access controls for purposes that do not infringe copyright.

Finally, as I've noted above, consumers recently won in the courts, when a jury rejected the claims of prosecutors that the Russian software firm Elcomsoft criminally violated the provisions of the DMCA. More recently, in Norway, Jon Johansen, the teenaged inventor of the DeCSS decryption program that unlocks Hollywood DVDs, was acquitted of digital piracy on Jan. 7, 2003. As reported in the *New York Times*, the court ruled that "[S]omeone who buys a DVD film that has been legally produced has legal access to the film." U.S. law to the contrary, the court sensibly said that consumers have rights to legally obtained DVDs that apply "even if the films are played in a different way than the makers had foreseen."

The situation remains very dangerous, however. Copyright law is a morass of complexity that even copyright lawyers, much less consumers, struggle to understand. The advent of digital technology and the Internet has complicated matters still further. The content industry has used the threat of infringement to provide cover for its relentless drive to expand its rights, securing new, more onerous laws even less comprehensible to consumers. For their part, consumers have tuned out the content industries' claims (as they often do when claims seem grossly unfair or senseless), returning nullifying verdicts and continuing to access works and use technology.

Napster at its peak had tens of millions of users, all of whom were potentially federal felons; its successors like KaZaA have attracted just as much support. Until the content industry becomes more reasonable in its claims, we should expect more of the same. Laws ignored this widely breed disrespect for the law in general; a law that makes criminals out of this many people is already irrelevant to most people.

History teaches us that there can be a bright future — if we resist the claims of the content industries. While phonographs, movies, broadcasting and the VCR undermined the business models of some industries, others grew up and flour-

## Can copyright be reclaimed for the public?

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ished. In the early 1900s, the content establishment viewed audio recording, motion pictures and radio as profoundly destabilizing; later, these previously "new" industries resisted television, cassette recording and video technology. Congress and the courts wisely refused to entrench 19th-century technology at the beginning of the 20th century.

Now, at the beginning of the 21st century, we should follow their example. We may understand that infringement is a threat without relentlessly eroding the public's right to access and use copyrighted works. Our future in the Information Age will depend on how successfully we can negotiate this challenge.

### Endnotes

1. *MAI Systems Corp. v. Peak Computer Inc.* 991 F.2d 511 (9th Cir. 1993).
2. Interestingly this "logic" has not been applied to listening to CDs on a home stereo, although the technology of home CD players is not materially different from that of a computer CD drive.
3. *Intellectual Reserve Inc. v. Utah Lighthouse Ministry Inc.*, 75 F.Supp. 2d 1290 (D. Utah 1999).
4. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002).
5. See <http://www.infoworld.com/articles/op/xml/01/10/011001opfoster.xml>.
6. *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), *cert. granted*, 534 U.S. 1126 (2002), *mod.*, 534 U.S. 1160. It bears mention that the content industry's primary justification for this extension was "harmonization" with the laws of other countries, notably those of the European Union. However, the vast remaining differences between American and European copyright law belie the industry's claims; for example, while the United States extended protection for sound recordings by 20 years (to 95 years), European protection still lasts just 50 years. It is also noteworthy that under the less-protective American version of copyright, the United States became the foremost exporter of content in the world. Perhaps, then we should pay less attention to the shibboleth of "harmonization."

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