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Does the Digital Millennium Copyright Act Impede Scientific Expression?

TIEFFA HARPER

The Digital Millennium Copyright Act was recently challenged by a scientific research team on the grounds that it restricts free speech rights. This article surveys the litigation between the scientific research team and the Recording Industry Association of America as well as free speech rights in comparison to copyright protections.

Digital piracy has been a pervasive plague on the

entertainment industry, advanced by the advent of the Internet and file-compression techniques available to the most basic computer user. The recording industry's legal battle to quell the unprecedented wave of digital piracy is constant, but many users freely share copyrighted material through peer-to-peer music services. In 1998, Congress' efforts to curb digital piracy resulted in the enactment of the

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Illustration by Richard Laurent

EDITOR'S COLUMN

It is with tremendous enthusiasm and excitement that I begin my tenure as the new editor-in-chief of *Entertainment and Sports Lawyer*. As with all exciting new ventures, I am planning many fresh ideas to continue improving the publication. New features and design elements will be appearing in upcoming issues — all intended to help you get the information you need in the most effective manner possible.

This is also a good time for you — the reader — to let me know of your own ideas on how to improve the publication. Send an e-mail message to bob@rjg.com and I will personally respond to your suggestions. My goal is to build a highly responsive publication that fully meets your needs.

This issue of *Entertainment and Sports Lawyer* is made up of articles inspired and edited by Ken Abdo — the outgoing editor-in-chief. I want to thank Ken for handing over the publication with so many good articles in hand and with many articles on the way or ready to be submitted. Ken has edited the publication for several years and all of us participating in the ABA Forum on the Entertainment and Sports Industries owe him a debt of gratitude for all his hard work.

Finally, had it not been for the mentoring and support of David Given and Richard Greenstone, and Ken, I would not be so fortunate to become editor-in-chief.

David first hired me as an editorial assistant during his tenure with the newsletter — while I was still in law school. I saw firsthand how he put the publication together with interesting and challenging articles. David is now the Forum chair.

His work carried on many improvements instituted by Richard Greenstone, who is now the Forum Publications chair. I thank all of these gentlemen for the opportunity to take the helm of this fine publication.

So, without further ado, let's "heave-to" and begin the journey.

Bob Pimm
Editor-in-Chief

Call for articles

If you have an article idea for the *Entertainment and Sports Lawyer*, contact Bob Pimm at bob@rjg.com for a free copy of our *Submissions Guidelines*.

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Does the Digital Millennium Copyright Act Impede Scientific Expression?

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Digital Millennium Copyright Act¹ (DMCA), which prohibits illegal digital copying and trafficking.

The DMCA specifically prohibits the circumventing of technological measures designed to control access to protected works, trafficking in such technology and services and researching for the purposes of advancing infringement. The DMCA, however, has been recently challenged on the basis that it violates the First Amendment of the Constitution, effectively “chilling” the scientific community from publishing its research.

This article will briefly examine the background of *Felten v. RIAA*, before analyzing the claim that the DMCA restrains free speech. Specifically, it will examine relevant First Amendment rights and legal standards in comparison to the legal interests of the entertainment industry and its copyright holders.

The article will then conclude by proposing how the DMCA can be harmonized with free speech concerns in order to promote the advancement of scientific research *and* the protection of the rights of digital copyright holders.

Felten v. RIAA: Controversy brews over the DMCA

On Sept. 6, 2000, the Secure Digital Music Initiative Foundation, (SDMI),² issued the SDMI Public Challenge (Challenge), inviting the public to attack digital watermarks and other technologies that protect copyrighted digital materials, so that the SDMI could determine which technology it should adopt.³ Successful challengers could elect to receive \$10,000 in compensation per attack while assigning their intellectual property rights to the SDMI or retain such rights to their property, with encouragement to submit details of successful challenges to the foundation.

The Challenge agreement specifically authorized challengers only to attack the encoded digital music samples and files, retained the rights of the SDMI and the copyright owners under the DMCA and prohibited reproduction, modification, distribution, performance or making use of any of the samples.⁴

Edward Felten — associate professor of computer science at Princeton University — and his research team entered the Challenge and successfully launched attacks on five of the six technologies offered by the SDMI.⁵ Felten and his team chose not to assign their intellectual property rights to the

SDMI and wrote a paper describing the research and successful attacks, with the intention of submitting it to a peer-reviewed scientific conference for eventual publication.⁶

The paper was accepted for presentation and a series of communications began between Felten and Verance, a proponent of one of the technologies used in the Challenge, about the detailed information provided in the paper.⁷

Felten then alleged that he received a letter from the Recording Industry Association of America (RIAA),⁸ stating that Verance’s watermark was already in commercial use and the paper could “seriously jeopardize the technology and its contents.” The letter went on to state that if the research were to be released, the team could be subject to federal law, including the DMCA. The paper was later accepted at the 10th UNISEX Security Symposium.⁹

Legal wranglings between Felten and the RIAA

Felten elected to pursue litigation against the RIAA and others,¹⁰ claiming that the DMCA “impermissibly restricts freedom of speech and of the

Did the DMCA ‘impermissibly restrict freedom of speech’?

press, academic freedom and other rights secured by the First Amendment to the United States Constitution,” by imposing civil and criminal liability for publishing speech about access technologies and copy control measures.¹¹ Felten further claimed that “[w]ithout full and open access to research in areas potentially covered by the DMCA, scientists and programmers working in those areas cannot exchange ideas and fully develop their own research. As a consequence, the DMCA will harm science.”¹²

The RIAA moved to dismiss the complaint on the basis that Felten and the other plaintiffs did not have standing to pursue the claim.¹³ The court agreed and

dismissed the case.¹⁴ The Electronic Frontier Foundation, the legal team representing Felten and the plaintiffs, has stated its intention to appeal the case to the Third Circuit Court of Appeals, claiming that “[t]his decision is clearly contrary to settled First Amendment law....”¹⁵

The constitutional challenge to the DMCA¹⁶

Though dismissed on other grounds, the Felten litigation has raised important concerns over whether the DMCA is overbroad in scope. Specifically, Felten claims that it is unclear what research is proscribed under the statute and that the DMCA targets the speech of scientists and researchers, effectively “chilling” science.

The DMCA specifically mentions encryption research,¹⁷ stating that a person will not violate the act if the research is attempted in the course of good faith research and, if the person (1) lawfully obtained

What about the right to publish information obtained through individual research?

the encrypted copy, phonorecord, performance or display of the published work; (2) the act is necessary to conduct encryption research; and (3) the person made a good faith attempt to obtain authorization before the circumvention.

Exemption under the DMCA is determined by examining whether the researcher disseminated the encryption research in a manner that advances the state of knowledge or in such a way that facilitates infringement.¹⁸ Thus according to Felten’s research team, while the DMCA attempts to allow good faith encryption research while not permitting it to be circumvented for infringement purposes, this is a violation of the First Amendment.

The First Amendment states that “Congress shall make no law ... abridging the freedom of speech,” and it has been described as one of the four essential human freedoms. Potential censorship by the government is rigidly scrutinized and the Supreme Court is

adamant in safeguarding the right to be free from impermissible government regulation in speech.

The First Amendment in light of *Reno v. ACLU*¹⁹

In 1997, the Supreme Court tackled the issue of free speech regulation, the Internet and First Amendment concerns. In *Reno v. ACLU*,²⁰ the Communications Decency Act of 1996²¹ — which was enacted to protect minors from harmful material on the Internet — was challenged. The court’s concern over the act was based on two grounds: (1) the CDA was content-based regulation of free speech, thus having a “chilling effect”; and (2) the CDA was a criminal statute.

The court held that the CDA’s “indecent transmission” and “patently offensive” provisions abridged the “freedom of speech” protected by the First Amendment by being overbroad in scope. The court stated that the CDA “lacked the precision the First Amendment requires when a statute regulates the content of speech ... and the CDA’s burden on free speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the act’s legitimate purposes.”²² The lack of Congress’ statutory attention to detail and the open-ended prohibitions that applied to all nonprofit entities and individuals prompted the court to invalidate the act.

Reconciling *Reno v. ACLU* with the DMCA

The *Reno* decision mandates that Congress must be precise in its language when enacting content-based statutory regulations and that the government maintains a heavy burden in establishing the effectiveness of alternative measures to protect the interest. Though the Recording Industry Association of America managed to dodge a constitutional curve ball when the district court recently decided to dismiss the Felten claim, a successful challenge to the DMCA could raise serious implications for industry protections against digital piracy.

While some courts have taken the general position that the DMCA does not violate free speech, the Felten team seeks to advance the right to publish information obtained through individual research, a practice common within the scientific community.²³ Thus, the proper inquiry must be whether subsequent publication sufficiently advances scientific knowledge in itself or if such publication is impermissibly linked to copyright infringement so as to be considered integrated into the act of infringement.

Unfortunately, there is no precise determination of standards that can accurately address this inquiry, as seen in the Felten litigation.

While the relevant provision appears to protect scientific research, it is unclear precisely how the Felten team's research and publication attempts are protected *or* prohibited by the DMCA. The team's research efforts may be properly within the scope of the DMCA's protective veil, but subsequent publication is questionable because the release of such information could be interpreted as paving the way for copyright infringement. This interpretative vagueness raises concerns for both sides and could lead to litigation that diverts attention from those that deserve prosecution.

Solution: balancing protection and research²⁴

The concern over the Felten papers is valid in light of the entertainment industry's fight to protect the rights of its copyright holders and the scientific community's desire to push toward technological advances. The damage of digital protection is difficult to calculate and the simple download of one song or CD severely affects the industry and consumers. Currently, millions of users freely swap copyrighted material by simple downloads. Detection and management of individual digital pirates is difficult.

Equally valid, however, is the right of individuals to freely express ideas and innovations. The Supreme Court, while consistently recognizing legitimate government interests in protecting against certain types of expression mediums, will invalidate federal measures if other less intrusive measures could accomplish the same goal. Thus, in an adversarial process, a balancing of interests is warranted and ultimately, the legitimate rights of one party may be diminished in favor of the other.

It appears that the purpose of the SDMI Challenge was to involve the scientific community in assisting the recording industry by scrutinizing its protective measures. However, the initial challenge to the Felten publication by the RIAA may have alienated the scientific community.²⁵ While it is not likely that the dispute will be easily resolved, the implications of such litigation could hamper the industry's efforts because the scientific community is one of its most valuable allies in the fight against digital piracy.

The most immediate solution would involve an alliance and discourse between the entertainment industry and the scientific community, encouraging the promotion of scientific research and exchange of ideas, while jointly working toward the eradication of digital piracy. Such efforts could involve a study of First Amendment concerns and how the RIAA — long an advocate of free speech — could be involved in efforts to protect its interests while safeguarding the rights of others to freely publish their communications. Such analysis of current standards

may reveal that the DMCA must be more specific in scope on what type of research leads to infringement.

In the interim, an industry consensus must be reached explicitly adopting its position on scientific research and what it considers to be impermissible copyright infringement under the DMCA. An adversarial approach to the resolution of this problem may not be the most attractive solution for the parties involved.

Conclusion

The DMCA's purpose is important because it seeks to protect the rights of copyright holders against the damaging effects of digital piracy. However, the right to free speech has been raised, on the basis that the DMCA unconstitutionally restrains it. This problem may not be quickly resolved for the RIAA. Regardless of personal positions on which right outweighs the other, a court

The damage of digital protection is hard to calculate.

declaration may curb such rights and lead to unfavorable results.

What is essential is that the RIAA and the scientific community must reach a joint, mobilized front to effectively curb the digital piracy movement. Both communities, working together, could eventually shift the illegal exchange of copyrighted materials by collectively adopting measures that protect copyright holders and those that seek free speech.

Tieffa Harper just graduated from Rutgers School of Law, Camden, N.J. This article was the winning entry in the Recording Academy's Entertainment Law Initiative legal writing competition. Ms. Harper's e-mail is tharpe@hotmail.com.

Endnotes

1. 17 U.S.C § 1201
2. The SDMI is a multi-industry, nonprofit organization, comprised of more than 180 companies and organizations in the recording industries, consumer electronics, information technology, securities technology and Internet service providers. See RIAA Memorandum In Support of Its Motion To Dismiss.
3. The SDMI Public Challenge stated that the SDMI was in the process of testing technologies that prevent the

“unauthorized copying, sharing and use of digital music,” and that these technologies “must pass several stringent tests: they must be inaudible, robust and run efficiently on various platforms, including PCs.” The Challenge invited the public to defeat the screening technology — a watermark — by removing or altering it and not significantly degrading the quality of a digital music sample, which was available to be downloaded as part of the Challenge. *See* EFF Complaint, *Felten v. RIAA* (June 6, 2001).

4. *See* EFF Complaint, *Felten v. RIAA* (June 6, 2001), paragraph 33.

5. *Id.* at paragraph 37.

6. The paper, entitled, “Reading Between the Lines: Lessons from the SDMI Challenge” was submitted to the Fourth International Information Hiding Workshop, in late November/early December 2000.

7. According to Felten’s complaint, Felten received an e-mail from Verance and cordial communications began about the paper. Felten submitted a pre-publication copy of the paper to Verance with the express request that it not be circulated outside of Verance. Felten was informed that the paper had not been circulated outside of Verance, but that the SDMI, amongst others, had been notified and that Verance was concerned about the “unnecessarily detailed information.” The communication also stated that it was not clear that such inclusions “advance your stated goals of furthering the academic body of knowledge regarding security technologies or any other cause, other than facilitating the use of your results by others seeking to circumvent the legitimate use of these technologies for copyright protection purposes.” Felten was encouraged to reconsider publication and to discuss opportunities in which individual objectives could be achieved without compromising academic value. EFF Complaint, at paragraph 41.

8. The RIAA is a trade association comprised of a membership that creates, manufactures and distributes approximately 90 percent of all legitimate sound recordings produced and sold in the United States.

9. According the complaint, Verance proposed more than 25 changes to the paper and Felten was informed that the paper could not be presented at the conference without written agreement by all parties concerned, before ultimately concluding that the paper could be presented. Felten claims that the paper was withdrawn because of fear of having to defend a lawsuit. The paper was later accepted at the UNISEX Symposium.

10. Felten, represented by the Electronic Frontier Foundation, named the SDMI, Verance and Attorney General John Ashcroft, in his official capacity.

11. *See* EFF Complaint, at paragraph 69.

12. *Id.* at paragraph 68.

13. The RIAA claimed that there was no adversity of interests with respect to the papers because they expressly consented to the publication of the Felten papers and thus a decision by the court would have no effect on the plaintiff’s rights. The RIAA also asserted that the plaintiffs did not have standing because there was no remote threat of a lawsuit and the court should not invalidate an act of Congress in response to hypothetical, future concerns.

14. *See* Scarlett Pruitt, *Courts Side With Copyright Holders In DMCA Battles* (Nov. 30, 2001), at <http://www.cnn.com/2001/TECH/industry/11/30/dmca.appeal.idg/index.html>

15. *See Judge Denies Scientists’ Free Speech Rights: EFF Argues Digital Music Case* (Nov. 28, 2001), www.eff.org/effector/HTML/effect14.37.html

16. This comment will not examine the standing issues raised by the parties and will only focus on the validity of the First Amendment challenge to the DMCA.

17. “Encryption Research” is defined as “activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products; “Encryption technology” means “the scrambling and descrambling of information using mathematical formulas or algorithms.” 17 U.S.C. § 1201

18. Other factors for consideration include “whether the person is engaged in a legitimate course of study, is employed or is appropriately trained or experienced, in the field of encryption technology; and whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research. A person will also not violate the DMCA if the person develops and employs technological means to circumvent a technological measure for the purpose of good faith encryption research and that person provides the technological measures to another person with whom he or she is working collaboratively...” 17 U.S.C. § 1201(g)(3)(A), (B), (C).

19. The EFF raised several First Amendment cases to support its position, but for the sake of brevity, this article examines the *Reno* decision as the guiding precedent for First Amendment analysis of content regulated free speech.

20. 521 U.S. 844 (1997)

21. The Communications Decency Act, 47 U.S.C.S. § 223, prohibited the “knowing transmission of obscene or indecent messages to any recipient under 18 years of age,” and “the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.”

22. *Id.* at 871, 875. Though the court recognized the government’s interest in protecting minors from harmful material, it held that the “purpose of protecting children from sexually explicit material does not foreclose inquiry into its validity,” and rejected the argument that it should defer to congressional judgment that a total ban was most effective. *Id.* at 875.

23. *See Universal City Studios v. Reimerdes*, 82 F. Supp 2d. 211 (S.D.N.Y. 2000)

24. The proposed solution does not examine congressional amendment of the language of the DMCA for two reasons: (1) the process of congressional amendment is often lengthy in comparison to the speed of digital piracy and the relative ease of stealing copyrighted works, thus it is not the most feasible solution at this time; and (2) the author has chosen to propose a solution that deals with the current DMCA because the Felten litigation — and subsequent challenges — may be resolved under the current statutory construction.

25. *See* Pruitt at note 14.

Old friends: ASCAP and DOJ Reach a New Consent Decree

BY MICHAEL A. EINHORN

On June 11, 2001, the Southern District Court of New York approved a joint motion by the U.S. Department of Justice and ASCAP to enter a Second Amended Final Judgment (AFJ2)¹ that vacates previous judgments (AFJ1)² established in 1941 and 1950.

The new consent decree expands and clarifies ASCAP's obligation to offer genuine license alternatives in addition to its basic blanket service. In addition, the decree modifies or eliminates restrictions that now govern royalty payments and relations among songwriter and publisher members of ASCAP. The department's underlying rationale is available in a memorandum posted on its Web site.³

The new decree is generally a competitive improvement over its predecessor. With regard to licensing, rules are tightened in a manner that makes ASCAP's program license more competitive with its "all or nothing" blanket license; broadcasters and other users will now have more economic ability to substitute out of the blanket contract. That could save shareholders in the broadcast industry considerable amounts.

With regard to writer payments, market adjustments and joint collective bargaining between writer groups and licensees will replace government rule making as a means of valuing the relative worth of different types of music. Here the decree may be too optimistic in its assessment of the health of competition in the market for performing rights and its ability to restore market-based compensation for all writers.

License reform

The key area of competitive concern for the Justice Department (DOJ) in its relationship with both ASCAP and BMI has been the design of *blanket licenses* that convey to a music user the right to perform, without limit, all catalogued works that are registered with the performing rights organization (PRO) for the duration of a license contract.

Blanket fees for a licensee can be based on its revenues, size or some measure of usage capacity, but do not vary with its actual music usage during the contract. If offered alone, blanket licenses would compel users to make "all or nothing" choices between a full-size license or having nothing at all. If

unchecked, a blanket license of this nature would present market power to the seller and confine smaller users to "tie-ins" of unwanted material.

By earlier consent decrees, ASCAP and BMI must permit members to make alternative arrangements directly with users; consequently, local stations now use other means of "clearing" music for radio and television use without having to go to the PRO. *Direct licensing* entails contracts between broadcast stations and writers of individual musical works, such as introductory themes for local news and talk

Blanket licenses could compel users to make all-or-nothing choices.

shows. *Source licensing* entails writer/publisher deals with program producers, who hire music to produce soundtracks that are conveyed with the program to station buyers.

ASCAP itself must offer two other licenses besides the blanket contract. *Program licenses* confer full usage rights for all catalog music that is used during the presentation of specified programs or day parts. *Commercial "mini-blanket" licenses* confer rights to off-program ambient and incidental uses of music, including commercials.

A broadcast licensee now chooses its most preferred licensing system by comparing blanket fees with its best combination of the direct, source, program and commercial license elements. The choice is evidently affected by ASCAP's relative fees for the program, commercial and blanket alternatives that are now under its domain.

According to Sections VII and VIII of AFJ1 (1950), ASCAP is obliged to offer nonblanket arrangements that present a "genuine choice" to the blanket. To this end, a main objective of AFJ2 is "to ensure that

a *substantial number of users* within a similarly situated group will have an opportunity to substitute away from the blanket.” (Memorandum, III (F)). As enacted, the new decree will be in marked contrast to previous rate court policy, which designed alternative contracts purposely to limit migration from the blanket license.

Parts VII and VIII of AFJ2 modify existing rules for program licenses. While Subpart VII (A) (1) reestablishes ASCAP’s obligation to offer program licenses to broadcasters, Subpart VII (A) (2) obliges ASCAP additionally to offer *segment licenses* to background/foreground music services and online music users.

The purpose of segment licensing is to enable users who lack formal program structure to have access to other forms of competitive licensing. (Memorandum, III (E)). Accordingly, AFJ2 would allow ASCAP’s arbitrating rate court magistrate great flexibility in the design of the segment alternative. (Memorandum, III (E)).

Part VIII of AFJ2 governs the relationship between

The reform is a substantial competitive improvement.

program and blanket fees. Music licensees are to be categorized in groups of similarly situated customers with a designated *representative user*, which is an actual or hypothetical licensee whose frequency and usage intensity are typical of the entire group (AFJ2, II (P)). The total expected payment for a necessary slate of ASCAP-program licenses to this representative user should approximate the corresponding blanket fee that ASCAP charges. Per Section VIII (B), “it shall be assumed ... that all of the music user’s programs or segments that contain performances of ASCAP music are subject to an ASCAP fee.”

The meaning of the last sentence is as follows. Suppose that 50 percent of a representative station’s programs use *any* music written by an ASCAP composer (called “ASCAP music”) *regardless* of how it is eventually licensed. This would translate to an allowed program-to-blanket multiple of 2 ($2 = 1/.5$). In the standard percentage-of-revenue arrangement, any licensee in the station group may then pay to ASCAP a blanket fee of (hypothetically) 1 percent of its adjusted total ad revenues or a program fee of 2

percent of ad revenues for those individual shows produced with music that is actually licensed from ASCAP.

If ASCAP were able to license each of these music-bearing programs, blanket and program fees would evidently be identical. However, if a station is able to migrate all music on a program to direct or source options, payments due to ASCAP for the particular show would be eliminated.

The reform is a substantial competitive improvement on earlier practices, which deployed a program multiple based on the fraction of station programs that finally chose an ASCAP program license. Readers interested in the technical differences and its consequences are referred to a companion piece on music performing rights available from this author and in the *Columbia Journal for Law and the Arts*.

Another possible gain for the broadcast user appears in the design of a “mini-blanket” to cover off-program (that is, ambient and incidental) uses that are not now covered in source, direct and program license contracts that deal only with music in the program.

Before AFJ2, ASCAP offered a “mini-blanket” for off-program uses that was based on a percentage of total station-adjusted advertising revenue. This addition made the program option less attractive compared with the blanket arrangement, which did not affix any additional fee for off-program uses.

The essential “genuine choice” is better preserved in Section VII (A) (1) of AFJ2, which permits to each program licensee a full offsetting dollar allowance for any fees paid for the “mini-blanket” license for ambient and incidental uses. (Memorandum, III (F)).

Other licensing matters

Two other matters regarding licensing in AFJ2 are interesting.

“Through to the Audience”: Under Section V of AFJ2, ASCAP must offer to each requesting user a “through to the audience” license that automatically conveys performance rights to secondary users. Primary licensees, who control decisions regarding the use and licensing of musical content, can then convey any negotiated cost savings to downstream users who need not carry any supplemental licenses to perform the works.

First Time Rules: Under Section IX (C), ASCAP may not use license fees negotiated during the first five years with a new party as a later benchmark for subsequent fees that it may seek. New music users are perceived here as fragmented, inexperienced, lacking in resources and unduly willing to acquiesce to ASCAP’s early proposals.

Writer relations

As a second modification to the historic consent decrees, Section XI of AFJ2 dispenses with earlier rules that had prescribed allocation factors for dividing ASCAP's pool of collected royalties among alternative uses of music (theme, feature, background or commercial), as well as rules for voting, performance surveys and dispute resolution. These rules were established in 1960 to protect theme, soundtrack and commercial writers who felt that feature songwriters on the ASCAP member board discriminated against them.

This protection is no more. Under Section XI (B) (1), ASCAP may now distribute, without DOJ oversight, collected royalty monies to writers and publishers based on its own assessment of their relative worth in contributing value to its catalog. However, ASCAP's chosen weighting method must be consistently applied and made public.

For dissatisfied members, Section XI (B) (3) now allows withdrawal of all catalogued works from ASCAP at the end of any calendar year. Furthermore, under Section IV (B), ASCAP may not interfere with a member's right to license compositions to a particular user (or group) collectively through any agent — other than another PRO — that can negotiate and contract on behalf of a number of writers and publishers. This reform now permits independent joint bargaining and may enable dissatisfied writers to flex some negotiating muscle by banding from time to time into "virtual PROs" for a particular license application.

Regarding prerecorded tracks that appear in music libraries, the department and the district court both rejected arguments by the Production Music Association and its expert economist that opposed the liberalization of Section XI (B) (1). The department here is perhaps content with believing that the bargaining provisions of Section IV (B), as well as the competition between the PROs, are sufficient to provide a competitive market place. This matter is discussed below.

Competition in performing rights

If the decree can be faulted, it seems too secure that competition among the collecting societies is healthy because ASCAP has lost considerable market share to BMI and SESAC since 1960 (Memorandum, III (I)). Presumably, the forces of competition can now be relied on to bring about greater efficiency in licensing and administration.

The department must be more cautious before making assertions about the overall health of competition in this market. It is not now possible to purchase the performance rights to more than a handful

of songs from more than one PRO. Consequently, any prospective licensee must generally sign contracts with all three PROs, which can use each other's rates as negotiation benchmarks to raise their own.

Furthermore, competition for writers and publishers is limited. If a writer were to move to or from, such as ASCAP, the organization would not need to adjust any contract fee to reflect the change in the size of its catalog. Consequently, if a new writer joins, royalties can be paid only by reducing payouts to others (but for some possible limited reductions in employee compensation and overhead). Furthermore, if a writer leaves, ASCAP would have more

Dissatisfied writers may have more negotiating muscle.

free cash to attract other migrants. The market in the short run is basically set up for a game of rotating membership.

Presumably, ASCAP can earn more at its next major negotiation if it can attract particular talent, such as a "hot writer" or genre that adds "prestige" to its catalog. This too is arguable. Any licensing dispute that lasts 60 days can go before a rate court, where "prestige" is neither measurable nor translatable into any financial consequence.

Furthermore, many "prestigious" writers in one format (such as Paul McCartney) would be of little importance to a large number of radio stations (such as, country) that participate in all-industry negotiations to obtain a group-based rate.

Finally, the two independent rate courts of ASCAP and BMI have established no unambiguous measure or index of market share that should be binding on the licensees of ASCAP and BMI.

The department contends that BMI and SESAC successfully competed against ASCAP in 1960-1994, as ASCAP's market share decreased from 85 to nearly 50 percent (Memorandum, III (I)). In fact, this gain occurred when ASCAP was effectively fee regulated, while BMI had never appeared before a rate court. Additionally, ASCAP maintained an outdated four-pool system that siphoned off a share of revenues to pay off legacy writers of historic catalog.

ASCAP's weakened years are now history. With newly competitive ASCAP management and an acti-

vated BMI rate court, ASCAP and BMI now pay only for music usage in the current reporting period and both societies are more symmetrically regulated. The two are now basically balanced and will remain so indefinitely, unless fees in each can be tied directly to one defined measure of market share. Until that time, neither organization can surpass a rough market equality or face the threat of losing it.

The third society, SESAC — which now licenses a small 3 percent of American songs — may make some future inroads in the market as long as it can continue to evade rate court arbitration by virtue of its small size. However, this growth is more the result of administrative asymmetry rather than superior market performance. “Cream skimming” from ASCAP

ASCAP's weakened years are now history.

and BMI may benefit particular individuals in SESAC, but does not reflect real improvements in market efficiency.

If reasonable adjustments and vigorous competition cannot be established in performing rights, we can reasonably consider the purpose of having three performing rights organizations. Licensees would surely benefit from the transactional efficiency of negotiating all deals with one performing society, which now prevails in all other countries except Brazil.

Writers and publishers would also benefit considerably from scale economies in litigation, administration and “marketing” costs that one organization may achieve. Based on Web site data for the year 2002, ASCAP retains roughly 14 cents for every dollar paid out to writers and publishers; BMI no longer lists its payout.⁴ Unit costs might reasonably be halved were the societies restructured into one institution.

Recognizing the potential for digital transmissions to be monitored directly without need for the transactional economies of a blanket license, the department's accompanying memorandum (footnote 10) states:

The department is continuing to investigate the extent to which the growth of [digital] technologies warrants additional changes to the antitrust decrees against ASCAP and BMI, including the possibility that the PROs should

be *prohibited* from collectively licensing certain types of users of performances. (*emphasis added*)

The point can be considered. Transactional economies would be possible if Sound Exchange (or Music Reports Inc.) were empowered to administer performance rights for both sound recordings and their underlying musical compositions. Alternatively, the Harry Fox Agency, which now administers the mechanical rights for digital reproductions of musical compositions, can administer download and streaming rights (which now statutorily qualify as “performances”).

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Endnotes

1. U.S. Department of Justice, Antitrust Division, Second Amended Final Judgment, at <http://www.usdoj.gov/atr/cases/f63000/6395.html> (visited May 5, 2001)
2. *U.S. v. ASCAP, et al.*, 1941 Trade Cases, 56, 104 (S.D.N.Y. 1941); *U.S. v. ASCAP*, 1950-51 CCH Trade Cases, 62, 595 (S.D.N.Y. 1950)
3. U.S. Department of Justice, Antitrust Division, Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, at <http://www.usdoj.gov/atr/cases/f63000/6396.html> (visited Dec. 20, 2000)
4. At http://www.ascap.com/press/financial_020502.html (visited Feb. 26, 2002); historic BMI numbers of 18 cents were at <http://www.bmi.com/iama/media/faq/money.asp> (visited May 1, 2000; link no longer active)

The Supreme Court Decides the Case, But Not the Arguments: What is the Impact of *PGA Tour v. Casey Martin*?

BY JOHN T. WOLOHAN

Some people are calling Casey Martin's victory over the PGA Tour a landmark decision for the disabled because it is the first time the Americans with Disabilities Act¹ (ADA) has been used successfully by a professional athlete. Other commentators are calling the Supreme Court's decision in *Martin* a hollow victory, claiming that the decision is so narrowly tailored to the *Martin* case, that it will have limited effect outside professional golf.

The purpose of this paper, therefore, is to examine the potential effect of the *Martin* decision on other professional and amateur sports. The paper begins with a brief review of the facts of the case. Next, it will discuss both the majority and dissenting opinions. While only two members of the Supreme Court dissented from the decision, the dissenting opinion is included because of a number of issues it raised. Finally, without commenting on whether the Supreme Court's decision was correct or not, the paper concludes by outlining some areas where the *Martin* decision has the potential to have the greatest impact.

Casey Martin suffers from Klippel-Trenaunay-Weber Syndrome, a rare degenerative circulatory disorder that has atrophied his right leg so that it is only about half the size of his left leg. The reason for the atrophy is because Martin's leg does not have the vein that runs along the bone in his lower leg. The blood returning to his heart, therefore, goes through a jumble of veins near the surface of his leg and when stressed, the veins bleed into his knee causing pain and damage to the knee.² His disorder constitutes a disability under the ADA.

Martin is also a professional golfer,³ who in 1997 sought entry onto the PGA Tour. While there are various ways of gaining entry onto the tour, the most common means of earning playing privileges in that tour or the Buy.Com Tour (which in 1997 was named the Nike Tour) is by participating in a three-stage qualifying tournament known as the "Q-School." After qualifying for the third stage of Q-School, Martin requested permission, supported by detailed medical records, to use a golf cart.

Because of the progressive nature of his disability, it is difficult and dangerous for Martin to walk an 18-hole golf course without aid. Walking not only causes him pain, fatigue and anxiety, but also creates a significant risk of hemorrhaging, developing blood clots and fracturing his tibia so badly that an amputation might be required.⁴ When the PGA refused to waive the "walking only" rule, Martin filed a lawsuit under Title III of the ADA.

Americans with Disabilities Act

The purpose of the ADA, which was passed by Congress in 1990, is to send a "clear and comprehensive national mandate" to eliminate discrimination against disabled individuals and to integrate them "into the economic and social mainstream of American life."⁵ To accomplish this goal, the ADA was codified into five titles covering major areas of public life, among them employment (Title I), public

The act sought to integrate the disabled into public accommodations.

services (Title II), public accommodations (Title III), telecommunications (Title IV) and miscellaneous provisions (Title V).

Martin filed his lawsuit under Title III, which covers discrimination by places of public accommodation, instead of Title I, because he is not an employee of the PGA Tour. The courts concluded that he was an independent contractor of the PGA and therefore not covered under Title I.

Title III states that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of

any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation.⁶

In addition, Title III requires an entity operating “public accommodations” to make “reasonable modifications” in its policies, practices or procedures, when such modifications are necessary to accommodate individuals with disabilities.

The language and legislative history of the ADA makes it clear that a “golf course or other place of exercise or recreation” is a place of public accommodations. The only exception to this requirement is when the organization can demonstrate that making such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations.⁷

Casey Martin v. PGA Tour

The PGA argued that allowing Martin to use a golf cart in the PGA and Nike Tour competitions and in any qualifying rounds for those tours, would “fundamentally alter” the nature of those tournaments. In finding for Martin, the district court ruled that the purpose of the walking rule was to inject fatigue into the skill of shot making. However, even with the use of a cart, the district court determined that Martin suffers “undeniably greater” fatigue from coping with

Martin’s fatigue from his disability was bad enough, the court ruled.

his disability than the fatigue his able-bodied competitors endure from walking the course.⁸ As a result, the district court concluded that modifying the walking rule for Martin was a reasonable accommodation that would not fundamentally alter the nature of PGA golf tournaments.⁹

In affirming the district court findings, the Ninth Circuit Court of Appeals concluded that golf courses, including play areas, are places of public accommodation during professional tournaments and that permitting Martin to use a cart would not “fundamentally alter” the nature of those tournaments.¹⁰

U.S. Supreme Court decision

On appeal to the U.S. Supreme Court, the PGA raised three main issues. First, it argued that Martin was not a member of the class protected by Title III of the ADA. Title III, the PGA argued, is concerned

with discrimination against “clients and customers” seeking to obtain “goods and services” at places of public accommodation. Martin is neither a client nor customer.

Like an actor in a theater production, Martin, as a professional golfer, is a provider rather than a consumer of the entertainment that petitioner sells to the public.¹¹ Martin therefore cannot bring a claim under Title III because he is not one of the “clients or customers of the covered public accommodation.” Martin’s claim of discrimination, the PGA contended, was “job-related” and therefore could only be brought under Title I. However, since Martin is an independent contractor, not an employee, Title I does not apply either.

In rejecting the PGA’s argument, the Supreme Court found it entirely appropriate to classify the golfers who pay the PGA \$3,000 for the chance to compete in the Q-School and, if successful, in the subsequent tour events, as a client or customer of the PGA. In the Supreme Court’s opinion, PGA tournaments simultaneously offer at least two “privileges” to the public; that of watching the golf competition and that of competing in it.¹²

The second argument raised by the PGA was that even if it is subject to Title III, its walking-only rule is an essential rule of the sport. The rule is essential because it is “outcome-affecting” and waiving it for one contestant would create an unfair advantage for that contestant, thereby fundamentally altering the nature of PGA golf tournaments. “The goal of ... competitive athletics, the PGA argued, is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules.”¹³

In rejecting this argument, the Supreme Court observed that the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has always been shot making. In fact, the Supreme Court noted, there is nothing in the Rules of Golf that either forbids the use of carts or penalizes a player for using a cart. The court also noted that the handicap system used by golfers does not consider whether a player walks, rides in a cart, uses a caddy or carries his or her own clubs. Thus, the walking rule is at best peripheral and may be waived in individual cases without working a fundamental alteration.

As for the argument that the purpose of the walking rule is to inject fatigue into the skill of shot-making, the Supreme Court held that even if the rule serves that purpose, the district court found that Martin, who must walk more than a mile during an 18-hole round, “easily endures greater fatigue even

with a cart than his able-bodied competitors do by walking.”¹⁴ The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart.

A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to “fundamentally alter” the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in PGA tournaments. As a result, Martin’s request for a waiver of the walking rule should have been granted.

As for the argument that all golfers need to play under the same conditions, the Supreme Court found that it is impossible for the PGA to guarantee that all competitors will play under exactly the same conditions or that an individual’s ability will be the sole determinant of the outcome. For example, the Supreme Court noted, changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. Or, a lucky bounce may save a shot or two. As a result, the Supreme Court concluded Martin’s use of a cart was reasonable and would not fundamentally alter the nature of PGA tournaments.

The third argument raised by the PGA was that if Martin were to succeed, it would place an unreasonable administrative burden on the organization. The PGA argued that the decision would unreasonably increase the number of appeals it faced and unfairly opens the organization to increased lawsuits. In particular, the PGA argued that the decision would put the PGA into the unfair position of trying to determine which disabilities were serious enough to ride a cart and which disabilities were not.

In rejecting this argument, the Supreme Court held that the PGA’s legal position was fatally flawed because the ADA, by its very nature, imposes some administrative burdens on the operators of places of public accommodation.¹⁵ So, even if fatigue adversely affected performance and the walking rule is “outcome affecting,” the Supreme Court held that the PGA’s refusal to consider Martin’s personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA.

Congress, the Supreme Court held, intended organizations like the PGA to not only give individualized attention to any requests that it might receive, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.¹⁶ Therefore, in order to comply with the ADA, the Supreme Court concluded that organizations must make an individualized inquiry into each request.

Justice Scalia’s dissent

The dissent, by Justice Scalia, complained that the Supreme Court was overstepping its power and that its decision in *Martin* “was an exercise in benevolent compassion that the law does not place within our power to impose.”¹⁷ In making his point, Justice Scalia rejected the majority’s decision that Martin was a “customer” of the PGA Tour or of the golf courses on which it is played and therefore covered under Title III.

Professional golfers, Justice Scalia argued, are no more “enjoying” the entertainment that the tour provides or the facilities of the golf courses on which it is held, than professional baseball players “enjoy” the baseball games in which they play or the facilities of Yankee Stadium. Professional athletes, who participate in the games and use the stadiums and courses, are the entertainment that the customers pay to watch.¹⁸

Next, Justice Scalia argued that even if Martin were a consumer, there is no basis for the PGA to

Scalia, in dissent, said the athletes are the entertainment.

alter its rules of competition. Scalia claimed it is irrelevant whether walking is essential to the game of golf or not because the PGA has the right to set any rules it wishes. The ADA only requires that the PGA Tour not deny Martin access to the game because of his disability. It does not require the PGA to provide him a game different (whether in its essentials or in its details) from that offered to everyone else.¹⁹

As to whether modification of the walking-only rule would “fundamentally alter the nature” of the PGA Tour, Justice Scalia stated that “either out of humility or out of self-respect, the court should decline to answer this incredibly difficult and incredibly silly question.”²⁰ To say that something is “essential” is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement, it is quite impossible to say that any of a game’s arbitrary rules are “essential.”

Eighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields —

all are arbitrary and none is essential. It is almost impossible to say that any of a game's rules are "essential."²¹ They are entirely arbitrary and there is no basis on which anyone, not even the Supreme Court of the United States, can pronounce one or another of them to be "nonessential" if the rulemaker (such as the PGA) deems it to be essential.

Finally, Justice Scalia found that the ADA provides no basis for individualized analysis. The statute only seeks to assure that a disabled person's disability will not deny him or her equal access to (among other things) competitive sporting events — not that the disability will not deny an equal chance to win competitive sporting events.

Potential impact of the case

Even though the Supreme Court has reached a decision in the case, there is still a lot of debate about the potential impact the case might have on

The case may have a bigger impact than the Supreme Court intended.

professional and amateur sports. The following are just some of the areas where the case might have a bigger effect than the court intended.

Professional golf — In the world of golf, the consequences of the decision are already being felt. On June 4, 2001, the Supreme Court followed up its decision in *Martin* by remanding *Olinger v. United States Golf Association* (USGA) back to the Seventh Circuit Court.²² In that case, which was factually similar to *Martin*, Ford Olinger — a highly skilled golfer who suffers from a degenerative hip condition that significantly impairs his ability to walk — sought a waiver of the USGA's walking-only rule for the United States Open. When the USGA refused his request, Olinger sued the USGA.²³

Unlike *Martin*, however, both the district court and the Seventh Circuit Court upheld the USGA's walking-only rule. In reaching its decision, the Seventh Circuit concluded that even assuming that the competitive part of the golf course is a place of public accommodation, any alteration to the rules that could give a competitor even a single shot advantage would fundamentally alter the event.

In trying to demonstrate the importance of even a single shot in a golf tournament, the circuit court pointed to the fact that in 30 of the 99 U.S. Opens played since 1895, the tournament required a playoff at the end to determine the national champion.²⁴ In addition, the Seventh Circuit also concluded that the ADA does not require the USGA to bear "the administrative burdens of evaluating requests to waive the walking rule and permit the use of a golf cart."²⁵

On receiving the case back from the Supreme Court, the Seventh Circuit asked the parties pursuant to Circuit Rule 54 to file a joint statement regarding what action should be taken in light of the Supreme Court's decision in *PGA Tour v. Martin*.²⁶ The USGA is now reviewing all requests for carts on a case-by-case basis.

In addition to the Supreme Court's handling of *Olinger*, the PGA, USGA and LPGA (Ladies Professional Golf Association) recently announced that they will work together to make golf and golf courses more accessible.

High school and college athletics — Another area where this decision could have a large impact is high school and college athletics. Federal courts throughout the country have applied the ADA unevenly in a number of cases where athletes with disabilities have challenged state high school athletic association and NCAA eligibility requirements. For example, federal courts in Connecticut, Colorado and Florida have ruled that waiving an eligibility rule to allow athletes with disabilities to play high school sports would not fundamentally alter high school athletics.

Federal courts in Michigan, Missouri and New York have upheld eligibility rules as essential elements and ruled that waiving them would fundamentally alter the nature of high school athletics. In those jurisdictions where the courts have refused to waive the requirements, the courts have ruled that it would be an undue burden on high school athletic associations to evaluate each request individually.²⁷

With the Supreme Court's holding in *Martin*, athletic associations will no longer be able to refuse to waive eligibility rules simply by claiming that individualized reviews would cause an undue burden on the organization. The Supreme Court's holding makes it clear that the ADA not only requires every organization to give individualized attention to any requests that it might receive, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.

Judicial involvement in sport

The *Martin* decision could also have a significant effect on judicial involvement in sport. As Justice

Scalia stated in his dissent, “rules are the rules” and it is not the job of the court to determine which of a game’s rules are essential and which are nonessential. As far as Justice Scalia is concerned, every one of a game’s rules is entirely arbitrary and there is no basis for anyone, not even the Supreme Court of the United States, to pronounce them “nonessential” if the rulemaker (such as the PGA) deems it to be essential.²⁸

The Supreme Court’s decision in *Martin* will probably not open the door for someone to challenge the height of basketball hoops or the length of baselines in baseball, which Justice Scalia claims are all arbitrary and not essential. However, the Supreme Court’s decision could open the door to challenges of other less fixed rules. That is the hard part for administrators and lawyers, however, since the PGA believed that its walking-only rule was as fixed and essential as 10-foot-high baskets are in bas-

Will the *Martin* decision
open a floodgate of litigation?

ketball. While only time will tell if the *Martin* decision opens a floodgate of litigation over league and game rules, it would be in the best interest of all parties, the courts and sports organizations, if the gates were kept locked.

Increased access to sports

Finally, perhaps the biggest impact the decision is going to have on sports, both professional and amateur, is the increased awareness the public sports administrators now have concerning the ADA. The *Martin* case generated front-page coverage on every newspaper across the country. This increased level of awareness will almost certainly translate into other athletes with disabilities using the ADA to challenge league and organizational rules. As organizations face more and more challenges, they are going to have to find ways to accommodate more and individuals with disabilities.

Competing in professional sports, whether it is golf or any other sport, is extremely difficult and requires a lot of training and skill. It is rare to see an athlete like Casey Martin, who has a disability, com-

pete at the highest level of competition. Therefore, in the end, it is likely that the biggest effect of the *Martin* case will be on amateur sports, where equal access to competing, not winning, is usually the only thing that matters.

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Endnotes

1. Americans with Disabilities Act of 1990, 104 Stat. 328, 42 U.S.C. § 12101 et seq
2. *PGA Tour v. Martin*, 532 U.S. 661; 121 S.Ct. 1879; 149 L. Ed. 2d 904; 2001 U.S. LEXIS 4115; 69 U.S.L.W. 4367 (2001).
3. Casey Martin played on the Nike Tour in 1998 and 1999 and based on his 1999 performance, qualified for the PGA TOUR in 2000. He is currently playing on the Buy.Com Tour (which used to be the Nike Tour).
4. *PGA Tour v. Martin*, 532 U.S. 661 (2001).
5. *Id.*, citing S. Rep. No. 101-116, p. 20 (1989); H. R. Rep. No. 101-485, pt. 2, p. 50 (1990).
6. 42 U.S.C. § 12182(a).
7. 42 U.S.C. § 12182(b)(2)(A)(ii).
8. *Martin v. PGA Tour*, 994 F. Supp. 1242 (D. Or. 1998).
9. *Id.*
10. *Martin v. PGA Tour*, 204 F.3d 994 (2000).
11. *PGA Tour v. Martin*, 532 U.S. 661 (2001).
12. *Id.*
13. *Id.*
14. *Martin v. PGA Tour*, 994 F. Supp. 1242, 1252 (D. Or. 1998).
15. *PGA Tour v. Martin*, 532 U.S. 661 (2001).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Olinger v. United States Golf Association (USGA)*, 121 S.Ct. 2212; 150 L.Ed.2d 207 (2001).
23. *Olinger v. United States Golf Association (USGA)*, 205 F.3d 1001 (7th. Cir. 2000).
24. *Id.*, at 1006.
25. *Id.*, at 1007.
26. *Olinger v. United States Golf Association (USGA)*, 2001 U.S. App. Lexis 20379.
27. *Sandison v. Michigan High School Athletic Association*, 64 F.3d 1026, 1035 (6th Cir. 1995)
28. *PGA Tour v. Martin*, 532 U.S. 661 (2001).

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The Uncommon Origins of 'The Common Law Origins of the Infield Fly Rule'

BY ROBERT M. JARVIS AND PHYLLIS COLEMAN

In its June 1975 issue, the *University of Pennsylvania Law Review* published an anonymous student note (actually, an "Aside") entitled "The Common Law Origins of the Infield Fly Rule."¹ Over the years, this brilliant parody has been hailed as a classic,² praised for its erudition,³ listed as a personal favorite,⁴ used to teach undergraduates about the judicial system,⁵ and credited with launching an entire genre of legal writing.⁶ Curiously, however, the story of who wrote the Aside and the struggle to get it published has not been told.

The Aside recalled

Those who have never read the Aside have had an incomplete education. Remarkably short,⁷ it opens by observing, "The Infield Fly Rule is neither a rule of law nor one of equity; it is a rule of baseball."⁸ Several sentences later, the author explains, "The purpose of the Aside is . . . to examine whether the same types of forces that shaped the development of the common law also generated the Infield Fly Rule."⁹

Did the same forces that shaped the rule also shape common law?

As baseball fans know, the Infield Fly Rule is triggered when a batter hits an infield fly ball and there are men on first and second (or first, second and third) and fewer than two outs. In the absence of the rule, a fielder might be tempted to drop the ball, thereby increasing the chances of turning a double play. The Infield Fly Rule eliminates this possibility by deeming the ball to have been caught.¹⁰

The importance of the Infield Fly Rule has been explained as follows:

Prior to the enactment of this rule, base runners would be given a Hobson's choice that was dependent on the actions of an infielder. If they were to

run and the ball were caught, they could easily be tagged out for having left the base before the catch; if they were to stay on the base and the ball were intentionally dropped, they would have to run and thereby be forced out at the next base. Thus, a devious infielder could start a rally-killing double play by simply intentionally allowing an easy pop fly to drop. This situation gave the defense "an advantage that it did not deserve and that the offense could not have prevented."¹¹

The need for the Infield Fly Rule first surfaced during a game in Baltimore on May 23, 1893. With the Orioles at bat and a man on first, New York Giants shortstop Monte Ward intentionally mishandled a pop fly and thereby doubled up the runner.¹²

In response to Ward's clever ploy, the owners adopted the "trap ball" rule at their Winter 1894 meetings.¹³ As a result, the batter was to be called out if he hit a ball that could be caught by an infielder and there was a runner at first base and one out.¹⁴ This still did not fully set things right:

First, although the rule declared the batter out, there was no way to know that the rule was in effect for a particular play. The umpire was not required to make his decision until after the play and, consequently, unnecessary disputes ensued.

Second, it became apparent that the feared unjust double play was not one involving the batter and one runner, but one that, when two men were on base, would see two baserunners declared out. The 1895 league meeting ironed out these difficulties through changes in the rules.

The third problem with the trap ball rule of 1894, one not perceived until later, was that it applied only when one man was out. The danger of an unfair double play, however, also exists when there are no men out. This situation was corrected in 1901 and the rule has remained relatively unchanged since that time.¹⁵

With the foregoing out of the way, the Aside reaches its central point: "The Infield Fly Rule, then, emerged from the interplay of four factors, each of which closely resembles a major force in the development of the common law."¹⁶ These four factors are: 1) a sense of fair play; 2) a formal code of rules that ensures proper conduct; 3) the ability of an umpire (or judge) to do equity as circumstances require; and, 4) the piecemeal approach that rules committees take to problems.¹⁷

The Aside concludes by praising the deliberateness that marked the development of the Infield Fly Rule and that distinguishes the common law from other systems:

The dynamics of the common law and the development of one of the most important technical rules of baseball, although on the surface completely different in outlook and philosophy, share significant elements. Both have been essentially conservative, changing only to the extent necessary to remove the need for further change. Although problems are solved very slowly when this attitude prevails, the solutions that are adopted do not create many difficulties. If the process reaps few rewards, it also runs few risks.¹⁸

The Aside's legacy

Not surprisingly, the Aside quickly proved a hit. In 1976, the Fifth Circuit cited it in *Kessler v. Pennsylvania National Mutual Insurance Co.*,¹⁹ a declaratory judgment action; in 1977, the Third Circuit found room for it in *Aluminum Co. of America v. Amerola Products Corp.*,²⁰ a patent infringement suit. Then in 1978, the Aside was republished as part of a sports law symposium in the *Journal of Contemporary Law*.²¹

Also appearing in the issue was an article by Professor John J. Flynn of the University of Utah. Described as a

Are the rule and common law both fashioned by common sense?

“Further Aside” and entitled, “A Comment on ‘The Common Law Origins of The Infield Fly Rule’,” Flynn “chided” the Aside for ignor[ing] the impact of economic analysis in the evolution of both the Infield Fly Rule and the common law. Psychological analysis is given short shrift; and the insights of sociology, anthropology, political “science” and statistical analysis are totally ignored.

One is left with the impression that both the Infield Fly Rule and common law were largely fashioned by common sense human reactions to reality; surely a disturbing conclusion to the followers of S. Freud, C.W. Mills, B.F. Skinner, A. Smith, H. Spencer, L. Keynes, J. Bentham, M. Freidman and countless other leaders of modern social “science.”²²

Since Flynn, a number of other authors have tried (with varying degrees of success) to emulate the Aside:

The legendary essay, “Aside: The Common Law Origins

of the Infield Fly Rule,” appeared in the *University of Pennsylvania Law Review* in 1975. A steady stream of law review articles followed, with titles like “Further Aside: A Comment on ‘The Common Law Origins of the Infield Fly Rule’,” “The Infield Fly Rule and the Internal Revenue Code: An Even Further Aside,” “Strict Constructionism and the Strike Zone and *In re Brett*: The Sticky Problem of Statutory Construction.”²³

Warier authors have been content to simply cite the Aside and references to it have turned up in discussions of such diverse subjects as bankruptcy,²⁴ constitutional law,²⁵ ethics,²⁶ evidence²⁷ and tax.²⁸ Because of its clever use of footnotes, it often appears in articles concerning legal scholarship.²⁹ And, of course, it has become a staple of “baseball and the law” pieces.³⁰

The Aside also has found its way into works having nothing to do with its subject matter. For example, one author lamented the fact that he could not fit a discussion of the Aside into his essay (thereby squeezing it in),³¹ while another added a “Cf.” solely as an excuse to cite the Aside.³²

The untold story of the Aside

So just who is responsible for the Aside? Although the answer has appeared in print three times, it has long been a mystery.

The Aside is the work of William S. Stevens, a 1975 graduate of the University of Pennsylvania Law School. A rabid baseball fan, Stevens had spent much of law school thinking “about creating a great multi-volume treatise, to be called, of course, *Doubleday on Baseball*.”³³ By the second semester of his third year, he had scaled back his ambitions but thought an article about the common law origins of the Infield Fly Rule might have some promise:

I had no intention of actually writing such a piece, but one evening, as I was leaving the law review office around 10:30 to meet some friends for beers, I mentioned the article to the editor-in-chief and the executive editor. I don't recall the precise words, but the gist of their response was: “You write it. We'll print it. Now get out of here so we can do some work.”³⁴

Thus encouraged, Stevens began writing and, with the help of M. Duncan Grant, the *Review's* editor-in-chief and Michael C. Kelcy, its executive editor, soon had a completed manuscript.³⁵ By now, however, a new editorial board had been installed and Nancy J. Bregstein, who had taken over as editor-in-chief, was less than excited about the prospect of publishing the Aside. Grant therefore had no choice but to confront her:

Will did almost all the writing of the piece. I did some editing that I thought at the time was mean-

ingful, contributed some work to the footnotes and made the most meaningful literary decision of my life, namely that we would publish the thing. It is true that I then had to fight with my successor editor-in-chief to ensure that it would be published, because she was normally in charge of the publication decision after the changeover in the board of editors on the first Monday in March 1975, but I persuaded her to do it against her judgment. The compromise that she and I reached was that the Aside would not be listed on the cover of that issue; something in her mind about Henry Friendly, who had an article in that issue, being offended to be coupled with an Aside on the cover of a law review. I didn't think Friendly would care, but since the covers are discarded anyway when the volume is bound, I didn't really care whether the Aside appeared on the cover. I just wanted it published.³⁶

As mentioned earlier, the Aside appeared in print without attribution.³⁷ Yet Stevens's identity became known almost immediately. In the October 1975 issue of the *ABA Journal*, readers of the "Current Legal Literature" column learned,

There is a new department in the *University of Pennsylvania Law Review* or it could be just an 'Aside' for the June issue. Whatever it is, this time it is about baseball: "The Common Law Origins of the Infield Fly Rule." Let all the Charley Finleys read it before they try to introduce more gimmicks to pick up business. . . ."

This clever piece appears in the June, 1975, *University of Pennsylvania Law Review*. The author is William S. Stevens of Short Hills, N.J., who, after graduation from Yale in 1970 and the law school of the University of Pennsylvania in 1975, is now an associate in a Philadelphia law firm. Baseball teams, take notice! He's a logical successor to Bowie Kuhn, himself a graduate of Princeton, Virginia Law School and a Wall Street law firm.³⁸

Several months later, Judge John R. Brown was drafting the Fifth Circuit's opinion in *Kessler*³⁹ and wanted to include the name of the Aside's author. Although the *ABA Journal* likely was within arm's reach, Brown "had his law clerk call the law review and demand the name of the author."⁴⁰

After these two early disclosures, subsequent cites to the Aside omitted any reference to Stevens. Then in 1999, Professor Roger S. Clark of Rutgers University "re-discovered" the Aside's creator, stating (without elaboration) in a footnote: "By skillful detective work, I have ascertained that the author was William S. Stevens."⁴¹

Was the Aside to be the highlight of the author's career?

Conclusion

Today, William Stevens works at the American Law Institute,⁴² just a few blocks from the offices of the *University of Pennsylvania Law Review*. When he is asked about the famous work he created three years ago, he responds good-naturedly:

It has given me far more than the 15 minutes of fame Andy Warhol said I should get. With recent flurries of interest in the piece, I am probably up to 21 minutes and 30 seconds. . . . My ego is simultaneously flattered by the attention and bruised by the notion that something I cranked out more than 25 years ago would prove to be the highlight of my professional and academic careers.⁴³

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Endnotes

1. Aside, "The Common Law Origins of the Infield Fly Rule," 123 *U. Pa. L. Rev.* 1474 (1975). The issue also contained a dedication to retiring Dean Bernard Wolfman (written by Professor Louis B. Schwartz), a speech Circuit Judge Henry J. Friendly delivered at the law school in April 1975 as the Owen J. Roberts Memorial Lecture, an article concerning Watergate and the Constitution (by Professor Louis H. Pollak), an article about parol evidence (by Professor John E. Murray Jr.), Two unsigned student comments (one on private rights of action and the other on the Freedom of Information Act) and a book review of Professor Joseph W. Bishop Jr.'s *Justice Under Fire: A Study of Military Law* (1974) (by Charles R. Bruton).

2. See, e.g., Spencer Weber Waller et al, *Baseball and the American Legal Mind* 3 (1995); Michael A. Heller, "The Cutting Edge of Poster Law," 49J. *Legal Educ.* 467, 467 n.2 (1999); Kenneth Lasson, "Scholarship Amok: Excesses in the Pursuit of Truth and Tenure," 103 *Harv. L. Rev.* 926, 940 n.71 (1990). See also Ronald J. Rychlak, "The Lighter Side of the Green Movement: The Three Stooges as Early Environmentalists," 48 *Okla. L. Rev.* 35, 36 n.6 (1995) (describing the Aside as "[p]erhaps the most famous humorous law review article" ever written).

3. See, e.g., In re Grand Jury Subpoena, Misc. No. 86-738, 1986 WL 13539, at *3 (D. Mass. Nov. 26, 1986); Russ Versteeg, "A Statutory Analysis of the 'Laws' of Little League Baseball (An Essay Urging Changes to the Little League Rules)," 9 *Marq.*

Sports L.J. 103, 119 n.78 (1998); Alice I. Youmans et al., "Questions and Answers," 83 *Law Libr. J.* 195, 197 n.10 (1991).

4. See, e.g., Donald Gjerdingen, "Law Review at 25, Editors at 50," 25 *Wm. Mitchell L. Rev.* 1177, 1183 n.2 (1999); Nancy Levit, "Listening to Tribal Legends: An Essay on Law and the Scientific Method," 58 *Fordham L. Rev.* 263, 263-64 n.3 (1989); Thomas E. Baker, "A Review of *Corpus Juris Humorous*," 24 *Tex. Tech. L. Rev.* 869, 889 n.125 (1993) (book review).

5. See Political Science 206 - Fall 2001 Syllabus, at <http://www.acad.carleton.edu/curricular/POSC/classes/Posc206/F01/> (last visited Dec. 1, 2001) (indicating that students in Professor Kimberly Smith's American Courts course at Carleton College are to read the Aside for "Class 6: Reasoning from Cases").

6. See Roger S. Clark, "Steven Spielberg's *Amistad* and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery," 30 *Rutgers L. J.* 371, 372 n.1 (1999) ("The whimsical genre was born in what may be the best law review piece ever written, Aside, 'The Common Law Origins of the Infield Fly Rule,' 123 *U. Pa. L. Rev.* 1474 (1975).").

7. The Aside runs just eight pages, including 48 elaborately documented footnotes.

8. "Aside," 123 *U. Pa. L. Rev.* at 1474 (footnotes omitted).

9. *Id.* at 1475 (footnotes omitted).

10. Paul Dickson, *The New Dickson Baseball Dictionary: A Cyclopedic Reference to More than 7,000 Words, Names, Phrases and Slang Expressions that Define the Game, Its Heritage, Culture and Variations*, 270 (1999).

11. *North County Contractor's Ass'n Inc. v. Touchstone Ins. Servs.*, 33 *Cal. Rptr. 2d* 166, 171 n.4 (Ct. App. 1994) (quoting "Aside").

12. "Aside," 123 *U. Pa. L. Rev.* at 1477. Following the end of his Hall of Fame career, Ward became a successful lawyer. Today, of course, he is remembered principally for his pioneering efforts to improve the working conditions of baseball players. See Bryan Di Salvatore, *A Clever Base-Ballist: The Life and Times of John Montgomery Ward (1999)* and David Stevens, *Baseball's Radical for All Seasons: A Biography of John Montgomery Ward* (1998).

13. "Aside," 123 *U. Pa. L. Rev.* at 1477-78.

14. *Id.*

15. *Id.* at 1478 (footnotes omitted).

16. *Id.*

17. *Id.* at 1478-80.

18. *Id.* at 1480-81.

19. 531 F.2d 248, 249 n.3 (5th Cir. 1976).

20. 552 F.2d 1020, 1021 n.1 (3d Cir. 1977).

21. See 4 *J. Contemp. L.* 233-39 (1978).

22. John J. Flynn, "A Comment on 'The Common Law Origins of The Infield Fly Rule,'" 4 *J. Contemp. L.* 241, 241 (1978) (footnote omitted).

23. Charles Yablon, "On the Contribution of Baseball to American Legal Theory," 104 *Yale L. J.* 227, 238 (1994) (footnotes omitted). To Yablon's list, one could add: Margaret A. Berger, "Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule," 5 *Fed. Sentencing Rep.* 96 (Sept./Oct. 1992); P.C. Doherty, "A Quodlibet, a Mumpsimus and the Rule of Infield Flies: The Unfinished Business of Term Limits in Florida," 18 *Nova L. Rev.* 921 (1994); Loren Singer, "Infield Fly Rule: It's the Baseball Version of the Internal Revenue Code," *West's Legal News*, Mar. 29, 1996, at 2757, available at 1996 WL 259455; Christopher W. Lane, "Bluebooks, Filled Milk and Infield Flies: Deconstruction, The Footnote and a Uniform System of Citation," 19 *Wm. Mitchell L. Rev.* 161 (1993) (book review).

24. See, e.g., Karen Gross, "Taking Community Interests into Account in Bankruptcy: An Essay," 72 *Wash. U. L.Q.* 1031, 1046 n.40 (1994); Nancy B. Rapoport, "Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy," 26 *Conn. L. Rev.* 913, 917 n.15 (1994).

25. See, e.g., Alan K. Chen, "Shadow Law: Reasonable Unreasonableness, Habeas Theory and the Nature of Legal Rules," 2 *Buff. Crim. L. Rev.* 535, 536 n.4 (1999); Alan K. Chen, "The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests," 81 *Iowa L. Rev.* 261, 282-83 n.117 (1995); Jim Chen, "Rock 'N' Roll Law School," 12 *Const. Comment.* 315, 317 n.23 (1995); David P. Currie, "The Most Insignificant Justice: A Preliminary Inquiry," 50 *U. Chi. L. Rev.* 466, 466 n.2 (1983); Jeffrey P. Ferrier, Comment, "Title IX Leaves Some Athletes Asking, 'Can We Play Too?'," 44 *Cath. U. L. Rev.* 841, 842 n.7 (1995).

26. See, e.g., Judith L. Maute, "Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine," 20 *Conn. L. Rev.* 7, 30 n.91 (1987); Trisha Olson & Karl B. Shoemaker, "Civility and Remembrance," 26 *Cumb. L. Rev.* 883, 906 n.118 (1996).

27. See, e.g., Gregory T. Jones, "Lex, Lies & Videotape," 18 *U. Ark. Little Rock L. J.* 613, 644 n.164 (1996); Alexander M. Sanders Jr., "Newgarth Revisited: Mrs. Robinson's Case," 49 *S.C. L. Rev.* 407, 428-29 n.62 (1998).

28. See, e.g., Erik M. Jensen, "A Monologue on the Taxation of Business Gifts," 1992 *BYU. L. Rev.* 397, 402 n.33.

29. See, e.g., Arthur [D.] Austin, "Footnote Skulduggery and Other Bad Habits," 44 *U. Miami L. Rev.* 1009, 1019 n.64 (1990); Arthur D. Austin, "Footnotes as Product Differentiation," 40 *Vand. L. Rev.* 1131, 1142 n.51 (1987); Paul F. Macloon, "Defending the Lowly Footnote," 73 *N.Y. St. B.J.* 64, 64 n.20 (Mar./Apr. 2001); Mary I. Coombs, "Lowering One's Cites: A (Sort of) Review of the *University of Chicago Manual of Legal Citation*," 76 *Va. L. Rev.* 1099, 1101 n.10 (1990) (book review); David E.B. Smith, "Just When You Thought it Was Safe to Go Back into the Bluebook: Notes on the Fifteenth Edition," 67 *Chi.-Kent L. Rev.* 27, 275-76 n.6 (1991) (book review).5

30. See, e.g., Joseph W. Dellapenna, "The Phoenix Phillies v. The Philadelphia Phillies: A Recently Discovered Opinion on 'Baseball' and the 'Antitrust' Exemption," 5 *Vill. Sports & Ent. L.J.* 233, 240 n.4 (1998); Paul Finkelman, "Baseball and the Rule of Law," 46 *Clev. St. L. Rev.* 239, 242 n.12 (1998); Robert M. Jarvis & Phyllis Coleman, "Benjamin N. Cardozo: New York Giant," 13 *Marq. Sports L. Rev.* ___ n.335 (2002) (forthcoming); Michael J. Yelnosky, "If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball and 'The Sex Stuff,'" 28 *Conn. L. Rev.* 813, 837 n.135 (1996).

31. Erik M. Jensen, "Food for Thought and Thoughts About Food: Can Meals and Lodging Provided to Domestic Servants be for the Convenience of the Employer?," 65 *Ind. L.J.* 639, 640 & n.9 (1990) ("At no point does the essay discuss the relationship between the convenience of the employer doctrine and the Infield Fly Rule, although I wish it did.").

32. Aside, "Don't Cry Over Filled Milk: The Neglected Footnote Three to *Carolene Products*," 136 *U. Pa. L. Rev.* 1553, 1558 n.20 (1988).

33. E-mail from William S. Stevens, to Professor Robert M. Jarvis (Aug. 24, 2001, 16:44:00 EDT) (on file with the authors).

34. *Id.*

35. "Duncan did most of footnote 38. The most significant change made by Mike was to change footnote 36 from 'Compare Richard Nixon with Harry Truman' to the published text." *Id.*

36. E-mail from M. Duncan Grant, to Professor Robert M. Jarvis (Aug. 28, 2001, 17:36:00 EDT) (on file with the authors).

Ironically, the *University of Pennsylvania Law Review* now regularly publishes *Asides*.

37. At one time, of course, law reviews uniformly published student works anonymously. Since the mid-1980s, this practice has all but vanished for the reason given by the editors of the *Stanford Law Review*:

The traditional anonymous citation form for student work rests on the proposition that student notes reflect the combined efforts of the student authors and the editorial staff. This tradition, however, imposes undeserved anonymity on students who write. Virtually all law review articles, whether by students, faculty members or others, require heavy doses of editorial reconstruction. Yet no one suggests that faculty pieces be anonymous.

Ivan K. Fong, "President's Page," 39 *Stan. L. Rev.* 1, 1 (1986).

38. Arthur John Keeffe, "The Infield Fly Rule, Annotated," 61 *A.B.A. J.* 1281, 1281 (1975).

39. See *supra* note 19 and accompanying text.

40. Stevens, *supra* note 33.

41. Clark, *supra* note 6, at 372 n.1.

42. In addition to his duties at the ALL, Stevens is a member of the editorial board of *The Philadelphia Lawyer*. In 1999, it published his article about the Scopes monkey trial. See William S. Stevens, "Detour to Dayton," 62 *Phil. Law* 40 (Summer 1999), available at http://www.philabar.org/member/pubs/phl_lawyer/detour.asp (last visited Nov. 23, 2001).

43. Stevens, *supra* note 33.

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BOOK REVIEW

Insurance Coverage of Intellectual Property Assets

David A. Gauntlett
Aspen Law & Business
2001 edition; 600 pages

Reviewed by Bob Pimm

By using this book counsel will be able to (1) determine the scope of intellectual property (IP) insurance coverage under a client's insurance policies; (2) properly tender an IP insurance claim; and (3) seek the proper remedies if coverage is denied. For entertainment and sports lawyers whose clients own, create or handle IP assets, this book is an excellent guide.

The author, David Gauntlett, practices in the areas of policyholder insurance coverage and bad faith, IP and general business litigation. He is a nationally recognized speaker for CLE credit on behalf of many organizations, including the Practising Law Institute and the American Bar Association.

His book is unique in that it covers the many

The book discusses coverage for IP tort claims.

insurance legal issues that arise in IP disputes. In addition, there is an unusual melding of law, state-by-state public policy and practical guidance, that prepares counsel not only to understand the issues, but also to explain the underlying concepts to clients.

The main focus of the book is on "advertising injury" and "personal injury" provisions of standard form comprehensive and commercial liability policies. The book seeks to illustrate the full scope of insurance coverage available for IP tort claims. Also, because many IP torts involve advertising — both to establish liability and to calculate damages — the author carefully reviews the tort elements.

The book discusses all pertinent federal and state case law and is supplemented annually with new developments. Also, commercial insurance policy

provisions are carefully examined, discussed and compared so that policy language that limits or excludes coverage for IP claims is highlighted.

The book is logically organized to take counsel from A to B in analyzing an IP insurance problem. For example, it begins by offering assistance to counsel in deciding if coverage for IP assets even exists in the insurance policies held by the client. If such coverage exists, the book then assists counsel in defining the scope of such coverage.

If the injury is an "advertising injury," there is substantial discussion of the scope of such coverage and any exclusions that may exist in the client's policies.

What is an "advertising injury?" According to Gauntlett, a typical insurance policy may define an advertising injury as:

... any injury arising out of an offense committed during the policy period occurring in the course of the named policyholder's advertising activities, if such injury arises out of such libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan.

He notes, however, that numerous insurance companies now incorporate IP exclusion endorsements in which the above-stated injuries are excluded from coverage.

Once coverage has been established and the scope of coverage defined, Gauntlett then explains how to effectively tender a claim to the insurer. For instance, to trigger the insurer's obligation to defend, a policyholder must tender as soon as possible. If the policyholder fails to immediately forward cease-and-desist letters sent to opponents or communications suggesting a potential lawsuit, the insurer may argue that the policyholder forfeited coverage for breach of the duty to notify.

Following tender of the claim, Gauntlett examines the insurer's obligation to defend and how this duty is determined. He discusses the insurer's duty to investigate, then the important area of allocation of defense costs, payment and reimbursement policies state-by-state.

The author then moves on to a defense employed by insurers, namely the "reservation of rights." He explains that insurers may agree to provide a defense once a tender of claim has been made, subject to "reservation of rights." This reservation of rights

means the insurer can avoid being bound by adverse findings in the underlying action and the insurer can wait to see whether the underlying action will establish that the policyholder's acts are excluded from coverage.

Gauntlett then considers how insurance policies are interpreted in general, reviewing the rules of policy interpretation. These rules include reading the policy language within the policy as a whole; reading the policy as it would be understood by a layperson; resolving ambiguity versus plain meaning, etc. Policy interpretation rules are then compared and contrasted state-by-state.

Following the A to B analysis of intellectual property insurance issues implicating all IP problems,

*B*ut what happens if the insurer denies coverage?

Gauntlett tackles specific intellectual property disciplines in separate sections. There are discrete sections on patents, trademarks, trade secrets and copyrights. These sections are very helpful in developing ideas and insights specific to these kinds of IP insurance claims.

But, what happens if the insurer denies coverage? Gauntlett describes the remedies available to policyholders in the event of such denial of coverage, including declaratory relief and damages. The discussion of the breach of the covenant of good faith and fair dealing is useful in its comparison of the approach of different jurisdictions to bad faith law. Gauntlett closes this section with a discussion of choice of law.

Practical sections near the end of the book examine what coverage should be obtained, the types of IP insurance policies available and overall risk management techniques for owners of IP assets. These sections discuss the purposes and goals of acquiring IP insurance from the perspective of offense-based, risk-specific coverage to procuring coverage for the pursuit of infringers. Also, the risk-management section includes a helpful questionnaire that focuses client organizations on the responsibilities and actions of those managing IP assets.

This is a comprehensive book aimed at two audiences: (1) the insurance lawyer with little IP experience and (2) lawyers with clients who create, own

or handle IP assets, but who have little experience in insurance law. For both audiences the book is an excellent guide. Each audience, however, will likely need to supplement the book with other guidance.

Bob Pimm practices entertainment and sports law at The Law Offices of Richard J. Greenstone, in San Francisco. He is editor-in-chief of the Entertainment and Sports Lawyer. Mr. Pimm's e-mail is bob@rjg.com.

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