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- Save the Date – Page 1
- Case of Interest – Page 1
- Annual Court Report Offers Guidance For Third Circuit Practitioners – Page 2
- The Ins and Outs of Third Circuit Cross Appeals – Page 3

On Appeal

SAVE THE DATE: 2014 THIRD CIRCUIT JUDICIAL CONFERENCE

After what will be a three-year hiatus, plans are in the works for the 71st Judicial Conference of the Third Circuit. The conference will be held May 7-9, 2014 at a new location: Hershey Lodge in Hershey, Pennsylvania. The court has asked those interested to send non-binding responses to gauge the level of interest—and all indications are that interest is high. If it's likely that you will attend, please send an email to judicial_conference@ca3.uscourts.gov.

Past Judicial Conferences have featured ample Continuing Legal Education credits, bench-bar receptions and dinners, and distinguished speakers (including justices of the United States Supreme Court). The 2014 Conference also is sure to be a valuable educational and networking opportunity, with up to 12 CLE credits (including 2 Ethics credits), pending approval. 3CBA members and Third Circuit practitioners are encouraged to indicate their interest and mark their calendars.

CASE OF INTEREST

Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013)

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The United States Court of Appeals for the Third Circuit recently ruled that the First Amendment did not bar a plaintiff's state-law right of publicity claim against defendant, Electronic Arts, Inc. ("EA"), based on its use of the plaintiff's likeness in the *NCAA Football* videogame series. [Hart v. Elec. Arts, Inc.](#), 717 F.3d 141 (3d Cir. 2013). The plaintiff, a former quarterback on Rutgers University's football team, alleged that EA violated his right to publicity by replicating his likeness in the 2004, 2005 and 2006 versions of the *NCAA Football* videogame series. Although plaintiff's name was not used in the videogame series, the digital avatar of Rutgers University's quarterback had the same height, weight, appearance, and biographical information as the plaintiff.

EA moved for summary judgment, conceding for purposes of its motion that it violated plaintiff's right of publicity, but contending that the First Amendment barred plaintiff's claim because *NCAA Football* was a protected expressive work. The United States District Court for the District of New Jersey granted EA's motion and dismissed plaintiff's right of publicity claim.

The Third Circuit reversed in a 2-1 decision. In the majority opinion, written by Judge Greenaway, the court noted that video games

are "expressive speech" and "enjoy the full force of First Amendment protections." Nevertheless, "[a]s with other types of expressive conduct, the protection afforded to games can be limited in situations where the right to free expression necessarily conflicts with other protected rights," such as the right to publicity. Thus, to "resolve the tension between the First Amendment and the right of publicity," the court was required to "balance the interests underlying the right to free expression against the interests in protecting the right of publicity."

The court examined the three balancing tests that courts have used "to resolve cases where a right of publicity claim collided with First Amendment protections." First, the court discussed the "Predominant Use Test," which provides that the First Amendment will not bar a right of publicity claim if the product at issue "predominantly exploits the commercial value of an individual's identity." The court rejected that test as "antithetical to our First Amendment precedent" because it would require courts to "analyze select elements of a work to determine how much they contribute to the entire work's expressiveness." In other words, the test "calls upon judges to act as both impartial jurists and discerning art critics."

(continued on page 5)

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ANNUAL COURT REPORT OFFERS GUIDANCE FOR THIRD CIRCUIT PRACTITIONERS

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The Administrative Office of the U.S. Courts has once again released its annual report on the Judicial Business of the United States Courts (available [here](#)). The report provides helpful insight into the work of the Third Circuit that will help answer questions clients frequently ask during the appellate process. This article highlights key statistics regarding appeals in the Third Circuit for the 12-month period ending September 30, 2012.

The Court's Caseload. Appeals to the Third Circuit increased 3.3% between 2011 (3,645 cases initiated) and 2012 (3,766 cases initiated), and have increased more than 8% since 2000 (3,482 cases initiated). Practitioners should be mindful that continuing caseload increases, coupled with recent cuts to the federal court system's budget (the result of federal austerity measures), could lead to significant delays in the resolution of their clients' appeals in the Third Circuit. See Federal Judiciary Braces for Broad Impact of Budget Sequestration, available [here](#).

Criminal matters (including private and non-private prisoner petitions) made up approximately 46% of the Court's caseload in 2012. By contrast, civil matters (including bankruptcy-related matters) made up only 32% of the docket.

Will The Court Hear Oral Argument? There has been a noticeable decline in the percentage of cases orally argued in the Third Circuit. In the 12-month period ending September 30, 2002, the Court heard oral argument in 25% of the cases it resolved on the merits. Howard J. Bashman, *Statistics Confirm Growing Rarity of Oral Arguments at Third Circuit, The Legal Intelligencer* (Feb. 12, 2013), available [here](#). But 10 years later, for the 12-month period ending September 30, 2012, this percentage had plummeted sharply to 12.1 percent. As reflected in the table below, in 2012, the Court decided almost 85% of all cases without the benefit of oral argument, higher than the average for all courts of appeals (74%).

12-Month Period Ending	Decided After Oral Argument	Decided After Submission on Briefs
9/30/12	12.1%	84.5%
9/30/11	12.9%	87.1%
9/30/10	13.9%	86.1%
9/30/09	15.8%	84.2%
9/30/12 (Average Of All Circuits)	18.8%	74.0%

When Can We Expect to Receive A Ruling? As the table below demonstrates, the average appeal from the U.S. district courts takes approximately 10.3 months from filing of the notice of appeal to final appellate disposition. The average length of an appeal in the Third Circuit is slightly less, taking only 8.7 months. Clients should, however, be prepared for civil appeals in the Third Circuit to take approximately 10.5 months from the time you file your notice of appeal to receive a ruling on the merits (nationwide average is 12.2). Criminal appeals, on the other hand, take a month longer in the Third Circuit than the nationwide average (11.7 months vs.

	Civil Appeals (Non-Prisoner)		Criminal Appeals	
	From Filing of Notice of Appeal to Final Disposition (in months)	From Oral Argument to Final Disposition (in months)	From Filing of Notice of Appeal to Final Disposition (in months)	From Oral Argument to Final Disposition (in months)
Nationwide Avg.:	12.2	2.1	10.7	1.9
District of Columbia	10.0	2.8	18.5	2.2
First	10.7	3.2	14.5	3.6
Second	13.0	0.7	14.5	0.6
Third	10.5	3.0	11.7	3.1
Fourth	6.6	2.0	8.0	2.2
Fifth	10.6	1.4	10.1	1.2
Sixth	16.6	3.0	15.4	2.6
Seventh	10.2	3.5	9.7	2.6
Eighth	9.2	3.5	7.5	3.2
Ninth	17.3	1.2	12.8	1.0
Tenth	10.4	3.7	9.9	3.3
Eleventh	9.6	1.6	8.9	2.0

10.7 months). Source: Table B-4A.

What Are The Odds The Third Circuit Will Reverse The District Court's Ruling? The Third Circuit (like all of the federal courts of appeals) affirms the great majority of cases that come before it on the merits. And in the year ending September 30, 2012, it reversed only 6.4% of the appeals it disposed of, slightly below the nationwide average of 6.8%. Note, however, that this number varies depending on the type of case.

Will The Court Issue a Precedential Opinion? In 2012, the Third Circuit designated 87.3% of opinions in cases terminated on the merits as "unpublished" or "not precedential" (down from 89.8% in 2010). Several other circuits issued more unpublished opinions (on a percentage basis) in 2012 (Eleventh Circuit (87.4%) Ninth Circuit (87.6%), Fourth Circuit (88.8%)), though the Third Circuit average still slightly exceeds the nationwide average of 81.4 percent.

THE INS AND OUTS OF THIRD CIRCUIT CROSS APPEALS

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It is common for a litigant to lose some motions and win others. A question appellate lawyers often hear from lawyers representing clients who have won some and lost some, but who ultimately prevailed, is, “Do I need to cross-appeal?” The U.S. Court of Appeals for the Third Circuit’s recent decision in *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223 (3d Cir. Jan. 23, 2013), sets the stage for a refresher course on the rules governing cross-appeals (and a few other appellate tidbits, too).

The Allegations

Ethypharm is a French manufacturer of pharmaceuticals, including a cholesterol-reducing drug known as a fenofibrate. Rather than undertake the effort required to enter the U.S. pharmaceutical market directly, Ethypharm entered into a license and distribution agreement with an American company, Reliant Pharmaceuticals. Reliant, in turn, obtained the requisite approval from the Food and Drug Administration to market the fenofibrate under the name Antara.

Abbott Laboratories sued Reliant, alleging that Antara infringed certain of Abbott’s patents. Reliant and Abbott ultimately settled, with Abbott providing Reliant a non-exclusive license in exchange for a percentage of Reliant’s sales. The settlement also effectively foreclosed Reliant from assigning its rights to, or partnering with, a list of restricted entities, including several-dozen pharmaceutical companies and manufacturers of generic drugs. Abbott also retained the right to approve any sale or transfer.

A few months later, Reliant sold its rights to market and sell Antara in the United States to Oscient Pharmaceutical Co. Although Oscient was not on the restricted list, Abbott exercised its rights under the settlement not to approve that transaction. As a result, Oscient was effectively prevented from developing new combination drugs or different doses of Antara. Oscient’s sales of the drug never

reached hoped-for levels and Oscient eventually filed for bankruptcy.

Ethypharm sued, alleging that Abbott’s settlement agreement with Reliant was anti-competitive, in violation of sections 1 and 2 of the Sherman Act. Ethypharm also asserted related claims under state law. According to Ethypharm, the settlement was designed to ensure that Antara would be put into the hands of a company with limited resources and a small sales force that would not be able to effectively compete with Abbott’s rival product.

The Parties’ Motion Practice

In August 2008, after Ethypharm had amended its complaint, Abbott moved to dismiss the Sherman Act claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for lack of antitrust standing. (Antitrust standing is a prudential doctrine, different from the constitutional standing requirement. To establish antitrust standing, a plaintiff must establish, among other factors, that it suffered antitrust injury — in other words, that it suffered an injury of the type the antitrust laws are intended to prevent and that flows from that which makes the defendant’s acts unlawful.)

The district court denied Abbott’s motion in early 2009. Abbott did not ask the court to certify the order for interlocutory review under 28 U.S.C. § 1292(b). Instead, the parties proceeded to take discovery and retain expert witnesses.

Two years later, Abbott filed a motion for summary judgment on all of Ethypharm’s claims. The district court granted that motion and entered a final judgment in Abbott’s favor. Ethypharm appealed. Abbott did not file a notice of cross-appeal.

Third Circuit Reverses

Rather than weigh in on the merits of Ethypharm’s claims — the subject of the summary judgment briefs — the Third Circuit revisited whether Ethypharm had antitrust standing, the subject of the earlier motion to dismiss. Concluding that

Abbott had, in fact, been correct years earlier, the Third Circuit reversed, explaining that Ethypharm did not have standing to sue under the Sherman Act because it did not itself compete with Abbott in the U.S. market, and had not suffered a cognizable antitrust injury. Then, noting that Ethypharm had relegated its challenges to the dismissal of its state-law claims to a footnote in its opening brief, the court deemed those challenges waived and affirmed the judgment in Abbott’s favor in all respects.

When Cross-Appeal Is Necessary

The court’s grant of relief was proper despite the fact that Abbott had not filed a notice of cross-appeal. As the Third Circuit reminds in *Ethypharm*, an appellee may, without taking a cross-appeal, “support the judgment as entered through any matter appearing in the record.” Thus, Abbott was entitled to make any properly preserved argument that would support the judgment in its favor, including the argument that the district court should have dismissed the complaint at the Rule 12(b)(6) stage.

The rationale behind the rule that an appellee is not required to cross-appeal all possible alternative grounds for affirmance in order to preserve those issues is to prevent the needless expansion of the scope and complexity of appeals, as in *Eichorn v. AT&T*, 484 F.3d 644, 657-58 (3d Cir. 2007).

Conversely, if the appellee seeks either to enlarge its rights beyond the relief it was granted in the district court or to diminish its opponent’s rights, a cross-appeal is mandatory, and the failure to properly and timely lodge one in accordance with Federal Rule of Appellate Procedure 4(a)(3) will result in the forfeiture of the appellee’s arguments on appeal. The Supreme Court has described this rule as “inveterate and certain,” as in *Morley Construction v. Maryland Casualty*, 300 U.S. 185, 191 (1937). Toward that end, the Third Circuit will

(continued on page 4)

THE INS AND OUTS OF THIRD CIRCUIT CROSS APPEALS

— continued from page 3

not hesitate to look closely at whether an appellee that purports to be doing nothing more than seeking affirmance on alternative grounds was in fact required to file a cross-appeal.

The court's decision in *Nationwide Mutual Insurance v. Cosenza*, 258 F.3d 197 (3d Cir. 2001), illustrates this principle. There, policyholders sued to compel arbitration of claims under the underinsured motorist coverage of an automobile liability policy. The insurer sought a declaratory judgment that a "no dual recovery" provision in the policy precluded the insureds from recovering UIM benefits because they also had received payments under the liability portion of the same policy.

On cross-motions for summary judgment, the district court ruled that the dispute was not covered by the arbitration clause, but that the no-dual-recovery provision was enforceable. The policyholders appealed; the insurer did not. The insurer nevertheless asked the Third Circuit to reverse several adverse coverage rulings the district court had made in its opinion. Citing the absence of a cross-appeal, and concluding that the insurer was seeking to enlarge its rights and lessen the policyholders' rights, the court found that those arguments were not properly before it. It then went on to hold that the policy's prohibition on dual recoveries was unenforceable.

Unnecessary cross-appeals should, of course, be avoided. However, it is critically important for you, as counsel for the prevailing party, to understand long before the appellate brief-writing begins, what arguments you might wish to make on appeal and what specific relief you intend to ask the court to grant, and to consider carefully whether the court may determine that you are asking it either to enlarge your client's rights or impair your adversary's rights. If so, prudence likely will warrant filing a cross-appeal to ensure that you adequately protect your client's interests.

Permissive Interlocutory Appeal

Ethypharm also serves as an implicit reminder that litigants are never required to take steps to take a permissive interlocutory appeal from a district court order (pursuant to, e.g., 28 U.S.C. § 1292(b) or Federal Rule of Civil Procedure 54(b)). Permissive interlocutory appeals, properly used, can be powerful, game-changing strategies.

In *Ethypharm*, with the benefit of 20/20 hindsight, one might question whether pursuing a section 1292(b) appeal from the district court's order denying Abbott's motion to dismiss the complaint might have been an effective strategy (one that, if successful, could have saved the parties considerable time and expense). It must be kept in mind, however, that permissive interlocutory appeals are disfavored and rarely allowed. Ideally, any decision to pursue such an appeal should be made after consultation with an experienced appellate specialist who can both offer an objective view of the likelihood of success, and assist trial counsel in framing the legal issues and arguments in a way that will maximize the chance of success.

Failing to Fully Develop an Argument

Lastly, *Ethypharm* contains a reminder about yet another element of appellate practice: the importance of fully developing all of the appellant's arguments in the opening brief. The court's summary affirmance of judgment in Abbott's favor on *Ethypharm*'s state-law claims shows that relegating an argument to a footnote, perhaps in the mistaken belief that you will have an opportunity to develop it more fully in reply, is a fatal miscalculation. If you want the court to entertain an argument, it must be made in the body of the brief, be supported by legal authorities, and contain the requisite cites to the record.

CASE OF INTEREST

— continued from page 1

Second, the court discussed the “Rogers Test”—first articulated in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989)—which provides that the First Amendment protects “the use of a celebrity’s name in a movie title unless the title was wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services.” The Court noted that it was “skeptical” that the *Rogers* Test could extend beyond the title of a work to its general contents. In any event, the court held that although the *Rogers* Test “may have a use in trademark-like right of publicity cases,” it was “unfit for widespread application.”

The court explained why the *Rogers* Test could not be applied beyond “trademark-like” right of publicity cases:

[EA] argues that [plaintiff] should be unable to assert a claim for appropriating his likeness as a football player precisely because his likeness was used for a game about football. Adopting this line of reasoning threatens to turn the right of publicity on its head.

... It cannot be said that the very activity by which [plaintiff] achieved his renown now prevents him from protecting his hard-won celebrity. We decline to endorse such a conclusion and therefore reject the *Rogers* Test as inapplicable.

Third, the Court discussed the “Transformative Use Test,” which imports the concept of “transformative use” from copyright law into the right of publicity context. Specifically, the “Transformative Use Test” requires courts to determine

whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, *whether the product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.*

To satisfy this test, “an author depicting a celebrity must contribute something more than a ‘merely trivial’ variation, but must create something recognizably ‘his own,’ in order to qualify for legal protection.”

The court adopted the “Transformative Use Test” because it “seems to excel precisely where the other two tests falter.” Unlike the “Predominant Use Test,” it “requires a more circumscribed inquiry, focusing on the specific aspects of a work that speak to whether it was merely created to exploit a celebrity’s likeness.” And unlike the *Rogers* Test, it “maintains a singular focus on whether the work sufficiently transforms the celebrity’s identity or likeness, thereby allowing courts to account for the fact that misappropriation can occur in any market segment, including those related to the celebrity.”

Applying the “Transformative Use Test,” the court ruled that the *NCAA Football* videogames “do not sufficiently transform [plaintiff’s] identity to escape the right of publicity claim.” The court found that neither the overall appearance of plaintiff’s digital avatar, nor the context in which the digital avatar existed, was transformative:

[B]ased on the combination of both the digital avatar’s appearance and the biographical and identifying information -- the digital avatar does closely resemble the genuine article. ...

Considering the context within which the digital avatar exists . . . provides little support for [EA’s] arguments. The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative; the various digitized sights and sounds in the video game do not alter or transform the [plaintiff’s] identity in a significant way.

The court rejected EA’s argument that its use of plaintiff’s identity was transformative because users had the ability to alter plaintiff’s digital avatar. Indeed, a contrary ruling would allow video game companies to “commit the most blatant acts of misappropriation only to absolve themselves by including a feature that allows users to modify the digital likeness.” Moreover, plaintiff’s “unaltered likeness is central to the core of the game experience,” as “the appeal of the game lies in users’ ability to play ‘as, or alongside’ their preferred players or teams.”

Judge Ambro dissented. He agreed that “the Transformative Use Test is the preferred approach,” but concluded that the majority misapplied that test

by “limiting their inquiry to the realistic rendering of [plaintiff’s] individual image.” Judge Ambro opined that the majority should have “review[ed] the likeness in the context of the work in its entirety, rather than focusing only on the individual’s likeness.” Judge Ambro reasoned that, by failing to do so, the majority ignored the many creative, expressive features of *NCAA Football*, which warrant First Amendment protection:

NCAA Football transforms Hart’s mere likeness into an avatar that, along with the rest of a digitally created college football team, users can direct and manipulate in fictional football games. With the many other creative features incorporated throughout the games, sufficient expressive transformation takes place to merit First Amendment protection.

NCAA Football involves myriad original graphics, videos, sound effects, and game scenarios. These artistic aspects permit a user to direct the play of a college football team whose players may be based on a current roster, a past roster, or an entirely imaginary roster comprised of made-up players.

The Third Circuit’s decision in *Hart* likely will have significant impact. Indeed, in late July, the Ninth Circuit discussed *Hart* approvingly in applying the “Transformative Use Test” in a similar right of publicity suit by a former collegiate football player, and rejecting Electronic Arts’ First Amendment defense. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 3928293, at *6-7 (9th Cir. July 31, 2013). After *Hart*, courts in this Circuit seemingly are now bound to apply the “Transformative Use Test” in the vast majority of cases in which “a right of publicity claim collide[s] with First Amendment protections.” Although the *Hart* court did not definitively rule that the “Transformative Use Test” must be applied in *all* such cases, it rejected the “Predominant Use Test” as “antithetical to our First Amendment precedent” and denounced the *Rogers* Test as “unfit for widespread application.” Moreover, *Hart* (and the Ninth Circuit’s decision in *NCAA Student-Athlete Name & Likeness Licensing Litigation*) may generate the filing of similar lawsuits against EA and other video game companies, particularly given that EA releases a new version of *NCAA Football*, containing the digital avatars of hundreds of new college football players, every year.

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