



Texas Entertainment and Sports Law Journal

SECTION OFFICERS

CHAIR

Shannon Jamison
3100 Main St., Ste. 132
Dallas, TX 75226
Phone: (972) 772-9252
Fax: (972) 772-3464
jamisonlaw@me.com

CHAIR-ELECT

Catherine Hough
2500 Dallas Pkwy., Ste. 260
Plano, TX 75093
Phone: (972) 378-9111
Fax: (972) 378-9115
chough@dallasbusinesslaw.com

SECRETARY

Craig Crafton
1301 East Collins Blvd.
Richardson, TX 75266
Phone: (214) 570-6000
craig.crafton@gmail.com

TREASURER

Amy E. Mitchell
401 Congress Ave., Ste. 1540
Austin, TX 78701
Phone: (512) 970-3223
Fax: (512) 366-9915
law@amyemitchell.com

IMMEDIATE PAST CHAIR

Mitzi L. Brown
1201 Elm St.
Dallas, TX 77271
Phone: (214) 854-3630
Fax: (214) 584-3271
mitzi@redmangousa.com

COUNCIL

Terms Expiring 2013

Chris Harrison
Sally Helppie
Erin Rodgers

Terms Expiring 2014

Decker Sachse
Mike Farris
Emilio Nicolas

Terms Expiring 2015

Victoria Helling
Todd Krumholz
Roberto "R.C." Rondero de Mosier

ENT. LAW INSTITUTE DIRECTOR

Mike Tolleson
2106 East MLK Blvd.
Austin, TX 78702
Phone: (512) 480-8822
Fax: (512) 479-6212
mike@miketolleson.com

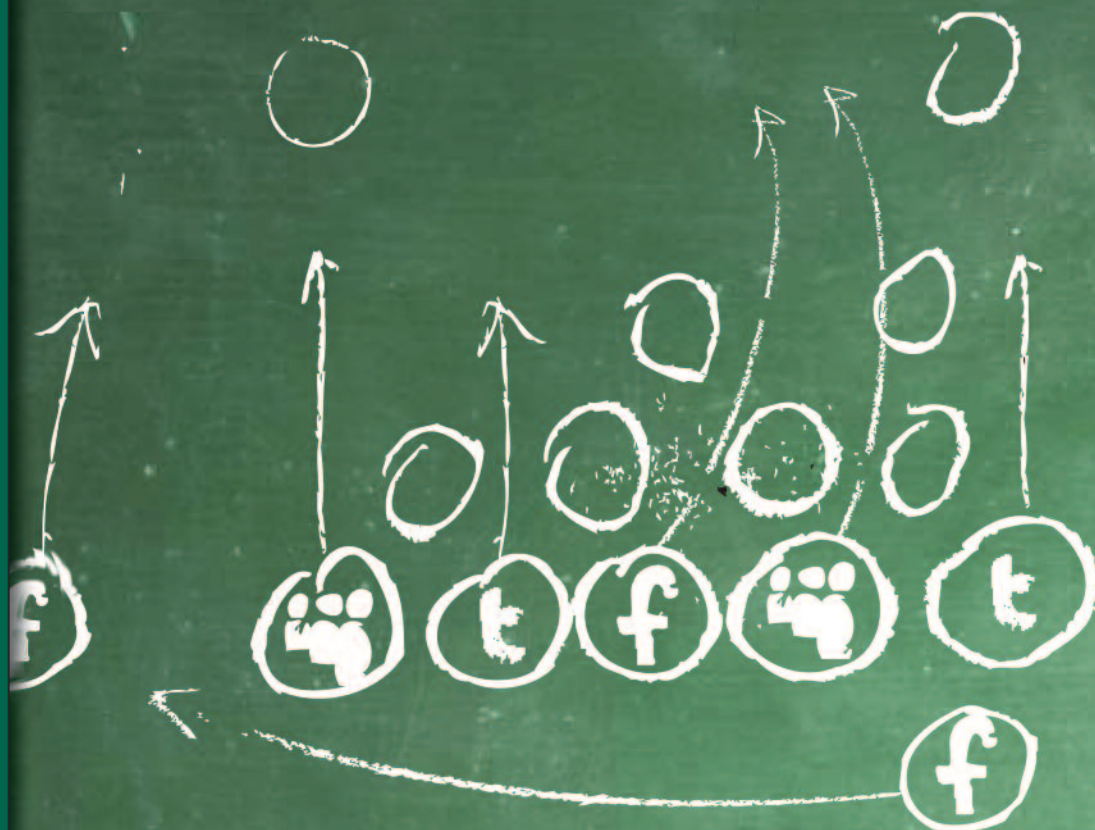
JOURNAL EDITOR

Craig Crafton
1301 East Collins Blvd.
Richardson, TX 75266
Phone: (214) 570-6000
craig.crafton@gmail.com

WEBMASTER

Amy E. Mitchell
401 Congress Ave., Ste. 1540
Austin, TX 78701
Phone: (512) 970-3223
Fax: (512) 366-9915
law@amyemitchell.com

SPRING 2013 — Volume 22 • No. 1



SOCIAL MEDIA AND ATHLETICS

Why University Monitoring of Student Athletes' Social Media Activities is a Recipe for Disaster

IN THIS ISSUE

Chair's Report	2	Opportunities Increasing in China for U.S. Entertainment Industry	12
Top Hits	3	ELI Triumphs Again	14
Someone to Watch Over Me: Why University Monitoring of Student Athletes' Social Media Activities is a Recipe for Disaster	7	I Can't Get No Cause of Action?!: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.	15
Texas State Incentives for Film and Television Production — Then, Now, and Later	9	High Profile Trademark Actions 2012	17
Attorney Profile: Alan Tompkins	11	Recent Entertainment & Sports Law Publications	33
		Join TESLAW	38

TEXAS ENTERTAINMENT AND SPORTS JOURNAL STAFF

EDITOR

Craig Crafton
Travelers Insurance Company
1301 East Collins Blvd.
Richardson, TX 75266
Phone: (214) 570-6478
craig.crafton@gmail.com

ASSOCIATE EDITORS

Chris Harrison
Assistant General Counsel
Pandora Media, Inc.
2101 Webster St.
Oakland, CA 94612
(510) 858-3049
charrison@pandora.com

Catherine Hough
Ferguson Law Group
2500 Dallas Pkwy., Ste. 260
Plano, TX 75093
Phone: (972) 826-4463
chough@dallasbusinesslaw.com

Decker Sachse
Sachse Law Group
Falkin+Sachse, PLLC
2828 Routh St., 5th Floor
Dallas, TX 75201
Phone: (214) 849-9840
deck@falkinlaw.com

FACULTY ADVISOR

Professor Andrew T. Solomon
South Texas College of Law
1303 San Jacinto St.
Houston, TX 77002
Phone: (713) 646-2905
asolomon22@gmail.com

TESLAW.ORG

The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, collegiate and professional sports. The TESLAW website at www.teslaw.org offers attorneys a chance to be listed with their focus area of practice in a publically searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment law. Join today to be part of a collegial organization growing the practice of entertainment law in Texas and for new bar members the first year's dues are free.

CHAIR'S REPORT

Hello TESLAW members! I want to start out by thanking all of you for making TESLAW the dynamic Section that it is today. TESLAW now has over **950** members, and I attribute this increase in TESLAW membership to its members and council members that work so hard to make the Section a success. As a member of TESLAW, you are currently entitled to: 1) receive the acclaimed *Texas Entertainment and Sports Law Journal*; 2) receive the new TESLAW bi-monthly e-Newsletter; 3) add your information onto TESLAW's searchable database at www.teslaw.org; 4) receive a discount on the cost of the annual Entertainment Law Institute (ELI); and 5) become a part of the growing Texas-based entertainment and sports law community.



TESLAW kicked off 2013 with the first edition of its bi-monthly e-Newsletter in January. Each newsletter will feature a member spotlight, a case note, and a practice document. To be considered for the TESLAW Member Spotlight please submit a short bio (no more than 200 words) and photograph to Victoria Helling, e-Newsletter Editor, at attorney.vhelling@gmail.com. You may also contact Victoria if you are interested in contributing to the e-Newsletter or assisting with its preparation. She would welcome the help!

TESLAW recently collaborated with the Copyright Society of the USA (the "Society"), a nationwide organization devoted to copyright law, education, and understanding. The Society held its yearly mid-winter meeting in Austin, Texas on February 14-16, 2013. The program covered topics such as user-generated content, social media, video game law, international copyright development, and much more. TESLAW's very own Amy Mitchell was a speaker at the event.

We are excited to announce our **Third Annual TESLAW SXSW Mixer** that will be held during SXSW on **Thursday, March 14, 2014 from 4:00 – 6:00 p.m.** at the **Iron Cactus** (Sixth Street/Trinity). We will be on the Mezzanine level. Even if you are not attending SXSW, as a member of TESLAW you are invited to the reception. Drinks and appetizers will be provided. As an added bonus, TESLAW's "Rock Star Attorney" merchandise will be available for sale. We hope that you will join us and help us meet our goal of keeping Texas lawyers at the forefront of the entertainment industry!

And please plan to join us at our next TESLAW meeting which will be held during the State Bar of Texas' Annual Meeting in Dallas on **June 21, 2013** at the Hilton Anatole. We have great speakers lined up including Brad Sham of the Dallas Cowboys, and two incredible entertainment attorneys, Steven Masur and Dina LaPolt. This is a great place to learn more about our Section and to get involved with committees and planning the future of TESLAW.

Finally, I would like to thank Craig Crafton, TESLAW Secretary and Journal Editor, for his hard work in making the TESLAW journal such an amazing benefit to our TESLAW members. We hope that you enjoy this edition and we welcome your thoughts and comments about TESLAW at any time.

Shannon Jamison
2012-2013 Chair

TOP HITS

**Craig Crafton, Editor**

“Storage Wars” Triggers Reality Lawsuit

David Hester has filed suit against A&E Television Networks (“A&E”) alleging that the producers of *Storage Wars* rigged the reality television series by salting storage lockers before they were auctioned off to buyers. See <http://www.scribd.com/doc/126065176/Storage>. Hester argues that the First Amendment doesn’t protect A&E, but rather that 47 U.S.C. § 509, enacted following the TV quiz show scandals of the 1950s applies. Section 509 prohibits “influencing, prearranging, or predetermining outcomes” in “contests of knowledge, skill, or chance.”

Hester, a professional buyer of abandoned storage lockers, says producers began salting lockers during the first season. As a result of alleged “interference and manipulation of the outcomes of the auctions shown” on *Storage Wars*, Hester claims he was portrayed as less skillful than his competition. A&E asserts that Hester’s suit arose only after contract negotiations for his future participation on the show faltered.

A&E claims, in an anti-SLAPP position, that it “cannot be seriously disputed” that *Storage Wars* is “an expressive work entitled to full First Amendment protection.” Hester pleads that: “A&E glibly asserts that the Series ‘does not even arguably’ fall within 47 U.S.C. section 509 since the auctions portrayed on the Series are not contests of chance, intellectual knowledge or intellectual skill. Perhaps A&E does not watch its own programs or monitor its own website. A&E’s website describes the auctions featured on the Series as contests. In a bonus clip available on A&E’s website entitled ‘Who Has the Best Strategy,’ each of the ‘Contestants,’ as they are identified in the clip, discusses his or her strategy and the strategies employed by the competition...”

Subpoena for Documentary Outtakes Quashed

Ken Burns and the other filmmakers of the *Central Park Five* documentary, the story of the five wronged men convicted in an infamous 1989 rape of a Central Park jogger, successfully quashed a subpoena seeking notes and outtakes from the documentary film. See <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=271>.

The filmmakers argued that the subpoenaed material consisted of non-confidential news-gathering materials and was protected by New York’s Shield Law. New York City sought the information for use in a lawsuit brought by the accused, who were set free after another imprisoned man confessed to the crime and provided DNA evidence. The city argued that the documentary’s outtakes supported its arguments that authorities acted in good faith at the time of prosecution.

In finding for the filmmakers, U.S. District Judge Ronald Ellis stated that “any discussion of the reporter’s privilege begins with an inquiry into whether a journalist can first establish entitlement to the privilege by demonstrating the independence of her journalistic process.” The Judge held that the filmmakers were independent despite having a point of view, receiving help from the plaintiffs and making statements about encouraging a settlement for the plaintiffs. New York City failed to make a sufficient showing that the information being sought was of likely relevance and not reasonably available from another source. Judge Ellis concludes: “In sum, Defendants have failed to present this Court with ‘a concern so compelling as to override the precious rights of freedom of speech and the press’ the reporter’s privilege seeks to ensure.”

Continued on page 4.

Top Hits

Continued from page 3.

No Confusion Means No Trademark Infringement

The 7th Circuit has held that a trademark plaintiff cannot recover in a suit over a movie title when no confusion is alleged. See <http://www.ca7.uscourts.gov/tmp/Q00RC3EB.pdf>.

Florida-based Eastland Music Group sued Lionsgate alleging that the movie title 50/50, starring Joseph Gordon-Levitt and Seth Rogen, infringed upon its trademark for “Phifty-50.” Eastland alleged that it had been using the mark since 2000 in connection with entertainment services and products, such as CDs and DVDs. Eastland alleged that Lionsgate’s plans to release the 50/50 film on DVD threatened to harm the recognition and goodwill “Phifty-50” earned in the marketplace.

The matter was dismissed at the trial court level on the basis that the Lionsgate’s film title wasn’t explicitly misleading. Seventh Circuit Judge Frank Easterbrook confirmed Lionsgate’s victory stating that it wasn’t necessary to look at constitutional defenses like whether Lionsgate had fair use to the title because it was artistically relevant. Rather, Eastland’s complaint failed at the threshold. “It does not allege that the use of ‘50/50’ as a title has caused any confusion about the film’s source – and any such allegation would be too implausible to support costly litigation.” Further, the court notes that: “At oral argument, plaintiffs’ counsel conceded that not a single person has ever contacted Eastland or its web site to seek a copy of the film or complain about the film’s contents or quality. Nor does the complaint allege that any potential customer has turned to Lionsgate or Summit in quest of the rap duo’s products.”

Lastly, Judge Easterbrook notes that Wikipedia lists eight films with the title 50/50, six of which pre-date Eastland’s use. “If there is any prospect of intellectual property in the phrase 50/50, Eastland Music is a *very* junior user and in no position to complain about the 2011 film.”

Digital Leads Rise In Music Industry Sales

The International Federation of the Phonographic Industry (“IFPI”) reports that global music sales rose in 2012 for the first time since 1999. Sales increased 0.3 percent to \$16.5 billion, down from the \$38 billion that the industry took in at its peak. “It’s clear that 2012 saw the global recording industry moving onto the road to recovery,” said Frances Moore, IFPI chief executive said. “There’s a palpable buzz in the air that I haven’t felt for a long time.”

Record labels’ digital sales rose about nine percent in 2012 to \$5.6 billion and accounted for 34 percent of income overall as digital sales continue to grow offsetting the decline in CD sales. Download sales increased 12 percent to 4.3 billion units globally. Digital album sales rose 17 percent to 207 million. In addition, subscription-based offerings, including Spotify, Rhapsody and Muve Music grew by 44 percent last year, to 20 million, the IFPI reported. In the United States, sales continued to slip in 2012, as most of the growth in global music sales were driven in developing markets.

Texas Accountants and Lawyers for the Arts Expands to Meet Statewide Demand

By: Erik Metzger, Intel Corporation;
Blair Dancy, Van Osselaer & Buchanan LLP



Blair Dancy

Blair Dancy is a partner with Van Osselaer & Buchanan in Austin, Texas, licensed in Texas and New Mexico. Blair specializes in civil trials involving commercial disputes, including arts-related matters. He is vice president of TALA.



Erik Metzger

Erik Metzger is an intellectual property attorney with Intel Corporation, where he leads and serves on several pro bono initiatives, including entertainment/arts and patent pro bono initiatives. Erik is a board member of California Lawyers for the Arts and a member of the central Texas advisory committee for TALA.

Since 1979, Texas Accountants and Lawyers for the Arts (a.k.a. "TALA") has provided statewide legal and accounting services to financially-qualifying artists. Today, more than 600 volunteer accountants and attorneys handle 350-plus matters per year, amounting to more than \$600,000 annually in donated services to arts and cultural communities, not to mention seminars and workshops geared toward art issues.

TALA's involvement with the arts community not only provides professional services to those who might not be able to afford it, but it also provides *pro bono* opportunities for lawyers wanting to explore new areas of the law. In turn, the whole state benefits. With more capable and experienced lawyers, the Texas entertainment services industry expands, keeping jobs—and artists—here in the state. TALA's extension of a physical presence to Austin in 2012 highlights the impact volunteer lawyers can have.

Expansion in 2012.

Last year, the organization expanded its physical presence to central Texas thanks to an initial donation, and continuing financial support, from Intel Corporation. While TALA has historically provided statewide coverage out of Houston offices, the opportunity to put feet on the ground in our capital city has allowed TALA better to reach out directly to central Texas artists and arts non-profits.

In the first eight months of having a part-time staff person on the ground in Austin, TALA sponsored eight educational seminars (four of which included CLE credit) with 369 attendees, plus another eight events getting the word out about TALA opportunities for both artists and professionals. With local staff, TALA also coordinates with other arts-related non-profits to enhance their services. TALA's success can be seen through significantly increased membership in central Texas, reflecting services provided to a demographic previously underserved. Despite TALA providing state-wide services, having a staff person locally attracts both volunteers and clients. Empowering local artists, in turn, benefits everyone. Our recent experience begs the question of how many artists in other parts of our state are not being served.

What Austin's experience means for other Texas cities.

As professionals promoting the arts, TALA understands the service needs of the creative class and how it affects local economies. A recent report measured the economic impact of Austin's creative sector as providing almost 49,000 jobs in 2010, a 25% increase in that sector's employment over the last five years (compared to 10% growth over the same period for the Austin economy as a whole). The median salary for arts-related occupations was \$52,540. As an economic engine, the arts provide a significant contribution.

Continued on page 6.

Texas Accountants and Lawyers for the Arts Expands to Meet Statewide Demand

Continued from page 5.

While Austin's creative economy as a proportion of its total economy is higher than that in other Texas cities, it is not by much. The Bureau of Labor Statistics shows 1.78% of direct employment in Austin in 2010 was in arts, entertainment, and design occupations. Houston was at 0.94%, San Antonio at 1.02%, Fort Worth at 1.08%, and Dallas at 1.40%. Looking at the bigger picture, helping the arts directly impacts local economies. But to succeed, artists need the legal and accounting tools to protect and enable themselves to work in the arts.

This rosy picture leads, inevitably, back to you.

Professional services provided by volunteers like you.

As a volunteer, you may work with visual artists, musicians, actors, dancers, film makers, writers, fashion designers, or non-profit organizations that serve these and other artists. Clients must earn less than \$50,000 per year to qualify for these referrals; non-profits have their own income and asset limits. Referrals include non-profit organization formation, accounting, pre-suit dispute resolution, intellectual property, contract and license drafting and negotiation, trademark registration, and many other legal matters within the entertainment industry. Other services include seminars on accounting basics and intellectual property law essential for artists and arts organizations to thrive.

Some of these seminars are geared not for the artists, but for you, the volunteers. One of the primary obstacles to volunteerism, particularly among attorneys who do not practice entertainment law primarily, is a lack of comfort in how to handle these issues. Although volunteers may be highly competent in entertainment legal topics—such as intellectual property law, labor law, and others—a barrier to entry for some volunteers is the lack of understanding of the business of entertainment and what legal issues surround it.

Intel and other companies with in-house attorneys in the Austin area have recently infused TALA's volunteer pool. To facilitate this influx, these new volunteers are receiving training from *pro bono* firm partners on specific entertainment law topics, and TALA is developing a training guide based on these events to further assist new volunteer lawyers. TALA has recently hosted several CLE events to train volunteers on current legal issues concerning artists and the entertainment industry in Austin and provides these events on a regular basis statewide.

In addition to training, volunteers can partner with local entertainment lawyers and firms as co-counsel on matters referred by TALA. Firm partnering has been crucial to attorneys at companies like Intel, who may be risk adverse when providing counsel on matters that are outside the scope of their primary practice. By partnering with experienced co-counsel, Intel attorneys have been able to provide quality representation on numerous TALA matters. Lawyers new to a subject area can also be matched with volunteer mentors and knowledgeable staff to assist with their *pro bono* clients. When final exams and summer jobs permit, volunteer law students are also eager to help.

Malpractice insurance is also a concern of many volunteer in-house legal departments who may not have insurance for *pro bono* activities. However, TALA carries a professional liability, claims-made policy with \$500,000 in limits for volunteer lawyers accepting referrals. This coverage enables TALA to benefit from lawyers who might otherwise not be inclined to volunteer their time.

To meet the increase in demand that comes from a more visible presence, TALA continues to reach out to firms, in-house legal departments, and academic organizations to expand the central Texas volunteer pool of accountants and attorneys. Potential attorney volunteers, in particular, are plentiful not only in central Texas but throughout the state, particularly in areas helpful to artists, such as contract and license negotiation and intellectual property, due to the strong economy and its need for high-tech and entrepreneurial legal talent. Nevertheless, lawyers—such as you—must sign up with TALA to have the opportunity to volunteer.

Continued on page 19.

Someone to Watch Over Me:

Why University Monitoring of Student Athletes' Social Media Activities is a Recipe for Disaster

By: John Browning



John G. Browning, Partner
Lewis Brisbois Bisgaard & Smith LLP

John Browning is a partner in the Dallas office of Lewis Brisbois Bisgaard & Smith, where he handles civil litigation in state and federal courts, in areas ranging from employment and intellectual property to commercial cases and defense of products liability, professional liability, media law, and general negligence matters. Mr. Browning received his Juris Doctor from the University of Texas School of Law in 1989. He is the author of

the book *The Lawyer's Guide to Social Networking, Understanding Social Media's Impact on the Law*. He is a recurring legal commentator for the NBC and FOX news stations in Dallas.

The old wartime propaganda warning that “Loose lips sink ships” has found a new home in college athletic departments nationwide, as coaches and administrators wrestle with the thorny issue of monitoring the social media postings of student athletes in order to police the school’s “brand” and good name. Student-athletes may be subject to discipline based on the content of their Tweets and Facebook postings, particularly if that content contains “fighting words” or true threats, defamatory statements, obscenity, violations of criminal laws, or violations of reasonable team or NCAA rules. However it becomes trickier for constitutional purposes when the content on a student-athlete’s social networking page isn’t materially disruptive, but actually can be classified as protected free expression.

The focus should not be on how universities should react upon learning of a student’s potentially objectionable social networking activities, rather than on how universities discover this content in the first place—by monitoring the social media accounts of their student athletes. In Orwellian fashion, college and university athletic departments across the country are mandating that competing in varsity sports comes with a hefty price tag: one’s right to privacy and the protections afforded by the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. In an attempt to justify this, schools are pointing to the incredible popularity of social networking sites; the alarming frequency with which student-athletes are posting questionable content;¹ oversight obligations that might be incumbent upon the universities in wake of recent NCAA rulings; and the potential damage that offensive tweets, Facebook posts, and YouTube videos can do to a university’s “brand”—both in terms of reputational harm as well as the very quantifiable revenues generated by a major athletic department. As this article will demonstrate, monitoring a student-athlete’s social media accounts not only raises serious constitutional questions, but can also expose schools in a steadily-growing number of jurisdictions to violations of state law as well as risk other types of civil liability exposure.

There are now over 1 billion Facebook users worldwide. Twitter processes over 400 million tweets (messages of 140 characters or less) each day, and over 72 hours of video are uploaded to YouTube each minute. Over 65% of all adult Americans have at least one presence on a social networking site, and for younger age groups, that figure climbs dramatically higher, approaching 95%. Just as social networking platforms have transformed the communication and information-sharing habits of people generally, athletes have been quick to embrace social networking as a means of sharing with not only friends and family but fans as well. Virtually every major sports league and governing body now imposes rules of the use of social media by its athletes, yet despite this, there is a continual parade of athletes posting crude or offensive content online (witness the number of Olympic athletes who exhibited poor social media judgment, like U.S. hurdler Lolo Jones and her tweets about “shooting sports” after the Aurora massacre and her insensitive comments towards paralyzed Rutgers football player Eric LeGrand).

Without a doubt, the carelessness of student-athletes when it comes to their social media activities can have serious consequences. At the University of Arkansas in 2009, just weeks after members of the men’s basketball team were accused of rape, one of the players tweeted “I’m getting it at workouts like a dude who doesn’t understand the word no from a drunk girl lol.”² Heisman Trophy winner Johnny Manziel of Texas A&M University may have been engaging in perfectly legal activities

Continued on page 8.

Someone to Watch Over Me: Why University Monitoring of Student Athletes' Social Media Activities is a Recipe for Disaster

Continued from page 7.

when he tweeted photos of himself drinking alcohol at a club (he was accompanied by parents) and flashing a wad of cash at a casino, but that didn't prevent the ignition of a firestorm of controversy over the tweets – a storm during which the football player had to remain largely on the sidelines while university media reps dealt with the fallout.³ “It's hard to watch some of the stuff that people say to you when you take a picture or you do some stuff or you're at these games or whatever. It's tough to sit back and you can't really defend yourself,” said Manziel.⁴ And the fans react (or overreact) on social media as well. When Ricky Seals-Jones of Sealy High School, ranked by some as the top wide receiver recruit in the country, withdrew his commitment to play for the University of Texas, he received death threats via Twitter.⁵ Finally, the “catfishing” of Notre Dame football player Manti Te'o has served a cautionary tale for the digital age when it comes to initiating romantic relationships via social media.

On the collegiate level, the NCAA already regulates social networking activities in the context of the recruiting of student athletes.⁶ In addition, in an era in which big-time football or basketball programs can generate tens of millions of dollars in annual revenue for a school through lucrative television contracts, licensing apparel, and ticket sales—and mean millions more in alumni donations for a high-profile university—colleges and universities are protecting their “brand” and the school's reputation by taking an increasingly active interest in the social media musings of student athletes. For some, this may take the form of coach-imposed limitations on social media use, or the implementing of university social media policies that apply to all students.

However, a growing number of universities are turning to third party vendors like UDiligence, Varsity Monitor, and Centrix Social to monitor the social media accounts of student athletes. The student athletes are required to install the software applications on their computers and wireless devices, and the vendor monitors their activities, searching the social networking sites looking for key words that might point to discussion of drug or alcohol use, obscenities, offensive comments, or references to potential NCAA violations like agents or free gifts. With every school, says Sam Carnahan (chief executive of Varsity Monitor), “we work to customize their key word list. We look for things that could damage the school's brand and anything related to their eligibility.”⁷ For about \$6,450 a year, a company like UDiligence (used by such schools as the University of Texas, Texas Tech, Baylor, LSU, Missouri, Ole Miss, New Mexico, and Utah State) or Varsity Monitor (used by Oklahoma University, University of Nebraska, and the University of North Carolina) will use proprietary technology to scan and filter athletes' personal accounts for specific content and then report to the university's athletic department contact (usually a coach or compliance official) via email about the flagged content.

Putting the university in charge of deciding what words warrant a red flag, though, is problematic to say the least. Consider the recent revelations surrounding the social media monitoring of student-athletes at the University of Kentucky (which uses Centrix Social) and the University of Louisville (which uses UDiligence). The 400 or so words or slang terms that appear on each school's “red flag” list of potentially embarrassing or damaging comments include the predictable: names of agents; words like “free,” “payoff” or “cheat sheet”; references to alcohol (“beer,” and specific brand names); references to drug use (“doobie,” “zoomies,” “weed,” “bong,” etc.); and references to “porn,” “rape,” slang terms for genitalia, and Internet acronyms like GNOC (get naked on camera). However, the list also includes more troubling words and phrases like “Arab,” “Muslim,” “gay,” and “drunk driving.”⁸ Why are certain ethnic or religious groups singled out, while others aren't? If a student-athlete chooses to discuss his or her sexual preference with select friends online, is it the coach's or university's business? Should a student have to think twice before posting about a friend killed by a drunk driver, for fear of college officials lurking on his Facebook page?

University of Kentucky athletics spokesman DeWayne Peevy defends the practice, saying that the school's primary concern is what the public can see, since this impacts the brand of the university and the athlete. “If they're all wanting to have private accounts and not put it out to the public, I think we'd be all for that,” he says. Peevy goes on to claim that “We spend every day trying to protect their privacy here . . . [social media] is a tool, but if used wrong it's a dangerous tool.”⁹ If the spin of “we have to invade their privacy in order to protect it” seems to you reminiscent of a “we had to destroy the village in order to save it” justification, you're not alone. William Creeley, director of legal and public advocacy of the free speech and civil liberties advocacy group Foundation for Individual Rights in Education, points out that a university's decision to engage in such monitoring puts it on a slippery slope. “First it's their Twitter feed, then it's their dorm room conversations, then it's their work in class, etc. It sends a strange message to student-athletes about what being a student-athlete entails,” he says.¹⁰

Continued on page 20.

Texas State Incentives for Film and Television Production — Then, Now, and Later

By: Andrew Solomon



The State of Texas has long sought to establish itself as a “third coast” for film and television production. In furtherance of that goal, Texas long-ago established an official state government office to serve as a resource for film and television production projects. However, in the past five years, Texas has taken a much more proactive role in promoting in-state production by following the national trend of providing financial incentives at the state level to production companies that film the majority of their projects within state lines.

This article will focus on the Texas financial incentives primarily aimed at film, television and commercial production and will attempt to analyze the effectiveness of the State’s incentive program. Additionally, this article will evaluate the long-term fiscal health and viability of the Texas film incentive program which is currently in jeopardy of having its budget eliminated by Texas lawmakers.

Andrew Solomon (B.A./J.D. Texas) is an associate with Jackson Walker L.L.P. in their Austin office. He focuses his practice on general corporate governance, entity formation and transactional matters related to various facets of the entertainment industry.

History of Texas Film Programs

The Texas Film Commission was originally created in 1971 via legislation and an executive order from Governor Preston Smith.¹

After a brief stint in another state agency, the Texas Film Commission was moved back to the Governor’s Office under Governor Ann Richard’s leadership. Today, the Texas Film Commission and the Texas Music Commission make up the Film and Music Marketing Program, a Trusteed Program of the Governor’s Office.

In response to the wave of film incentive programs that were established by other states in the past decade, the Texas Legislature passed enabling legislation in 2005 to create the Texas Moving Image Industry Incentive Program (the “TMIIP”). The TMIIP was established to prevent runaway production to other states, notably New Mexico and Louisiana, which had already established generous state tax incentives and reimbursement policies to lure filmmakers across their borders.²

However, the TMIIP wasn’t funded until two years later in the 2007 Legislative Session when the legislature passed an appropriations bill to fund the program. Upon the passage of H.B. 1634 authored by Texas State Representative Dawnna Dukes in the same legislative session, and the establishment of the rules governing the incentive program which were finalized in March 2008, the TMIIP finally had the resources to start attracting production to Texas.³

For the 2008-2009 biennium, the incentive program was given its initial appropriation of \$22 million of which \$20 million was earmarked for film and television incentives and \$2 million was set aside for administration expenses. In the 2009 Legislative Session, the program was appropriated an additional \$62 million to use for the following 2010-2011 biennium. Additionally, the State passed legislation to amend the TMIIP which, among other provisions, increased the cap on reimbursements given to qualifying productions and created a sliding scale reimbursement rate to make the program more competitive with incentive programs offered by other states.⁴ The new rules and reimbursement rates went into effect for projects that were approved after April 24, 2009.

Due to statewide budget shortfalls in the 2011 Legislative Session, the program had its funding levels reduced to \$32 million for 2012-2013 biennium. As of December 28, 2012, \$20.6 million of the funding allocated to the TMIIP had been paid out to production companies or reserved for qualifying projects.⁵

Continued on page 10.

Texas State Incentives for Film and Television Production — Then, Now, and Later

Continued from page 9.

Qualifications for Film and Television Projects

The TMIIP is governed by Title 13 of the Texas Administrative Code and Chapter 485 of the Texas Government Code. These statutes and regulations provide a framework for the Texas Film Commission to evaluate applications for film, television, commercial and video game productions and establish certain qualifications for prospective productions.

In order for feature films or television programs (excluding reality television programs) to qualify under the Texas incentive program, the production must spend a minimum of \$250,000 on in-state expenses. These in-state expenses may include wages paid to “Texas residents” which are defined as individuals who have resided in Texas since the 120th day before the first day of principal photography.⁶ However, any amount paid to a Texas resident in excess of \$1 million, including wages paid to an actor or director, can’t be counted towards the total amount of in-state expenses.⁷

Examples of eligible in-state expenditures include reimbursements paid to Texas residents for mileage, the cost of air travel to and from Texas on a Texas-based airline (*e.g.*, Southwest), and legal fees paid to Texas-based lawyers which are directly attributable to the production;⁸ while examples of ineligible in-state expenditures include a project’s distribution and marketing expenses, fees for story rights, music rights or clearance rights, and payments for entertainment expenditures, alcohol or tobacco.⁹

In addition to the in-state spending requirement, the incentive program also requires that 60% of the filming days for the film or television project must be filmed in Texas, 70% of the paid cast (including extras) must be Texas residents, and 70% of the paid crew must be Texas residents.¹⁰ Commercial and educational productions are subject to the same qualifications, except that their in-state spending requirements are reduced from \$250,000 to a minimum of \$100,000.¹¹

The following productions are not eligible for reimbursements under the incentive program: productions that are “obscene” (as defined by Section 43.21 of the Texas Penal Code); news programs; local events or religious services; sporting events; and local awards shows. Additionally, the State may deny any application because of inappropriate content or “content that portrays Texas or Texans in a negative fashion.”¹² Though the Texas Film Commission has rarely denied an application based on this statute, the State has twice gained negative international attention for rejecting a film on these grounds.

The first application denied by the Texas Film Commission on such grounds occurred in May 2009 when then-Texas Film Commission Director Bob Hudgins denied the application for a film project titled *Waco* which focused on the 1993 federal raid of the Branch Davidian compound near Waco, Texas. Hudgins cited factual inaccuracies in the movie’s script as the basis for the rejection; however, the denial of the film’s application, which was announced the same week as the Cannes Film Festival, was criticized by some as censorship by the State’s film incentives program.¹³

The Texas Film Commission notably denied another request for incentives in late 2010 when it denied the application for the theatrical feature *Machete*, an action film starring Danny Trejo and directed by Texas film icon Robert Rodriguez.¹⁴ The status of *Machete*’s application for incentives had already received heightened attention due to a public letter-writing campaign coordinated by syndicated radio host Alex Jones. The decision to deny the film’s bid for tax incentives, which occurred at the same time as the national controversy surrounding Arizona’s S.B. 1070¹⁵, caused many Texas film leaders to question the reasoning behind the denial, including H.B. 1634 author Dawnna Dukes, who called the move “purely political.”¹⁶

Grants Awarded Under the TMIIP

While the Texas Film Commission advertises that Texas films and television projects may receive grants of up to 15% of their in-state expenses, the reality is that only large productions are likely to receive this reimbursement rate. In order to incentivize large-scale production, the Texas Film Commission rewards grants to productions on a sliding scale where larger budget

Continued on page 23.

ATTORNEY PROFILE



Alan Tompkins

How I Got Started Practicing Sports and Entertainment Law:

I joined Unity Hunt (and its affiliates Hunt Sports Group and Hunt Capital Group) as General Counsel in 2003 primarily to manage investment transactions and activities. About the time I arrived, Hunt Sports signed an agreement to develop a major soccer stadium and concert facility in Frisco, Texas. I was quickly pulled in to work on the stadium project and was appointed as general counsel of the three Major League Soccer teams that we owned at that time – FC Dallas, the Columbus Crew, and the Kansas City Wizards. We've presented dozens of large-scale live music events at the stadium in Frisco since it was completed, so I got a good bit of experience in handling the legal and contractual issues of those large events through "on the job training." I'm also quite involved in bluegrass and country music personally, as a musician and event producer, and have been asked to handle a wide variety of projects for musicians and others in the music industry that I know.

Details of Interesting Cases:

There've been plenty of complicated and challenging situations that required my involvement over the past decade. But I work for a private family office, so the details of those situations must remain private.

How Do You Find Clients:

I'm in-house, so I am fortunate in not having to go out and find clients. My clients walk in my office most every day with a wide range of challenges and requests. I try to make sure they keep walking in by getting out to see them regularly so that they remember that I'm there to help keep little issues from becoming big problems.

Advice For Attorneys Who Want to Practice Sports and Entertainment Law:

The most accurate (and fairly obvious) advice for those who want to practice sports and entertainment law is to get to know (and be trusted by and available to) people who do sports and entertainment business. Find a way to be available to them, be interested in what they do, and offer to help them in any way you can. With some luck, they will (sooner or later) ask for your help – and you will be practicing sports or entertainment law. Except for a few areas where very specific expertise is required, there are no secrets to our kind of practice. You must work to become reasonably familiar with and competent in a broad range of legal areas (contract, intellectual property, insurance, real estate, tax, and entity law, for example) and work hard to understand and solve problems for your clients – whether they be people you work with on a daily basis or the folks you bill by hour. Be the absolute best, craftiest, and most ethical lawyer you can possibly be, and your practice will grow. If you've found a way to get associated with folks who do business in the areas of sports and entertainment, then you'll be a sports and entertainment lawyer

Opportunities Increasing in China for U.S. Entertainment Industry

By: Stan Soocher



Stan Soocher traveled to China in 2012 to teach the course “American Music Goes to Court” at the International College of Beijing. He reports here on the state of entertainment industry issues in China, as U.S. companies try to expand their reach into that country. This article covers copyright law in China, TV and film concerns, online content issues, and the increase in U.S. intellectual property and entertainment firms involved in China.

Beijing — The banner just inside an entrance to the Silk Market in the capital city in Summer 2012 read: “Embrace national brand, increase awareness for national intellectual property.” As it hosted the World Intellectual Property Organization’s (WIPO; www.wipo.org) Diplomatic Conference on the Protection of Audiovisual Performances, the capital city of China wanted to promote an image of a growing protector of intellectual property for both domestic and foreign rights owners.

Stan Soocher is Editor-in-Chief of Entertainment Law & Finance and a tenured Associate Professor of Music & Entertainment Industry Studies at the University of Colorado’s Denver Campus. In addition, Stan is an entertainment attorney and award-winning legal journalist. In summer 2012, he taught the course “American Music Goes to Court” at the International College of Beijing in China, where his book *They Fought the Law: Rock Music Goes to Court* has been published in a translation edition by Law Press China.

The international convention delegates did sign a Beijing Treaty on Protecting Audiovisual Performances. But Beijing streets and shops were soon to be stocked again with “knock-off” goods of famous brands and illegal copies of entertainment products. And foreign individuals and trademark owners often find their trademarks registered in China by Chinese companies. For example, Chinese companies domestically registered the names of 88 athletes who played in the 2012 Euro Cup.

In fact, with China’s deeply rooted “copycat culture” and long-held reputation as a leading nation for piracy, still estimated to be at least 90% — and the Communist government’s often-stringent control of content — this second largest economy in the world remains a significant challenge to a U.S. entertainment industry seeking to establish stronger business ties to the Asian nation. These ties currently range from U.S. producers/China joint film ventures to the formal licensing of audio and visual content for online uses, and an influx of U.S. intellectual property lawyers. In 2012, the Chinese investment conglomerate Wanda Group announced it would acquire AMC Entertainment, the second-largest U.S. theatrical film exhibition chain for \$2.6 billion. China itself is one of the top three film theatre-exhibition markets in the world.

Increased U.S. entertainment industry participation in China certainly requires more consistent use of intellectual property protections. At the same time, much of the recent move to strengthen China’s intellectual property laws in copyright, trademarks, patents and trade secrets laws can be attributed to the government’s desire to back the surge in the number of Chinese businesses that now have such valuable rights to protect. For example, the number of patent applications filed in China now exceeds that of those filed in the United States.

According to statistics released in 2012 by China’s National Copyright Administration, the copyright industries’ share of the country’s Gross Domestic Product increased from 4.94% in 2004 to 6.55% in 2009. However, this is only one-fourth the value of U.S. copyright industries. China’s GDP percentage stats include WIPO-defined core copyright industries like music, film and television to partial-copyright sectors like architecture and craft works. (China’s core copyright exports accounted for just .66% of the country’s exports.)

Continued on page 13.

Opportunities Increasing in China for U.S. Entertainment Industry

Continued from page 12.

CHANGES IN CHINESE COPYRIGHT LAW

In 1991, China instituted a modern copyright law. The country added revisions in 2001 so that China could join the World Trade Organization and then again in 2010 regarding U.S.-China intellectual property issues. Still, rights ownership can be murky. In March 2012, the China's National Copyright Administration issued for public comment a draft of extensive amendments to the Copyright Law of the People's Republic of China.

One proposed People's Republic change would make it clear that copyright registration provides some proof of ownership, though the March 2012 draft didn't detail registration procedures. Among other proposed copyright law clarifications, the draft also provided for joint authors to be able to file suits over a work and set forth a punitive damages range of one to three times actual damages for ongoing intentional infringement.

Two proposed changes were particularly controversial in the Chinese music industry. One would have permitted formalized copyright income collection via an agency that would also bind non-members without these artists' authorization. The other proposal would have changed current Chinese law that states "no work can be used if the copyright owner refuses permission" to instead allow third-parties to use sound recordings three months after initial public release. The third parties would have been able to do so by applying to the National Copyright Bureau, rather than requiring permission of the original recording's owner, who would be paid through the non-profit Music Copyright Society of China. But in July 2012, after an outcry from China's artistic community, the National Copyright Administration largely backed down on these two proposals.

The international Audiovisual Performances Treaty was negotiated over 12 years before it was signed at the Beijing conference in June 2012 by 122 WIPO member nations. In an official statement, WIPO explained: "The new treaty brings audiovisual performers into the fold of the international copyright framework in a comprehensive way, for the first time. ... The Beijing Treaty on Audiovisual Performances (BTAP) will strengthen the economic rights of film actors and other performers It will potentially enable performers to share proceeds with producers for revenues generated internationally by audiovisual productions. It will also grant performers moral rights to prevent lack of attribution or distortion of their performances."

"For the first time it will provide performers with protection in the digital environment," the WIPO statement added. "The treaty will also contribute to safeguarding the rights of performers against the unauthorized use of their performances in audiovisual media, such as television, film and video."

This is a step in the right direction from the acting community's perspective, but enforcing the provisions of the Audiovisual Performances Treaty on an international scale will be complicated.

TV AND FILM INDUSTRIES

In China, dating shows and talent competitions are very popular programming formats. But opportunities for U.S. industry players in the film and TV markets have been hampered by content and distribution restrictions. In 2012, for example, the State Administration of Radio, Film and Television (SARFT; www.sarft.gov.cn) enacted new restrictions on TV program genres, such as eliminating dramatizations from shows that reenact historical events. Remakes of foreign TV serials and those based on online games have been banned.

But even with this, major U.S. film releases are China's biggest box-office generators. In a deal negotiated in 2012 in the United States through Chinese then-Vice-President Xi Jinping (who is now the country's top leader), the Chinese government increased the permissible number of foreign films, from 20 to 34, on which income can be based on box office revenues — an important gain for Hollywood, whose recent major releases like *The Avengers* and the 3-D version of *Titanic* drew blockbuster audiences in China, the latter quickly grossing close to \$150 million. According to a report compiled by the Chinese entertainment research center EntGroup (<http://english.entgroup.cn>), nine recent foreign film releases, dominated by American

Continued on page 26.

ELI TRIUMPHS AGAIN

The 22nd Annual Entertainment Law Institute (“ELI”) was held last October at the Mansion on Judge’s Hill in Austin. Featuring topics on How to Build an Entertainment Law Practice, Copyright Terminations and Reversions and Realty Television Program Production, ELI is the most entertainment program to obtain CLE hours! Kudos to ELI Director Mike Tolleson on another terrific event.



The packed gallery appreciates the comments of, from left to right, Amy Mitchell, Tamera Bennett and Craig Barker.



Discussing International Music Marketing, from left to right, Casey Monahan (Texas Music Office), Benom Plumb (Bluewater Music), Jeffery Liebenson (Liebenson Law), Kevin Womack (Loophole Management) and Mike Tolleson (Mike Tolleson and Associates).

The 2013 Entertainment Law Institute will be September 26-27 at the Doubletree Hotel in Austin. May great topics and speakers are on the agenda. Watch for details and plan to attend!

I Can't Get No Cause of Action?!: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.

By: **Eric Quiroz**



I. Introduction

The recent plight of the music industry is well documented. Music sales declined seven times within eight years in the early twenty-first century.¹ Retailers significantly reduced floorspace devoted to CDs.² It appeared as though society stopped listening to music or they stopped buying it. The future looked bleak: running a business without any revenue is impossible. Jump forward a bit and there are some promising signs. Digital sales grew 8% globally in 2011 to an estimated \$5.2 billion.³ Within the first four months of the year, 2012 produced “three of the top ten biggest weeks for song downloads.”⁴ On the other hand, a sales increase after the market hits rock bottom is not uncommon.

Eric Quiroz is a graduate of St. Mary's School of Law (May 2012). He received a BA in English from The University of Texas (May 2008) and is the current Website Editor for the Texas Music Coalition in San Antonio.

Thanks to technology, fans have new ways to consume music and rights holders have new revenue streams such as online radio and on-demand music streaming. Unfortunately, technology has also enabled unscrupulous consumers to steal music in large volumes. A number of studies confirm that peer-to-peer (P2P) file sharing has contributed to the decline in music sales. Many countries have

enacted policies aimed at curbing online piracy in recognition of the harms of online file sharing.⁵ Some efforts are government driven⁶ and others, as in the US, are voluntary initiatives between record labels and Internet service providers (ISPs).⁷ Additionally, subscription services have emerged as an affordable alternative to piracy, capable of satisfying consumer demand.⁸

However, copyright holders find it difficult to maintain a suit for copyright infringement against a multitude of infringers across the globe.⁹ The Digital Millennium Copyright Act (DMCA) provides for the take down of alleged infringing material but is silent with regard to people that download content.¹⁰ Unfortunately, the DMCA does not apply to foreign websites so rights holders are still exposed to unbridled infringement abroad.¹¹ Further, technology such as bittorrent, which allows the transmission of copyrighted materials, is likely to escape liability if it falls within a judicial safe-harbor that protects technology capable of significant non-infringing uses.¹²

As a result, copyright owners are at a significant disadvantage in the fight against foreign infringers. Rights holders are entitled to protection of their works. However, the difficulties of maintaining a suit against the direct infringer often render recovery impossible.¹³ In similar circumstances, courts may permit the rights holder to recover from an entity that materially contributes to the infringement under a theory of secondary liability.

This article argues that U.S. law supports a cause of action against a search engine for contributory copyright infringement. In order to bring a suit under this theory, copyright owners should send written notification to a search engine when a keyword search for a copyrighted work produces links to websites hosting unauthorized content. Copyright holders should include a list of legitimate retailers where consumers may find the copyrighted material and request the search engine prioritize valid outlets. Rights holders should continue this process if subsequent searches produce results that do not prioritize the legitimate retailers. If a search engine has not prioritized results after receipt of the third notification, this paper argues a rights holder should bring a cause of action against the search engine for contributory copyright infringement.

This solution is attractive for a number of reasons: the process does not require any changes in law; it will make downloading unauthorized content more difficult and hopefully less attractive; it places the incentive to protect works on the rights holder

Continued on page 16.

I Can't Get No Cause of Action?!: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.

Continued from page 15.

and places the burden of prevention on the party in the best position to exercise control; and the notification process preserves evidence that can help defend against contributory liability or support a plaintiff's case. Additionally, this notification system mirrors the DMCA and will be familiar to copyright holders and service providers. Further, any disputes related to notifications can be resolved by reference to DMCA case law. This proposed cause of action works in conjunction with existing law and is only one element of a solution to widespread online piracy. Most importantly, this proposal will be most effective if it can garner the support of search engines themselves.

II. Advocating a Cause of Action for Contributory Liability under *Grokster*

Contributory liability stems from the idea that one who directly contributes to another's infringement ought to be accountable.¹⁴ According to Judge Posner, because the law recognizes "the impracticability and futility of copyright owner's suing a multitude of individual infringers, the law allows copyright holders to sue a contributor to infringement instead, in effect as aider and abettor."¹⁵

This article proposes copyright holders send a written notification to search engines when the copyright holder discovers certain search terms produce links to websites hosting or providing index files¹⁶ for unauthorized copyrighted sound recordings. The notification should parallel those used in the DMCA¹⁷ and include information sufficient for the search engine to identify the infringing sites. Because this exact method of notification is already implemented in the DMCA, search engines and rights holders ought to be familiar with the process. Additionally, the notification should include a list of legitimate retailers where consumers can obtain copies or a list of alternatives for consuming music, such as music-subscription services. Most importantly, receipt of this notice by the search engine ought to be sufficient to establish actual knowledge of the infringement. This is important because the rights holder will use this evidence of the search engine's knowledge to support their cause of action for contributory liability for copyright infringement.

Copyright holders should then pursue a cause of action under *Grokster* or, in the alternative, under various cases after *Grokster* that address services and copyright infringement. Rights holders should argue their exclusive rights to *authorize* the reproduction and distribution of their copyrighted works has been infringed. Additionally, rights holders should argue their exclusive rights to reproduce and distribute have been infringed by the online posting and distribution of their copyrighted material, and that search engines materially contribute to the direct infringement. Arguably, the search engines should then be held liable for materially contributing to copyright infringement.

Authorization of the Right to Reproduce and Distribute

Copyright holders have the exclusive right to *authorize* the reproduction and distribution of their copyrighted works under the Copyright Act.¹⁸ Congress included "authorize" to avoid any confusion regarding the liability of contributory infringers.¹⁹ The Supreme Court in *Grokster* did not address the issue of "authorization," opting for the "active inducement test" instead.²⁰ This lessens the force of "authorization" arguments, but it does not necessarily render them impotent.²¹ *Sony* discussed the right to authorize and the manner in which a court imposed liability for infringement under *Kalem*.²² The Supreme Court found Sony did not authorize users to violate plaintiff's copyrights because Sony did not control the works or the consumers' actions.²³ Although search engines do not control the unauthorized content or the consumers' actions, search engines do contribute to consumers' ability to access the copyrighted works. Based on the House Report and the wording of the statute, a search engine may be liable as a contributory infringer for the unauthorized reproduction and distribution of copyrighted materials.

The Supreme Court in *Fonovisa* quoted an earlier case for the definition of contributory liability: "one who, with knowledge of infringing activity, induces, causes, or materially contributes to infringing conduct of another may be held liable as a 'contributory infringer.'"²⁴ In *Fonovisa*, the copyright owners of sound recordings sued the operators of a swap meet for infringement by sales of counterfeit sound recordings by independent vendors.²⁵ The Court adopted a rule from the Third Circuit, holding that provision of the site and facilities for known infringing activity is sufficient to establish contributory liability.²⁶

Continued on page 28.

High Profile Trademark Actions 2012

By: Roberto "R.C." Rondero de Mosier



One of the more interesting developments in the legal world over the past year has been the increase in high profile trademark filing and lawsuits.¹ Truth be told, the legal activity in the trademark world is not new, but it does seem to be higher profile. From Jay-Z and Beyonce's baby to direct to home movies that seek to trade on the name of high profile films hitting theatres, there are a number of interesting claims and disputes on the books.

Blue Ivy: Just days after Jay-Z and Beyonce's child, Blue Ivy, was born, the happy couple filed applications with the U.S. Patent and Trademark Office to protect the name and use it in fourteen goods and services classes, from skin care products to CDs, ring tones to baby bedding.² Anytime a person applies for trademark protection, they can choose from numerous classes, or file in each class depending on what they

want to exploit.³ Filing across all classes can be pricey at a minimum of \$275 a pop, but the payoff can be lucrative. The Carters (Jay-Z and Beyonce) tried for numerous classes, but as happens in high profile filings, many others are trying to capitalize on the name by filing competing applications or challenging their filings.⁴

It is up to the United States Patent and Trademark Office to sift through all the applications and give each application its fair shake. I find it intriguing how the Carters, savvy business people

themselves, have already sought to secure monetization of their child's name. The process for trademark registration has been slowed by other parties seeking to trademark Blue Ivy concurrently, but ultimately the Carters will probably be successful.⁵ Their application was published November 7th and it looks poised to be approved. They did lose out on using Blue Ivy in the wedding planning business though. A Boston wedding planner secured her rights to Blue Ivy in the midst of the filing challenges.⁶

Tebowing: Back when "Tebowing" became a phenomenon, a very clever Tim Tebow (or his advisors through XV Enterprises), made sure to file trademark applications in seven classes.⁷ Tebow also ran into the issue of others trying to capitalize on the name. But, after diligent work, the Trademark Office has published the applications for opposition, meaning someone will have to make a pretty convincing case of prior use to stop the eventual securing of the trademark by Tebow.⁸ The ability of Tebow to capitalize on a gesture he performs during each pregame may actually be his longest lasting legacy.

Louboutin Shoes: In an interesting result that came out of trademark litigation, the unique red-soled shoes from designer Christian Louboutin were given trademark protection after it was determined that the glossy red soles that differed from the heel color had acquired a secondary meaning.⁹ What does that mean? Well, the red soles are unique and distinctive enough that the look deserves trademark protection since no one else does it.¹⁰ And now, no one else will without infringing on a trademark. The decision opens up interesting new precedent for designers that can span across a few industries.¹¹

The Hobbit: The Film Production company, The Asylum, has a long standing tradition of releasing direct to video (or streaming) films that allude to a relation to major blockbusters in theatre.¹² The most recent release is *Age of the Hobbits*, which seeks to capitalize on *The Hobbit: An Unexpected Journey*.¹³ This is just the most recent misleading Asylum release after recent releases such as *American Warships* (originally *American Battleships* before a judge ruled that the name violated the *Battleship* trademark¹⁴) and *Abraham Lincoln v. Zombies*.¹⁵ The most recent *Age of the Hobbits* film was challenged by the studios behind *The Hobbit*, and if not for their recent loss on the challenge from the studios behind *Battleship*, one might have believed The Asylum would be safe, but unfortunately for them, their antics were not looked upon highly by the court.¹⁶

The recent trademark filings and challenges through litigation show an interesting trend in the trademark world. Trademark laws are strong in the United States, and as long as they remain so, parties will seek to get trademark rights since they can last

Roberto "R.C." Rondero de Mosier is an attorney licensed to practice law in Texas, California, New York and Illinois. He is a partner at Gonzalez & Mosier Law PLLC. His practice specializes in Entertainment Law and Intellectual Property rights. In his spare time he enjoys watching television and films, and writing about it. Follow him on Twitter @showbizattorney, or e-mail him at rc@gonzalezmosier.com.

Opportunities Increasing in China for U.S. Entertainment Industry

Continued from page 17.

in perpetuity.¹⁷ It creates a great potential revenue stream. By registering a mark, the owner has the ability to leverage licensing rights or sue to enforce its trademark rights. The recent trademark action has actually led a well respected trademark attorney to trademark the term "trademarklawpocalypse," in order to describe the activity we have seen in the trademark world over the past year.¹⁸

Aside from the entertainment value of watching this activity unfold, it also brings forth an important object lesson for entrepreneurs. A registered trademark can be a powerful investment tool. While a filing and cost of attorney can be an upfront cost (and not a large one at that), the benefit of the brand building can pay large dividends in the future. Having a mark registered before someone else tries to enter your space with a similar mark can save time and money in the long run. Statutory damages for trademark infringement are stiff, so it is worth having that in your back pocket as an entrepreneur. And also, be on the lookout for that next brand that you think has a "markable" appeal. One can trademark a service company name on to apparel that promotes that name. So even if your company falters a bit, you might have a great brand with a powerful mark that you may want to exploit in another fashion.

ENDNOTES

- 1 See Eriq Gardner, *Hollywood's IP Wars: Inside the Fight Over Trademarks*, The Hollywood Reporter, November 30, 2012, available at <http://www.hollywoodreporter.com/thr-esq/denzel-washingtons-flight-parenthood-inside-393168>.
- 2 Trademark filing: *Blue Ivy Carter*, United States Patent and Trademark Office, available at <http://tess2.uspto.gov/bin/showfield?f=doc&state=4001:9r4hd0.3.2>
- 3 Nice Agreement Tenth Edition – General Remarks, Class Headings and Explanatory Notes - Version 2012, United States Patent and Trademark Office, available at <http://www.uspto.gov/trademarks/notices/international.jsp>
- 4 The Reliable Source, *'Blue Ivy,' the trademark: Feds move fast on rights to Beyoncé and Jay-Z's baby's name*, February 3, 2012, available at http://www.washingtonpost.com/blogs/reliable-source/post/blue-ivy-the-trademark-feds-move-fast-on-rights-to-beyonce-and-jay-zs-babys-name/2012/02/03/gIQAOTDGNQ_blog.html
- 5 The Reliable Source, *Beyoncé's 'Blue Ivy' trademark application still alive but moving slowly*, The Washington Post, October 24, 2012, available at http://www.washingtonpost.com/blogs/reliable-source/post/beyonces-blue-ivy-trademark-application-still-alive-but-moving-slowly/2012/10/23/9e5023fa-1d5b-11e2-ba31-3083ca97c314_blog.html
- 6 Dan Hyman, *Jay-Z and Beyoncé Lose Bid to Trademark 'Blue Ivy'*, Rolling Stone, October 22, 2012, available at <http://www.rollingstone.com/music/news/jay-z-and-beyonce-lose-bid-to-trademark-blue-ivy-20121022>
- 7 Matthew Brown, *Tim Tebow trademarks 'Tebowing' to prevent abuse of prayerful pose*, Deseret News, October 29, 2012, available at <http://www.deseretnews.com/article/865565520/Tim-Tebow-trademarks-Tebowing-to-prevent-abuse-of-prayerful-pose.html?pg=all>
- 8 *Id.*
- 9 Larry Neumeister, *Court protects Louboutin shoes' red sole trademark*, USA Today, September 5, 2012, available at <http://usatoday30.usatoday.com/money/industries/retail/story/2012-09-05/louboutin-red-sole-shoe-protection/57605246/1>
- 10 *Id.*
- 11 *Id.*
- 12 Mark Litwak, *Hobbit Titles: An Unexpected Journey in Confusion*, ifp resources, January 3, 2013, available at <http://www.ifp.org/resources/hobbit-titles-an-unexpected-journey-in-confusion/>
- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 Question 7 – How Long Does Trademark Protection Last?, available at <http://www.legalfliip.com/Article.aspx?id=90&pageid=473>
- 18 Trademark filing: *Trademarklawpocalypse*, United States Patent and Trademark Office, available at <http://tess2.uspto.gov/bin/gate.exe?f=doc&state=4004:e7jd22.2.1>

TESLAW Journal Articles Hypelinked

As part of our continuing effort to improve the TESLAW Journal we have added hyperlinks to many citations. Each hyperlink will take the reader to the State Bar of Texas' free research service, Casemaker. If not previously registered for Casemaker, a reader will need to subscribe using their bar card number.

Using the remember me function ensures that sign-in will not be necessary each time a reader clicks a hyperlink. Unfortunately Casemaker does not support all secondary sources and out of Texas citations — so not all citations are hyperlinked. But we and Casemaker will get better with coming Journals.

Texas Accountants and Lawyers for the Arts Expands to Meet Statewide Demand

Continued from page 6.

Funding.

In addition to more clients and volunteers, the third leg of TALA's success in expanding to Austin has been funding. With austerity measures at every level of government, and private donations also down, TALA has been fortunate to be able to add Austin staff. TALA is funded not only by public and private sources, but also by membership fees.

TALA's Austin presence would not have been possible without the financial leadership of, and lawyer volunteers from, Intel Corporation. The Intel Foundation provides grants to non-profits, in proportion to time Intel attorneys donate themselves to *pro bono* matters. Over two years, Intel has donated more than \$20,000 to TALA and over 2000 hours of *pro bono* time.

Donations such as these also recently helped TALA host Austin entertainment lawyer Chris Castle for a series of four music-rights seminars, which culminated with a well-attended presentation by Camper Van Beethoven (and Cracker) front man, David Lowery, about his new initiative to stem online music piracy by going after the advertisers and search engines that serve illegal download sites. In addition, monetary contributions from firms and companies within Austin help provide educational and clinical services to local artists on a regular basis, in conjunction with other arts non-profits.

TALA is fortunate to have such a strong and dedicated *pro bono* partner as Intel in Austin to fund these events, but more assistance is needed—both in Austin and statewide—to help TALA help the arts. As nice as it would be for volunteerism alone to address this issue, volunteers and artists still need the help of TALA to find each other and facilitate referrals and seminars.

How you can help.

Get involved. TALA seeks volunteers, funders, and client artists and arts organizations.

Sign up at TALA's website for referrals. The process is easy, and once you're on, you will get a periodic email listing available cases. When you have the time, request one of the referrals that appeals to you.

- Attend an event. Training sessions are held around the state at various times of the year.
- Volunteer to speak to other lawyers or artists about a topic you already know.
- Volunteer to help with any of TALA's other activities, such as its annual gala, happy hours, arts auctions, or publications on arts topics.
- Refer TALA to an artist or arts organization who could benefit from TALA's services.
- Match TALA with possible funding sources, whether your employer, an organization you serve, or a foundation looking for good causes.

Through the three pillars of a sustainable *pro bono* organization – volunteers, clients, and funding – TALA has been able to boost Austin's *pro bono* legal services for artists. But to continue its mission statewide, TALA needs help from local contributors like you. We look forward to hearing from you!

Someone to Watch Over Me: Why University Monitoring of Student Athletes' Social Media Activities is a Recipe for Disaster

Continued from page 8.

Forcing student-athletes into having their social media accounts monitored raises a host of troubling legal issues. First of all, the very arrangement is expressly prohibited by most social networking sites' terms of service. Facebook, for example, explicitly forbids a user from sharing his password with a third party (on this basis, Facebook has taken a stand against employers seeking the passwords and login information of job applicants). Second, the practice could spawn unanticipated civil liability. The family of Yeardley Love, a University of Virginia women's lacrosse player who was murdered by her ex-boyfriend (a member of the men's lacrosse team) is suing athletic department officials for \$30 million in a negligence suit alleging that they ignored previous violent behavior of her attacker and other warning signs. Imagine if the school had engaged in social media monitoring, but missed signs of such behavior, or if any school with such a monitoring program "knew or should have known" of a student-athlete's violent tendencies or statements before a campus shooting but failed to take action? Bradley Shear, a Maryland attorney who closely follows social media legal issues, says this is a serious risk. "Can you imagine if the coaches are following everything these kids are saying online, and they knew or should have known that a student was doing something or should be doing something and didn't act to stop it? That's a liability situation that I don't think any school should have to deal with," he observes.¹¹

Besides such civil liability exposure, there are also the constitutional issues (although Bentley's article correctly points out that this would not pose the same concern for private institutions). The landmark case of *Tinker v. Des Moines Independent Community School District* and its progeny made it clear that students do not check their First Amendment rights at the school-house door.¹² And while several courts have justified certain invasions of a student-athlete's Fourth Amendment rights in cases involving random drug testing, recent decisions in the digital age have come down on the side of protecting a student's right to expression via social media. For example, in a September decision, a federal court in Minnesota held that school officials violated a middle school student's First and Fourth Amendment rights by forcing her to turn over her Facebook password and searching her Facebook and private email accounts.¹³ The student in question had posted a message about an adult hall monitor at the school being "mean" to her; citing concerns about "impermissible bullying," school officials browbeat the girl into providing the access information before disciplining her for "insubordination." The court held that the comments in question weren't true threats or a disruption of the school environment, and that the rummaging around the student's Facebook page violated the Fourth Amendment.¹⁴

There has been a split among the circuits when it comes to disciplining students for their expressions on social media platforms. Generally speaking, the trend among courts is to uphold a school's regulation of a student's social media activity (even when done off-campus) if the school can prove that the speech was either a material disruption to the school, or fell under the category of unprotected speech (like hate speech).¹⁵ Yet as the Third Circuit has recognized, the ubiquitous nature of social media poses unique challenges from a First Amendment standpoint:

For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.¹⁶

Beyond the civil liability exposure and the constitutional questions that universities' social media monitoring of student athletes raises (not to mention the inherent creepiness), such monitoring is already against the law in several states, and may soon be banned in others. Legislatures in Maryland, Delaware, Colorado, and California have all passed legislation forbidding colleges from requesting or requiring login information like passwords or from installing monitoring software. While Maryland's bill has stalled, the Delaware act and California's Senate Bill 1349 have become law, and other states are mulling similar legislation.¹⁷ These laws were inspired, in part, by similar laws prohibiting an employer from forcing an employee or job applicant to turn over their Facebook passwords. Such laws have been passed in California, Illinois, Maryland, Delaware, and New Jersey, and at least 12 states including Texas are considering similar legislation.

In fact, Texas may soon join the list of states prohibiting universities from social media monitoring of all students, including student athletes. Rep. Dawnna Dukes (D-Austin) authored House Bill 451, which would ban universities from accessing current

Continued on page 21.

Someone to Watch Over Me: Why University Monitoring of Student Athletes' Social Media Activities is a Recipe for Disaster

Continued from page 20.

or prospective students' personal social media accounts. It would also prohibit requesting or requiring students' user names and passwords, as well as requiring students to add officials as "friends" on Facebook. According to a statement from Rep. Dukes' office, "Employees and students should not feel compelled to divulge their social media login information."¹⁸ In addition, there is activity at the federal level. New York Congressman Elliot Engel recently reintroduced the Social Networking Online Protection Act (SNOAPA). The bill would ban employers and schools from being able to request or require that employees, job applicants, students' or student applicants provide access to "personal password protected digital accounts," including social networking profiles.

Finally, some schools have defended the practice of monitoring student-athletes based on a March 2012 ruling by the NCAA. Prompted by tweets and posts by University of North Carolina football players Marvin Austin and Donte Paige-Moss alluding to impermissible benefits, the NCAA investigated. On March 12, 2012, it levied penalties against North Carolina that included a one-year bowl ban and the loss of 15 football scholarships.¹⁹ But universities that point to the NCAA's action as justification for social media monitoring are ignoring the actual wording of the NCAA's report, which expressly states that "The committee declines to impose a blanket duty on institutions to monitor social networking sites."²⁰ In fact, the NCAA made it clear that a duty to monitor or investigate would only arise if there was some reasonable suspicion of rules violations:

The committee recognizes that social networking sites are a preferred method of communication in present society, particularly so among college-aged individuals. While we do not impose an absolute duty upon member institutions to regularly monitor such sites, the duty to do so may arise as part of an institution's heightened awareness when it has or should have a reasonable suspicion of rules violations. If the membership desires that the duty to monitor social networking sites extend further than we state here, the matter is best dealt with through NCAA legislation.²¹

While it's true that universities have considerable reputational and tangible investments at stake in their athletic programs, student-athletes are still students first and foremost, not merely living billboards for a school's football or basketball program. As such, they have rights. Rather than risk civil liability, the potential violation of applicable privacy laws, or the undermining of constitutional protections afforded to every other student, colleges and universities concerned about social media fallout would be better advised to do what they do best: educate. Schools can and should teach their student-athletes about the dangers of misusing social media, thereby protecting their brands while refraining from invasive, legally-dubious conduct.

An earlier version of this article appeared in the December 2012 issue of the Texas Bar Journal.

ENDNOTES

- 1 See, for example, the cautionary tale of Yuri Wright, a much-heralded recruiting prospect from Ramsey, New Jersey. The high school cornerback was expelled in January 2012 after a series of sexually-graphic and racially-charged tweets, which also cost him football scholarship offers from a number of Division I programs.
- 2
- 3 Nichole Auerbach, "Athletes Chirp Their Objections," USA Today, Jan. 11, 2013.
- 4 *Id.*
- 5 Machota, *Id.*
- 6 See, e.g., Victor Broccoli, *Policing the Digital Wild West: NCAA Recruiting Regulations in the Age of Facebook and Twitter*, 18 SPORTS LAWYER J. 43 (Spring, 2011); Mary Pilon, *Watch That Tweet! N.C.A.A., Colleges Wrestle With Social Media Recruiting Rules*, N.Y. TIMES, Dec. 12, 2011.
- 7 Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. TIMES, Mar. 20, 2012, http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&_r=0.
- 8 Sam Laird, *Inside the Battle for College Athletes' Social Media Lives*, MASHABLE.COM, Aug. 20, 2012, <http://mashable.com/2012/08/20/college-athletes-social-media/> (last visited Oct. 7, 2012); Mark Boxley, *University of Kentucky, Louisville Flag Hundreds of Words From Athletes' Tweets*, COURIER-J., Aug. 21, 2012.
- 9 Allie Grasgreen, *California Second State to Forbid Colleges From Social Media Monitoring of Athletes*, INSIDE HIGHER ED., Aug. 27, 2012, <http://www.insidehighered.com/news/2012/08/27/california-second-state-forbid-colleges-social-media-monitoring-athletes> (last visited Oct. 7, 2012).
- 10 *Id.*
- 11 *Id.*
- 12 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
- 13 *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 2012 WL 3870868 (D. Minn. Sept. 6, 2012).
- 14 *Id.*
- 15 See, for example, *Evans v. Bayer*, 684 F.Supp.2d 1365 at 1372 (S.D. Fla. 2010) ("Therefore, the Court finds that Evans' speech – her publication of the Facebook page – is off-campus speech. But, the inquiry does not end because schools can discipline off-campus speech if it is unprotected speech.")

Continued on page 22.

Someone to Watch Over Me: Why University Monitoring of Student Athletes' Social Media Activities is a Recipe for Disaster

Continued from page 21.

16 *Laysbuck ex rel. Laysbuck v. Hermitage Sch. Dist.* 650 E.3d 205, at 220-21 (3d Cir. 2011), cert denied, 132 S. Ct. 1097 (2012)

17 Grasgreen, *supra* note 5.

18 Kolten Parker, "Social Media Monitors Targeted," *San Antonio Express-News*, Jan. 26, 2013.

19 N.C.A.A. – University of North Carolina, Chapel Hill Public Infractions Report, Mar. 12, 2012.

20 *Id.* at 11.

21 *Id.* at 12.



STATE BAR OF TEXAS ANNUAL MEETING
DALLAS, JUNE 20-21, 2013

TESLAW Presents at the State Bar of Texas Annual Meeting — *3 Hours of CLE*

Hot Topics in Video Game Law

Stacy Allen, *Austin*
Jackson Walker L.L.P.

Brand and Celebrity Engagement Deals: The Digital Media Evolution

Steven Masur, *New York, NY*
MasurLaw

Dina LaPolt, *West Hollywood, CA*
LaPolt Law, P.C.

NFL Players Post-Playing Career and the Ongoing Struggle to Deal With Injuries and Players' Grievances

Brad Sham, *Dallas*
The Dallas Cowboys

Friday June 21, 2013, Hilton Anatole, Dallas

Texas State Incentives for Film and Television Production — Then, Now, and Later

Continued from page 10.

productions are eligible for a higher percentage reward. The State uses the following scale to determine grants for qualifying feature films and television programs:

- (i) productions that spend at least \$250,000 but less than \$1 million in in-state expenses are eligible to receive a grant equal to 5% of their in-state expenses;
- (ii) productions that incur at least \$1 million but less than \$5 million in in-state expenses may receive grants equal to 10% of their in-state expenses; and
- (iii) productions that incur \$5 million or more in in-state expenses may receive grants equal to 15% of their in-state expenses.¹⁷

In addition to the above percentage reimbursement rate, qualifying projects which film at least 25% of the time in underutilized or economically distressed areas may receive an additional 2.5% of their total in-state spending.¹⁸

The reimbursement incentives that are offered to qualifying commercials, educational videos and reality television shows under the incentive program are not on a sliding scale basis and are less favorable than those which are given to film and television projects. Qualifying projects are eligible to receive only 5% of their total in-state spending regardless of the total amount of their in-state expenses.¹⁹

The Application Process

To obtain funds, a production must first apply to the Texas Film Commission to qualify for the incentive program *before* production begins on the project; however, applications will not be accepted earlier than 30 days before a project's principal start date.²⁰ As a result of the narrow application window, producers begin work on their projects without any assurance from the State that their application will be approved.

Once submitted, the Texas Film Commission will review an application to determine if the project is expected to meet the minimum in-state expense and Texas resident requirements. Qualified applications will then be evaluated on a number of factors such as the economic impact to the state, the number of jobs created in Texas, and the project's ability to promote Texas as a tourist destination.²¹ Upon the approval of an application, the Commission will enter into a grant agreement with the successful applicant, and the Office of the Governor will encumber funds in the TMIIP for the project.²²

Other Texas Production Incentives

In addition to the reimbursements granted under the TMIIP, producers of film, television and commercial projects are exempt from paying sales tax on many items related to the production of their project. Under Texas law, producers are recognized as "manufacturers" which allows them to claim sales tax exemption on many products and services.²³ The exemption includes items such as cameras, film, lights, props, and digital equipment. However, the exemption does not include office equipment, maintenance equipment, and machinery used in distribution activities.²⁴

Additionally, Texas filmmakers may benefit from an exemption from hotel occupancy taxes since Texas law provides that anyone who stays in a hotel room for more than 30 consecutive days can waive all state and local occupancy taxes.²⁵

Effects of the Texas Incentive Program

Texas film and budget experts have differing opinions on the effectiveness of the TMIIP. Since the current rules for the TMIIP have only been in place since April of 2009, the program's limited operating history makes it difficult to ascertain the

Continued on page 24.

Texas State Incentives for Film and Television Production — Then, Now, and Later

Continued from page 23.

effect that the incentives have had on Texas production. An April 2011 report issued by the IC2 Institute at The University of Texas at Austin applauded the TMIIP for achieving its legislative intent of drawing new production jobs to Texas to generate substantial economic estimates. The report found that from June 2007 through December 2010, the productions that qualified under the TMIIP had a \$1.1 billion effect on the Texas economy and led to over 10,000 new jobs in Texas.²⁶

In particular, the report highlighted the effectiveness of the legislative changes made to the TMIIP program in the 2009 Legislative Session which, according to the report, led to a dramatic increase in Texas film and television projects. The report notes that in the 16 months prior to enactment of the 2009 legislation, the Texas Film Commission granted awards to only 67 projects. But in the same period of time following the enactment of the new legislation, awards were granted to 204 projects—an increase of over 300%.²⁷

The report also compared the TMIIP to other state incentive programs and found that while the Texas program is “not generous” when compared to other states, the TMIIP was the most efficient of the states analyzed at creating new in-state production jobs. While other states provide much higher reimbursement rates and other incentives than those provided by the TMIIP,²⁸ the Texas incentive program has been able to create in-state jobs at a cost to the State that is roughly 35% cheaper than any other state that the report analyzed.²⁹

Texas Governor Rick Perry has also issued high praise for the State’s investment in the TMIIP. Known for his frequent promotion of the Texas economy as compared to other states, in a May 2012 speech given by Governor Perry at a film conference on the Texas A&M University-Corpus Christi campus, Governor Perry cited to the same UT-Austin study and proclaimed to the conference attendees that “for every dollar we spend in our Moving Image Industry Incentive Program, we generate almost \$19 in private sector economic activity.”³⁰

However, despite the success that some have attributed to the TMIIP, the future of the program is in jeopardy as certain budget leaders in the Texas legislature do not believe that the program has been an efficient use of Texas taxpayer money. In the first month of the 2013 Legislative Session, both the Texas House of Representatives and Senate laid out their initial budget proposals for the for 2014-2015 biennium, and both proposals—H.B. 1 and S.B. 1—call for the elimination of all funding to the TMIIP for the upcoming biennium.³¹

Some Texas legislators, such as State Senator Kirk Watson, have stated their skepticism of the program’s effectiveness and cite to a budget report prepared by the Texas Legislative Budget Board, a permanent joint committee that establishes budgetary recommendations for the Legislature. In the report, the Legislative Budget Board casts doubt on the effectiveness of the TMIIP and states that “it is difficult to determine that Texas is chosen as a place of production over other states because of Texas’ program.”³²

While the recommendation to eliminate funding for the TMIIP have come to the surprise and disappointment of many of the program’s supporters and beneficiaries, many months still remain in the 2013 Legislative Session, and the future of the TMIIP is difficult to predict. Supporters of the program faced similarly disappointing budget recommendations in the 2011 Legislative Session when the initial budget proposals at that time called for only \$10 million to be allocated to the TMIIP which represented a drastic reduction from the \$60 million that was allocated to the TMIIP for the previous biennium. However, as a result of lobbying efforts and legislative support on behalf of the TMIIP, the final budget bill allocated \$30 million to the program for the 2012 – 2013 biennium—a \$20 million increase from the initial draft of the bill.³³

Conclusion

Research indicates that the incentives offered by the Texas Moving Image Industry Incentive Program have likely accomplished their intended effects by creating economic benefits and production jobs for the State of Texas. Though the program was slow to start and the incentives offered by other state film programs may be more attractive, the TMIIP has developed into a successful program as a result of legislative changes and a positive Texas filmmaking environment. Because of the program’s

Continued on page 25.

Texas State Incentives for Film and Television Production — Then, Now, and Later

Continued from page 24.

youth and the state's reluctance towards using taxpayer resources for government-run incentive programs, the TMIIP is currently in danger of becoming a political casualty of the state budget making process.

ENDNOTES

- 1 Texas Film Commission — History, <http://governor.state.tx.us/film/info/history> (last visited Feb. 13, 2013).
- 2 Robert Tannenwald, *State Film Subsidies: Not Much Bang for Too Many Bucks*, Center on Budget and Policy Priorities (November 17, 2010).
- 3 House Research Organization — Bill Analysis of TEX. H.B. 1634, 80th Leg., R.S. (2007), Apr. 10, 2007, <http://www.lrl.state.tx.us/scanned/hroBillAnalyses/80-0/HB1634.PDF> (last visited Feb. 13, 2013).
- 4 TEX. H.B. 873, 81st Leg., R.S. (2009).
- 5 Vicky Garza, *Better Film Incentives Sought for Texas*, Austin Business Journal, December 28, 2012.
- 6 TEX. GOV'T CODE §485.021(4).
- 7 *Id.* at §485.024(b).
- 8 13 TEX. ADMIN. CODE §121.5(a).
- 9 *Id.* at §121.5(b).
- 10 *Id.* at §§121.5(b)-(d). Note that for animated and documentary productions or reality television programs only 70% of the combined cast and crew must be Texas residents.
- 11 *Id.* at §121.5(e).
- 12 TEX. GOV'T CODE §485.022(e).
- 13 Charles Ealy & Matthew Odam, *Tax Incentives for "Waco" Film Rejected*, Austin American-Statesman, May 20, 2009.
- 14 *Texas Film Commission Denies Incentives to "Machete"*, The Hollywood Reporter, Dec. 8, 2010, at <http://www.hollywoodreporter.com/blogs/risky-business/texas-film-commission-denies-incentives-58008> (last visited Feb. 13, 2013).
- 15 2010 Ariz. Sess. Laws 113.
- 16 Richard Whittaker, *Is That a Wrap for Incentives?*, The Austin Chronicle, Jan. 28, 2011.
- 17 13 TEX. ADMIN. CODE §121.6(a).
- 18 *Id.* at §121.7.
- 19 *Id.* at §121.1(a)(1).
- 20 *Id.* at §121.8(a)(3).
- 21 *Id.* at §121.8(c).
- 22 *Id.* at §121.8(d).
- 23 TEX. TAX CODE §151.3185.
- 24 *Id.* at §§151.3185(b)-(c).
- 25 *Id.* at §156.601.
- 26 James E. Jarrett & Bruce Kellison, *Texas Moving Image Industry Incentive Program: The Economic Benefits From Incentives*, Bureau of Business Research, IC2 Institute, The University of Texas at Austin (April 2011).
- 27 *Id.*
- 28 Michigan offers the largest incentives to production companies with a refundable and transferrable tax credit of up to 42.5%.
- 29 *Id.*
- 30 James Richard "Rick" Perry, Governor, State of Texas, Keynote Address at the Power On For Texas Film, Interactive and Tourism Conference (May 15, 2012) (transcript available at <http://governor.state.tx.us/news/speech/17249/>) (last visited Feb. 13, 2013).
- 31 James Jeffrey, *Texas Film Commission Defends Incentive Program*, Austin Business Journal, Feb. 7, 2013.
- 32 Legislative Budget Board — Summary of Recommendations Presentations — Senate Finance Committee, Section 3, (February 13, 2013), http://www.lbb.state.tx.us/Documents/SFC_Summary_Recs/83R/Agency%20300.pdf (last visited Feb. 13, 2013).
- 33 Letter from Don Stokes, President, Texas Motion Picture Alliance, to members of the Texas Motion Picture Alliance (June 7, 2011), available at <http://us1.campaign-archive1.com/?u=cc1dd9cad50e06a3b314b1d108&id=f3eb4842b5> (last visited Feb. 13, 2013).

CAVEAT

Articles appearing in the Journal are selected for content and subject matter. Readers should assure themselves that the material contained in the articles is current and applicable to their needs. Neither the Section nor the Journal Staff warrant the material to be accurate or current. Readers should verify statements and information before relying on them. If you become aware of inaccuracies, new legislation, or changes in the law as used, please contact the Journal Editor. The material appearing in the Journal is not a substitute for competent independent legal advice.

Opportunities Increasing in China for U.S. Entertainment Industry

Continued from page 13.

movies, generated five times as much in box-office revenues in China than did Chinese domestic film releases. In addition, Chinese distributors have annually obtained rights to almost three dozen foreign movies under flat-fee licenses.

The Chinese government collects 5% of box-office revenues for its National Film Development Fund, created to stimulate movie screenings outside big cities and to support the patriotic and children's film sectors. But to more generally help domestic film production, the Chinese government recently considered rebating its cut to movie houses that emphasize domestic films.

Members of the Chinese film community nevertheless point to content restrictions as a major damper on making Chinese films competitive with foreign film offerings. For example, China Daily newspaper quoted film director Yang Shupeng as saying: "Domestic filmmakers are not allowed to shoot ghost stories, but we had *Ghost Rider*, starring Nicolas Cage, in theaters. We obviously can't compete with Hollywood in visual effects and action scenes."

Recent trends have reaffirmed the strong appeal of the Chinese market for U.S. film companies. Veronika Kwan Vandenberg, president of distribution for Warner Bros. International, was quoted in *The Hollywood Reporter* as saying: "The top 10 films [dominated by U.S. movies] through June 30 [of 2012] in China are already 85% of the top 10 films for the entire year in 2011." Then in September 2012, Imax Corp. announced an increase in the number of Chinese-language films it would format from Chinese production house Huayi Bros. The two companies first partnered for the 2010 release of *Aftershock: The Imax Experience*. Imax recently had about 50 exhibition sites in Dalian Wanda Group theatres and sought to increase that to at least 90 in the near future.

When the Beijing-based Wanda Group completed its \$2.6 billion purchase of the giant Kansas City-based AMC Entertainment theatrical-exhibition chain in September 2012, Wanda chairman Wang Jianlin also noted Wanda's strategy for AMC and major U.S. films producers to enter into joint ventures. (Wanda's AMC acquisition made it the largest theatrical exhibitor worldwide, though AMC previously had foreign ownership interests, after Loews Theatre merged with Canada's Cineplex Odeon Corp. to create Loews Cineplex Entertainment, which merged with AMC.)

RAPID ONLINE GROWTH

China has the largest online user base in the world, estimated at around one-half billion. China's rapidly growing online arena has allowed even greater massive, often unchecked, piracy of U.S. entertainment content. But there is earning potential for U.S. companies, too, as some law and order has begun to take shape.

For example, in an earlier court fight in 2005, Universal Music, Warner Music and Sony Music sued China's Google-equivalent Baidu — estimated to account for 80% of online searches in China — for enabling piracy through deep linking, but the record companies lost in lower court. The music companies appealed to the Beijing High People's Court but resolved the litigation by signing Baidu to content licensing deals. The labels' venture, One-Stop China, made more than one-half million tracks available. The agreement allowed online users to download or stream for free, with per-use monies paid for by Baidu through ad revenues. More recently, the Chinese e-commerce mega-site Taobao, which is a part of Alibaba Group, agreed to work with the international Motion Picture Association to curb copyright infringement and counterfeiting activities.

Despite the high level of online piracy in China, content licensing deals have been happening for several years now. In TV programming, Disney and CBS were among the early leaders in entering into agreements with China's Youku and Sohu online services for the streaming of such shows as *Desperate Housewives*, *Gossip Girl* and *Grey's Anatomy*. Also, Youku has signed a joint venture agreement with Warner Bros Entertainment for pay-per-view movies. Importantly, foreign films aren't subject to the high level of restrictions in online settings as these films are in movie theatres in China. Digital TV Research, based in the United Kingdom, has estimated that revenues for online videos and TV content will grow to \$2.1 billion by 2017.

Continued on page 27.

Opportunities Increasing in China for U.S. Entertainment Industry

Continued from page 26.

But online services in China face their own economic challenges. The country's two biggest online video services became one in 2012 following the finalizing of a \$1 billion stock deal by Youku, China's largest online video provider, to buy the second-largest, Tudou. Both services had lost money in 2011; prompting the deal was a need for cost-savings, which could be achieved by utilizing greater bargaining power to negotiate lower fees for obtaining content. Youku had previously entered into deals with U.S. entertainment companies like DreamWorks and NBCUniversal.

Still, in an example of the growing value of online services in China, the Chinese e-commerce company Alibaba Group Holding Ltd. agreed in May 2012 to buy half of Yahoo! Inc.'s 40% stake in Alibaba for a minimum of \$6.3 billion in cash, plus \$800 million in preferred stock.

U.S. LAWYERS IN CHINA

American lawyers have been working in Hong Kong for many years. On the Chinese mainland, much of the recent influx of U.S. intellectual property and entertainment lawyers naturally has been into the large commercial centers of Shanghai and Beijing. Most of these lawyers land in Chinese offices of firms that are well-established in the United States; it would be difficult for boutique firms, for which the entertainment industry is known, to compete on a transnational scale. For instance, U.S. firms with lead roles in the Youku/Tudou merger were mega-firms Skadden, Arps, Slate, Meagher & Flom and Kirkland & Ellis. In the AMC deal, U.S. and China-based lawyers from Davis Polk & Wardwell represented the Wanda Group, while Weil, Gotshal & Manges attorneys in both countries worked for AMC. Among the law firms that have recently added lawyers to their mainland China presence is the well-known entertainment industry firm Loeb & Loeb, with offices in Beijing and Shanghai, and Kilpatrick, Townsend & Stockton with a new IP office in Shanghai.

Intellectual property and entertainment lawyers whose practices involve China face a special blend of legal principles. First, English law has been retained in the former British colony Hong Kong, which was returned to China in 1997. In gambling center Macau — the former Portuguese island colony located near Hong Kong that was placed under China's administration in 1999 — Portuguese law is still practiced. (Note: Foreign law firms are barred from establishing independent practices in Macau but under local bar regulations can share revenues by referring clients.) Mainland China is based on its own Chinese law.

There is another aspect to doing business in China with which U.S. lawyers aren't used to: In 2012, the Chinese government ordered all lawyers to pledge their allegiance to the Communist Party, a move reportedly aimed at human rights attorneys. The Chinese government tallies its country's lawyer count at 166,000, with about one-third being Communist party members, a much higher percentage than the general population.

How might the recent pledge requirement affect U.S. lawyers in a content-expressive industry like the entertainment business? One senior partner at a Beijing firm told *The American Lawyer*: "At our firm, whether or not you are a Communist Party member has absolutely no effect on your work as a lawyer or how you're made partner." But according to a lawyer at a different Chinese firm: "[P]olitical factors could send things in directions that are very difficult to forecast."

This article is an update of an article that previously appeared in *Entertainment Law & Finance*. © Stan Soocher 2013. All Rights Reserved.

I Can't Get No Cause of Action?!: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.

Continued from page 16.

Contributory Liability and Knowledge

Quoting precedent, the *Fonovisa* court reminds us that knowledge is a requirement under contributory liability.²⁷ With regard to computer services, the critical period for knowledge of alleged infringement for service-based standard of contributory infringement is between the date the service provider was informed of the infringement and the date the content was removed.²⁸ The key issue with contributory infringement and knowledge is the ability to control the infringement.²⁹ This means services can be liable for failing to exercise control over their offerings. Bruce P. Keller elaborates:

“a ‘computer system operation’ can be held contributorily liable if it has ‘actual knowledge that *specific* infringing material is available using its system” (quoting *Napster*) and “can ‘take simple measures to prevent further damage’ to copyrighted works (quoting *Netcom*), “yet continues to provide access to infringing works.”³⁰

Under this reasoning, search engines with knowledge of specific infringement ought to be liable for failing to take simple measures to prevent further infringement while continuing to provide access to unauthorized content.

Grokster and the Active Inducement Test

Metro-Goldwyn Mayer, Inc. v. Grokster, Inc. is a recent case dealing with the copyright infringement of sound recordings.³¹ The defendants in *Grokster* operated a service that capitalized on users' desire to share, i.e., copy without authorization, copyrighted material.³² The question at the District Court was “whether actual knowledge of specific infringement accrued at a time when [Grokster] materially contributed to alleged infringement, and [could] therefore do something about it.”³³ The District Court held there was no admissible evidence that Grokster could supervise and control the infringing conduct.³⁴

The Supreme Court took the case on appeal from the Ninth Circuit to address their application of *Sony* to the case.³⁵ Although *Grokster* was capable of significant non-infringing uses, the court found Grokster actively induced infringement.³⁶ The “active inducement test” provides that anyone that “actively induces infringement of patent shall be liable as an infringer.”³⁷ The Court found evidence of defendants' unlawful intent through internal documents demonstrating the company's intent to fulfill former-Napster users' desire for sharing unauthorized sound recordings, defendants' failure to develop or implement filters or other methods of reducing infringing activity of their software, and because their business model relied on selling advertising space on users' screens.³⁸ The court recognized the impossibility of protecting a copyright owner's rights when suing a multitude of direct infringers, and asserted the only practical alternative may be to sue the distributor of the device for contributory infringement.³⁹ The Court mentioned that a failure to take affirmative steps to prevent non-infringing use, absent other indicia, would not result in a finding of contributory liability.⁴⁰ Holding search engines liable as contributory infringers would thus require proof of failure to take affirmative steps to prevent non-infringing use and other indicia such as selling ad space or an intent to fulfill users' desire to share unauthorized sound recordings.

Imposing Contributory Liability on Search Engines

Google sells advertising space on their search results pages.⁴¹ These ads often link to legitimate content but the search results themselves often link to unauthorized copyrighted sound recordings.⁴² Unfortunately, the trend is not limited to the US: a September 2010 poll by Harris Interactive in the UK found 23% of consumers regularly download music illegally, using Google as their means to find content.⁴³ Google may not benefit directly from a search for unauthorized copyrighted materials, but Google does benefit from being considered the best search engine. Companies know that consumers use Google to search for practically everything, and Google capitalizes on this fact by offering ad space on their search results. Further, studies suggest infringers prefer to use Google to assist them in obtaining unauthorized copies of sound recordings.⁴⁴ This begs the question: can Google exercise control over their search results?

Search engines derive their appeal from their ability to produce relevant search results quickly. Such a process requires complex codes and algorithms. This means search engines are well versed in optimizing their services. Additionally, search engines are highly

Continued on page 29.

I Can't Get No Cause of Action?!: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.

Continued from page 28.

capable of implementing features that filter certain results or prioritize others. Indeed, Google would not have experienced such tremendous success had it lacked the ability to control the operation of its search engine.⁴⁵ Thus, search engines that continue to link to unauthorized copyrighted content after receipt of a notice with a list of legitimate retailers satisfy two of *Grokster's* requirements: receiving a financial benefit and a failure to implement filters to reduce potential harms of their service. Intent is the only lacking element. This article argues that intent can be proven by circumstantial evidence in a contributory liability cause of action for copyright infringement.

In *Grokster*, the Court found intent because each company tried to satisfy a “known demand for copyright infringement.”⁴⁶ The court found direct evidence of the defendants’ intent from internal documents.⁴⁷ Search engines will not have internal documents evidencing an intent to contribute to copyright infringement. Perhaps circumstantial evidence, in conjunction with the other indicia above, can convince a court that it would be inequitable for a search engine to avoid liability for contributing to the unauthorized reproduction and distribution of copyrighted materials.

Kasunic argues circumstantial evidence is valid proof if relevant.⁴⁸ He posits, “anything that can be proven by direct evidence could also be proven by sufficient circumstantial evidence.”⁴⁹ For support, Kasunic refers to the opinion in *Perfect 10, Inc. v. Amazon.com, Inc.* where the court characterized the *A&M Records, Inc. v. Napster, Inc.* decisions as “deemed” distributions.⁵⁰ Kasunic concludes this “deemed distribution” standard is basically identical to circumstantial evidence of distribution” and asserts that the Ninth Circuit articulated a “doctrine of inferential distribution.”⁵¹ Therefore, a circumstantial case of infringement would require “facts or circumstances that indicate it is more likely than not that [a right was infringed].”⁵² This proposal for copyright holders seemingly satisfies the requirements for contributory infringement by using circumstantial evidence to establish inducement.

As noted above, this paper suggests copyright holders send a DMCA-like notice to search engines when rights holders discover certain keywords produce links to unauthorized sound recordings. This notice should include a list of legitimate retailers that offer the work and a request that search engines prioritize authorized outlets for the copyrighted material. A search engine’s repeated failure to prioritize legitimate sources for copyrighted material, despite their ability to implement such measures affordably,⁵³ merits an inference that a search engine intended to assist users in distributing and obtaining unauthorized sound recordings. This circumstantial evidence of intent should be used in conjunction with the copyright owner’s direct evidence of infringement to satisfy the final requirement of *Grokster*—inducement. However, if a copyright holder cannot find relief under *Grokster*, perhaps they can still recover under a series of cases dealing with online services.

III. A Cause of Action Against Services Generally

This discussion, thus far, has focused on products: *Sony* involved the manufacturer of a capable of significant non-infringing uses⁵⁴ and *Grokster* involved the distributors of a product who intended to capitalize on the unauthorized transmission of copyrighted sound recordings.⁵⁵ But what about services? The *Fonovisa* court involved a defendant that offered services.⁵⁶ Search engines perform services. Although search engines do not host the material, one could argue that they do materially contribute to copyright infringement. The Court in *Fonovisa* listed three actions that may be sufficient for a finding of contributory infringement: inducement, causation, and material contribution.⁵⁷ Search engines do not compel or cause individuals to infringe upon a copyright. But, courts have held that services can induce copyright infringement.

The defendants in *In re Aimster Copyright Litigation* operated a website where users could register for the defendants’ service and then share copyrighted materials with friends over America Online’s (AOL’s) Instant Messaging system.⁵⁸ The Court was considering whether a service could induce an individual to commit copyright infringement.⁵⁹ The Seventh Circuit, following *Sony*, considered whether the service was capable of significant non-infringing uses.⁶⁰ The Court held that a service provider must prove it was disproportionately costly to eliminate or reduce substantially infringing uses to avoid liability, even when there are noninfringing uses.⁶¹ As mentioned above, consumers value search engines for their ability to quickly locate relevant content. Further, search engines have the ability to filter search results as evidenced by their ubiquitous “advanced search” options. Therefore, implementing a system that prioritizes a list of legitimate retailers ought not be a costly burden.

I Can't Get No Cause of Action?!: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.

Continued from page 29.

Since *Grokster*, courts have imposed contributory liability on service providers for inducing copyright infringement through file sharing.⁶² Both cases turned on an extensive amount of marketing and documents showing that defendants targeted infringers. Proving active inducement may be difficult for copyright owners because search engines don't target users, but are instead chosen by users for their ability to locate relevant content efficiently and consistently. However, this may not prove to be fatal for the proposed cause of action, as the "material contribution" element of the *Fonovisa* test has been applied to service providers in the wake of *Grokster*.

The Ninth Circuit resolved two cases involving a copyright holder and issues of material contribution. In *Perfect 10 v. Amazon, Inc.*, the court held that Google could be contributorily liable if it had knowledge that infringing material was available using its search engine, that it could take measures to prevent further harms to the works at issue, and that it had failed to take those steps.⁶³ In *Perfect 10 v. Visa Intern. Service Assoc.*, the court refused to impose contributory liability on credit card companies because the companies didn't materially contribute or induce the infringement.⁶⁴

The Practising Law Institute notes that the "material contribution" element of the contributory infringement test is satisfied if Google assists both websites, in distributing the content, and users, in obtaining access to such infringing materials."⁶⁵ In these instances the search engine has had a direct connection to the infringement. In contrast, credit-card companies are not contributorily liable because they lack a "direct connection to the infringement."⁶⁶ The court reconciled the two cases because the search engines assist in the distribution of infringing content, whereas the payment systems do not.⁶⁷ Under the Ninth Circuit's holdings, a search engine could be liable for contributory infringement for assisting websites and users in their transmission of unauthorized sound recordings. A rights holder that utilizes the proposal in this article ought to establish knowledge and develop evidence sufficient to sustain a cause of action for contributory liability.

Additionally, courts have imposed liability for contributory infringement under the theory of "making available" unauthorized copyrighted materials.⁶⁸ For example, the Ninth Circuit in *Napster* affirmed the district court finding that Napster users' file sharing constituted copyright infringement.⁶⁹ The court held that "users that upload file names to search index for others to copy violate plaintiff's distribution rights."⁷⁰

District Courts in four separate opinions arguably supported such "making available" theories by denying defendants' motion to dismiss RIAA infringement claims for failure to prove that the copyrighted works were actually distributed.⁷¹ The courts based their holdings on various grounds, but each court decided that actual dissemination was not required to establish infringement of a copyright owner's distribution right.⁷² Additionally, two courts have granted plaintiffs' motions for summary judgment on "making available theories."⁷³ These cases demonstrate contributory liability may be imposed when a service provider makes unauthorized copyrighted material available to the public. Imposing liability on search engines for contributing to infringement is a reasonable solution considering the large-scale infringement of P2P file sharing and the relatively simple precautions that a search engine can employ when notified of specific infringing content.

IV. Conclusion

The Internet can simultaneously be a remarkable conduit for the authorized distribution of sound recordings and a vehicle for the unlawful transmission of copyrighted material. This paper outlines an alternative method for copyright holders to enforce their rights in light of the difficulty of suing direct infringers. The suggested solution utilizes processes based on existing law: processes that are familiar to copyright owners and service providers alike. The notification process preserves evidence and provides search engines with an opportunity to control the extent to which their services contribute to the infringement of copyrights. Further, this system properly places the incentive to look after rights on the rights-holder and places the burden of prevention on the party in the best position to exercise control. This solution is supported by case law and does not require any changes in statutes or regulations.

Moreover, this solution demonstrates respect for the judicial process by preserving evidence of alleged infringement and avoiding litigation until the requisite elements have been established. That is, the notification process will establish that a search

I Can't Get No Cause of Action?: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.

Continued from page 30.

engine had *actual* knowledge of *specific* infringement, and failed to implement measures that would reduce the potential for infringement by users of its services. At that point, a court ought to find it inequitable for a search engine to escape liability as a contributory infringer when the search engine had the ability to reduce potential infringement by prioritizing a list of legitimate retailers provided by the copyright owner, and failed to take such measures. Service providers will have a minimum of three opportunities to contribute to the protection of copyrighted material. A search engine's pattern of failing to protect property rights, when doing so would not impose significant costs, merits an inference the search engine materially contributed to direct copyright infringement, thus satisfying the requirements for imposing contributory liability. If courts agree that search engines'⁷⁴ failure to reduce potential infringement through their service, despite having the means to curb such abuse, then contributory liability for copyright infringement against search engines is indeed actionable. Perhaps then, copyright owners can get some satisfaction.

ENDNOTES

- 1 See Ethan Smith, *Music Sales Decline for Seventh Time in Eight Years*, The Wall Street Journal, Jan. 2, 2009, <http://online.wsj.com/article/SB123075988836646491.html>, (last visited May 1, 2012) (explaining the music sales were hurt by unlawful online distribution among other problems).
- 2 See Peter Kafka, *Music Decline to Accelerate in 2008 With Retailer Cutbacks*, The Business Insider, Oct. 3, 2007, http://articles.businessinsider.com/2007-10-03/tech/30047189_1_wal-mart-retailers-music-decline, (last visited May 1, 2012) (recounting predictions that floor space would be reduced between 20-40%).
- 3 INT'L FED'N OF THE PHONOGRAPHIC INDUS. DIGITAL MUSIC REPORT 2012 6 (2012) [hereinafter DMR 2012].
- 4 Keith Caulfield, *Digital Song Sales Are on Fire in 2012, May 01, 2012*, <http://www.billboard.com/column/chartbeat/digital-song-sales-are-on-fire-in-2012-1006926752.story>, (last visited May 01, 2012). Gorye's "Somebody That I Used to Know," featuring Kimbra, sold 542,000 downloads for the fourth-best digital sales week ever, dated April 28. *Id.* Justin Bieber's "Boyfriend" sold 521,000 downloads two weeks earlier, April 14, for the fifth biggest sales week. *Id.* "Payphone" by Maroon 5 and featuring Wiz Khalifa sold 493,000 downloads for the eighth-best sales week. *Id.*
- 5 DMR, *supra* note 3, at 17. For example, France's HADOPI agency, created by law, notifies internet users when their accounts have been used to infringe copyrights. *Id.* A HADOPI study from May 2011 suggests the law has had a significant positive impact: fifty-percent of people that received a notice, or knew someone that received a notice, stopped their activity. *Id.* New Zealand's Copyright (Infringing File Sharing) Amendment Act of 2011 implemented a Graduated Response (GR) system. *Id.* at 19. GR systems are designed to inform internet subscribers that their accounts have been used to download unauthorized copyright material. *Id.* at 17.
- 6 DMR, *supra* note 3, at 18 (IFPI). New Zealand enacted the Copyright (Infringing File Sharing) Amendment Act in September 2011, which utilizes a GR system. *Id.* at 19. Since February 2010, Italian ISPs have been ordered to implement site-blocking for notorious websites offering unauthorized content. *Id.* Denmark's Supreme Court similarly required site-blocking for The Pirate Bay in May 2010. *Id.*
- 7 See Antony Bruno, *Labels Reach Deal with ISPs on Antipiracy Effort* (July 7, 2011) <http://www.billboard.biz/bbbiz/industry/legal-and-management/labels-reach-deal-with-isps-on-antipiracy-1005267702.story> (describing collaborative efforts between ISPs and the music and film industries); see also CENTER FOR COPYRIGHT INFORMATION, *Copyright Alert System*, <http://www.copyrightinformation.org/faq>, (last visited April 26, 2012) [hereinafter CCI] (expounding on the Copyright Alert System). The 5 biggest ISPs include AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon. *Id.* Organizations include Motion Picture Association of America (MPAA) and its members, RIAA and its members, and the Independent Film and TV Alliance and the American Association of Independent Music. *Id.*; see also DMR, *supra* note 3, at 18. (reporting eircom, Ireland's largest ISP, operates a Three-Strike Graduated Response system under an agreement with the music industry that includes a parallel streaming service for customers).
- 8 See DMR, *supra* note 3, at 10 (explaining subscription-service consumers are estimated to have increased nearly 60%, from 8.2 million to 13 million in 2011); see also *Norway Runs Past Sweden in Music Streaming*, PRNewswire, Oslo, Norway, Jan. 23, 2012 [hereinafter Norway] (asserting Scandinavian countries are at the front of a changing consumer culture—one that is willing to pay for music).
- 9 *Grokster*, 545 U.S. at 930.
- 10 17 U.S.C.A. § 512(c)(1)(A) (West 2012). The DMCA provides online service providers (OSPs) with limited liability for hosting alleged infringing content if they comply with three requirements: (1) OSP must not have actual knowledge of infringing activity; (2) OSP must not receive a financial benefit directly attributable to the infringing content; and (3) OSP must act expeditiously to remove any alleged infringing content upon receipt of a "take-down" notice by the copyright holder. *Id.* This requires the copyright holder to notify OSPs in writing when the copyright holder believes their rights are being infringed by the unauthorized posting of content; also known as a "take down" notice. *Id.*; see Ann Marie Bridey, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 716 (2011) (noting the difficulty of targeting high volume infringers that distribute copyrighted works anonymously over dynamic networks).
- 11 Bridey, *supra* note 41, at 716.
- 12 See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) (holding betamax technology intended for "time shifting" was capable of substantial non-infringing uses and therefore, Sony was not liable for contributory infringement). Similarly, technology like BitTorrent—a favored method of downloading content—is capable of significantly non-infringing use when the transmission of content is authorized.
- 13 See Ann Marie Bridey, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 716 (2011) (noting the difficulty of targeting high volume infringers that distribute copyrighted works anonymously over dynamic networks); see also *AF Holdings, LLC v. Does 1-97*, NO. C-11-03067 CW (DMR) 2011 WL 2912909 *2 (granting plaintiffs' motion for leave for expedited discovery to uncover identity of then-unnamed defendants). The court explained that a subpoena to the ISP was the only method to obtain the info; see also *In re Charter Communications, Inc.*, 393 F.3d 771, 782 (8th Cir. 2005) (Murphy J., dissenting) (explaining Jon Doe actions are costly and time consuming).
- 14 See *Fonovisa*, 76 F.3d at 264 (holding swap-meet accountable for selling counterfeit recordings).
- 15 See *Grokster*, 545 U.S. 913 (2005); *In re Aimster Copyright Litigation*, 334 F.3d 643, 645-46 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004); *Napster*, 239 F.3d 1004 (9th Cir. 2001) (holding file-sharing services liable for contributory copyright infringement).
- 16 Christopher M. Swartout, Comment, *Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*, 31 NW. J. INT'L & BUS. 499, 505. Index files are used by BitTorrent programs to locate particular files. *Id.* This keeps users anonymous while they search. *Id.*
- 17 See 17 U.S.C.A. § 512(c) (West 2012) (providing written notification must include: a signature of the rights holder or their authorized agent; identification of the copyrighted work allegedly infringed; identification of the material that is alleged to infringe the copyright; information reasonably sufficient to enable service provider to contact the complaining party; a statement of good faith in the notice; and a statement that the information in the notice is accurate).
- 18 17 U.S.C.A. § 106 (West 2012) (emphasis added).
- 19 H.R. Rep. No. 94-1476 at 61 (1976). The report provided an example, "a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance." *Id.*
- 20 See *Grokster*, 545 U.S. at 936 (borrowing inducement test from Patent law to find liability for contributory infringement by service).
- 21 See Aden Allen, *What's in a Copyright*, 9 COLUM. SCI. & TECH. 87 (2008).
- 22 *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 435-36 (1984); see also Allen, *supra* note 140 at 91 (referring to *Sony* and authorization).
- 23 *Sony*, 464 U.S. 417, 435-36 (1984). Therefore, Sony did not grant or purport to grant customers the right to copy the plaintiff's work. *Id.*; see Allen, *supra* note 140 (referring to *Sony* and authorization).
- 24 *Fonovisa*, 76 F.3d at 264 (quoting *Gershwin*, 443 F.2d at 1162).
- 25 *Id.* at 259.
- 26 *Id.* at 264; see William F. Paltry, Copyright Law & Practice 1147 (suggesting that "merely providing means for infringement may be sufficient" to incur contributory copyright liability).
- 27 *Fonovisa*, 76 F.3d at 264 (9th Cir. 1996) (quoting *Gershwin*, 443 F.2d 1159, 1162). "[O]ne who, with knowledge of infringing activity, induces, causes, or materially contributes to infringing conduct of another may be held liable as a 'contributory infringer.' *Id.*

Continued on page 32.

I Can't Get No Cause of Action?: Advocating a Cause of Action Against Search Engines for Contributory Copyright Infringement.

Continued from page 31.

- 28 See *Netcom II*, 907 F.Supp. 1361, 1373-75 (N.D. Cal. 1995) (explaining ISP can be contributorily liable if it has knowledge); see also *Marobie Fl., Inc. v. Nat'l Ass'n Fire Equip. Distrib.*, F.Supp. 1167 (N.D. Ill. 1997) (explaining ISP potentially liable for contributory infringement depending on extent of ISP's knowledge that plaintiff's material was copyrighted and the degree of control the ISP had over the website).
- 29 See *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003); *Netcom II*, 907 F.Supp. at 1373-75; see also *Marobie Fl., Inc. v. Nat'l Ass'n Fire Equip. Distrib.*, F.Supp. at 1167 (N.D. Ill. 1997).
- 30 Bruce P. Keller, et. al., Practising Law Institute, Copyright law § 14.4.2 (2012), quoting *Perfect 10 v. Amazon, Inc.*, 508 F.3d 1145, 1170-73 (9th Cir. 2007) (emphasis original).
- 31 *MGM, Inc. v. Grokster, Inc.*, 380 F.3d 1154, 1160 (9th Cir. 2004).
- 32 *MGM, Inc. v. Grokster, Inc.*, 259 F.Supp. 2d 1029, at 1045 (C.D. Cal. 2003)
- 33 *Id.* at 1039.
- 34 *Id.* at 1046 (C.D. Cal. 2003). On appeal, the Ninth Circuit affirmed because it interpreted *Sony* as allowing a defendant to defeat a claim of contributory copyright infringement if the defendant could show "substantial or significant non-infringing uses;" see also *Sony*, 464 U.S. 417 (1984) (holding betamax technology intended for "time shifting" was capable of substantial non-infringing uses and therefore, Sony was not liable for contributory infringement).
- 35 See *Id.*
- 36 *Metro-Goldwyn Meyer, Inc. v. Grokster*, 545 U.S. at 913 (2005) [hereinafter *Grokster*]
- 37 Patent Act § 271; see also *Grokster*, 545 U.S. at 936 (2005). The Court borrowed the "inducement test" from patent law to hold defendants liable for inducement and contributory infringement. *Id.*
- 38 *Grokster*, 545 U.S. at 939-40. The court mentioned that significant non-infringing use was not at issue because evidence demonstrated the majority of use was infringing. *Id.*
- 39 *Grokster*, 545 U.S. at 930. "One infringes contributorily by intentionally inducing or encouraging a direct infringement."
- 40 *Grokster*, 545 U.S. at 939 n. 12.
- 41 Google "adwords." Advertisers create their advertisements and choose the keywords relevant to their business. *Id.* Advertisers pay Google based on the number of clicks a particular ad produces. *Id.*
- 42 For example, a search of the top five artists from the Billboard Top100 on November 1, 2011 plus the term "MP3" produced a majority of search results directing users to infringing content. DMR, *supra* note 3 at 24.
- 43 DMR, *supra* note 3 at 24. In New Zealand, Ipsos MediaCT study in August 2011 shows that search engines direct a significant number of users to unauthorized sources; 54% of users of unauthorized downloads found music through a search engine. *Id.* Similarly, Ipsos MediaCT found 49% of users of unauthorized downloads in Ireland found music through a search engine. *Id.*
- 44 See DMR, *supra* note 3 at 24. (explaining the majority of UK infringers use Google as their primary means to find content).
- 45 Not to mention Google's countless other endeavors such as Google Earth and Google Scholar.
- 46 See *Grokster*, 545 U.S. at 939.
- 47 See *Grokster*, 545 U.S. at 939. Internal documents demonstrated defendants consistently referred to Napster, their software was compatible with Napster, they advertised their software to Napster users, and the software functioned like Napster did except with the ability to distribute more kinds of files. *Id.*
- 48 See *Kasunic*, *supra* note 19 at 1152; Fed. R. Evid. 402 ("All relevant evidence is admissible ...").
- 49 See *Kasunic*, *supra* note 19 at 1152.
- 50 See *Kasunic*, *supra* note 19 at 1152. Deemed distribution is applicable only when copyrighted material can be "deemed to have been communicated to other computer users or where 'the owner of a collection of works who makes them available to the public may be deemed to have distributed copies of the works.'" *Id.* quoting *Perfect 10*, 508 F.3d at 1162.
- 51 See *Kasunic*, *supra* note 19 at 1152-53. As a result, he suggests "making available" may be used as circumstantial evidence of distribution, even if it is not direct evidence of distribution. *Id.*
- 52 See *Kasunic*, *supra* note 19 at 1155.
- 53 This is independent of the *Grokster* element of control. This element relates to the feasibility of implementing measures to reduce potential infringing uses. See *In re Aimster Copyright Litigation*, 334 F.3d at 653 (7th Cir. 2003) (requiring any alternatives be economically efficient before imposing liability for contributory infringement).
- 54 *Sony*, 464 U.S. at 442 (1984).
- 55 *Grokster*, 545 U.S. at 918.
- 56 See *Fonovisa*, 76 F.3d 259 (9th Cir. 1996) (leasing swap meet space to vendors considered a service).
- 57 See *id.* at 264.
- 58 *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).
- 59 *Id.*
- 60 *Id.* at 648-49.
- 61 *Id.* 653.
- 62 For example, in *Arista Records, LLC v. Lime Grp.*, the District Court held on summary judgment that the defendant actively induced copyright infringement by distributing and encouraging use of LimeWire. *Arista Records, LLC v. Lime Grp.*, 06 CV 5936 (KMW), 2011 WL 1742029, *17-*21 (S.D.N.Y. May 2, 2011) (finding purposeful conduct and intent to induce through: (a) marketing efforts attracting former Napster users...). Similarly, the judge in *Columbia Pic's Indus. v. Fung* granted summary judgment for the plaintiff that sued owner of the owner of Bittorrent websites for actively inducing copyright infringement on website advertising "Box Office Movies." See *Columbia Pic's Indus. v. Fung*, 96 U.S.P.Q.2d (BNA) 1620, 1624 (C.D. Cal. May 20, 2010).
- 63 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) [hereinafter *Amazon*]. The court asserted it was indisputable that Google assisted websites distribute infringing content worldwide and assists a global "audience of users to access infringing materials. *Id.*
- 64 *Perfect 10, Inc. v. Visa Int'l Service Assoc.*, 494 F.3d 788, 796 (9th Cir. 2007) [hereinafter *Visa*]. The credit card companies did not materially contribute because they lacked a direct connection to the infringement. *Id.* Similarly, the companies did not induce infringement because they did not take affirmative steps to encourage infringement and the companies did not promote their services as a means to infringe. *Id.*
- 65 Bruce P. Keller, et. al., Practising Law Institute, Copyright law § 14.4.2 (2012), quoting *Perfect 10 v. Amazon, Inc.*, 508 F.3d 1145, 1170-73 (9th Cir. 2007).
- 66 *Visa*, 494 F.3d at 796-97.
- 67 *Id.*
- 68 See *Moseley*, *supra* note 40 318-19 (noting a series of cases strengthened the "making available" theory in individual file sharing case).
- 69 *Napster*, 239 F.3d at 1014.
- 70 *Id.*
- 71 *Moseley*, *supra* note 40 318-19
- 72 See *InterScope Records v. Duty*, No. 05-CV-3744-PHX-FJM, 2006 Dist. LEXIS 20214 (D. Ariz., Apr. 14, 2006) (holding that "the mere presence of copyrighted sound recordings in Duty's share file may constitute copyright infringement"); *Warner Bros. Records v. Payne*, No. W-06-CA-051, 2006 WL 2844415 (W.D. Tex. July 17, 2006) (equating "distribution" with "publication," which is defined to include "offering to distribute copies or phonorecords ... for purposes of further distribution ..."); *Fonovisa, Inc. v. Alvarez*, No. 1:06-CV-011-C ECF, 2006 WL 5865272 (N.D. Tex. July 24, 2006) (following the precedents of Duty and Payne.); *Arista Records LLC v. Greubel*, No. 4:05-CV-531-Y, 453 F. Supp. 2d 961 (N.D. Tex. Sept. 1, 2006) (equating "distribution" with "publication" and following Duty, Payne, and Alvarez).
- 73 See *Universal City Studios Prods. LLLP v. Bigwood*, 441 F. Supp. 2d 185 (D. Maine July 25, 2006) (holding that "by ... mak[ing] copies of the Motion Pictures available to thousands of people over the Internet, Defendant violated Plaintiffs' exclusive right to distribute the Motion Pictures"); *Motown Record Co., LP v. DePietro*, No. 04-CV-2246, 2007 WL 576284 (E.D. Pa. Feb. 16, 2007) (mentioning that "the Court is convinced" that a plaintiff can establish infringement of the distribution right "by proof of actual infringement or by proof of offers to distribute, that is, proof that the defendant 'made available' the copyrighted work").

RECENT PUBLICATIONS

Compiled by **Monica M. Ortale**, Associate Director of Reference and Public Services
The Fred Parks Law Library, South Texas College of Law.

Sports Bibliography:

AMATEUR SPORTS

Nicholas Fram & T. Ward Frampton. *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003 (2012).

James P. Looby. Student Article. *Reasonable Accommodations For High School Athletes With Disabilities: Preserving Sports While Providing Access For All*, 19 SPORTS LAW. J. 227 (2012).

Marissa D. Sunio. Comment. *Saving Face: Protecting The Rights of Student-Athletes and The Idea Of Amateurism*, 33 WHITTIER L. REV. 431 (2012).

Antitrust

Robert A. Gottfried. Student Article. *Reasonable Relocation: Antitrust Implications of Restrictions on Movement of Professional Sports Teams*, 19 SPORTS LAW. J. 109 (2012).

Samuel G. Mann. Note. *In Name Only: How Major League Baseball's Reliance On Its Antitrust Exemption Is Hurting The Game*, 54 WM. & MARY L. REV. 587 (2012).

Abraham J. Sommer. Student Article. *The National Pastime of The American Judiciary: Reexamining The Strength of Major League Baseball's Antitrust Exemption Following The Passage of The Curt Flood Act and The Supreme Court's Ruling In American Needle, Inc. V. Nfl*, 19 SPORTS LAW. J. 325 (2012).

Arbitration

Annie Bersagel. *Is There A Stare Decisis Doctrine In The Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 PEPP. DISP. RESOL. L.J. 189 (2012).

Louise Reilly. *An Introduction to The Court of Arbitration For Sport (Cases) & The Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63.

Bankruptcy

John Dillon. Comment. *Major League Baseball Team Bankruptcies: Who Wins? Who Loses?* 32 LOY. L.A. ENT. L. REV. 297 (2012).

Contracts

Richard T. Karcher. *Broadcast Rights, Unjust Enrichment, and The Student-Athlete*, 34 CARDOZO L. REV. 107 (2012).

Discrimination

Erin Elizabeth Berry. *Respect For The Fundamental Notion Of Fairness Of Competition: The Iaaf, Hyperandrogenism, And Women Athletes*, 27 WIS. J.L. GENDER & SOC'Y 207 (2012).

Gambling

Rohani Mahyera. Comment. *Saving Cricket: A Proposal For The Legalization of Gambling in India to Regulate Corrupt Betting Practices in Cricket*, 26 EMORY INT'L L. REV. 365 (2012).

Ronald J. Rychlak. *Gambling With The Bronx Bombers: Betting On, Against, and With The Yankees*, 3 UNLV GAMING L.J. 165 (2012).

Continued on page 34.

Recent Publications

Continued from page 33.

Gender

Brenda L. Ambrosius. Note. *Title IX: Creating Unequal Equality Through Application of The Proportionality Standard In Collegiate Athletics*, 46 VAL. U. L. REV. 557 (2012).

Glatt, Ephraim. Student Article. *Defining "Sport" Under Title IX: Cheerleading, Biediger v. Quinnipiac University, and The Proper Scope Of Agency Deference*. (Biediger V. Quinnipiac University, 728 F. Supp. 2d 100, 2010.) 19 SPORTS LAW. J. 297 (2012).

Samantha Glazer. Note. *Sporting Chance: Litigating Sexism Out of The Olympic Intersex Policy*, 20 J.L. & POL'Y 545 (2012).

Katherine Kraschel. Note. *Trans-Cending Space In Women's Only Spaces: Title IX Cannot Be The Basis for Exclusion*, 35 HARV. J.L. & GENDER 463 (2012).

Alison Renfrew. Comment. *The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives*, 117 PENN ST. L. REV. 563 (2012).

Zachary Swartz. Note. *If It's Broken, Let Them Fix It: Why The Gebser Pre-Litigation Notice Requirement Should Apply To Title IX Athletics Lawsuits*. (Gebser V. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 1998.) 61 CATH. U. L. REV. 1207 (2012).

Andrew J. Weissler. Student Article. *Unasked Questions: Applying Title IX's Effective Accommodation Mandate to Interscholastic Athletics*, 19 SPORTS LAW. J. 71 (2012).

International

Kris Helge. *The Success of a Nation's Soccer Team: A Bellwether Regarding a Nation's Electronic Information Infrastructure, The Legal Regulations That Govern The Infrastructure, The Resulting Citizen-Trust in Its Government and Its E-Readiness in Nigeria, The Dprk, China, Japan, South Korea, The Netherlands and The United States*, 39 N. KY. L. REV. 467 (2012).

Labor

Michael H. Leroy. *An Invisible Union for an Invisible Labor Market: College Football and The Union Substitution Effect*, 2012 WIS. L. REV. 1077.

Smith, Christopher. Comment. *A Necessary Game Changer: Resolving the Legal Quagmire Surrounding Expiration of the Nonstatutory Labor Exemption in Sports*, 14 U. PA. J. BUS. L. 1191 (2012).

Medical

Andrew W. Breck. Note. *Keeping Your Head on Straight: Protecting Indiana Youth Athletes From Traumatic Brain Injuries Through "Return-To-Play" Legislation*, 9 IND. HEALTH L. REV. 215 (2012).

Ryan McLaughlin. Note. *Warning! Children's Brains Are In Danger: Legislative Approaches To Creating Uniform Return-To-Play Standards for Concussions in Youth Athletics*, 22 IND. INT'L & COMP. L. REV. 131 (2012).

Miscellaneous

Zak Brown. Note. *What's Said In This Locker Room, Stays In This Locker Room: Restricting The Social Media Use Of Collegiate Athletes And The Implications for Their Institutions*, 10 J. ON TELECOMM. & HIGH TECH. L. 421 (2012).

Matthew Gallagher. Student Article. *The Changing Face Of The "Sport Of Kings": A Brief History Of Thoroughbred Horse Racing in The United States, Its Recent Decline, and The Legal Implications Surrounding Racing Partnerships and Syndicates in the Current Landscape*, 19 SPORTS LAW. J. 275 (2012).

Professional Responsibility

Ryan Reszel. Comment. *Guilty Until Proven Innocent, and Then, Still Guilty: What The World Anti-Doping Agency Can Learn From The National Football League About First-Time Anti-Doping Violations*, 29 WIS. INT'L L.J. 807 (2012).

Continued on page 35.

Recent Publications*Continued from page 34.*

Professional Sports

Henry H. Perritt, Jr. *Competitive Entertainment: Implications of the NFL Lockout Litigation for Sports, Theatre, Music, and Video Entertainment*, 35 HASTINGS COMM. & ENT. L.J. 93 (2012).

Rockwell Thomas Gust, IV. Comment. *The California Workers' Compensation Act: The Death Knell of Nfl Players' "Concussion" Case?* 44 U. TOL. L. REV. 245 (2012).

Property

Michael Birch. Student Article. *Take Some Land for The Ball Game: Sports Stadiums, Eminent Domain, and The Public Use Doctrine*, 19 SPORTS LAW. J. 173 (2012).

Jessica Blumert. Note. *Home Games: Legal Issues Concerning the Displacement of Property Owners at the Site of Olympic Venues*, 21 CARDOZO J. INT'L & COMP. L. 153 (2012).

Symposia

Symposium 2012: Amateur Athletics, Professional IP, 20 CARDOZO J. INT'L & COMP. L. 571 (2012).

Tax

Britton R. Wight. Student Article. *College Football's BCS (Bowl Charity System?): An Analysis of the Characterization of BCS Bowls As Public Charities That Receive Tax-Exempt Status*, 19 SPORTS LAW. J. 129 (2012).

Torts

Talor Bearman. Note. *Intercepting Licensing Rights: Why College Athletes Need a Federal Right Of Publicity*, 15 VAND. J. ENT. & TECH. L. 85 (2012).

Kendall K. Johnson. Student Article. *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 SPORTS LAW. J. 1 (2012).

Michael Mullins. Note. *New Fame in a New Ballgame: Right of Publicity in the Era of Instant Celebrity*, 45 IND. L. REV. 869 (2012).

Joe Trevino. Student Article. *From Tweets to Twibel: Why The Current Defamation Law Does Not Provide for Jay Cutler's Feelings*, 19 SPORTS LAW. J. 49 (2012).

Trademarks

Lauren T. Warbington. Note. *Crossing The Line: The Collegiate Licensing Company's Overindulgent Attempt to Limit Small Businesses' Online Marketing Techniques Based on Frivolous Claims of Trademark Infringement*, 19 J. INTELL. PROP. L. 517 (2012).

Entertainment Bibliography:**Art**

Kenneth D. Crews. *Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 795 (2012).

Monica R. Difonzo. Note. *"Think You Can Steal Our Caravaggio and Get Away With It? Think Again." An Analysis of The Italian Cultural Property Model*, 44 GEO. WASH. INT'L L. REV. 539 (2012).

Jennifer Anglim Kreder. *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 757 (2012).

Margaret L. Mettler. Note. *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249 (2012).

Continued on page 36.

Recent Publications*Continued from page 35.***Copyright**

Peter Dicola & Matthew Sag. *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173 (2012).

Meaghan McGurrin Ehrhard. Note. *Protecting The Seasonal Arts: Fashion Design, Copyright Law, and The Viability of The Innovative Design Protection & Piracy Prevention Act*, 45 CONN. L. REV. 285 (2012).

Alexandra Manfredi. Note. *Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Designs*, 21 CARDOZO J. INT'L & COMP. L. 111 (2012).

Stuart Schussel. Note. *Copyright Protection's Challenges and Alaska Natives' Cultural Property*, 29 ALASKA L. REV. 313 (2012).

Criminal

Monica R. Difonzo. Note. *'Think You Can Steal Our Caravaggio And Get Away With It? Think Again.'* *An Analysis of The Italian Cultural Property Model*, 44 GEO. WASH. INT'L L. REV. 539 (2012).

Fair Use

Meghan Mcskimming. Comment. *Google Books And YouTube: Preserving Fair Use on The World's Leading Internet Video Community*, 42 SETON HALL L. REV. 1745 (2012).

Intellectual Property

Katelyn Brandes. Note. *Design Protection in the United States and European Union: Piracy's Detrimental Effects in the Digital World*, 37 BROOK. J. INT'L L. 1115 (2012).

Katherine M. Olson. Note. *The Innovative Design Protection and Piracy Prevention Act: Re-Fashioning U.S. Intellectual Property Law*. [Includes Photographs.] 61 DEPAUL L. REV. 725 (2012).

International

Francesco Francioni. *Public and Private in the International Protection of Global Cultural Goods*, 23 EUR. J. INT'L L. 719 (2012).

Alan Simpson. Note. *Taxation of Non-Resident Entertainers and Sportsmen: The United Kingdom's Definition of Performance Income and How It Ought to be Measured*, 11 WASH. U. GLOBAL STUD. L. REV. 693 (2012).

Miscellaneous

Matthew Beasley. Note. *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137 (2012).

Ashley Marshall. Comment. *Free Fashion*, 17 MARQ. INTELL. PROP. L. REV. 123 (2013).

Kevin Prewitt. Comment. *The Wisdom of the Precedents: The Act of State Doctrine' Role in Protecting the Cultural Heritage of the United States*, 80 UMKC L. REV. 855 (2012).

Adam Rich. Note. *Finding the Groove: A Path Forward on Terminations of Sound Recording Transfers*, 57 N.Y.L. SCH. L. REV. 363 (2012/13).

Michael A. Schwartz. *Propelling Aviation to New Heights: Accessibility to In-Flight Entertainment for Deaf and Hard of Hearing Passengers*, 77 J. AIR L. & COM. 151 (2012).

Museums

Tam, Sara. Note. *In Museums We Trust: Analyzing The Mission of Museums, Deaccessioning Policies, And The Public Trust*, 39 FORDHAM URB. L.J. 849(2012).

Continued on page 37.

Recent Publications

Continued from page 36.

Music

Abdullahi Abdullahi. Note. *Termination Rights in Music: A Practical Framework for Resolving Ownership Conflicts in Sound Recordings*, 2012 U. ILL. J.L. TECH. & POL'Y 457

Luke T. McDonagh. *Is the Creative Use of Musical Works Without a Licence Acceptable Under Copyright Law?* 43 IIC: INT'L REV. INTELL. PROP. & COMPETITION L. 401 (2012).

John S. Pelletier. Note. *Sampling the Circuits: The Case for a New Comprehensive Scheme for Determining Copyright Infringement as a Result of Music Sampling*, 89 WASH. U. L. REV. 1161 (2012).

James J. Schneider. Note. *Defeating the Terminator: How Remastered Albums May Help Record Companies Avoid Copyright Termination*, 53 B.C. L. REV. 1889 (2012)

Photography

Teresa M. Bruce. *In the Language of Pictures: How Copyright Law Fails to Adequately Account for Photography*, 115 W. VA. L. REV. 93 (2012).

Justin Hughes. *The Photographer's Copyright — Photograph as Art, Photograph as Database [Includes Photographs and Illustration]* 25 HARV. J.L. & TECH. 339 (2012).

Terry S. Kogan. *Photographic Reproductions, Copyright and The Slavish Copy*, 35 COLUM. J.L. & ARTS 445 (2012).

Radio

Amanda Reid. *The Power of Music: Applying First Amendment Scrutiny to Copyright Regulation of Internet Radio*, 20 TEX. INTELL. PROP. L.J. 233 (2012).

Symposia

Selected Material from Game: Business: Law — International Summit on The Law and Business of Video Games, 15 SMU SCI. & TECH. L. REV. 111 (2012).

Governing the Magic Circle: Regulation of Virtual Worlds, 2 UC IRVINE L. REV. 507 (2012).

Visualizing Law in The Digital Age, 57 N.Y.L. SCH. L. REV. 11 (2012/13).

Tax

Alan Simpson. Note. *Taxation of Non-Resident Entertainers and Sportsmen: The United Kingdom's Definition of Performance Income and How It Ought to be Measured*, 11 WASH. U. GLOBAL STUD. L. REV. 693 (2012).

Television

Carson S. Walker. Comment. *A La Carte Television: A Solution to Online Piracy?* 20 COMMLAW CONSPECTUS 471 (2012).

Trademarks

Erica S. Schwartz. Note. *Red With Envy: Why The Fashion Industry Should Embrace ADR as a Viable Solution to Resolving Trademark Disputes*, 14 CARDOZO J. CONFLICT RESOL. 279 (2012).

Video Games

Kent Jordan & Robert Wilkinson. Comment. *A Review of 2011 Video-Game Litigation and Selected Cases*, 15 SMU SCI. & TECH. L. REV. 271-292 (2012).

Join

TESLAW

The Texas Entertainment and Sports Law Section is a great way to network and commiserate. Members receive the Journal, access to the TESLAW listserve, invites to Section events and of course the right to purchase a Rock-Star Attorney t-shirt! Plus, TESLAW is always looking for those who want to be involved and become Section leaders.

To Join TESLAW go to Sections at www.texasbar.com, or just click on this link <https://www.texasbar.com/Sections>.

If this method does not work, please call the State Bar Sections Department at 1-800-204-2222 ext. 1420 to register by phone or fax.

Submissions

All submissions to the TESLAW Journal are considered. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. As general guidelines, articles should be no more than twenty-five typewritten, double-spaced, 8 ½" x 11" pages, including any endnotes; however, longer articles will be considered. Endnotes must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form. Please submit articles via e-mail in word or similar format to craig.crafton@gmail.com, or to discuss potential topics.

Once an article is submitted, the Journal does not request any additional authorization from the author to publish the article. Due to the number of submissions and the number of potential publications in the marketplace, it is nearly impossible to monitor publication of submissions in other publications. It is up to the author to assure that we are notified should there be any restrictions on our use of the article. This policy has been implemented to assure that our Journal does not violate any other publication's limitation on republication. The Journal does not restrict republication, and in fact encourages submission of an author's article to other publications prior to or after our election to publish. Obviously, the Journal will make the appropriate attribution where an article is published with the permission of another publication, and request such attribution to the Journal, if we are the first to publish an article.