



Texas Entertainment and Sports Law Journal

Spring/Summer 2014 — Volume 23 • No. 1

SECTION OFFICERS

CHAIR

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

CHAIR-ELECT

Craig Crafton
Travelers Insurance Co.
1301 E. Collins Blvd., Richardson 75266
Phone: (214) 570-6000
craig.crafton@gmail.com

SECRETARY

Sally C. Helppie
Vincent Lopez Serafino Jenevein, P.C.
1601 Elm St., Ste. 4100, Dallas 75201
Phone: (214) 979-7411
Fax: (214) 979-7402
shelppie@vilolaw.com

TREASURER

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

IMMEDIATE PAST CHAIR

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

COUNCIL

Terms Expiring 2014

Decker Sachse
Mike Farris
Emilio Nicolas

Terms Expiring 2015

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

Terms Expiring 2016

Andrew Borrego
Alan Tompkins
Brittany Morris-Easley

ENT. LAW INSTITUTE DIRECTOR

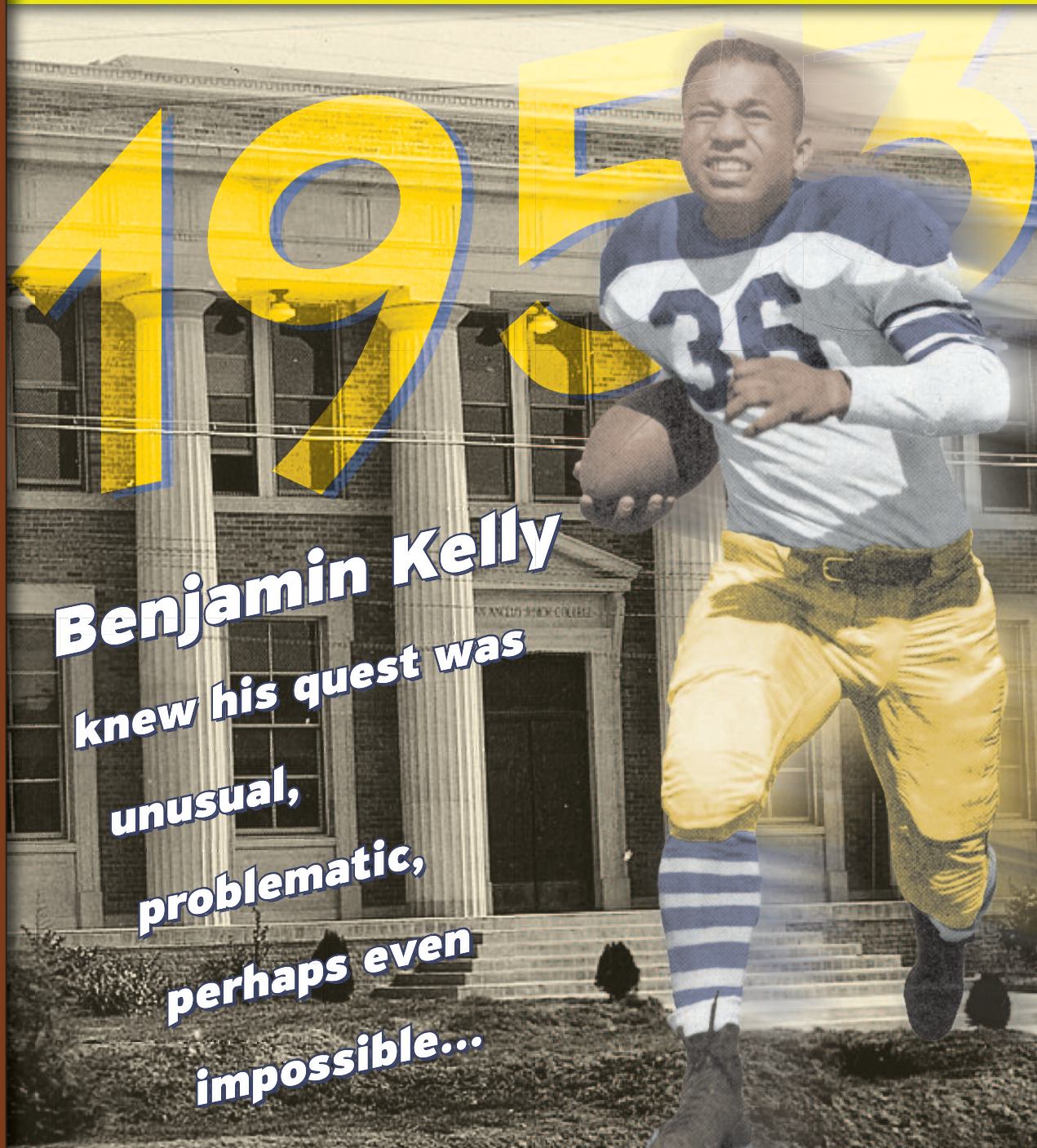
Mike Tolleson
2106 E. MLK Blvd., Austin 78702
Phone: (512) 480-8822
Fax: (512) 479-6212
mike@miketolleson.com

JOURNAL EDITOR

Mike Farris
Vincent Lopez Serafino Jenevein, P.C.
1601 Elm St., Ste. 4100, Dallas 75201
Phone: (214) 979-7435
Fax: (214) 979-7402
mfarris@vilolaw.com

WEBMASTER

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



Benjamin Kelly
knew his quest was
unusual,
problematic,
perhaps even
impossible...

INSIDE THIS ISSUE

Chair's Report	2	Tattoo You	9
Editor's Report	3	Trolls Trolls Everywhere	11
Member Profile	4	ASCAP Suit	13
Pioneer's Revival	5	New Copyright Recapture	15
A Site for Poor Eyes	7	Recent Entertainment & Sports Law Publications	33
Ninth Circuit Saves the Day	8		

**TEXAS ENTERTAINMENT AND
SPORTS JOURNAL STAFF****EDITOR**

Mike Farris
 Vincent Lopez Serafino Jenevein, P.C.
 1601 Elm St., Ste. 4100
 Dallas 75201
 Phone: (214) 979-7435
 Fax: (214) 979-7402
 mfarris@vilolaw.com

ASSOCIATE EDITORS

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

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

FACULTY ADVISOR

Professor Andrew T. Solomon
 South Texas College of Law
 1303 San Jacinto St.
 Houston 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, book publishing, and 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 and sports law. Join today to be part of a collegial organization growing the practice of entertainment and sports law in Texas; for new bar members, the first year's dues are free.

CHAIR'S REPORT

Dear TESLAW Members,

As my term draws to its close, I want to once again express my gratitude to you all for your continued membership. I'd also like to thank all those who attended our Annual SXSW networking mixer. It was a great success. Thanks!

With this edition of the *Texas Entertainment and Sports Law Journal*, I'd like to welcome its newest Editor-in-Chief, Mike Farris. Mike is an accomplished attorney, writer and literary agent. Plus, he's published six novels and written several screenplays, so the Journal is in extremely capable hands.

The Texas State Bar Annual Meeting is coming up June 26-27 in Austin and we have something special planned this year – Ethics. Some may think ethics presentations are dull and boring, but our incoming Chair, Craig Crafton, has put together an exciting presentation for the afternoon of June 26. I really suggest you attend because not only will we have special guest speakers from the film, music, sports and television industries, but you will get three hours of ethics credit. For more information or to register, please visit: <http://www.texasbar.com/Content/NavigationMenu/Events/AnnualMeeting/default.htm>

It's been an honor serving as Chair of TESLAW. Please enjoy this new edition of the Journal.

Catherine Hough
 Chair 2013-2014

EDITOR'S REPORT



Mike Farris, Editor

I'm pleased to follow in Craig Crafton's able footsteps as editor of the Texas Entertainment and Sports Law Journal. We have received a number of quality submissions for this volume, and I anticipate more to come. If any of you have any articles or papers you would like to submit, or if you would like to discuss ideas for submissions, please feel free to contact me.

As we have stressed before, not only are we interested in scholarly articles, but also articles that simply may be of general interest to our members in the areas of sports and entertainment. I'm particularly pleased to have been granted permission by The Dallas Morning News to re-print reporter Brad Townsend's wonderful article about Benjamin Kelly, which is feature on the cover. I'm sure you'll be inspired, as I was, to read of Mr. Kelly's trailblazing in the world of college football.

I hope you enjoy this volume of our Journal and I look forward to receiving submissions from you.

MEMBER PROFILE

How did you get interested/started in Entertainment Law?

I initially became interested in entertainment law when I was working as a music journalist in New York City early in my career. I'd always wanted to be a writer since I was five years old. I started out in the latter part of the 1970s as a freelance writer, doing some music features for United Press International, Modern Recording and other outlets. It was during my first full-time editorial job, as a staff editor/reporter at the fanzine *Circus* in Manhattan, that I realized how little I knew even about what quotes I could use from the artists I was interviewing. Rock musicians could be pretty outrageous, of course, so law seemed like a practical path to pursue.

Even in the pre-digital era, the many rapidly evolving issues in the entertainment industry—such as right of publicity—made entertainment law a compelling area to get involved in. I've been writing about it since 1981 and have been a licensed member of the New York Bar since 1984. I've served as editor of *Entertainment Law & Finance*, which is published by ALM (*The National Law Journal*, *New York Law Journal*, *Texas Lawyer*, etc.) since its start in 1985.



Stan Soocher

Can you give us some interesting client/case details?

My direct client work has been primarily transactional, much of it in music but in other areas of entertainment, too. Since I moved to Colorado in 2000 to first be Music Department Chair and then full-time music business faculty at the University of Colorado's Denver campus, my legal work moved more toward being retained by counsel, including as an expert witness, for cases they are working on.

One unusual case concerned the lyrics of the controversial rap group 2 Live Crew. Around 1990, 2 Live Crew sued Broward County Sheriff Nick Navarro for obtaining an ex parte court order that required record retailers to remove Crew's records from store shelves. 2 Live Crew's free speech suit against Navarro in Fort Lauderdale federal court became the first trial in which the lyrics of a sound recording were ruled obscene, though this was later overturned by the 11th Circuit.

I covered the case for *Rolling Stone* and for *The National Law Journal*, and interviewed Sheriff Navarro about it. Later, due to financial problems, 2 Live Crew lost ownership of their music. In his 1998 autobiography *Cuban Cop*, Navarro quoted some of 2 Live Crew's lyrics at length in discussing his court fight with the rappers. When the subsequent owner of Crew's songs sued Navarro for copyright infringement, Navarro's defense counsel Bruce Rogow, who had represented 2 Live Crew in the obscenity battle, retained me as an expert for Navarro. A very interesting deposition session, to say the least, though the case was settled without a trial.

How did your book idea come about and what can you tell us about it?

Research and writing is a major component of my academic position at University of Colorado. In November 2012, I was contacted by an acquisition editor for a publishing company curious as to whether I had any good ideas for a book. Out of this came a proposal for a book project that focuses on notable cases involving the Beatles. I had written a previous book, *They Fought the Law: Rock Music Goes to Court*, which contained a chapter on the Beatles' royalty litigation against Capitol-EMI. The current book project covers other Beatles litigations, including in-depth looks at the group's merchandise, management, immigration and copyright infringement struggles. I've been to quite a few archives for this and it's fascinating to see so many original signatures on court documents, particularly those of John Lennon, George Harrison and even Brian Epstein. Barring any major production glitches, the book is scheduled to be published sometime in 2015.

Do you have any advice for attorneys who want to practice entertainment law?

You've heard it before, but with the traditional sectors of the entertainment industry struggling to successfully restructure in the digital era, it's essential to be well versed and up-to-date in digital media law as well as in the larger field of intellectual property law. This gives those attracted to entertainment law greater opportunities for potential clients while keeping legal work in the entertainment industry close at hand.

Pioneer's Revival¹

By Brad Townsend, *Dallas Morning News*

Benjamin Kelly knew his quest was unusual, problematic, perhaps even impossible. But historic? Trailblazing?

“That didn’t dawn on me,” he says, 60 years later. “I wasn’t going out there for that. I just loved football and wanted to be on the team.”

A simple wish, if it hadn’t been 1953, if Kelly hadn’t been black, if the school for which he wanted to play hadn’t been all-white San Angelo College in segregated Texas.

Moreover, so far as anyone in San Angelo knew, no predominately white college in any of the former Confederate states had ever had a football player who was Negro, which in those days was considered the polite term to describe people of color.

Yet on Sept. 19, 1953, fullback Benjamin Kelly did play for SAC in its opener against Phoenix College. Matter of fact, he played two seasons for the Rams, making All-Pioneer Conference both years.



Brad Townsend



Photos, including cover photo, courtesy of Angelo State University

Benjamin Kelly wears his letter sweater as he’s joined by head coach Max Bumgardner and teammate Paul Horne, who roomed with Kelly on the road – that is, when the team stayed at a hotel that allowed black guests.

Outside of San Angelo, though, few had heard of Kelly, never mind pondered his significance in college sports history, until the days leading to his induction [in February] into the Dallas-based Texas Black Sports Hall of Fame.

Perhaps it’s because San Angelo College was a two-year school. It even dropped football from 1960-63 while transitioning to four-year Angelo State University.

“If people aren’t cognizant of what happened with their predecessors, that stuff gets more and more covered with cobwebs,” theorizes 89-year-old Phil George, who in ’53 was SAC’s football line coach and head basketball coach. He rose to athletic director in 1968.

“And then somebody has to shake it out,” he says. “I’m so thankful that the Texas Black Sports Hall of Fame recognized Benjamin. Please understand, he’s not a special black guy; he’s a special human being.”

Kelly’s story has been chronicled in *The San Angelo Standard-Times*, in Angelo State’s alumni magazine and in the “History and Traditions” section on the school’s website which states that Kelly in 1953 “broke the color barrier in Texas intercollegiate football” but there’s no evidence of it appearing elsewhere.

For decades, it’s often been written that North Texas State freshmen Abner Haynes and Leon King, both graduates of Dallas Lincoln High, were the first to integrate college football in Texas, in 1956.

¹ Originally appeared in *The Dallas Morning News*

Pioneer's Revival*Continued from page 5.*

SMU's Jerry LeVias didn't become the Southwest Conference's first black scholarship football player until 1966, the same year the football color barrier was broken in the Southeastern Conference.

To put Kelly's debut into perspective, know that it occurred eight months before *Brown v. Board of Education* and the Supreme Court's landmark decision to declare as unconstitutional state laws that had established separate public schools for black and white students.

Even then, Texas, which like many states had its own Jim Crow laws, was slow to integrate, not only schools but society.

Kelly's debut occurred in the same year Texas enacted a Jim Crow law penal code that required segregation of all public carriers, such as buses and trains. As late as 1958, Texas passed a law decreeing that no child would be compelled to attend a racially mixed school.

"It was a tough year, but a good year," Kelly says of that '53 season. "Once we started playing and getting to know each other, my teammates accepted me, once they realized I just wanted to do my job.

"The real struggle was that you wanted to play against your own brothers, if you had a chance. That's what was difficult."

Family Friend's Help

Texas Black Sports Hall of Fame officials say they were unaware of Kelly's story until about 18 months ago, when a friend of Kelly's family nominated him.

That friend, Jackie Henderson, played football at San Angelo State in the early '70s, dated one of Benjamin and wife Alvetta's daughters and got to know the soft-spoken and unassuming Kelly as "a gentle giant."

In recent years, Henderson began wondering why Kelly had never received statewide recognition, as LeVias and other football pioneers have.

"My goal was to get him into the Texas Sports Hall of Fame," says Henderson, adding that he hopes the Texas Black Sports Hall of Fame honor will be a precursor.

Henderson traveled from his Austin-area home [in February] to attend the Texas Black Sports Hall of Fame induction luncheon and represent Kelly, who recently was hospitalized with a foot infection.

Kelly also has diabetes and glaucoma, uses a wheelchair and lives at San Angelo's Park Plaza nursing home. Last month, officials from the home brought Kelly to a reception honoring him and others for their induction into Angelo State's Hall of Honor.

The nursing home also recently hosted Kelly's 83rd birthday party, attended by family members, longtime friends and school officials. The cake was decorated as a replica of a color photo of Kelly wearing his No. 36 Rams uniform.

"He's an incredibly humble person," Angelo State athletic director Sean Johnson says. "I think he knows what he did was significant, but he doesn't see his personal impact being that significant."

Others who were around in 1953, however, know how significant Kelly's impact was, how it reverberated well beyond football to the West Texas community of San Angelo and continues to resonate.

San Angelo now has about 100,000 citizens, but at the time of the 1950 census had just 52,000, with a small black population. Even now, only 5.4 percent of the population is black.

Continued on page 17.

A “Site” For Sore Eyes: When Are Commercial Websites Protected By Communications Decency Act §230?¹

By Shelly Rosenfeld



Shelly Rosenfeld is an attorney in the Los Angeles office of Lewis Brisbois Bisgaard & Smith LLP, specializing in Intellectual Property and Technology, and Entertainment. Before becoming an attorney, Ms. Rosenfeld worked as a television anchor and reporter.

For those who operate a website selling goods or services, the Communications Decency Act (“CDA”) §230 offers significant protection from claims of defamation, negligence, and similar claims, as demonstrated by recent cases.

The CDA’s §230(c)(1) offers the following safeguard: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” This provision of federal law (which controls claims arising under state laws, too) has always been understood to protect so-called Internet Service Providers (“ISPs”) and helped to foster a robust Internet. When, however, is a company operating a website sufficiently passive so that it is protected by CDA §230, and when does it become active in the communications so as to lose that immunity?

CDA’s §230 for Websites Offering Services

In *Beckman v. Match.com*, 2013 U.S. Dist. LEXIS 78339 (D. Nev. May 29, 2013), a woman sued Match.com after she was attacked by a man she met online through the dating site. The court held that Match.com would not be subject to liability, taking cover under §230. Although the pair met through the site, the content originated from third parties who filled out the profiles, not from the site itself. Thus, Match.com was not an information content provider. Rather, the site was a provider of interactive

computer services, which the CDA defined as an “information service . . . that provides or enables computer access by multiple users to a computer server . . .” 47 U.S.C. § 230(f)(2). In other words, Match.com was a passive forum where users could communicate, and thus could not be held responsible for what happens as a result of the information exchange.

In addition, the court held that the plaintiff did not plead the negligent misrepresentation claim with particularity, and Match.com did not owe a special duty to subscribers of the site. This is an important lesson, that just because someone subscribes to a site, and even pays for the access, it does not mean that the website owes them a special duty such that a negligent misrepresentation claim would survive.

CDA’s §230 for Websites Offering Goods

In *Okeke v Cars.com*, 2013 N.Y. Misc. LEXIS 2250 (N.Y. Civ. Ct. May 28, 2013), a user who paid for a truck, but never received it, sued Cars.com, the site where he bought the vehicle. The court held that CDA §230 shielded cars.com from any liability. The New York City Civil Court in Queens County held that Cars.com was an interactive computer service and thus immune from liability, because it was a forum where consumers could make purchases.

This case is noteworthy since the court also did not accept Cars.com’s argument that its terms of service prevented the claim, since the court did not find any evidence that the plaintiff had actual or constructive knowledge of the “browsewrap” terms. While the terms were available on the Cars.com website and the user could read them by clicking a link, NY courts usually require a user to take an additional step to confirm they read the terms in order for the terms to have a binding effect. An example would be if the user were required to click “I understand and accept these terms” as a condition of proceeding with the purchase. However, this was not the case with the website at issue.

¹ Republished from Lewis Brisbois Bisgaard & Smith Intellectual Property Newsletter, Summer 2013.

A “Site” For Sore Eyes: When Are Commercial Websites Protected By Communications Decency Act §230?

Continued from page 7.

A business should be aware that there are limits to CDA’s §230(c). *In Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (2008), the court held that CDA §230(c) did not apply as a safe harbor. This was because Roommates.com created the questions and answer choices in an online survey, so it was an “information content provider” as to the questions and c[ould] claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.” Thus, if a business is an interactive content provider and has such active involvement as both drafting the questions and the selected answers and mandates users answer them, then CDA’s §230(c) may not apply. Similarly, the U.S. District Court for the Eastern District of Kentucky ruled on August 12, 2013, that a website host went beyond the role of a passive intermediary when he selected a domain name that encouraged offensive posts and added his own comments to defamatory user-generated content. (*Jones v. Dirty World Ent. Recordings, LLC*, E.D. Ky., No. 2:09-cv-00219-WOB, 8/12/13.)

However, as long as the business has a passive role as its function as a forum for commercial transactions to take place, and the transactions are between the customers themselves, CDA’s §230(c) remains a strong defense.

Ninth Circuit Saves the Day for Studio in Superman Copyright Lawsuit¹

By Shelly Rosenfeld

A legally binding contract can be memorialized in a letter or series of letters without a single document titled “Agreement.” Also, while a party may seek to leave parts of an agreement somewhat ambiguous so that a deal does not fall apart over negotiating something that appears intractable, it risks coming back and wreaking havoc like Kryptonite.

In *Larson v. Warner Bros. Entm’t*, 2013 U.S. App. LEXIS 671 (2013) (unpublished), (“Superman case”), the court upheld a 2001 agreement between Warner Bros. and the heirs of the co-creators of Superman, saying that there was a valid Agreement. This means that the studio has all of the rights to the action hero.

Warner Bros. can now proceed with releasing the film, “Man of Steel” and other projects involving Superman. The federal appellate court’s decision ends years of litigation over the rights to the iconic character, who was created by Jerome Siegel and Joseph Shuster in the 1930s. While a 2008 decision resulted in a win for the Siegel heirs and expanded their copyright ownership, Warner Bros. appealed the decision with the Ninth Circuit, which resulted in this case reversing the lower court decision.

An important point for parties that may find themselves in a dispute over whether a series of letters constitute a contract is to look at the language that exists in the letters. According to the Superman case, the following language was in a letter, stating that the heirs “accepted D.C. Comics['] offer of October 16, 2001 in respect of the ‘Superman’ and ‘Spectre’ properties. The terms are as follows. . . .” The court said that there was also five pages of provisions describing payment in exchange for allowing the Studio to create works based upon Superman. Further evidence that shows there was an Agreement was the end of the Letter, which the court said was from the lawyer for one of Siegel’s heirs, Laura Siegel Larson. Larson’s lawyer expressed gratitude to DC Comics’ attorney for the his “help and patience in reaching this monumental accord.”

If you’re planning on making a deal in California, it is also helpful to note that California law allows for parties to enter into a binding contract, even when some material, or significant, aspects of that agreement will be written out later. This holds true even if the parties do not spell out in writing that they intend to enter into a future agreement to for these provisions.

¹ Republished from Lewis Brisbois Bisgaard & Smith Intellectual Property Newsletter, Winter 2013.

TATTOO YOU? COPYRIGHT INFRINGEMENT IMPLICATIONS AND TATTOOS



Stephanie Vitiello

Stephanie Vitiello is a graduating 3L at SMU Dedman School of Law, and a graduate of Rutgers University. She is a member of the International Law Review Association and a student member of the William “Mac” Taylor Inn of Court. Before starting her legal career, Stephanie was an accountant in the financial services industry in New York and Texas.



John G. Browning

John G. Browning is a partner in the Dallas office of Lewis Brisbois Bisgaard & Smith, where he handles a wide variety of civil litigation, including intellectual property matters. He is a graduate of Rutgers University and the University of Texas School of Law, and he serves as an adjunct professor at SMU Dedman School of Law.

I. INTRODUCTION

Do you have a tattoo? You’re hardly alone. Tattoos may have once been thought by many to be the exclusive preserve of rebels, sailors, and felons, but Americans are spending more time in the tattoo parlor than ever. In 2013, Americans spent \$1.65 billion on tattoos.¹ About 14% of all Americans have at least one tattoo: 36% of adults ages eighteen to twenty-five and 40% of adults ages twenty-six to forty.² And although seeing famous entertainers like Angelina Jolie or Johnny Depp, or professional athletes baring their ink for all to see has become a routine sight today, even some well-known historical figures have sported tattoos. Winston Churchill had an anchor on his right arm, while Teddy Roosevelt had his family crest emblazoned across his chest. Even Thomas Edison and Queen Victoria were “inked up.”

Today, tattoo artists are not only busier than ever, they’re also getting more visibility for their

work thanks to not only prominent coverage of celebrities and sports stars with tattoos, but reality television as well. Shows such as *Ink Master* and *Tattoo Nightmares* on Spike³ and *LA Ink*, *Miami Ink*, and *New York Ink* on TLC⁴ provide viewer insight on the inner workings and drama in the tattoo industry. Arguably one of the most famous tattoo artists, Kat Von D, even has a cosmetic line that sells at the high-end cosmetic retailer Sephora.⁵ And with wealth and fame comes a greater awareness of the legal dimensions of their work, especially copyright infringement. Although some celebrity tattoos arguably should never be reproduced, like the ice cream tattoo on rapper Gucci Mane’s face,⁶ celebrity tattoos are becoming an increasingly common sight commercially in movies, advertisements, and video games. And as a result, tattoo artists are suing for copyright infringement. While there have been a few cases regarding the issue of tattoo copyright infringement, guiding legal precedent is still rare. But with the greater prominence of tattooing in popular culture and a growing trend of tattoo artists asserting rights in their work featured on famous athletes and actors, it is necessary to take a closer look at this emerging legal issue.

II. TATTOO COPYRIGHT INFRINGEMENT

Can tattoos be copyrighted? The answer is a probable “yes.” Can a plaintiff tattoo artist prevail in a tattoo copyright infringement case? That is a tougher question to answer. To date, no court has ruled affirmatively either way. Under § 102 of the U.S. Copyright Act, copyright protection extends to “original works of authorship fixed in any tangible medium of expression . . . [including] pictorial, graphic, and sculptural works.” Yet common or clichéd tattoo designs, such as “Mom” in a heart or the dreaded barbed wire, are not copyrightable.⁸ Some copyright scholars distinguish between tattoos applied directly on the skin compared to tattoos drawn on a stencil first (tattoos drawn on something first may be more likely considered a tangible medium of expression compared to skin).⁹ Consequently, two main issues of tattoo copyright infringement emerge. One issue is whether skin is a “tangible medium of expression.” Another issue is if the tattoo is copyrightable, who owns the copyright—the tattoo artist or the tattoo holder? What seems like a clear-cut answer—to agree in writing as to who owns the tattoo—is not so clear. As discussed in the cases below, even if a tattoo holder signs an agreement in writing stating the tattoo artist owns all rights to the tattooed image, the tattoo artist may still not prevail in a copyright infringement case. In addition, it is not evident what rights third parties may have to tattoos, if any.

Continued on page 10.

TATTOO YOU? COPYRIGHT INFRINGEMENT IMPLICATIONS AND TATTOOS

Continued from page 9.

As with any other example of expression, unless there is a transfer of ownership, the initial author owns the copyrighted work.¹⁰ But the U.S. Copyright Act limits the exclusive right to use a copyrighted work. Under fair use, the use of a copyrighted work for purposes such as “criticism, comment, news reports, teaching . . . scholarship, or research, is not an infringement of copyright.”¹¹ In determining what is fair use, courts look at four factors: (1) the purpose and character of the use, including whether the use is commercial; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹² Fair use distinguishes piracy from parody.

In addition, a defendant faced with a tattoo copyright infringement case can defend against the claim by asserting the existence of an implied license. Copyright holders usually have several exclusive rights to do and authorize any of the following: to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public, and to display the copyrighted works publicly.¹³ If a tattoo artist holds the exclusive right to display the tattoo in public, the tattoo holder faces a dilemma: as a practical matter, they must cover the tattoo while in public or be liable for copyright infringement. Therefore, some copyrighted rights must pass, at least partially, to the tattoo holder. For example:

[w]hen a tattoo artist applies a tattoo to an individual, the artist knows that the recipient will likely be seen in public, and will likely during his or her lifetime be photographed and/or videotaped—all of which involve copying the tattoo, implicating the rights of reproduction and public display. This is especially true if the recipient is a celebrity.¹⁴

Most tattoo artists readily concede that tattoo holders have the right to be seen in public, photographed, and videotaped. The concern, however, is when a tattoo is featured commercially. The initial remedy in copyright infringement cases is to demand an injunction.¹⁵ Additionally, damages include actual damages and any additional profits made by the infringer or statutory damages.¹⁶ If the copyright holder elects to recover statutory damages instead of actual damages, statutory damages are at least \$750 but no more than \$30,000, per infringement.¹⁷ If the copyright infringement was committed willfully, the court may increase the award of statutory damages to \$150,000 per infringement.¹⁸ To date, tattoo copyright infringement cases have settled out of court or have been dismissed.

III. CASE LAW CONFUSION

A. Movies and Advertisements

Perhaps the most publicized tattoo copyright infringement case is *Whitmill v. Warner Brothers Entertainment Inc.* Here, tattoo artist S. Victor Whitmill, previously at Paradox-Studio of Dermagraphics, sued Warner Brothers for copyright infringement. Warner Brothers reproduced the infamous tribal face tattoo of former world heavyweight champion boxer Mike Tyson on the face of an actor in the movie, *The Hangover Part II*.¹⁹ The face tattoo was not only used on the character in the movie, but was also featured in advertisements and promotions of the movie.²⁰ Whitmill did not draw the tattoo on paper before he applied it to Tyson's face.²¹ But before applying the tattoo, Whitmill had Tyson sign a release form stating “that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of Paradox-Studio of Dermagraphics.”²² In addition, in 2011, Whitmill registered the copyright of the face tattoo (although after the statute of limitations had passed)²³ and alleged that he was never asked for permission or consented to Warner Brothers using the face tattoo.²⁴ Whitmill asserted that the face tattoo in *The Hangover Part II* was recurring and played an important role in the plot of the movie.²⁵ Warner Brothers argued that tattoos could not be copyrighted and that even if they could be, Warner Brothers' use of Tyson's tattoo fell under the fair use defense.²⁶

Whitmill tried to enjoin Warner Brothers from releasing the movie and he also filed for an injunction to stop the advertising, marketing, and promotion of the movie using the face tattoo.²⁷ Whitmill initially demanded upwards of \$30 million to settle

Continued on page 20.

TROLLS, TROLLS EVERYWHERE: WHY COPYRIGHT LAW'S RIGHT FOR TROLLING

By *Connie Powell Nichols**



INTRODUCTION

When the Recording Industry Association of America (the “RIAA”) ceased its enforcement campaign against fans for sharing music using peer-to-peer file-sharing platforms, who knew a troll was in the lurch waiting to exact its copyright toll? Generally, copyright trolls are individuals or companies who have acquired copyrights to movies, music or other creative works with the primary intent to derive a profit by filing lawsuits alleging online piracy. The threat of a lawsuit, the potential damages for copyright infringement, and the embarrassment associated with the content of the alleged infringed copyrighted material has been used to extort fees from users in exchange for the copyright troll to disappear. Threaten, bully, and settle with enough defendants, and you have a booming “troll toll” business. Indeed, millions of dollars began to flow into the bank accounts of those running these schemes.¹ This Article proposes that copyright statutory damages, technology, and permissive joinder and other antiquated discovery laws have created the lucrative bridge for trolling and argues that neither the Ninth Circuit’s decision in *Righthaven v. Hoehn*² nor the sanctions against Prenda Law (“Prenda”)³ ended copyright trolling. What will be necessary to curtail copyright trolling is a review of copyright law’s provisions on statutory damages and courts taking a more critical review of pleadings before allowing massive defendant joinder.

Connie Powell Nichols received her J.D. cum laude from Indiana University School of Law in 2000, where she served as senior managing editor for the *Federal Communications Law Journal*. After several years of private practice with the Chicago law firm of Winston & Strawn, LLP, working in the firm’s Intellectual Property group, she went in-house at Blockbuster, Inc. and then Global Hyatt Corporation. She came to Baylor Law School as an associate professor in 2008, teaching Intellectual Property and Contracts.

I. THE COPYRIGHT TROLL AND MOTIVATION

A. The Trolls

The term “troll,” as initially used in copyright law, referred to a holder of a specially tailored interest in a copyrighted work—an enforcement right—who sought to settle as many cases as one could

based upon this assignment of unbundled rights. However, a troll is much broader than that. Contemporarily, a troll is more about a business model than about the specific right that is held. As one Justice mused in *eBay, Inc. v. MercExchange*, a troll is a “scary thing.”⁵ As such, most trolls’ methods of operation revolve around a systematic filing of lawsuits, targeting hundreds or thousand of defendants, seeking settlements that are calculated to be lower than the cost of attorney’s fees, and oftentimes using the content of the copyright—pornography—as leverage to settle the lawsuit.⁶ At this juncture, one cannot talk about copyright trolling without discussing the two copyright trolls that put the practice of trolling in copyright into the limelight—Righthaven LLC and Prenda.

i. *The Rise and Fall of Righthaven*

Copyright trolling began to garner attention in 2010 and 2011 when Nevada-based company Righthaven LLC (“Righthaven”) began filing hundreds of copyright infringement claims against bloggers and other online users for posting content to newspaper articles that were subject to copyrights that were assigned to Righthaven.⁷ However, Righthaven had limited rights.⁸ Indeed, Righthaven had entered into a specially tailored Strategic Alliance Agreement (“SAA”) that controlled what Righthaven could do with any copyrights assigned to it. Specifically, any assignment of a copyright was limited to Righthaven’s searching for instances of infringement and pursuing settlement of lawsuits filed for infringement.¹⁰ Righthaven was announced by one of its major clients/copyright assignors, Stephens Media, the parent company of *Las Vegas Review-Journal* (“LVRJ”), as a “technology company whose only job is to protect copyrighted content.”¹¹

*Connie Powell Nichols is an Associate Professor of Law at Baylor University School of Law. Professor Nichols would like to thank her research assistant Cody Hill for his work on this topic.

Continued on page 12.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 11.

This business practice proved to be lucrative for both Righthaven and LVRJ, as the SAA between the two allowed for shared profits in the tolls exacted.¹² In 2012, it was reported by Righthaven that, of the 276 infringement cases filed, nearly half were settled immediately.¹³ The success of Righthaven's trolling only lasted until a number of defendants began to fight back asserting fair use as a defense to the infringement claims asserted by Righthaven.¹⁴ This is important because the tactical enforcement measures advanced by Righthaven were novel, but not outside the scope of what is authorized by the Copyright Act.¹⁵ Until Righthaven, the traditional method of enforcement for infringement of news articles online was to proceed from a far less adversarial position. The first line of enforcement usually began by sending cease and desist letters to the offending party followed by the Digital Millennium Copyright Act ("DMCA") notice and takedown process if the cease and desist was not successful. Righthaven shocked the industry with its trolling approach. Once the shock was over, individuals began to assert common defenses, and the courts began to question the legitimacy of the business practice. Indeed, Righthaven's business model began to implode once its standing to bring suit for infringement was challenged and the substance of the copyright assignments, as well as the SAA, was put under scrutiny by the courts.¹⁶ Specifically, courts began to question whether, under the Copyright Act, an assignee must possess some additional "rights" other than an enforcement right to maintain a claim for copyright infringement. The clause at issue, which involved Righthaven's client LVRJ, that brought Righthaven's copyright assignment into question provided in pertinent part:

Despite any Copyright Assignment, Stephens Media shall retain (and is hereby granted by Righthaven) an exclusive license to exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever and Righthaven shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery. To the extent that Righthaven's maintenance of rights to pursue infringers of the Stephens Media Assigned Copyrights in any manner would be deemed to diminish Stephens Media's right to Exploit the Stephens Media Assigned Copyrights, Righthaven hereby granted an exclusive right to Stephens Media to the greatest extent permitted by law so that Stephens media shall have unfettered and exclusive ability to Exploit the Stephens Media Assigned Copyrights. Righthaven shall have no Obligation to protect or enforce a Work of Stephens Media that is not Stephens Media Assigned Copyrights.¹⁷

In reviewing section 501(b) of the Copyright Act,¹⁸ which provides that the owner of an exclusive right of a copyright is entitled to institute an action for any infringement, the Ninth Circuit in *Silvers v. Sony Pictures Entertainment, Inc.*, held, en banc, that the assignment of the bare right to sue for infringement, without the transfer of an associated exclusive right, is impermissible under

Continued on page 25.

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 listserv, 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.

Playing the Casinos Can Be A Real Gamble

By Eric Zukoski



Eric Zukoski is a shareholder with the law firm of Quilling, Selander, Lownds, Winslett & Moser in Dallas, Texas, whose entertainment and intellectual property practice includes representing music publishers, record labels, managers, and musicians, as well as administering a growing catalogue of frequently-licensed musical works with numerous placements in TV, film, and other media.

Juris Doctor, Boston University School of Law, 1990. Edward F. Hennessy Scholar. Editor, *Boston University International Law Journal*.

Bachelor of Arts in Business Administration and Accounting, University of Washington, 1987.

Former Chairman and Member of the Board of Directors, Texas Music Project (501c3).

Member, Texas, Dallas, and Tarrant County Bar Associations.

Several members of AFM Musicians Local 72-147 were performing at a casino in Oklahoma under a non-AFM contract tendered by casino management. The casino's contract contained a very unusual provision:

19. Music Licensing. In the event Artist performs copyrighted compositions during Artist's musical performance at Nation, and it is determined that music licensing fees, other costs, expenses, taxes, fines, or damages are owed to a third party(s) for such performance of copyrighted compositions, Artist hereby declare that they are liable for such costs and Artist agrees to pay said costs. Further, should Nation incur said costs in connection with the performance of copyrighted compositions by Artist, then Artist shall be responsible and agree to pay such amounts to Nation.

Turns out the casino was not paying royalties to ASCAP for the performance of underlying compositions because the casino's outside counsel advised that they

could put the burden of copyright clearance on the musicians, and if the musicians failed to clear copyrights, the casino would enjoy sovereign immunity. It apparently did not matter to the casino's attorney that the musicians would not enjoy the same sovereign immunity, and the musicians, anxious to keep working, signed the contract.

ASCAP, tired of not being paid, and faced with the fact that under United States law the Native American-owned casino did in fact enjoy sovereign immunity, turned to the only available defendants it had left—the musicians. ASCAP sued each musician in federal court for up to the maximum statutory penalty under 17 U.S.C. §504(c)(1) of \$30,000 per song from the ASCAP catalogue performed without a license. Just so you understand, that is \$30,000—**A DOLLAR SIGN, FOLLOWED BY A THREE, FOLLOWED BY FOUR ZERO'S**, for each song from the ASCAP catalogue performed over a four hour engagement. This could mean that in a four-hour engagement, assuming ten songs per set, and assuming ASCAP could identify 50% of the songs performed as being from their catalogue, a musician might walk away with a bill of around \$600,000, which is probably more than the gig pays.

After being contacted to defend the musicians, we explained to the casino's in-house counsel and management how a performer-initiated copyright clearance system was a complete impossibility, not to mention the effect such a system would have on the practice of taking requests. We then contacted ASCAP on behalf of the musicians and arranged a deal by which ASCAP agreed that, if we were able to get the casino to sign an ASCAP license despite sovereign immunity, ASCAP would dismiss the lawsuit against the musicians. Once ASCAP agreed, all it took was the threat of a few phone calls to the headliners scheduled to appear at the casino to point out what happened and how they would be next. Casino management then signed an appropriate performance license with ASCAP, ASCAP dismissed the lawsuit, and the nightmare ended.

In fairness to the casino's in-house counsel and management, its early refusal to enter into an ASCAP license and instead place the burden of copyright clearance on the musicians' was apparently the idea of the casino's outside attorney. Casino management

Continued on page 14.

Playing the Casinos Can Be A Real Gamble

Continued from page 13.

ultimately even reimbursed the musicians attorney's fees and reinstated their gigs, which had temporarily ceased for obvious economic reasons. Though one musician pointed out that he didn't have \$600,000, and never would, so as long as they were paying cash, who cares if it runs up into the millions. Hard to argue with that.

Needless to say, the provision quoted above is not in any AFM form of contract, and never will be, and the best way to avoid your own personal gamble is to use a contract that is appropriate to the type of engagement, is comprehensive, and has been negotiated based on the interests of the client.

And when a casino attorney asks you at a gig to play "Fly Me To the Moon," tell him that you'd be glad to take the request . . . once you've fully investigated copyright ownership, have approval from all writers, publishers, administrators, and performing rights societies, and he has deposited sufficient sums in your bank account to cover all licensing fees as well as the cost of defense and indemnity.

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.

THE NEW COPYRIGHT RECAPTURE WINDOW ESTABLISHED BY THE 1976 COPYRIGHT ACT HAS OPENED¹

By Eric Zukoski



How many times have you heard the story about a musician or songwriter who created a monumental copyright but didn't receive any of the profits from the masterpiece that he or she created? The 1976 Copyright Act contains a provision allowing copyright creators to terminate transfers of their copyrights beginning 35 years after the copyright was transferred (17 U.S.C. §203). The 1976 Copyright Act went into effect on January 1, 1978, and therefore the first termination-recapture opportunities began on January 1, 2013. This termination-recapture right applies not only to songwriters who entered into agreements with music publishers, but also to musicians and singers who entered into agreements with record labels, and may well become the most significant tool available for redirecting royalties back to copyright creators.

United States copyright law provides that copyright rights belong initially to the author. The author of a recording is the performer on the recording. The author of an original composition is the songwriter. Recording and music publishing agreements, however, often contain provisions assigning the copyright rights to a record label or music publisher. There have been, and still are, termination-recapture provisions available under 17 U.S.C. Section 304 for songwriters to recapture the extended copyright terms beginning 57 and 76 years after the copyrights were secured. However, as a result of recordings gaining federal copyright protection in 1972, recordings are governed by the 1976 Copyright Act and the new termination-recapture right created by the 1976 Copyright Act (section 203) will allow singers and musicians to recapture rights in recordings.

The rationale behind these little-known recapture provisions is laudable. Congress recognized that copyright creators often do not know the value of their works until after they have been transferred. These copyright creators should have an opportunity to share in the value of the copyrights they transferred prior to their value being known. Also, the term of a copyright has been extended over the decades, and the copyright creators should have the first opportunity to benefit from these extended terms since the recording companies and music publishers have already received the original copyright term that they had bargained for. Automatically giving the unanticipated extended term to record labels and music publishers rather than the copyright creators would be a windfall to the labels and publishers.

Assignments of copyrights are terminated and recaptured by giving notice to the original recording company or publishing company to which the copyright was transferred or to its successor-in-interest.² The termination-recapture provisions allow the terminating copyright creator, or his or her heirs, to terminate and recapture the remaining copyright term in the United States only. Rights outside of the United States will remain with the original record label or music publisher or its successor. The terminating copyright creator can re-assign the recaptured United States rights to the original label or publisher (likely for more money and better terms), or to others. Or the terminating copyright creator can keep the recaptured United States rights.³

Works-for-hire present new ground for debate, or so the record industry seems to think. You can call a samba a waltz until you're blue in the face, but unless it has three beats per measure, it is not a waltz. And so it goes with works-for-hire. Under the 1976 Copyright Act, a work-for-hire is defined as (1) a work prepared by an employee within the scope of his or her employment, or (2) a commissioned work where the parties agree in writing that the work is a work-for-hire *and* the work falls into one of nine listed categories. These are: a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas. Termination-recapture does not apply to works-for-hire because the employer is considered the author of a work for hire and therefore the individual copyright creator cannot terminate. Recording agreements typically contain provisions stating that the recording is considered a work-for-hire. However, audio-only recordings do not fall into one of the listed categories, and therefore they are not works-for-hire.

A samba is a samba, and a waltz is a waltz. Simple, right? Apparently not to the record companies that stand to lose from termination-recapture. In November of 1999, the Recording Industry Association of America ("RIAA") snuck through an

Continued on page 16.

The New Copyright Recapture Window Established By The 1976 Copyright Act Has Opened

Continued from page 15.

amendment to U.S. copyright law which added recordings to the list of works-for-hire. Although congress ultimately undid this grab by the RIAA, record companies are still likely to argue that recordings are works-for-hire. The congressional staffer who assisted the RIAA reportedly now holds a lucrative consulting position with the RIAA.

Your record label and your music publishers probably have not told you about copyright termination-recapture, and probably never will. And if you ask them, the information you get will almost certainly be deficient, and possibly even misleading. The best thing you can do is to calendar the termination-recapture deadlines and make sure that a list of your works and the applicable termination-recapture deadlines are left with a trusted business manager or loved one who is aware of these dates and their importance, and if you have any questions, seek advice from someone knowledgeable about copyright termination and recapture.

- 1 Originally published in *Western Swing Monthly*, November 2012, pages 14-15.
- 2 In order to be valid, the notice must contain several required elements, must be recorded with the United States Copyright Office before the effective date of the termination, must be properly mailed, and must be timely. The termination-recapture window under section 203 is a five year period beginning 35 years after the copyright was transferred, or if the transfer concerns publication of the copyright, then beginning the earlier of 35 years after publication or 40 years after the transfer. The termination-recapture windows under section 304 are five year periods beginning 57 and 76 years after the copyrights were registered. Termination notices can be sent as early as ten years before the termination-recapture window opens and cannot be sent any later than two years before the window closes.
- 3 Royalties generated from licenses issued by a music publisher prior to termination involving derivative works are not recaptured. Mechanical licenses are considered derivative works, so royalties generated by mechanical licenses issued prior to termination are not subject to termination-recapture. Royalties from radio play (paid by BMI, ASCAP, and SESAC) are subject to termination-recapture, including royalties resulting from licenses issued prior to termination-recapture. Television play is a derivative work so an original transferee-music publisher will keep royalties resulting from synchronization licenses issued prior to termination. Sheet music and lyric re-prints are not derivative works so the resulting royalties are subject to termination-recapture, even if the licenses were issued prior to termination-recapture.

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.

Pioneer's Revival*Continued from page 6.*

Kelly grew up in San Angelo and attended Blackshear High, which until desegregation is where all of the town's blacks went to school.

Blackshear played its games on Thursday nights. San Angelo College assistant coach George and head coach Max Bumgardner knew Blackshear's coach and often attended games, even though segregation prevented them from recruiting any of the players.

The SAC coaches met Kelly after one of the games and were impressed by his manner and performance, but they were hardly alone.

Kelly had become so well known and liked in San Angelo that when he graduated from Blackshear knowing he wasn't allowed to attend any major colleges in the South two white San Angelo businessmen, Homer Nickle and Earl Horn, spear-headed fund-raising efforts to send Benjamin to the University of Illinois to attend school and play football.

"I was not aware of that at the time, but I found out about it later," George says of the fund-raising efforts. "That's how much some people here in town thought of him."

After one semester, however, Kelly became homesick, returned to San Angelo and joined the Army, where he remained for two years.

Then one August afternoon in 1953, he walked into the SAC coaches' office adjoining the gymnasium, where Bumgardner and George were preparing for the following week's start of fall practice.

"Coach Bum, I want to go to school here and play football for the Rams," he said.

President's OK

Bumgardner, who is deceased, explained that day what Kelly already knew, that SAC had no black students. Bumgardner told Kelly that as much as he'd like to have him on the team, he didn't have the authority to enroll him in school.

"Who would have that authority?" Kelly asked.

Bumgardner walked Kelly outside and pointed toward the administration building and the office of second-year school president Rex F. Johnston.

While Kelly headed toward Johnston's office, Bumgardner tried to call the president's secretary to let her know that a young man was about to arrive with a big request. The line was busy.

Kelly, meanwhile, introduced himself to Johnston's secretary and asked to see the president but didn't explain why.

Ushered into Johnston's office, Kelly made a brief but apparently convincing case for why he wanted to attend Johnston's college. Johnston sat silent for several seconds.

"If I felt as strongly about it as you do," he finally told Kelly, "I'd go over to the registrar's office and enroll."

Johnston phoned the registrar's office and said he was sending a young man over. With that, San Angelo College was integrated, paving the way for two black coeds, Mary Frances Simpson and Annie Owens, to enroll that Fall.

Long-distance phone costs and lack of time prevented coaches Bumgardner and George from notifying other Rams players about their new teammate. They found out at the first team meeting.

Continued on page 18.

Pioneer's Revival

Continued from page 17.

“Now all of a sudden, standing in the middle of them was this strong black guy, with a big grin on his face,” George says. “Well, that’s pretty traumatic for some of these kids.”

Running back Paul Horne recalls Bumgardner telling the team that Kelly would become the first Negro to play football at a previously segregated school south of the Mason-Dixon line.

“We didn’t know if that was true, but that’s what he said,” Horne recalls.

Teammates’ Support

George says that initially there were sideways glances and under-the-breath muttering, but by the end of the first week the team was unified in support of Kelly.

“My teammates treated me very well,” Kelly recalls during a phone interview from his hospital room.

He briefly alludes to problems with opposing teams, especially during road games, but declines to elaborate. Without naming the opposing team, Horne says the treatment of Kelly was particularly rough at one road game that first season, with opposing players name-calling and hitting Kelly under the pile after he’d been tackled.

Horne is perhaps referring to a game at Victoria Junior College. In a 1983 story in the *Standard-Times*, Bumgardner recalled that townspeople “had signs strung across the road, calling us every name in the book.” Furthermore, the Rams’ hotel reservations and meal reservations had been canceled.

Horne says that after the game he referenced, two members of the opposing team came to the Rams’ locker room and apologized to Kelly, impressed that he had not fought or jawed back in retaliation during the game.

Hotels and road meals remained an issue throughout Kelly’s two seasons, though. When staying at hotels that did allow blacks, Horne roomed with Kelly. When the team had no choice but eat at restaurants that didn’t allow blacks in the main dining area, Horne accompanied Kelly around back and ate with him in the kitchen.

“The way it worked out, he and I probably had the best food on the whole team,” Horne says. “Because a number of the cooks were the same color as he was.”

After his second season at SAC, Kelly says he had opportunities to play with the NFL’s 49ers and Giants, although the money wasn’t sufficient and he gave up after two seasons, returning to San Angelo for good.

“I had to support my family,” he says.

He worked at a dry cleaner, then at Ethicon, a division of Johnson & Johnson that manufactures surgical sutures, where his boss soon recommended him for a job at the Boys and Girls Clubs.

He became executive director and remained for 29 years, retiring in 1996, three years after the new gymnasium was named in his honor. Meanwhile, he and Alvetta remained close to Angelo State, especially the black football players, who always knew where to come for home cooking.

One such player, Mike Millegan, played cornerback on Angelo State’s 1978 national championship team, eventually became president of Verizon Global Wholesale and remains grateful for Kelly’s friendship, mentoring and quiet trailblazing.

“There’s very few leaders on this Earth, but this guy was a leader,” Millegan says. “And within leadership, there’s determination, there’s strength, there’s focus, there’s risk-takers.”

Continued on page 19.

Pioneer's Revival

Continued from page 18.

“And Ben embodied all of that because, quite frankly, his journey was a lonely journey.”

It's taken 60 years for anyone outside of San Angelo to notice, but anyone wondering how impactful the start of that journey was simply needs to look in San Angelo College's 1953-54 freshman yearbook.

The class favorite, voted by students, was Benjamin Kelly.

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 mfarris@vilolaw.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 re-publication. The Journal does not restrict re-publication, 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.

TATTOO YOU? COPYRIGHT INFRINGEMENT IMPLICATIONS AND TATTOOS

Continued from page 10.

the claim.²⁸ But federal judge Catherine D. Perry of the Eastern District of Missouri issued an oral opinion denying Whitmill's request for the injunction.²⁹ She based her decision on four factors: (1) the likelihood of Whitmill succeeding on the merits; (2) whether Whitmill suffered irreparable harm; (3) the balance of the equities; and (4) public interest.³⁰ Judge Perry noted that Warner Brothers spent millions of dollars promoting the film and the scheduled opening, which outweighed Whitmill's harm.³¹ She also concluded that the harm to the "public interest" of preventing the release of the movie also outweighed Whitmill's harm.³² Yet, Judge Perry described the likelihood of Whitmill prevailing in the case as "strong" and called Warner Brothers' defense arguments "silly."³³ She also found irreparable harm for Whitmill because he no longer had control over the image.³⁴ Furthermore, the court made it clear that the face tattoo was an exact copy, not a parody.³⁵ And although she denied Whitmill's injunction, Judge Perry opined that Whitmill was entitled to some amount of money.³⁶ Significantly, the court had no reservations about copyright protection for tattoos, saying:

Of course tattoos can be copyrighted. I don't think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson's face, or restricting Mr. Tyson's use of his own face, as the defendant argues, or saying that someone who has a tattoo can't remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it's entirely consistent with the copyright law.³⁷

The lawsuit later settled out of court.³⁸

The issue of tattoo copyright infringement proves to be confusing, even for copyright scholars. Even an authority as prominent as UCLA law professor David Nimmer has changed views on whether tattoos could be copyrighted.³⁹ Nimmer, the author of the treatise *Nimmer on Copyright*, was retained by Warner Brothers as an expert in *Whitmill v. Warner Brothers Entertainment Inc.*⁴⁰ In his declaration, Nimmer claimed that Tyson's head is not a "protectable medium of expression," and therefore the tattoo could not be copyrighted.⁴¹ Nimmer admitted that he previously stated that a tattoo could "presumably qualify as a work of graphic art, regardless of the medium in which it is designed to be affixed such as human flesh," as he stated in *Nimmer on Copyright*.⁴² In the suit, Nimmer expressed that "a body . . . simply is not subject to copyright protection."⁴³ Why the change in theory? Ann Bartow, a copyright professor at Pace University School of Law, pointed out that Nimmer's abrupt about-face seemed convenient since Nimmer was hired by Warner Brothers.⁴⁴

In 2005, Portland tattoo artist Matthew Reed sued Nike and advertising agency Weiden + Kennedy for tattoo copyright infringement.⁴⁵ Reed also sued Portland Trailblazer Rasheed Wallace for contributory copyright infringement.⁴⁶ Reed tattooed an Egyptian-themed tattoo on the arm of the NBA star.⁴⁷ Reed and Wallace designed the tattoo together and Reed created a stencil before applying the tattoo on Wallace.⁴⁸ The tattoo cost \$450, which Reed considered low but rationalized that he would receive business exposure as a result of Wallace's prominence as a professional basketball player.⁴⁹ There was no written agreement assigning ownership to either party.⁵⁰ In 2004, Reed discovered that the Egyptian-themed tattoo was featured in a Nike advertising campaign.⁵¹ The commercial, which was broadcast on television and the Internet, featured a close-up of the tattoo that was digitally redrawn on Wallace's arm while he described and explained the meaning of the tattoo.⁵² Reed contended that he was never contacted by Wallace, Nike, or Weiden + Kennedy for permission to use the tattoo in the commercial.⁵³ Reed sought actual damages and to enjoin Nike and Weiden + Kennedy from using the tattoo in the Nike commercial.⁵⁴ Ultimately, the case settled for an undisclosed amount before it went to trial.⁵⁵

Across the pond, English tattoo artists have also sued for copyright infringement. In 2005, English soccer star and model David Beckham had a public dispute with famed tattoo artist Louis Molloy.⁵⁶ Allegedly, Beckham had plans to highlight the tattoos he received from Molloy in an advertisement.⁵⁷ Supposedly, Beckham and Molloy tried to create a license agreement, but it proved too complicated.⁵⁸ Apparently, contract language is one thing that the English soccer icon could not "bend like Beckham." Molloy claimed to own the copyright and said he would sue if Beckham used the images without Molloy's permission.⁵⁹ Apparently Beckham and Molloy resolved the issue because Molloy has since tattooed Beckham and the dispute has faded away (unlike the ink).⁶⁰

Continued on page 21.

TATTOO YOU? COPYRIGHT INFRINGEMENT IMPLICATIONS AND TATTOOS

Continued from page 20.

B. Video Games

In July 2009, tattoo artist Christopher Escobedo tattooed a lion on the ribcage of professional mixed martial artist Carlos Condit.⁶¹ Escobedo drew the lion tattoo on paper first before tattooing Condit.⁶² In 2009, Escobedo copyrighted the distinctive lion tattoo.⁶³ In 2012, in *Escobedo v. THQ, Inc.*, Escobedo filed suit against THQ, Inc., an interactive entertainment software developer and publisher, for copyright infringement of the lion tattoo.⁶⁴ THQ created two video games, *UFC Undisputed 2010* and *UFC Undisputed 3*, where Condit is a computer-generated character bearing the lion tattoo.⁶⁵ Allegedly, artists recreated the tattoo on the Condit character for the video games.⁶⁶ As a feature of the game, THQ allows users to make a highlight reel of the fight and post it online; if Condit was in the posted fight, so too was the lion tattoo.⁶⁷ The *UFC Undisputed 3* website also displayed a picture of Condit and the lion tattoo.⁶⁸ In a press release, Escobedo claimed that he never signed a written agreement assigning the copyright to Condit.⁶⁹ Escobedo explained that he would not have agreed to the recreation of his work without approving the artwork and receiving fair compensation.⁷⁰ As a result, Escobedo initially sought over \$4 million in damages based on royalties of sales from the games and refused a \$22,500 settlement.⁷¹ Shortly after Escobedo filed suit, the case was stayed because THQ filed for Chapter 11 bankruptcy.⁷² Escobedo pursued a claim in the bankruptcy case, but U.S. Bankruptcy Judge Mary F. Walrath ruled that Escobedo's claim was only worth a maximum of \$22,500, the amount Condit was paid for appearing in the games.⁷³ Escobedo has appealed the ruling.⁷⁴

In 2012, tattoo artist Stephen "Scotty" Allen sued Electronic Arts, Inc. for copyright infringement and former Miami Dolphins running back Ricky Williams for contributory copyright infringement based on a tattoo Allen gave Williams in 2003.⁷⁵ Williams signed a waiver that stated "artwork remains property of Scotty Allen unless otherwise expressed. All rights reserved by owner. Any form of reproduction is prohibited by state and federal copyright [sic] laws."⁷⁶ Allen discovered in 2010 that Williams was depicted by EA on the cover for the video games *NFL Street*, *Madden NFL 10*, and *Madden NFL 11*.⁷⁷ Allen claimed he was never contacted by Williams or EA regarding the use of the tattoo on the game covers.⁷⁸ The case was eventually dismissed in April 2013.⁷⁹ However the lawsuit prompted action by the NFL Players Association (NFLPA).⁸⁰ According to published reports, the NFLPA "advised agents to tell their players that when they get tattoos going forward they should get a release from the tattoo artist and if they can track down their former artists, they should get a release."⁸¹ George Atallah, the NFLPA's assistant executive director of external affairs, explained that players are getting the release forms and that "[t]attoo artists are cooperating . . . if there is a little extra money exchanged for the license, then so be it."⁸² In addition, the NFLPA may require players to indemnify and hold harmless the NFLPA and associated companies if the player fails to obtain a release from the tattoo artist.⁸³ Athletes that are already inked may be compelled to find their tattoo artists and convince them to sign documents that transfer ownership of the image to the players.⁸⁴ However, Atallah does not concede that there is merit to the tattoo copyright infringement cases so far,⁸⁵ and professes no concern because third parties have been named in most tattoo copyright infringement cases to date.⁸⁶

So why not just leave the tattoos off of athletes in video games? Apparently it matters. When discussing *Madden NFL 15 PS4/XB1*, one gaming blogger explained, "No tattoos for players like Colin Kaepernick really hurts in the new next-gen era."⁸⁷ But video game publishers such as EA may have insurance coverage for lawsuits alleging copyright infringement of celebrity tattoo art, at least regarding advertising.⁸⁸ Tattoo copyright infringement lawsuits may be covered under companies' liability insurance policies, which could help cover the costs of defending lawsuits and the costs of any settlements or liability.⁸⁹ The "advertising injury" section of a company's general liability policy could provide coverage.⁹⁰ The policy would cover infringements that appear on the box advertising of the product, but would not cover claims alleging that the product itself infringes on a copyright.⁹¹ However, some policies may contain exclusions for copyright infringement.⁹²

C. Slogans

Tattoo artists are not the only ones who sue over tattoos. In *Brown v. Way*, clothing designer Clement Brown, Jr. sued Deandre Cortez Way, professionally known as rapper Soulja Boy Tellem, for copyright infringement.⁹³ Brown alleged that he authored a certain slogan known as "Laundry Money" and that Way tattooed a similar slogan on his chest.⁹⁴ Brown alleged copyright infringement because the picture of Way's tattoo appeared in a magazine called *Urban Ink*.⁹⁵ Brown also claimed that Way may

Continued on page 22.

TATTOO YOU? COPYRIGHT INFRINGEMENT IMPLICATIONS AND TATTOOS

Continued from page 21.

perform with his shirt off in concert, thus exposing the alleged infringing tattoo to the audience.⁹⁶ But the court rejected this notion, explaining, “[t]he undersigned doubts very highly that the general public attends a Soulja Boy concert to view Defendant Way’s tattoos, rather than to appreciate and enjoy Defendant Way’s singing and dancing abilities.”⁹⁷ The U.S. District Court for the Eastern District of Michigan dismissed Brown’s case on other grounds—lack of personal jurisdiction.⁹⁸

IV. CONCLUSION

Some entrepreneurs are already ahead of tattoo copyright infringement cases. Matt Siegler, an account management representative at a publicly traded company, bought the exclusive license to certain athletes’ tattoos.⁹⁹ Siegler negotiated directly with the tattoo artists who created the designs to get exclusivity.¹⁰⁰ Siegler reached agreements with six tattoo artists, representing work on at least eight athletes, including Kobe Bryant, LeBron James, Chris Bosh, Ray Rice, Kenyon Martin, DeAndre Jordan, Michael Beasley, and Eric Bledsoe.¹⁰¹ After hours of research and speaking with numerous attorneys, Siegler is convinced that tattoos on athletes’ bodies belong to the tattoo artist and that his exclusive licenses are valid and enforceable.¹⁰² Siegler plans to put the athletes’ tattoos onto apparel, clothing, and other merchandise.¹⁰³ Yes, some day, you too can be the “Chosen 1.”

Despite a dearth of legal precedent, celebrities and tattoo artists alike would be well-advised to protect themselves. Celebrities and other tattoo holders should obtain an assignment of all rights connected with the tattoo they receive upfront. Even if the tattoo costs a little extra, it may reduce the likelihood of a lawsuit in the future. Tattoo artists should file for copyright registration as soon as possible. In addition, it is advisable to memorialize the tattoo on paper before applying the tattoo to skin. Regardless, both parties should discuss and agree in writing as to how each party may use the tattoo.

In conclusion, the issue of tattoo copyright infringement is far from resolved. There are also several other issues that have not been addressed. If the copyright belongs to the artist, what happens when the copyrighted tattoo is expanded, altered, or covered up by the tattoo holder? For example, One Direction singer Harry Styles recently covered his “I Can’t Change” tattoo with an anchor.¹⁰⁴ In addition, problems may exist when more than one tattoo artist works on a single tattoo. Getting multiple tattoo artists to sign waivers may prove difficult. In the future, copyright infringement cases may also involve body art or modifications other than tattoos, including scarring, branding, piercing, and putting objects under the skin.¹⁰⁵

ENDNOTES

- 1 *Tattoo Statistics*, STATISTIC BRAIN (Dec. 11, 2013), <http://www.statisticbrain.com/tattoo-statistics/>.
- 2 *Id.* The millions of Americans with ink include the authors of this article.
- 3 *See Ink Master* (Spike television broadcast), available at <http://www.spike.com/shows/ink-master>. *See Tattoo Nightmares* (Spike television broadcast), available at <http://www.spike.com/shows/tattoo-nightmares>.
- 4 *See LA Ink* (TLC television broadcast), available at <http://www.tlc.com/tv-shows/la-ink>. *See Miami Ink* (TLC television broadcast), available at <http://www.tlc.com/tv-shows/miami-ink>. *See New York Ink* (TLC television broadcast), available at <http://www.tlc.com/tv-shows/ny-ink>.
- 5 *Kat Von D*, SEPHORA, <http://www.sephora.com/kat-von-d> (last visited Mar. 11, 2014).
- 6 Mariel Concepcion, *Gucci Mane Gets New Ice Cream Face Tattoo*, BILLBOARD (Jan. 13, 2011), <http://www.billboard.com/articles/columns/the-juice/473658/gucci-mane-gets-new-ice-cream-face-tattoo>.
- 7 17 U.S.C. § 12 (2006).
- 8 Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 103 (2003).
- 9 Declaration of David Nimmer, ¶¶ 49–51, *Whitmill v. Warner Bros. Entm’t, Inc.*, No. 4:11-cv-752 (May 20, 2011) [hereinafter Nimmer Declaration].
- 10 17 U.S.C. § 201 (2006).
- 11 *Id.* at § 107.
- 12 *Id.*
- 13 *Id.* at § 106.
- 14 Timothy C. Bradley, *The Copyright Implications of Tattoos*, 29 ENT. & SPORTS LAW. 1, 29 (2011).
- 15 17 U.S.C. § 502 (2006).
- 16 *Id.* at § 504(a).
- 17 *Id.* at § 504(c)(1).
- 18 *Id.* at § 504(c)(2).

Continued on page 23.

TATTOO YOU? COPYRIGHT INFRINGEMENT IMPLICATIONS AND TATTOOS

Continued from page 22.

- 19 Complaint at ¶ 1, *Whitmill v. Warner Bros. Entm't, Inc.*, 2011 WL 2038147 (E.D. Mo. Apr. 28, 2011) (No. 4:11-cv-752) [hereinafter Whitmill Complaint].
- 20 *Id.*
- 21 Nimmer Declaration, *supra* note 9.
- 22 Verified Complaint for Injunctive and Other Relief at Exhibit 3, *Whitmill v. Warner Bros. Entm't, Inc.*, 2011 WL 2038147 (E.D. Mo. Apr. 28, 2011) (No. 4:11-cv-752).
- 23 Yvette Joy Liebesman, *Copyright and Tattoos: Hangover II Injunction Denied, But the Copyright Owner Got Some Good News Too—Whitmill v. Warner Bros. (Guest Blog Post)*, TECH. & MKTG LAW BLOG (May 24, 2011), http://blog.ericgoldman.org/archives/2011/05/copyright_and_t.htm.
- 24 Whitmill Complaint, *supra* note 19, ¶ 17.
- 25 *Id.* ¶ 15.
- 26 Noam Cohen, *Citing Public Interest, Judge Rules for 'Hangover II,'* N.Y. TIMES BLOG (May 24, 2011, 4:05 PM), http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/?_php=true&_type=blogs&_r=0.
- 27 Whitmill Complaint, *supra* note 19, ¶ 19.
- 28 Cohen, *supra* note 26.
- 29 Travis Burchart, *The Hangover II Must Go On: Tattoo Artist Denied Injunction in Mike Tyson/Tattoo Copyright Suit against Warner Brothers*, LEXISNEXIS LEGAL NEWSROOM INTELL. PROP.: COPYRIGHT AND TRADEMARK LAW BLOG (May 27, 2011, 7:44 PM), <http://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/archive/2011/05/27/the-hangover-ii-must-go-on-tattoo-artist-denied-injunction-in-mike-tyson-tattoo-copyright-suit-against-warner-brothers.aspx>.
- 30 Liebesman, *supra* note 23. Burchart, *supra* note 29.
- 31 Burchart, *supra* note 29.
- 32 Cohen, *supra* note 26.
- 33 Burchart, *supra* note 29.
- 34 *Id.*
- 35 Cohen, *supra* note 26.
- 36 *Id.*
- 37 *Id.*
- 38 Matthew Belloni, *Warner Bros. Settles 'Hangover II' Tattoo Lawsuit*, HOLLYWOOD REPORTER (June 20, 2011, 1:39 PM), <http://www.hollywoodreporter.com/thr-esq/warner-bros-settles-hangover-ii-203377>.
- 39 Nimmer Declaration, *supra* note 9, ¶¶ 15–17.
- 40 *Id.* ¶ 2.
- 41 *Id.* ¶ 13.
- 42 *Id.* ¶ 15.
- 43 *Id.* ¶ 16.
- 44 Ann Bartow, *When a Treatise Writer Tries to Reconfigure Copyright Law to Benefit a Client*, MADISONIAN.NET (May 25, 2011), <http://madisonian.net/2011/05/25/when-a-treatise-writer-tries-to-reconfigure-copyright-law-to-benefit-a-client/>.
- 45 See Complaint, *Reed v. Nike, Inc.*, 2005 WL 1182840 (D. Or. Feb. 10, 2005) (No. CV 05 198).
- 46 *Id.*
- 47 *Id.* ¶ 13.
- 48 *Id.* ¶ 12.
- 49 *Id.* ¶ 13.
- 50 *Id.* at Exhibit A.
- 51 *Id.* ¶ 15.
- 52 *Id.* ¶ 15.
- 53 *Id.* ¶ 16.
- 54 *Id.* at Prayer for Relief.
- 55 Ira Boudway, *Hey, Pro Athletes: Your Tattoo Is Going to Get You Sued*, BUSINESSWEEK (Sept. 4, 2013), <http://www.businessweek.com/articles/2013-09-04/hey-pro-athletes-your-tattooed-arms-are-going-to-get-you-sued>.
- 56 Noam Cohen, *On Tyson's Face, It's Art. On Film, a Legal Issue*, N.Y. TIMES, May 20, 2011, at A1, available at http://www.nytimes.com/2011/05/21/business/media/21tattoo.html?pagewanted=all&_r=1&.
- 57 *Id.*
- 58 *Exclusive: I Own Beck's Tattoo. . . And I'll Sue*, MIRROR (June 27, 2005), <http://www.mirror.co.uk/3am/celebrity-news/exclusive-i-own-becks-tattooand-ill-sue-548295>.
- 59 *Id.*
- 60 Sarah Harvey, *Why Louis Molloy gives David Beckham the Needle*, NOW MAG. (Apr. 13, 2007), <http://www.nowmagazine.co.uk/celebrity-news/236316/exclusive-why-louis-molloy-gives-david-beckham-the-needle>.
- 61 Complaint at ¶ 12, *Escobedo v. THQ Inc.*, 2012 WL 5815742 (N.D.Ill. Nov. 16, 2012) (No. 2:12CV02470).
- 62 *Id.* ¶ 13.
- 63 *Id.* ¶ 16.
- 64 *Id.* ¶ 3.
- 65 *Id.* ¶¶ 25–35.
- 66 *Id.* ¶ 48.

Continued on page 24.

TATTOO YOU? COPYRIGHT INFRINGEMENT IMPLICATIONS AND TATTOOS

Continued from page 23.

- 67 *Id.* ¶ 36.
- 68 *Id.* ¶ 38.
- 69 Press Release, PRWeb, Tattoo Artist Files Lawsuit Claiming that THQ Stole His Artwork in UFC Undisputed 3 (Nov. 16, 2012), available at <http://www.prweb.com/releases/2012/11/prweb10144896.htm>.
- 70 *Id.*
- 71 Matt Chiappardi, *Tattoo Artist Appeals Slashed IP Claim in THQ Bankruptcy*, LAW360 (Sept. 11, 2012, 10:13 PM), <http://www.law360.com/articles/471802/tattoo-artist-appeals-slashed-ip-claim-in-thq-bankruptcy>. Brayndi Grassi, *Copyright in Tattoos, Artist vs. Canvas*, N.Y.L. SCH. (Dec. 20, 2013), <http://www.infringethat.com/copyright-in-tattoos-artist-vs-canvas/>.
- 72 Chiappardi, *supra* note 71.
- 73 *Id.*
- 74 *Id.*
- 75 See Complaint, *Allen v. Elec. Arts, Inc.*, 2012 WL 6852208 (W.D. La. Dec. 31, 2012) (No. 5:12-cv-03172).
- 76 *Id.* at Exhibit 1, page 2.
- 77 *Id.* ¶ 11.
- 78 *Id.* ¶ 12.
- 79 Boudway, *supra* note 55.
- 80 *Id.*
- 81 Darren Heitner, *Questions Concerning Copyright Of Athlete Tattoos Has Companies Scrambling*, FORBES (Aug. 14, 2013, 8:01 AM), <http://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/>.
- 82 *Id.*
- 83 *Id.*
- 84 *Id.*
- 85 *Id.*
- 86 *Id.*
- 87 thecoop, *Madden NFL 15 PS4/XB1 Wishlist*, OPERATION SPORTS BLOG (Nov. 16, 2013, 12:34 PM), <http://www.operationsports.com/forums/madden-next-gen/682471-madden-nfl-15-ps4-xb1-wishlist.html>.
- 88 Erin L. Webb, *Potential Insurance Coverage for Lawsuits Against Video Game Publishers Alleging Copyright Infringement of Celebrity Tattoo Art*, POLICY HOLDER INFORMER (Feb. 12, 2013), <http://www.policyholderinformer.com/2013/02/12/potential-insurance-coverage-for-lawsuits-against-video-game-publishers-alleging-copyright-infringement-of-celebrity-tattoo-art/>.
- 89 *Id.*
- 90 *Id.*
- 91 *Id.*
- 92 *Id.*
- 93 See *Brown v. Way*, No. 10-13016, 2011 WL 3555631 (E.D. Mich. Mar. 31, 2011) report and recommendation adopted, 2011 WL 3555618 (Aug. 5, 2011).
- 94 *Id.* at 1–2. The “Laundry Money” slogan reads as follows: “grind... hustle hard... double up... flip... stack... get your weight up... save... cop... invest... re-cop... reinvest... own your own business... buy property... network... build credit... stay determined... stay focused... stay dedicated... and Keep... LAUNDRY MONEY “clean clothes 4 dirty work.” Way’s tattoo allegedly bears the following words: “Grind Hustle, Invest Sleep 10%, Save Get, Money.”
- 95 *Id.*
- 96 *Id.* at 8.
- 97 *Id.*
- 98 *Brown v. Way*, No. 10-CV-13016, 2011 WL 3555618 (E.D. Mich. Aug. 5, 2011).
- 99 Darren Heitner, *Exclusive Licensee of LeBron James and Kobe Bryant Tattoo Artwork Preps to Profit Off of Images*, FORBES (Oct. 2, 2013, 8:06 AM), <http://www.forbes.com/sites/darrenheitner/2013/10/02/exclusive-licensee-of-lebron-james-and-kobe-bryant-tattoo-artwork-preps-to-profit-off-of-images/>.
- 100 *Id.*
- 101 *Id.*
- 102 *Id.*
- 103 *Id.*
- 104 Becca Longmire, *Harry Styles Covers ‘I Can’t Change’ Ink As One Direction Hunk Hits Tattoo Parlour AGAIN*, ENTERTAINMENTWISE (Jan. 13, 2014), <http://www.entertainmentwise.com/news/137820/Harry-Styles-Covers-I-Cant-Change-Ink-As-One-Direction-Hunk-Hits-Tattoo-Parlour-AGAIN>.
- 105 Bianca Barz, *Extreme Body Modifications, from Pierced Eyes to Self-Inflation: 40 Freaky Tattoo Alternatives*, TRENDHUNTER (Jan. 20, 2009), <http://www.trendhunter.com/slideshow/tattoo-alternatives-extreme-body-modification> (warning: contains some graphic material).

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 12.

the Copyright Act and does not confer standing to sue.¹⁹ Section 106 of the Copyright Act lists the “exclusive rights” held by the owner of a copyright and does not list the right to sue for infringement as a right included in the bundle of rights accompanying a copyright.²⁰ There is much debate about whether section 501(b) of the Copyright Act is limited by the language of these types of assignment contracts assigning essentially only enforcement rights. Section 201(d) of the Copyright Act provides that any of the exclusive rights comprised in a copyright may be transferred to another, who will then be entitled to all of the protection and remedies accorded by the Copyright Act.²¹ As the Ninth Circuit noted in *Silvers*, exclusive rights in a copyright may be transferred and owned separately, “but § 201(d) creates no exclusive rights other than those listed in § 106, nor does it create an exception to § 501(b).”²² When determining whether a contract transferred exclusive rights, courts look not just at the labels the parties use within the agreement but also at the substance and effect of the contract.²³ Specifically, the district court in *Nafal v. Carter* looked to the substance of an assignment contract purporting to give the plaintiff ownership and concluded the agreement only assigned the right to sue.²⁴ Affirming the district court’s conclusion, the Ninth Circuit characterized this alleged assignment contract as “a disguised assignment of a cause of action” that was insufficient to grant an ownership interest in the copyright.²⁵ The above-quoted language in the SAA provided ample ground for the courts in *Righthaven, LLC v. Hoehn*²⁶ and *Righthaven, LLC v. Democratic Underground, LLC*²⁷ and subsequent courts to find a lack of standing to sue. Indeed, the Ninth Circuit ultimately determined that when viewing the copyright assignment and the SAA together, there was not the requisite conveyance of rights under the Copyright Act to establish standing to sue.²⁸ Appropriately extending Abraham Lincoln’s logic that calling a tail a leg does not make it so²⁹, the Ninth Circuit found that “merely calling someone a copyright owner does not make it so.”³⁰ As such, Righthaven’s trolling was brought to a screeching halt. But copyright trolling was not. Another troll lingered in the shadows. One not encumbered with strategic alliances, but rather one that was armed with pornography assignments and IP addresses seeking names of individuals downloading on BitTorrent and other peer-to-peer file sharing protocols. There lie in waiting, Prenda.

ii. *The Vexatious Litigation of Prenda Law*

Prenda’s trolling method was dark and sinister with a plan to troll for as many defendants as possible to join in one lawsuit.³¹ Prenda started by monitoring downloading activity on BitTorrent of pornographic movies subject to their copyright ownership.³² Prenda began recording Internet Protocol (“IP”) addresses downloading the movies.³³ Once Prenda had compiled a sufficient number of IP addresses, it began filing suit against John Does identified only by their IP addresses in federal court to subpoena Internet Service Providers (“ISPs”) for the identity of the subscribers to these IP addresses.³⁴ Once Prenda obtained the names of the John Does, it began a campaign of trolling by sending letters to the identified individuals that outlined the details of their alleged violations of copyright law and the terms of settlement normally for an amount between \$3,000 to \$4,000, the cost just below the retainer for an attorney to defend against such a lawsuit.³⁵ But Prenda’s settlement tactics did not end with the calculated settlement fees.³⁶ Prenda went a step further.³⁷ It used the content of its copyright to shame its potential defendant into settlement.³⁸ Indeed, when it named an individual in a suit, Prenda posted the defendant’s name on its website, along with a link to the lawsuit.³⁹ If a spouse or potential employer conducts a search for that individual defendant, they’ll learn he’s been accused of stealing salacious movies such as *Sexual Obsession or My Little Panties 2*.⁴⁰ One judge summed up Prenda’s scheme succinctly by stating that Prenda has:

outmaneuvered the legal system. They’ve discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense costs. And they exploit this anomaly by accusing individuals of illegally downloading a single pornographic video. Then they offer to settle—for a sum calculated to be just below the cost of a bare-bones defense...So, now, copyright laws originally designed to compensate starving artists allow starving attorneys in this electronic-media era to plunder the citizenry.⁴¹

Prenda’s founder, John Steele, touted the company as perhaps being the original copyright troll,⁴² which drew its practice much criticism.⁴³ First, the company’s use of IP addresses as the identifying mechanism for the infringer proved to be troublesome, as the paying subscriber with the IP address may not be the person who downloaded the pornographic material subject to the copyright owned by Prenda.⁴⁴ It has been estimated that as many as 30% of the names turned over by ISPs are not those of the

Continued on page 26.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 25.

individuals who actually downloaded or shared copyrighted material.⁴⁵ Secondly, the practice has been criticized for its abuse potential.⁴⁶ As noted above, to save from embarrassment, even if one is not the infringer, a subscriber may likely pay the settlement price.⁴⁷ Parties bringing these suits often have no plan to take them to trial, but simply want to get identifying information for alleged copyright infringers and then shame these individuals into paying a few thousand dollars to make the problem go away.⁴⁸ As Judge Wright indicated, Prenda took advantage of the legal system and social stigma to monetize its copyright assignments in ways not seen before in the copyright industry.⁴⁹

Ultimately, Judge Wright issued sanctions in the total amount of \$81,319.72 against Prenda, which incorporated a punitive multiplier justified by Prenda's "brazen misconduct and relentless fraud."⁵⁰ Judge Wright went on to criticize the Prenda attorneys for their inappropriate business structure and expressed intent to refer the attorneys to their respective state and federal bars.⁵¹ Finally, noting that the only enterprise that Prenda resembles is a Racketeer Influenced and Corrupt Organization ("RICO"), Judge Wright expressed an intention to refer the matter to both the United States Attorney for the Central District of California, as well as the Criminal Investigation Division of the Internal Revenue Service ("IRS").⁵²

While these significant sanctions and the tongue-lashing that Judge Wright delivered to Prenda effectively exposed Prenda's novel use of its copyright assignments, Prenda's business structure, not its actual copyright functioning, proved to be Prenda's downfall. Judge Wright recognized that copyright owners certainly have a right to assert their intellectual property rights.⁵³ The focus of the sanctions issued against Prenda stemmed from Prenda's inability to accurately identify the individuals alleged of infringing any copyrights, then proceeding to lie to the court in order to use expedited discovery orders to extract settlements.⁵⁴ Without better technology, it was "simply not economically viable to *properly* prosecute the illegal download of a single copyrighted video."⁵⁵ As such, Prenda's demise was due to its improper business structure and not due to the technicalities of its copyright functioning.

B. The Bridge

Copyright trolls are exceptionally scary because of the bridge at which they exact their tolls. As pointed out by Judge Wright, the trolls have found gaps in the legal system that are subject to abuse.⁵⁶ Laws that were initially drafted to incentivize creativity and promote judicial efficiency are now being used to profit in ways that were not contemplated by policymakers. Indeed, trolls have taken advantage of not only the laws that are available, but also the massive amount of data and technology that allows for the analysis of that data. Analysis of the data has been used by these trolling organizations to navigate through the legal system.

i. Copyright Law Statutory Damages

The Copyright Act allows the copyright owner to elect to receive "statutory damages" instead of actual damages in an infringement action.⁵⁷ Electing statutory damages allows the court to award the copyright owner a fixed amount between \$750 and \$30,000 per work infringed, as it "considers just."⁵⁸ The Act also allows the court to raise the limit to \$150,000 if the infringement was willful.⁵⁹ Statutory damages were originally enacted to eliminate the obstacle that most copyright owners faced in quantifying the true extent of their damages or proving the defendant's profits.⁶⁰ Today, statutory damages serve as a guarantee of damages for an infringement claim. The formula, which is essentially "what the court considers just,"⁶¹ has created an atmosphere of uncertainty in copyright damage litigation. In *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, the authors, Samuelson and Wheatland, note several excessive awards of statutory damages in copyright cases.⁶² In one such case, a jury awarded statutory damages of more than \$1.92 million against a defendant who had illegally downloaded about \$54 worth of music on a peer-to-peer file-sharing network.⁶³ What is illustrative about this case is the range of damages is too high, is punitive in nature, and it builds the bridge for trolling.

Indeed, if actual damages were required, copyright trolling would be impossible because copyright trolls have no actual market presence. The troll suffers no actual harm or losses and there are no profits from the infringing activity. However, by allowing the copyright owner to elect to receive statutory damages that are not based upon any harm with a fixed award floor of \$750, the Copyright Act effectively guarantees the troll a meaningful recovery. Moreover, as noted by Samuelson and Wheatland,

Continued on page 27.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 26.

courts have been liberal in finding willfulness, thus heightening the damages.⁶⁴ As such, possible damages of \$150,000 and the cost of litigation make settlement an option to consider even when you are not an infringer.

ii. Joinder and Infringement Based Upon Use of Technology

The rules on joinder play an important role in the trolling tactics in copyright cases. Joinder enables trolls to engage in massive litigation at minimal costs. Generally, a plaintiff is permitted to join multiple defendants in one action if any right to relief arises out of the same transaction, occurrence, or series of transactions or occurrences, or if there is any common question of law or fact in the action amongst the defendants.⁶⁵ The pioneer in the mass joinder litigation in copyright was the RIAA. In 2004, the RIAA began filing single multiple-defendant suits against those who were sharing music through peer-to-peer file-sharing platforms.⁶⁶ The RIAA joined 532 John Doe defendants into four lawsuits filed in New York and the District of Columbia.⁶⁷ Each suit identified the alleged infringer only by IP address, with a different ISP who could reside anywhere in the United States.⁶⁸

The system upon which the RIAA began its massive John Doe lawsuits first began by large recording companies hiring an online investigative firm to discover the IP address that was alleged to have shared or downloaded the copyrighted music file.⁶⁹ Next, the investigative firm would provide a report to the large recording companies that traced the IP address to an ISP.⁷⁰ Using this information, the recording companies, through the RIAA, would next seek to issue a subpoena to the ISP, requesting the name of the person associated with the IP address.⁷¹ The record companies would file an ex parte application to serve a subpoena upon the non-party ISP to obtain the identity of the alleged users.⁷² The ISP had the capability of identifying the computer from which the alleged infringement occurred and the name and address of the subscriber controlling the computer based on the user's IP address and the date and time of the allegedly infringing activity.⁷³ In support of their application for expedited discovery, the record companies would argue that good cause existed because ISPs typically retain user activity logs for only a limited period of time before erasing data.⁷⁴ At this juncture, district courts tended to disagree about the appropriateness of deciding joinder issues before the Doe Defendants (still only identified by their IP addresses) were identified and named individually.⁷⁵ A district court summarized RIAA's theory that joinder of the numerous unidentified Doe Defendants was proper as follows:

Although [the RIAA and record companies] do not know the true names of Defendants, each Defendant is alleged to have committed violations of the same law (*e.g.*, copyright law), by committing the same acts (*e.g.*, the downloading and distribution of copyrighted sound recordings owned by [the RIAA and record companies]), and by using the same means (*e.g.*, a file-sharing network) that each Defendant accessed via the same ISP. Accordingly, [the RIAA and record companies'] right to relief arises out of the same series of transactions or occurrences, and there are questions of law or fact common to all Defendants such that joinder is warranted and appropriate here.⁷⁶

Indeed, the method employed by the RIAA was lauded by Justice Breyer as a "teaching tool, making clear that much file sharing, if done without permission, is unlawful."⁷⁷ While the RIAA tactics served as a legitimate teaching tool for consumers as to the basics of copyright law, they also provided a guide to the nefarious.⁷⁸

The new troll tactics followed the guide provided by the RIAA in joining mass defendants. The defendants' alleged copyright violation involved the downloading of information using technology such as BitTorrent. BitTorrent is a peer-to-peer file-sharing network that allows users to share massive file content by transferring pieces of files and downloading those pieces simultaneously from others on the network until one has the entire shared file.⁷⁹

The BitTorrent protocol allows a user to download separate small segments of data from different users, which, according to copyright owners in these cases, creates a full copyrighted work when the data is compiled together.⁸⁰ The initial file, known as the "seed file," is uploaded or provided by an individual into the BitTorrent network.⁸¹ The copyright owners allege that the infringement process starts when the user that provides the seed file intentionally elects to share the file with the torrent network.⁸² Once the seed file is loaded, the BitTorrent program employs a protocol to initiate simultaneous connections to other BitTorrent

Continued on page 28.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 27.

users, who are able to share copies of whatever is included in the file.⁸³ As the information is copied to other users' computers piece-by-piece, the downloaded pieces become available to others seeking the file.⁸⁴ Each torrent file, in turn, has its own unique "hash identifier" that tracks and identifies each IP address user who shares the media file.⁸⁵ In these cases, the copyright owners assert that a group of users sharing a particular file with a specific hash identifier is referred to as a "swarm."⁸⁶ The users in a specific swarm are then collectively connected to share the particular hash file.⁸⁷ Completing their theory, copyright owners allege that each user of the BitTorrent software engages in a joint act of infringement by participating in the same swarm to copy and reproduce the copyrighted material.⁸⁸ Essentially, the claim is that each Doe Defendant is a member of a specific swarm that shares individual segments of copyrighted material, which results in unauthorized dissemination. Thus, relying on the RIAA's theory of permissive joinder, these more nefarious trolls, particularly members of the pornography industry, argue that participation in the swarm constitutes a series of transactions or occurrences necessary to meet the requirements for joinder under Fed. R. Civ. P. 20.⁸⁹ Currently, courts have differed in their analysis of the use of this theory of permissive joinder in copyright infringement actions, primarily utilized by the pornography industry and essentially created by the RIAA.⁹⁰

The combination of the BitTorrent technology and joinder rules allows trolls to take advantage of Rule 20 and the arguments made by RIAA. Specifically, trolls argue joinder is appropriate under Rule 20 because each of the defendants is jointly and severally liable for the infringing activity of the other and the infringing activity was a part of a series of transactions involving the exact same torrent file. As such, the troll argues the legal issues and questions of facts are common and, therefore, joinder of the John Doe Defendant is appropriate.

In a comprehensive study of the rise of copyright trolls, Professor Matthew Sag provides significant empirical data regarding the rate of growth of multi-defendant John Doe lawsuits, reporting that these types of copyright claims have gone from almost non-existent ten years ago to accounting for the majority of filings in 19 of 92 federal districts and over 42% of all copyright cases filed in 2013.⁹¹ This increase in filings is most accurately explained by economics.⁹² Trolls employ a business model, disguised as a litigation strategy, that is aimed at coercing individuals into early settlement and never intend to reach a trial on the merits of their claims to enforce intellectual property rights. Like any business model, trolls are motivated by economic realities. To date, the trolls' business model has been able to yield economic benefits in the form of settlements from individuals who seek to avoid litigation. Trolls are able to realize these economic benefits, in the form of settlements, by using the backdrop of legitimate litigation as leverage. To do so requires success in the early stages of litigation. Based on its profit-driven motivation, the trolls' business model hinges on filing lawsuits in joinder-friendly forums, which enables the trolls to effectively leverage their threat of litigation against individuals. As such, the trolls' business model incorporates forum shopping for joinder-friendly forums as an essential means of operation.

The litigation tactics used in *Millennium TGA v. Does 1-939* (hereinafter "*Millennium TGA I*") illustrates this point most appropriately.⁹³ Only nine days after filing suit, and after learning that Judge Robert L. Wilkins would preside over the case, the plaintiffs voluntarily dismissed the case without explanation.⁹⁴ The logical explanation, however, was that the forum had now become unfriendly due to the assignment of this case to Judge Wilkins.⁹⁵ Judge Wilkins had recently refused to allow plaintiffs in a similar copyright claim against BitTorrent users from serving expedited discovery requests on non-party ISPs.⁹⁶ Four days after dismissing the *Millennium TGA I* action, the same plaintiffs filed a complaint alleging copyright infringement of the same adult film, *Millennium TGA v. John Doe* (hereinafter "*Millennium TGA II*"), in the United States District Court for the Southern District of Texas. These cases provide a small sample of the strategy of forum shopping utilized by trolls. Because Judge Wilkins was seen as unfriendly to the trolls' joinder theories, the economically driven decision was made to try their claims in another forum.

Another arrow in the trolls' quiver of economically driven forum shopping weapons is the exploitation of outdated "pure bill of discovery" laws recognized by some states.⁹⁸ This is evidenced by trolls' willingness to file their copyright infringement lawsuits, a federal claim, in state courts, such as the state of Florida.⁹⁹ The rationale for this tactic lies in both the economics of the trolls' business model and the outdated policy behind this procedural device.¹⁰⁰ Motivated by their objective to extract settlements by leveraging threats of litigation and public humiliation, rather than actually seeking to litigate their claims, the trolls' business model depends on successfully obtaining individuals' information from ISPs.¹⁰¹ The pure bill of discovery is an

Continued on page 29.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 28.

ancient equitable remedy, initiated by filing a complaint, which seeks relief in the form of discovery.¹⁰² The pure bill of discovery is meant to obtain the disclosure of facts within a defendant's knowledge, or of writings or other things in the defendant's custody.¹⁰³ The trolls have dusted off this archaic procedural device, unfit for the modern information age, in order to effectively obtain information regarding the owners of IP addresses to use as leverage against those individuals.¹⁰⁴ While separate equitable actions to obtain discovery are no longer necessary under current rules of civil procedure in most states, Florida has never abrogated the equitable complaint for a pure bill of discovery.¹⁰⁵ Thus, based on the economic motivation and the current availability of these antiquated equitable discovery devices, trolls continue to demonstrate their willingness to utilize the current legal system by forum shopping for competitive advantages that enable their sinister and extortionate leveraging tactics.

II. CURTAILING THE TROLLING

Curtailling trolling requires answering the question: why do trolls troll? The most simplistic answer is the cost of trolling is low and the gains are high, provided however that the troll does not fall into one of the traps of trolls gone before. Curtailing trolling, then, would require an adjustment to the costs and gains. To accomplish this, it would require a review of the current regime of statutory damages, as well as the cost to file suit. As discussed above, if trolls are required to prove actual damages, then their claims would cease. However, given the background and the premise upon which statutory damages have evolved in the United States, this result is not one that is recommended because of the potential impact on the artists that the Act was intended to protect. However, when one looks at the way statutory damages have been structured, statutory damages tend to be more punitive than compensatory. As such, restructuring statutory damages so that the amount awarded in any given case is in line with plausible actual damages would be a more compensatory scheme, as opposed to one that borderlines punitive.¹⁰⁶ The current availability of enhanced statutory damages for willful infringement "has led to an increasing number of awards that are not only punitive in effect, but punitive in intent," which is inconsistent with sound copyright policy and Congress' intent in passing this legislation.¹⁰⁷ Exemplary statutory damages for willful, egregious infringements serve strong deterrent and punitive purposes.¹⁰⁸ However, the original and still desirable purpose of statutory damages to compensate copyright owners and incentivize creative works "has been undermined by overzealous plaintiffs and judges who have failed to grasp the tripartite structure of § 504(c)."¹⁰⁹ Unfortunately, this statutory model has provided ample grounds for extortion by those willing to use it in combination with social stigma as leverage to "plunder the citizenry."¹¹⁰ For example, for an illegal download of a movie that a buyer would pay \$5.99 to legitimately download, a statutory damages construction that would take into consideration the cost of a legitimate download in calculating the statutory damages and would be reasonably proportional to the damages sustained by a copyright holder, rather than a fixed amount, would be a disincentive for trolling. Eliminating the guaranteed amount that has no relationship to any damages sustained would affect the troll's cost/benefit analysis.

The second line of attack in curtailling copyright trolling is to adjust the costs associated with filing suit. As discussed above, joinder allows for judicial efficiency. However, in the manner it has been used, it allows trolls to acquire massive amounts of information by alleging infringement on minimal amounts of investigation and minimal litigation expense. Prior to approving the Rule 20 joinder, courts should review the pleadings to ensure that the pleadings meet the requirements under the Rules of Civil Procedure. In today's interactive society, identifying the account holder or subscriber to an IP address as the individual who performed a particular computer function is equivalent to asserting "an individual who pays the telephone bill made a specific call."¹¹¹ Simply naming an IP address that was "observed infringing" a copyright "does not raise a plausible inference" that any particular individual owner of that address is "liable for direct, contributory, or indirect copyright infringement."¹¹² Indeed, a plaintiff's complaint must offer "more than labels and conclusions" to sufficiently state a "plausible" ground for relief.¹¹³ Naming an individual, based solely on their ownership of an IP address linked to the online sharing of content, factually means "no more than that the named [individual] purchased Internet access and failed to ensure that others did not use that access to download copyrighted material."¹¹⁴ Simply put, an IP address can never infringe a copyright. Further, supporting a claim by solely demonstrating an individual owns a specific IP address is factually insufficient to support a claim for relief.¹¹⁵ Requiring the troll to invest time, money and effort to identify the individual responsible for the actual infringing activity prior to enabling this perverse scheme to unfold would address this issue head-on by creating economic disincentives for filing multi-defendant lawsuits.

Continued on page 30.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 29.

CONCLUSION

While copyright trolling has uncovered the good, the bad and the ugly in copyright enforcement, it has also provided an opportunity to evaluate the application of laws in an evolving society. Trolls are using preexisting bridges—many of which have not been used for decades—such as the Florida pure bill of discovery laws.¹¹⁶ What we do know is that trolling is a business and that in order to curtail the business, we must attack the bottom line. A review of statutory damages and joinder rules will certainly begin to affect the cost/benefit of the business of trolling.

- 1 Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made A 'Few Million Dollars' Pursuing (Sometimes Innocent) 'Porn Pirates'*, FORBES (Oct. 15, 2012, 2:09 PM), <http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/>.
- 2 716 F.3d 1166 (9th Cir. 2013).
- 3 *Ingenuity 13 LLC v. John Doe*, No. 2:12-CV-8333-ODW JCX, 2013 WL 1898633 (C.D. Cal. May 6, 2013) (entering Order issuing sanctions totaling \$81,319.72).
- 4 See Shyamkrishma Balganes, *The Uneasy Case Against Copyright Trolls*, 8 S. Cal. L. Rev. 723, 732 (2013) (defining a copyright troll as “an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest”).
- 5 Transcript of Oral Argument at 26, *eBay, Inc. v. MercExchange*, 547 U. S. 388 (2006) (No. 05-130).
- 6 See generally Lemley & Melamed, *Missing The Forest For the Trolls*, 113 COLUM. L. REV. 2117 (2013).
- 7 *Lausuits*, RIGHTHAVEN LAWSUITS, <http://www.righthavenlawsuits.com/lawsuits.html> (last visited March 24, 2014) (providing a comprehensive list of copyright infringement lawsuits filed by Righthaven, LLC and listing a total of 276 such lawsuits filed in federal district courts between March 13, 2010 to July 13, 2011).
- 8 See *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1168-69 (9th Cir. 2013).
- 9 *Id.*
- 10 See *id.* at 1169.
- 11 Sherman Frederick, *Copyright Theft: We're Not Taking It Anymore*, Las Vegas Rev.-J. (May 28, 2010, 2:40 pm), http://www.lvrj.com/blogs/sherm/Copyright_theft_were_not_taking_it_anymore.html?ref=164.
- 12 *Hoehn*, 716 F.3d at 1168 (“Righthaven was required to split any recovery it received with Stephens Media.”).
- 13 See Ian Plonsky, *You Can't Go Home Again: The Righthaven Cases and Copyright Trolling on The Internet*, 36 Colum. J. L. & Arts 71 (2012).
- 14 See *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1147-51 (D. Nev. 2011), *aff'd*, 716 F.3d 1166, 1168-69 (9th Cir. 2013); *Righthaven LLC v. Realty One Grp., Inc.*, No. 2:10-cv-1036-LRH-PAL, 2010 U.S. Dist. LEXIS 111576, at *4-6 (D. Nev. Oct. 18, 2010); *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, 2010 U.S. Dist. LEXIS 105307, at *6-10 (D. Nev. Sept. 17, 2010).
- 15 See generally 17 U.S.C. § 501 (2006) (Essentially, under § 501, anyone who, without authorization, violates any of the exclusive rights is liable to the copyright holder for infringement).
- 16 See, e.g., *Hoehn*, 792 F. Supp. 2d 1138, *aff'd*, 16 F.3d 1166 (9th Cir. 2013); *Righthaven, LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968 (D. Nev. 2011); *Righthaven, LLC v. Neuman*, 838 F. Supp. 2d 1071 (D. Nev. 2011); *Righthaven, LLC v. Mostofi*, No. 2:10-CV-1066-KJD-GWF, 2011 WL 2746315 (D. Nev. July 13, 2011); *Righthaven, LLC v. Hyatt*, No. 2:10-CV-01736-KJD-RJJ, 2011 WL 3652532 (D. Nev. Aug. 19, 2011); *Righthaven, LLC v. Allec*, No. 2:11-CV-00532-KJD-CWH, 2012 WL 909832 (D. Nev. Mar. 16, 2012).
- 17 Strategic Alliance Agreement at 4, *Righthaven LLC v. Democratic Underground* (available at <http://www.scribd.com/doc/53837486/Righthaven-Stephens-Media-agreement>).
- 18 17 U.S.C. § 501 (2006).
- 19 402 F.3d 881, 890 (9th Cir. 2005) (en banc) (holding that under § 501(b) of the Copyright Act, only a party with an ownership interest has standing to sue).
- 20 17 U.S.C. § 106 (2006) (listing the “exclusive rights” that can be held, including the right to reproduce the copyrighted work, to prepare derivative works based on the work, and to distribute copies of the work by selling, renting, leasing, or lending).
- 21 17 U.S.C. § 201(d) (2006).
- 22 *Silvers v. Sony Pictures Entmt.*, 402 F.3d 881, 884 (9th Cir. 2005) (en banc).
- 23 *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1169-70 (9th Cir. 2013).
- 24 *Nafal v. Carter*, 540 F. Supp. 2d 1128, 1141-43 (C.D. Cal. 2007), *aff'd*, 388 Fed. Appx. 721 (9th Cir. 2010).
- 25 *Nafal v. Carter*, 388 Fed. Appx. 721, 723 (9th Cir. 2010).
- 26 792 F. Supp. 2d 1138, 1145-47 (D. Nevada 2011), *aff'd*, 716 F.3d 1166 (9th Cir. 2013).
- 27 791 F. Supp. 2d 968 (D. Nev. 2011).
- 28 *Hoehn*, 716 F.3d at 1169-71.
- 29 See David Herbert Donald, *Lincoln* 396 (1995).
- 30 *Hoehn*, 716 F.3d at 1167-68.
- 31 See generally *Ingenuity 13 LLC v. John Doe*, No. 2:12-CV-8333-ODW JCX, 2013 WL 1898633 (C.D. Cal. May 6, 2013); Unlike Righthaven, who simply departed from traditional methods of dealing with infringements online, Prenda's model was inspired by the tactics used by the RIIA in its campaign to stop music sharing online. However, Prenda's model was much more sinister in that it used the content of its copyright, pornography, to extort individuals into settlement.
- 32 *Id.* at *2.
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*
- 36 *Id.*
- 37 *Id.*

Continued on page 31.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 30.

- 38 *Id.*
- 39 See Claire Suddath, *Prenda Law, the Porn Copyright Trolls*, BLOOMBERG BUSINESSWEEK (May 30, 2013), <http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copy-right-trolls>.
- 40 See *Digital Sin, Inc. v. Does* 1-179, No. 11 CIV. 8172 PAE, 2012 WL 8282825 (S.D.N.Y. Feb. 1, 2012) (stating that “the possibility of having one’s name publicly associated with allegations of illegally downloading ‘My Little Panties 2’ easily satisfies the standard” necessary to issue a protective order under Fed. R. Civ. P. 26(c)(1)).
- 41 *Ingenuity* 13, 2013 WL 1898633, at *1.
- 42 Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made A ‘Few Million Dollars’ Pursuing (Sometimes Innocent) ‘Porn Pirates’*, FORBES (Oct. 15, 2012, 2:09 PM), <http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/>.
- 43 See *EEF to Appeals Court: Stop the Porn Troll Shakedown Scheme*, ELEC. FRONTIER FOUNDATION, (May 14, 2013), <https://www.eff.org/press/releases/eff-appeals-court-stop-porn-troll-shakedown-scheme>.
- 44 *Ingenuity* 13, 2013 WL 1898633, at *3 (characterizing Prenda’s practice as “nam[ing] individuals as defendants based on a statistical guess”).
- 45 *Hill*, *supra* note 42.
- 46 *Ingenuity* 13, 2013 WL 1898633, at *1.
- 47 *Id.*
- 48 *Id.* at *3 (“But this deception was calculated so that the Court would grant [Prenda’s] early-discovery requests, thereby allowing [Prenda] to identify defendants and exact settlement proceeds from them.”).
- 49 *Id.* at *1.
- 50 *Id.* at *5.
- 51 *Id.* (Judge Wright stated that the Prenda attorneys “suffer from a form of moral turpitude unbecoming of an officer of the court”).
- 52 *Id.*
- 53 *Id.* at *1.
- 54 *Id.* at *3-4 (Judge Wright also pointed to Prenda ignoring a Court Order vacating early discovery and committing an act of forgery, all in the name of defrauding the court).
- 55 *Id.* at *3 (emphasis in original).
- 56 *Id.* at *1.
- 57 17 U.S.C. § 504(c)(1) (2006).
- 58 *Id.*
- 59 17 U.S.C. §504(c)(2).
- 60 See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 446 (2009).
- 61 17 U.S.C. § 504(c)(1).
- 62 See generally Samuelson & Wheatland, *supra* note 60.
- 63 See *id.* at 442-43 n.14 (citing *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008)).
- 64 *Id.* at 441.
- 65 Fed. R. Civ. P. 20.
- 66 Press Release, RIAA, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online* (Sept. 8, 2003), available at <http://www.riaa.org/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1>.
- 67 See *RIAA v. The People: Four Years Later*, ELEC. FRONTIER FOUNDATION (Oct. 31, 2011, 4:02 PM), https://www.eff.org/sites/default/files/filenode/riaa_at_four.pdf (noting that over 20,000 individuals were sued during the RIAA’s campaign).
- 68 See Paul Roberts, *RIAA Sues 532 John Does*, PCWORLD (Jan. 21, 2004, 1:00 PM), <http://www.pcworld.com/article/114387/article.html>.
- 69 See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 902-05 (8th Cir. 2012) (providing a factual recitation of the process the RIAA used to discover the identity of an individual and sue for copyright infringement).
- 70 *Id.* at 903.
- 71 *Id.*
- 72 See *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 559 (S.D.N.Y. 2004).
- 73 *Id.*
- 74 *Id.*
- 75 Compare *id.* at 568 (concluding that it was premature to consider the issue of joinder when resolving a motion to quash because “[a]lthough [a Doe defendant and amici curiae] raise a fair issue as to whether all these claims against forty apparently unrelated individuals should be joined in one lawsuit, discussion of joinder is not germane to the motions to quash before the Court, as the remedy for improper joinder is severance, see Fed. R. Civ. P. 21, and not the quashing of the subpoena at issue here”), and *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 11 (D.D.C. 2008) (the improper joinder “inquiry is premature without first knowing Defendants’ identities and the actual facts and circumstances associated with Defendants’ conduct”), with *LaFace Records, LLC v. Does 1-38*, No. 5:07-CV-298-BR, 2008 WL 544992 (E.D.N.C. Feb. 27, 2008) (severing all Doe defendants except one before a subpoena was served on the ISP), and *Arista Records, LLC v. Does 1-11*, No. 1:07-CV-2828, 2008 WL 4823160 (N.D. Ohio Nov. 3, 2008) (concluding that “joinder can and should be decided before the Doe Defendants are identified.”).
- 76 *Arista Records, LLC v. Does 1-11*, No. 1:07-CV-2828, 2008 WL 4823160 (N.D. Ohio Nov. 3, 2008) (in concluding that a decision regarding joinder was warranted, the court noted that “[t]his action is a typical music downloading lawsuit that [the record companies] and other members of the [RIAA] have filed across the country.”).
- 77 *MGM v. Grokster*, 545 U.S. 913 at 963 (Breyer, J., concurring).
- 78 See, e.g., *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82, report and recommendation adopted sub nom. *Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012) (“These actions are part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent.”).

Continued on page 32.

Trolls, Trolls Everywhere Why Copyright Law's Right For Trolling

Continued from page 31.

- 79 See, e.g., *Dragon Quest Prods., LLC v. Does 1-100*, No. CIV. 12-6611 JHR/AMD, 2013 WL 2949407 at *1, *6 (D.N.J. June 14, 2013) (finding that “the use of the BitTorrent protocol by Defendants in these cases does not constitute a series of transactions or occurrences necessary to meet the requirements for joinder”).
- 80 *Id.* at *1.
- 81 *Id.*
- 82 *Id.*
- 83 *Id.*
- 84 *Id.*
- 85 *Id.*
- 86 *Id.*
- 87 *Id.*
- 88 See *Id.* at *2.
- 89 *Id.*
- 90 Compare *Id.* at *6 (pointing out that “the initial seeder, other seeders, the various peers, and the Defendants may have participated in this swarm months apart from each other,” and holding that while these four categories of individuals “may be connected by the same initial seed file, the Court finds that this connection alone is not sufficient to establish joinder.”), and *Third Degree Films, Inc. v. Does 1-131*, 280 F.R.D. 493, 498 (D. Ariz. 2012) (finding that a “user participating in the same swarm is not the same transaction or occurrence or series of transactions or occurrences” and pointing out that a particular swarm can last for many months, initial participants may never overlap with later participants, and “because pieces and copies of the protected work [may] be coming from various sources within the swarm, individual users might never use the same sources”), with *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 244 (S.D.N.Y. 2012) (holding that because the allegation was that the Doe defendants were “trading the exact same file as part of the same swarm,” the allegation satisfied the requirement of arising out of a series of transactions or occurrences for purposes of Fed. R. Civ. P. 20(a)).
- 91 See Matthew Sag, *Copyright Trolling, An Empirical Study*, pp. 11-14 (March 21, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404950 (as of the date of this article, Professor Sag’s article was forthcoming in the Iowa Law Review).
- 92 See generally *id.* (providing an economic formula for this type of litigation and assessing the factors that contribute in the equation, including but not limited to statutory damages, avoidance of filing fees, and permissive joinder rules).
- 93 *Millennium TGA, Inc. v. Does 1-939*, No. 1:11-cv-02176 (D.D.C. filed Dec. 7, 2011).
- 94 See *Millennium TGA, Inc. v. Comcast Cable Commc’ns LLC*, 286 F.R.D. 8, 9 (D.D.C. 2012) (explaining the procedural history of Millennium TGA’s filings); see also houstonlawy3r, *Comcast Fights Prenda... Victory for its subscribers!*, TORRENTLAWYER (June 29, 2012) <https://torrentlawyer.wordpress.com/2012/06/29/comcast-fights-prenda-victory-for-its-subscribers/> (commenting on the *Millennium TGA* litigation and referring to Judge Wilkins as “known to be unfriendly to copyright trolls”).
- 95 See *Comcast*, 286 F.R.D. at 9 (“As Comcast opines, a very likely explanation for Millennium’s dismissal—especially in light of Millennium’s subsequent actions—is that [Judge Wilkins] had previously imposed restrictions upon plaintiffs who had brought a similar copyright infringement case, and Millennium therefore preferred to litigate before what it considered to be a more favorable forum.”).
- 96 *Nu Image, Inc. v. Does 1-23,322*, 799 F. Supp. 2d 34, 41 (D.D.C. 2011).
- 97 See *Comcast*, 286 F.R.D. at 9 (citing *Millennium TGA, Inc. v. John Doe*, No. 4:11-cv-4501-VG (S.D. Tex. filed Dec. 20, 2012)).
- 98 See Bart Huffman, *The Latest in Nationwide Internet User Identification – Part 1 (The Ancient State Law “Pure Bill of Discovery”)*, FREEDOM TO TINKER (Nov. 21, 2011), <https://freedom-to-tinker.com/blog/bhuffman/latest-nationwide-internet-user-identification-part-1-ancient-state-law-pure-bill-disc/> (describing how copyright trolls’ increasing willingness to file copyright infringement suits in Florida state courts is due to the trolls’ ability to misuse the outdated “pure bill of discovery” laws in effect in Florida).
- 99 See Ross Chaffin, *Trolls and Pure Bills: Antiquated Florida Discovery Law Creates a Perverse Incentive for the Filing of Frivolous Infringement Lawsuits*, U. MIAMI L. REV. (Nov. 7, 2012) <http://lawreview.law.miami.edu/trolls-pure-bills-antiquated-florida-discovery-law-creates-perverse-incentive-filing-frivolous-infringement-lawsuits/> (explaining that “Florida’s antiquated ‘pure bill’ rule continues as an enticing reason for copyright trolls to file expensive and frivolous suits” in the Florida state courts).
- 100 See generally, Huffman, *supra* note 98.
- 101 See *id.*
- 102 See Daniel Morman, *The Complaint for a Pure Bill of Discovery—A living, Breathing, Modern Day Dinosaur?*, FLA. BAR J., Vol. LXXVIII, No. 3, March 2004, at 50 (available at <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/CD48D82DEB84C04885256E43004F37C7>).
- 103 See *id.*
- 104 See Chaffin, *supra* note 99 (explaining that while the equitable remedy was designed to seek discovery of facts within the defendant’s knowledge before the actual filing of a lawsuit, copyright trolls abuse this device to effectuate their strategy of extracting early settlements).
- 105 See *id.*; see also *id.* at n. 8.
- 106 Samuelson & Wheatland, *supra* note 60, at 446-47.
- 107 *Id.*
- 108 *Id.* at 500.
- 109 *Id.*
- 110 See *Ingenuity 13 LLC v. John Doe*, No. 2:12-CV-8333-ODW JCX, 2013 WL 1898633 at *1 (C.D. Cal. May 6, 2013).
- 111 *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765 at *3 (E.D.N.Y. May 1, 2012).
- 112 *Elf-Man, LLC v. Cariveau*, No. C13-0507RSL, 2014 WL 202096 (W.D. Wash. Jan. 17, 2014) (dismissing a claim of copyright infringement against BitTorrent users for failure to state facts that sufficiently state a plausible ground for relief).
- 113 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).
- 114 *Elf-Man*, 2014 WL 202096 at *2.
- 115 *Id.* at *2-3.
- 116 See generally, Huffman, *supra* note 98.

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

Christopher Davis, Jr. & Dylan Oliver Malagrino. *The myth of the “full ride”: cheating our collegiate athletes and the need for additional NCAA scholarship-limit reform*, 65 Okla. L. Rev. 605 (2013).

Robert John Givens. Comment. “*Capitamateuralism*”: an examination of the economic exploitation of student-athletes by the National Collegiate Athletic Association, 82 UMKC L. Rev. 205 (2013).

Dylan Oliver Malagrino. *Off the board: NCAA v. Christie challenges Congress to “move the line” on the Professional and Amateur Sports Protection Act*, 118 Penn St. L. Rev. 375 (2013).

ANTITRUST

Drew N. Goodwin. Note. *Not quite filling the gap: why the miscellaneous expense allowance leaves the NCAA vulnerable to antitrust litigation*, 54 B.C. L. REV. 1277 (2013).

GAMBLING

Emanuel V. Towfigh, et al. *Dangerous games: the psychological case for regulating gambling*, 8 Charleston L. Rev. 147 (2013).

GENDER

Kerensa E. Barr. Comment. *How the “boys of fall” are failing Title IX*, 82 UMKC L. Rev. 181 (2013).

LABOR

A Celebration of Baseball Unionism. 16 N.Y.U. J. LEGIS. & PUB. POLY 317 (2013).

Wolfgang S. Weber. Comment. *Preserving baseball’s integrity through proper drug testing: time for the Major League Baseball Players Association to let go of its collective bargaining reins*, 85 U. Colo. L. Rev. 267 (2014).

MEDICAL

Kelly A. Heard. Note. *The impact of preemption in the NFL concussion litigation*, 68 U. Miami L. Rev. 221 (2013).

Kyle R. Wood. Note. *NCAA student-athlete health care: antitrust concerns regarding the insurance coverage certification requirement*. 10 Ind. Health L. Rev. 561 (2013).

MISCELLANEOUS

Zachary A. Greenberg. Note. *Tossing the red flag: official (judicial) review and shareholder-fan activism in the context of publicly traded sports teams*, 90 Wash. U. L. Rev. 1255 (2013).

Talon Powers. Note. *If it’s in the game, is it in the game?: examining League-wide licensing agreements*, 97 Minn. L. Rev. 2352 (2013).

PROFESSIONAL SPORTS

Grant Goeckner-Zoeller. Note. *Extraterritorial lockouts in sports: how the Alberta Labor Board erred in declining jurisdiction over the NHL*, 37 Colum. J.L. & Arts 101 (2013).

Continued on page 34.

Recent Publications*Continued from page 33.***TAX**

Dena Guttmann. Note. *Dear Olympic medalists, thank you for representing our country in the Olympics, but it's time to pay up!* 22 *Cardozo J. Int'l & Comp. L.* 85 (2013).

TORTS

Erin Cronk. Note. *Unlawful encroachment: why the NCAA must compensate student-athletes for the use of their names, images, and likenesses*, 34 *U. La Verne L. Rev.* 135 (2013).

TRADEMARKS

Daniel A. Craig. Note. *Bad sports: has Olympic brand protection gone too far?* 9 *S.C. J. Int'l L. & Bus.* 375 (2013).

Marcella David. *Trademark unraveled: the U.S. Olympic Committee versus knitters of the world.* [Includes illustration.] 14 *Minn. J. L. Sci. & Tech.* 705 (2013).

Entertainment Bibliography:**ART**

James Creekmore & Andrew P. Connors. *Understanding intellectual property: a guide for artists*, 7 *LIBERTY U. L. REV.* 317 (2013).

Al Roundtree. Note. *Graffiti artists "get up" in intellectual property's negative space*, 31 *Cardozo Arts & Ent. L.J.* 959 (2013).

Christina Chloe Orlando. Note. *Art or signage?: the regulation of outdoor murals and the First Amendment*, 35 *Cardozo L. Rev.* 867 (2013).

COPYRIGHT

Caroline Hewitt Fischer. Note. *It's de minimis, but wait! It's also fair use: Faulkner v. Sony Pictures and why courts should focus on developing the de minimis doctrine to streamline copyright infringement analysis.* (Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc., 2013 WL 3762270, 2013.) 16 *Tul. J. Tech. & Intell. Prop.* 301 (2013).

Michael H. Hoffheimer. *Copyright, competition, and the first English-language translations of Les Miserables* (1862), 17 *Marq. Intell. Prop. L. Rev.* 163 (2013).

Erlend Lavik & Stef van Gompel, *On the prospects of raising the originality requirement in copyright law: perspectives from the humanities*, 60 *J. Copyright Soc'y U.S.A.* 387 (2013).

Monica Sullivan. Comment. *After Louboutin: responding to trademark ownership of color in creative contexts*, 64 *Mercer L. Rev.* 1047 (2013).

Rebecca Tushnet. *Performance anxiety: copyright embodied and disembodied*, 60 *J. Copyright Soc'y U.S.A.* 209 (2013).

Samson Vermont. *The dubious legal rationale for denying copyright to fashion*, 21 *Tex. Intell. Prop. L.J.* 89 (2013).

INTELLECTUAL PROPERTY

David S.W. Ma. Note. *Right to integrity and the proposed Resale Royalty Right and Notification Right in the PRC Copyright Law*, 49 *Stan. J. Int'l L.* 477 (2013).

Continued on page 35.

Recent Publications*Continued from page 34.***INTERNATIONAL**

Shalia Sakona. Note. *Frankly, my dear America, we don't give a damn: comparing Chinese and European trade barriers to American audiovisual works and the American response*, 54 B.C. L. Rev. 1385 (2013).

MISCELLANEOUS

Emily Stutts. Student article. *Will your digital music and e-book libraries "Die Hard" with you?: transferring digital music and e-books upon death*, 16 SMU Sci. & Tech. L. Rev. 371 (2013).

MOTION PICTURES

Corey E. Kilburn. Comment. *An offer you can't refuse: a Sherman Act antitrust examination of the Motion Picture Association of America and the use of the ratings system as an unreasonable restraint on trade*, 82 UMKC L. Rev. 255 (2013).

MUSEUMS

Virginia D. Ryan. Note. *Balancing donor intent with museum needs: proposed deaccession planning strategies for art bequeathed to museums*, 101 KY. L.J. 863 (2012-2013).

MUSIC

Mark R. Carter. *Applying the fragmented literal similarity test to musical-work and sound-recording infringement: correcting the Bridgeport Music, Inc. v. Dimension Films legacy*, 14 Minn. J. L. Sci. & Tech. 669 (2013).

David M. Liston. Note. *Songwriter, side musician, or sucker?: the challenge of distinguishing composers from contributors under U.S. copyright law and the lessons of a famous British case*, 65 Rutgers L. Rev. 891 (2013).

Jamie Lund. *Fixing music copyright*, 79 Brook. L. Rev. 61 (2013).

Jon Peritz. Note. *Closing a loophole in musicians' rights: why digital remasters of analog sound recordings are not derivative works protected by the Copyright Act*, 11 Cardozo Pub. L. Pol'y & Ethics J. 385 (2013).

Theodore Serra. Note. *Rebalancing at resale: ReDigi, royalties, and the digital secondary market*. (Capitol Records, LLC v. ReDigi, Inc., 2013 WL 1286134, 2013.) 93 B.U. L. Rev. 1753 (2013).

Neil S. Tyler. Comment. *Music piracy and diminishing revenues: how compulsory licensing for interactive webcasters can lead the recording industry back to prominence*, 161 U. Pa. L. Rev. 2101 (2013).

Michael J. Worth. Comment. *The digital double standard for Internet music lockers: the DMCA's feeble attempt at adapting to the digital universe*, 42 Sw. L. Rev. 661 (2013).

SYMPOSIA

Game: *Business: Law International Summit on the Law and Business of Video Games*. 16 SMU Sci. & Tech. L. Rev. 1 (2013).

IP for Creative Upstarts, 21 Mich. St. Int'l L. Rev. 547 (2013).

THEATRE

Lori Brooke Day. Note. *Turn off the danger: the lack of adequate safety incentives in the theatre industry*, 88 N.Y.U. L. Rev. 1308 (2013).

VIDEO GAMES

Nicholai Diamond. Note. *Killer games and GATS: why the WTO should permit Germany to restrict market access to violent online video games*, 45 Geo. Wash. Int'l L. Rev. 539 (2013).

Continued on page 36.

Recent Publications

Continued from page 35.

Jessica Fisher. Note. *Brown v. Entertainment Merchants Association: “modern warfare” on First Amendment protection of violent video games.* (Brown v. Entm’t Merchs Ass’n, 131 S. Ct. 2729, 2011.) 8 J. Bus. & Tech. L. 525 (2013).

Annabelle L. Gibson. Note. *Brown v. Entertainment Merchants Association: violent video game legislation loses the game against the First Amendment—independent regulation of the game industry scores a point instead.* (Brown v. Entm’t Merch’s Ass’n, 131 S. Ct. 2729, 2011.) 32 Miss. C.L. Rev. 171 (2013).

Kathryn E. Maldonado. Comment. *Grand theft free speech? An analysis of First Amendment restrictions on violent video game legislation,* 81 UMKC L. Rev. 725 (2013).

Van S. Wiltz. *Will the JOBS Act jump-start the video game industry? Crowdfunding start-up capital,* 16 Tul. J. Tech. & Intell. Prop. 141 (2013).

Wesley W. Wintermyer. Note. *Who framed Rogers v. Grimaldi?: what protects trademark holders against First Amendment immunity for video games?* (Rogers v. Grimaldi, 875 F.2d 944, 1989) 64 Ala. L. Rev. 1243 (2013).