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July 15, 2013

## TESLAW E-Newsletter July 15, 2013 Issue No.4

Dear TESLAW Members,

Thank you so much for your membership! We on the TESLAW Council truly appreciate your support. It was wonderful to meet some of you at the State Bar Annual Meeting held June 20-21 in Dallas. I want to thank all the speakers who presented panels on topics ranging from video game law to celebrity branding, including a frank discussion about the NFL. If you were not able to attend, please allow me to introduce myself – I'm Catherine Hough and am honored to serve as Chair of TESLAW for the upcoming year.

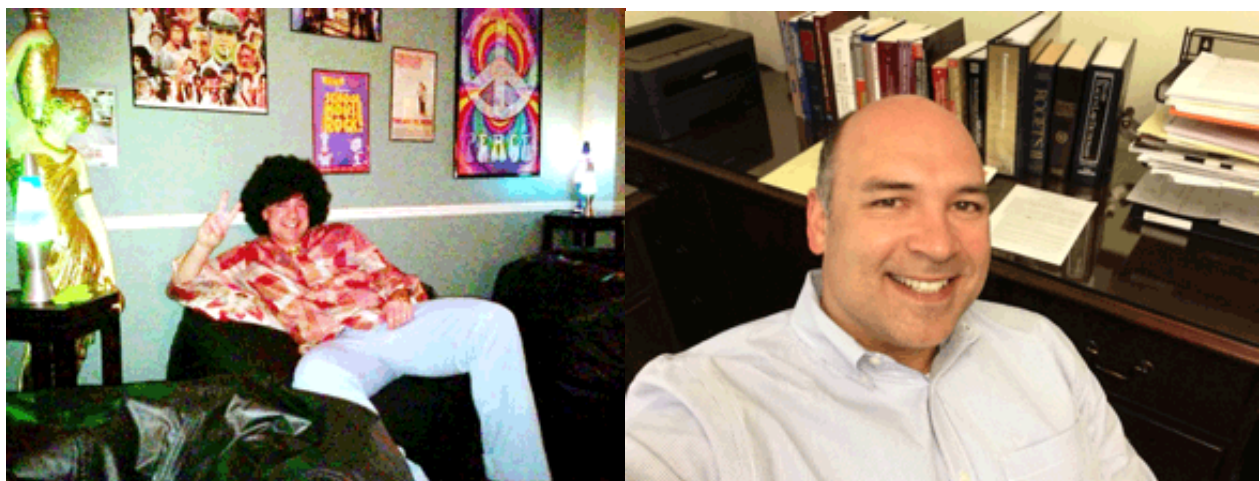
Please register to attend the [Entertainment Law Institute](#). Now, in its 23rd year, this CLE program will be held **September 26-27, 2013** in Austin. As a TESLAW member, you are eligible for a discount on the registration fee! I always look forward to attending as the program continually offers interesting and informative presentations in all areas of Entertainment Law.

This newsletter would not be possible without the efforts of Victoria Helling, so I would like to thank her for her dedication and hard work. Also, if any member wishes to join any TESLAW committee or contribute to this newsletter, feel free to contact me directly via [e-mail](#).

Very truly yours,  
[Catherine Hough](#), Chair  
Entertainment and Sports Law Section

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### TESLAW Member Spotlight



One (or both) of these persons is Austin attorney Ken Pajak, a former Chair of the State Bar Entertainment and Sports Law Section and lover of all music, including but not limited to, the unmistakable sounds of the 70's.

Ken is a business, estate planning, and probate attorney representing entertainment industry professionals and creative clientele. Ken graduated from South Texas College of Law in 1998, where he served as Editor In Chief of *Annotations*. Since then, he has spent the last 15 years protecting his clients' interests and IP rights – in court, through contract negotiations, by planning musical legacies through wills and trusts, and by strategically forming and maintaining their business entities. Ken's clients include singer-songwriters, bands, producers, investors, filmmakers, radio and screen talent, authors, heirs, creditors, gaming companies, and technology entrepreneurs. Ken also uses his experience to mediate complex business, entertainment, and technology disputes.

As an Adjunct Professor, Ken teaches the Legal Aspects of the Entertainment Industry course offered at ACC's Department of Music Business, Performance, and Technology and the Intellectual Property Law course offered in its Paralegal Studies program.

Ken is the husband of Wendy Pajak, Assistant General Counsel to the Texas Medical Board; proud father of a U.S. Army Soldier; Assistant Scoutmaster to his 12 year old son's Boy Scout Troop; "Dance Dad" to his 10 year old daughter; and, amateur triathlete.

This August, Ken will launch [Pajak Law, PLLC](#). For more information about Ken, feel free to send him a short [e-mail](#).

*To be considered for the TESLAW Member Spotlight please submit a short bio (no more than 200 words) and photograph to [Victoria Helling](#).*

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## ***Sony BMG Music Entertainment v. Tennenbaum*** **Case Note by Catherine Hough**

### **The First Circuit upholds \$22,500-per-song penalty against college student who downloaded and shared 30 songs**

Anyone still wondering if courts are still concerned about illegal downloading and song sharing? Well, the First Circuit has upheld a willful infringement damages claim of \$675,000 against a Massachusetts college student.

In 2009, a jury ordered Joel Tennenbaum, to pay a \$22,500-per-song penalty for downloading and sharing 30 songs online. Tennenbaum then moved for remittitur, arguing that the award was so high that it violated his right to due process. The court side-stepped the issue of remittitur and held that the award violated due process, reducing it to \$67,500. *Sony BMG Music Entm't v. Tennenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010). Sony appealed the reduction and on Tuesday, June 25, the First Circuit Court of Appeals upheld the original penalty amount of \$675,000.

During appeal, Tennenbaum argued that the award of \$675,000 violated his due process because it was not indicative of the actual injury that was caused by his downloading and sharing activities. Tennenbaum stated that the damage to the record labels was \$450, the cost of the 30 albums. However, the evidence demonstrated that Tennenbaum continued his activities for several years— despite numerous warnings— making thousands of songs available illegally, and during discovery, he denied responsibility for his actions.

In making the ruling, the First Circuit analyzed different precedents for how to apply damages and settled on one brought in a Supreme Court case that held that a statutory damage award violates due process only “where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”

The court was not persuaded with Tennenbaum's due process argument, stating Tennenbaum's behavior proved the exact situation that Congress was trying to deter when it amended the Copyright Act in 1999 and that an amount representing 15% of the maximum statutory award possible for willful violations did not violate Tennenbaum's due process right. *Sony BMG Music Entm't v. Tennenbaum*, No. 12-2146 1st Cir. Ct. App June 25, 2013.

*Catherine Hough is Of Counsel at Ferguson, Braswell, & Fraser, P.C. located in Plano, Texas. She practices Intellectual Property and Entertainment Law.*

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## Practice Document

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*Send questions, comments, and submissions for the TESLAW E-Newsletter  
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