TESLAW THE STATE BAR OF TEXAS ENTERTAINMENT & SPORTS LAW SECTION

January 15, 2016

TESLAW Tidbits:

A Little Taste of TESLAW

January 15, 2016

Issue No. 16

Dear TESLAW Members,

Happy New Year! I hope this year is starting out well for all of you.

Now is the time for you to consider taking a bigger role with TESLAW by joining the Council or running for an officer position. We will be appointing a nominating committee soon so I hope you will think about volunteering yourself or nominating someone else you think has the energy and interest to help lead our growing section (but please confirm their willingness first!). Our "year" runs from June to June, with elections held during our annual meeting.

Speaking of June meetings, be sure to put **June 16th** on your calendar; that's when we'll be presenting our entertaining CLE at the SBOT Convention in Fort Worth. All TESLAW members are welcome to attend the CLE at no charge, whether or not you attend the full convention. In the meantime, I hope you'll swing by our mixer at SXSW in Austin on **March 17th** at the Iron Cactus. Again, it's free to TESLAW members.

I look forward to seeing you in 2016.

Respectfully,
Sally C. Helppie, Chair
Entertainment and Sports Law Section

BONUS Article!

Be sure to check out the bonus case note below on the Texas Moving Image Industry Incentive Program. Happy 2016!

Events Calendar

Thursday, January 21st
Entertainment & Sports Law Section Social, Austin
Hosted by Austin Bar Association Entertainment & Sports Law Section

Wednesday, January 27th
12 to 1 p.m. (1 hour CLE credit)
Helping Photographers Navigate Legal Issues, Dallas
Hosted by the Dallas Bar Association Sports & Entertainment Law Section

Thursday, March 17th
4 to 6 p.m.
SXSW Mixer, Iron Cactus, Downtown Austin
Hosted by TESLAW

Spotlight on Catherine Tabor

Cathy Tabor is a seasoned entertainment attorney, professor and musician based in Austin with almost 30 years of experience in the music business.

Tabor's current practice, Tabor Law Firm PC, focuses on entertainment matters and litigation with an emphasis on the music and film industries. Her clients include recording artists, songwriters, composers, independent labels, publishers, concert promoters, film producers, actors, and authors. Tabor also operates Global Rapport, a subsidiary of In the Pocket International, Inc., which offers communications, media, and business development consulting to clients across the globe.

Prior to establishing her practice, Tabor worked in political consulting where she was a legislative aide in the Texas House of Representatives, worked on three gubernatorial races in Texas, and also worked on national and local races.

As a frequent lecturer, Tabor speaks on entertainment law and business development issues at seminars across the country and in Europe. She is also a writer and professor. She has published articles on entertainment law and served as adjunct professor of Event and Venue Management at St. Edward's University in Austin.

Tabor received a Bachelor of Arts in Journalism from the University of Texas at Austin and her Juris Doctor degree from Baylor University. She is a member of the State Bar of Texas, TESLAW, Texas Accountants and Lawyers for the Arts, and the National Academy for the Recording Arts & Sciences (GRAMMYs) where she served on the Board of Governors from 2006 - 2008. Tabor can be reached through LinkedIn.

Taylor Swift Shakes Off a $42 Million Lawsuit
by Chase LanCarte, Esq.

Looks like Taylor Swift may have shaken off a recent copyright infringement suit brought by Jessie Braham, a little known R&B singer whose stage name is Jesse Graham. On October 28, 2015, Braham filed a pro se complaint against Sony/ATV Music Publishing, Taylor Swift, Max Martin, and Big Machine in the United States District Court for the Central District of California. *Braham v. Sony/ATV Music Publ'g*, No. 2:15-cv-8422-MWF, 2015 U.S. Dist. LEXIS 155268 (C.D. Cal. Nov. 10, 2015). Braham alleged that Swift's massively popular song "Shake It Off" infringes the lyrics of his song "Haters Gone Hate" by using an unidentified 22-word phrase. His complaint argues that more than 90 percent of "Shake It Off" comes from his song, that Swift's song uses his song's phrase string more than 70 times, and that without his song "Haters Gone Hate," Swift's "Shake It Off" would not exist. Braham's complaint sought $42 million in monetary damages, as well as granting him writing and publishing credit to "Shake It Off."

As of November 10, 2015, the court denied Braham's in forma pauperis (IFP) application to proceed without paying the court-filing fee. The court noted that federal law (codified in 28 U.S.C. § 1915(e)(2)(B)(ii)) requires it to deny IFP status and dismiss a complaint if the complaint "fails to state a claim on which relief may be granted." The court explained that the standard is the same as a 12(b)(6) motion, and it "must be dismissed if it fails to allege sufficient facts to support a cognizable legal theory."

To establish a prima facie case of copyright infringement, a plaintiff must demonstrate (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. The court found that Braham had satisfied the first element because his "copyright registration is prima facie evidence of the validity of the copyright and the facts stated in the certificate." The court concluded, however, that Braham had failed to satisfy the second element because his petition failed to "contain a short and plain statement of the claim showing" that he was entitled to relief, as required by Rule 8(a)(2) of the Federal Rules of Civil Procedure. The court explained that Braham's complaint did not identify the subject matter (i.e. the 22-word phrase) that the defendants allegedly copied. Moreover, upon reviewing the lyrics of both songs, the court could not identify the "constituent elements" or lyrics that "raise a right to relief above the speculative level." Accordingly, the court denied the IFP application and dismissed the complaint.

The court further warned that even if Braham amended and re-filed his lawsuit, he still faces an uphill battle in pleading a copyright infringement case. "Braham must plead copying of constituent elements of the work that are original.'" The court stated that Braham is unlikely to satisfy this burden because "alleging copying of something is not enough. Rather Braham must allege copying of portions of his work that are protectable." That is, Braham must show that Swift's song copies components of his song that are specifically original to his work.

By way of example, the court provided samples from other sources that demonstrate the lyrics, "haters gone hate" and "players gone play," are not original to Braham's 2013 song:

- "Playas Gon' Play," 3LW (2000) (using phrase "Them playas gon' play, them haters gon' hate" in musical work).
- "Haters Gonna Hate" entry on Urban Dictionary, reflecting use and definition of the phrase since at least August 2010.
- "Haters Gonna Hate," Google Trends (reflecting use of phrase starting between 2009 and 2011, and peaking between 2011 and 2013, until popular reporting of the commencement of this lawsuit in 2015).
- "Players Gonna Play," Google Trends (reflecting use of phrase starting in 2011).
- *See also* "Know your Meme" (purporting to describe history, origin, search interest, and etymology of "Haters Gonna Hate," including use in internet memes and animated GIFs throughout 2011, and as early as 2008).

Additionally, the court stated that Braham must allege facts that convince a court that the phrasing "haters gone hate" is either the result of direct copying by Swift, or otherwise satisfies the Ninth Circuit's substantial similarity test, where a "plaintiff can establish copying by showing (1) that the defendant had access to the plaintiff's work and (2) that the two works are substantially similar." Finding that Braham had plausibly alleged the defendants' access to his song via YouTube, the court focused on whether the alleged facts showed that the works were substantially similar. Under this analysis a court applies a two-part test. One test is the "extrinsic test," which is an "objective comparison of specific expressive elements; it focuses on the "articulable similarities" between the two works, while the other test, the "intrinsic test," is a subjective comparison that focuses on whether an ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.

In particular, the court criticized Braham's ability to subsequently plead facts necessary to satisfy the extrinsic test, which requires Braham to identify the protectable elements (i.e. the original elements) of "Haters Gone Hate" and show such infringing use in "Shake It Off." While Braham's complaint fails to identify the exact lyrics that have been infringed, the court noted only two, possibly three, similarities between the songs:

1. The use of lyrical phrase "haters gone/gonna hate";
2. The use of the lyrical phrase "players/playas gone/gonna play"; and—straining credulity—
3. Some lyrics referring to fakers faking people.

The court heavily criticized any attempt by Braham to re-plead on the basis of these similarities, finding that the songs have different melodies and belong to different musical genres. More importantly, the court emphasized that the song "Shake It Off," unlike "Haters Gone Hate," uses unique rhetorical repetitions at the end of the lyrical phrases. For example, Swift's song states: "Haters gonna hate, hate, hate, hate, hate," and "Players gonna play, play, play, play, play."

In sum, the court rather amusingly found that Braham's complaint that requires Braham to do more than write his name at least for the moment, Defendants have shaken off this lawsuit."

Chase is a solo practitioner at Lancarte Law P.L.L.C. with his principal office located in Arlington. He focuses his practice in the areas of music & entertainment, copyright, trademark, trade secret, and corporate law. Chase can be contacted via email.

Texas Film Commission Directors Chop Down Machete's Allegations
by Brent Turman

Shortly before the New Year, the U.S. Court of Appeals for the Fifth Circuit shut the door on allegations that the Texas Moving Image Industry Incentive Program ("TMIIIP") was unconstitutional, both facially and in the context of *Machete Productions, L.L.C. v. Heather Page & David Morales*. The TMIIIP was created in an attempt to increase employment opportunities for Texan professionals and increase economic activity in Texas. Under the program, qualified films, commercials, media, visual effects, and video game projects may receive cash grants from the Texas Film Commission. However, merely applying for a grant does not guarantee success because "the [Texas Film Commission] is not required to act on any grant application and may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the [Texas Film Commission]...." TEX. GOV'T CODE ANN. § 485.022(e) (West 2012) (emphasis added).

The Texas Film Commission exercised this statute when Bob Hudgins, its former Commissioner, denied an application for the Robert Rodriguez-directed film *Machete* in 2010, after the film's content caused political controversy. The rationale for this denial was that the film's content was inappropriate and portrayed Texas / Texans in a negative fashion. However, this did not stop Machete Productions, LLC ("Machete") from submitting an application for the sequel, *Machete Kills*. In 2012, David Morales, Governor Perry's general

counsel and designated Film Commission director, denied the application due to the film's "inappropriate content." After the denial, Machete sued David Morales in his individual capacity, as well as Heather Page, in her official capacity as the current Director of the Texas Film Commission. This suit alleged that the TMIIIP violated the First Amendment, Fourteenth Amendment, and Article I, Section 8 of the Texas Constitution. Per the Magistrate Judge's recommendation, the U.S. District Court for the Western District of Texas dismissed all of Machete's claims.

Under the First Amendment claim, Machete argued that the former director discriminated against it by denying production incentives on the basis of viewpoint. However, the Court of Appeals noted that Supreme Court precedent allows governmental entities to selectively fund programs to encourage certain activities it believes to be in the public interest. See *Rust v. Sullivan*, 500 U.S. 173, 193, 196 (1991). Moreover, governmental funding provisions do not run awry of the First Amendment so long as they don't "silence speakers by expressly threaten[ing] censorship of ideas" or attempt to punish the expression of particular views. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572, 583 (1998). The Court found that *Machete* did not show that the denial of a monetary grant precluded it from holding or expressing any viewpoints in *Machete Kills* or punishing it for the film's expressions. In fact, the Film Commission did not impede Machete's ability to film in Texas or express its views through the film's release. Furthermore, Machete could not show that the First Amendment requires states with incentive programs, like Texas, to fund films that cast the state in a negative light.

Under the due process claim, Machete argued that it was deprived of a property interest protected by the Fourteenth Amendment of the U.S. Constitution. However, the Court of Appeals found that the TMIIIP did not create a constitutionally protectable interest for Machete. The grants are clearly discretionary, and the Commission "is not required to act on any grant application." TEX. GOV'T CODE ANN. § 485.022(e) (West 2012). The fact that the Texas Film Commission granted generously in the past was not enough for Machete to establish that it had a clearly established right to a grant from the Commission.

As for the Texas Constitution claim, Machete argued that the former director's application of TMIIIP violated the free-speech provision in the Texas Constitution and, therefore, Machete was entitled to relief from the former director, individually, and the current director in her official capacity. The Court of Appeals quickly put that argument to rest by noting that the former director did not forbid Machete from filming, producing, or releasing the film in question. Instead, he "merely opted not to subsidize the film with Texas taxpayer funds."

Brent Turman is an Associate in the Dallas office of Vincent Serafino Geary Waddell Jenevein, P.C. where he focuses his practice on entertainment law and business litigation. Brent was second chair in the "Fifty Shades of Grey" litigation in Tarrant County, where a jury found that the firm's client was entitled to an eight-figure verdict.

Practice Document

This document, provided by Phil McNicholas of Kessler Collins P.C., represents a written agreement between a baseball stadium owner and a concessionaire for the provision of concession services at the stadium. McNicholas is an Associate with Kessler Collins who focuses his practice in the Sports industry.

Send questions, comments, and submissions for TESLAW Tidbits to Victoria Helling, Editor in Chief.