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Law Office of Donald P. Brigham
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or our 21st annual Entertainment Law issue, we’ve turned our editorial dial to television. This year’s lineup includes analysis of the current trends in TV deal making, a guide to negotiating with vertically integrated networks and producers, and developments in the protection of ideas, international copyrights, and the software behind video games (well, you play them on a TV, right?). Unlike our TV programming counterparts, we encourage you to “flip around.”

As is our norm for this issue, we have someone from the entertainment industry featured on the cover. Appearing alongside Stephen J. Cannell, the mega-successful Emmy-winning writer/producer, is his attorney, entertainment law legend and stranger-to-none-of-you Kenneth Ziffren. Cannell is creator of such shows as *The Rockford Files*, *Baretta*, *The A-Team*, *Hunter*, *Wiseguy*, *The Commish*—the list (literally) goes on and on. With a track record like that it’s no wonder that his current project is...a novel? Indeed, Cannell’s 11th print thriller could very well tell the sordid tale of the most disturbing trend in television today—the death of the independent producer. We’ve left it up to Ziffren in his Closing Argument to provide the solution. (Don’t tell anyone the surprise ending—unless they work for the FCC.)

Unfortunately, with independent producers like Cannell out of the picture, television has devolved into just another commodity churned out by six multinational conglomerates who finance, produce, and distribute everything with vertically integrated homogeneity. We think viewers are looking for something more. No greater hint is that the two hottest shows of this season have the words “lost” and “desperate” in their titles.

Some of us actually long for the days of Newton Minow’s “vast wasteland.” At least it was vast. Today’s TV spectrum is a mile wide and an inch deep. Do we really need three ESPNs, seven Discovery Channels, and, at last count, 45 HBOs? Is there really enough programming to have a 24-hour-a-day channel devoted just to food? Or gardening? Or golf? (We only need one to broadcast shows like *My Favorite Greens*.) Even the History Channel, which should have a library as expansive as human knowledge, still finds itself compelled to regularly show back-to-back-to-back documentaries on Hitler’s final days. (How many different ways can you remind us that Russians hid his jawbone for 20 years?)

Part of the problem is that so much of television is devoted to putting ordinary people in front of the camera who, after intense preparation, scripting, and pre-production, still look unprepared, awkward, and unspontaneous. We used to call it public access. Now it’s called reality TV. By most estimations, anybody who wants to be on TV can. No professional experience is necessary (a fact that seems not to repel viewers half as much as it does the Hollywood talent and labor community). When we launched the Entertainment Law issue in 1984, the idea that Big Brother would be watching you was a devastating political and moral concern. In 2005, it’s a ticket to stardom.

The one thing we know is that you, our discriminating reader, are not the problem. Not only are you choosing not to watch TV, but you’re actually reading. What’s more, you’re reading an informative professional trade publication. In fact, you’re reading the *editors’ introductory column* to an informative professional trade publication. After all, we love the attention.
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Entry of Judgment and Section 998 Offers

**CODE OF CIVIL PROCEDURE** Section 998 provides that if a party makes a settlement offer no less than 10 days before a trial or arbitration and the offer is not accepted before the earlier of the commencement of trial or arbitration or the passage of 30 days from the time of the offer, the party making the offer may be entitled to certain benefits if the rejecting party fails to obtain a more favorable result at trial or arbitration. For example, if a plaintiff rejects an offer made by the defendant but does not obtain a more favorable judgment or award, the plaintiff cannot recover any costs he or she incurred after the offer and must pay the costs incurred by the defendant after the offer was made. The court also has the discretion to order the plaintiff to pay a reasonable sum to cover the costs of the services of an expert witness used by the defendant. The converse is true for a defendant who rejects a reasonable offer from the plaintiff.

This is clearly articulated in the text of Section 998. What may not be as clear to some, however, is whether a defendant can submit an offer under Section 998 or can agree to accept an offer under Section 998 without having a judgment entered. This conclusion may not seem readily apparent from the text of Section 998, which states, “[A]ny party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated” in the offer. Those who may consider arguing that an offer is not valid without an entry of judgment should know, however, that more than one court has interpreted this language as not requiring entry of judgment in order for an offer to be valid under Section 998.

**The Intent of Section 998**

Section 998 was enacted to encourage settlement by providing a strong financial incentive to a party to present a reasonable settlement offer, and an opposing financial disincentive for the offeree to reject such a reasonable settlement offer. In order to further these purposes, the offer must be clear and specific. A clear offer allows the offeree an adequate opportunity to meaningfully evaluate the offer and determine whether it should be accepted or rejected. In addition, an offer must be specific, because the court lacks the authority to adjudicate a dispute over the terms of the offer and subsequent agreement and can only perform the ministerial task of entering the judgment according to the terms of the offer. However, despite this preference for clear and specific terms, there is no requirement that the offer contain a particular method by which the case will be resolved—judgment against the defendant, entry of an award, or dismissal with prejudice.

In *Goodstein v. Bank of San Pedro*, the plaintiff challenged an order granting the defendant’s motion to recover expert witness fees and other fees and costs based upon a settlement offer that the plaintiff had rejected. The plaintiff argued that the offer was ineffective as a Section 998 offer because it proposed a voluntary dismissal with prejudice and did not allow judgment to be taken. The court rejected the plaintiff’s distinction and found that a voluntary dismissal proposed in a settlement offer operated as the equivalent of a “judgment” within the meaning of Section 998.

There was a similar result in *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, in which the defendants submitted a settlement offer that proposed payment of funds by the defendants in return for dismissal of the lawsuit with prejudice. When the plaintiff failed to obtain a more favorable judgment at trial, it disputed the defendants’ right to obtain reimbursement for costs and expert witness fees because the Section 998 offer did not specifically provide for entry of judgment as a condition of settlement. The *American Airlines* court rejected the plaintiff’s argument and held that if the settlement offer addressed some disposition of the lawsuit that functioned as the legal equivalent of a judgment, then actual entry of judgment was not required for the Section 998 offer to be effective.

In 2004 in *Berg v. Darden*, the court even noted that the legislature’s amendment of Section 998 after the *Goodstein* opinion indicates legislative approval of the result in that case and the intention that Section 998 cover any termination of an action between the parties to an agreement. Thus, it appears that there is no magic language required to make an effective Section 998 offer, as long as it is a clear, written offer that is intended to result in a final disposition of the action.


Cheryl Johnson-Hartwell is secretary of the Barristers and an associate with Waller Lansden Dortch & Davis, LLP.
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The Jobs Creation Act of 2004 and the Entertainment Industry

The passage of the American Jobs Creation Act of 20041 seemed to indicate that Congress had finally taken notice of the magnitude of the runaway production problem and the importance of addressing it, in part, through meaningful changes to the tax laws.2 The act includes several new provisions that the entertainment industry has been seeking, at least at first glance, as welcome changes. Perhaps the most alluring is new Internal Revenue Code Section 181, which allows taxpayers to write off the costs of certain qualified film and television productions in the year the costs are incurred, as opposed to depreciating these costs over several years. Although new Section 181 is a gift to the entertainment industry that has the potential to go a long way toward curbing the runaway production trend, the devil is in the details. It would be an understatement to say that many of the details remain to be worked out and that the true value of the new write-off will be clear only after this process is completed. In fact, there are already signals from Washington that the new write-off may end up being a shadow of what it was thought to be when the act was first signed into law.

Qualifying for the Section 181 Write-off

What we do know about the Section 181 write-off is that, based on the statutory language, several requirements will have to be met in order for a film or television production to qualify for the 100 percent write-off:

1) U.S. Compensation Percentage. In order to qualify for the new write-off, 75 percent of the total compensation incurred with respect to the film or television production must be performed in the United States by actors, directors, producers, and other relevant production personnel.3 For this purpose, compensation does not include amounts incurred on participations or residuals.4

2) Cost Limitation. In order to qualify for the new write-off, the aggregate cost of the film or television production must be at or below $15 million, subject to one exception under which a slightly higher threshold is available.5 If the cost of the work exceeds the $15 million threshold (or, where applicable, the higher threshold), none of the costs of the project will qualify for the deduction. That is, the cost limitation under new Section 181 is an all-or-nothing proposition— if the costs of the project exceed the ceiling, the production will not be eligible for the current deduction for costs up to the ceiling. The cost for a film or television production can go up to $20 million and still qualify for the Section 181 write-off if the costs for the project are “significantly incurred” in certain designated low-income communities.6 However, it will likely be difficult to obtain the benefit of this higher ceiling because whether costs are significantly incurred in low-income communities is determined by comparing the costs incurred in the low-income communities to the total cost of the film. In most cases pre- and post-production costs and certain other costs associated with the film will constitute such a large percentage of the overall costs that unless a significant portion of these activities take place in the low-income communities, the project will not satisfy the significantly incurred test. In many cases, the specialized facilities used for pre- and post-production activities will not be located in these locales.

Furthermore, even in those instances in which the costs incurred in the low-income communities do represent a substantial portion of the overall costs, it will be difficult to rely on the $20 million ceiling with any certainty unless and until the IRS issues guidance on what

M. Katharine Davidson is a partner and Mark Saulino an associate with Alschuler Grossman Stein & Kahan LLP.

References:
1. U.S. Compensation Percentage.
2. Cost Limitation.
3. Section 181.
4. Internal Revenue Code.
5. Aggregate Cost.
6. Low-Income Communities.
O’Donnell & Shaeffer LLP is pleased to announce that Ann Marie Mortimer has become a named partner and that the firm will now be known as O'Donnell Shaeffer Mortimer LLP.
percentage of the expenses incurred on a film or television production must be incurred in the low-income communities in order for such spending to be considered significant enough to satisfy the test.

3) Timing. In order to qualify for the new write-off, principal photography must commence between October 23, 2004, and December 31, 2008.7

4) Content Limitation. The only content-based limitation on the Section 181 write-off is that the production cannot include a “deploration of actual sexually explicit conduct.”8

5) Limit for Television Series. Only the first 44 episodes of a television series will qualify for the Section 181 write-off.9

Producers will have to be careful when it comes to verifying that a film or television production meets several of these requirements. For one, calculating the cost of a film or television production for purposes of determining whether the $15 million (or $20 million) cost limitation has been met may be very different from calculating the costs that are typically reflected in the budget used to finance the production. Some costs that are found in the financing budget will not have to be included in determining whether the Section 181 cost limitation is met, while other costs that are not reflected in the financing budget—such as an allocation of certain of the production company’s expenses that are not directly related to any particular project—will have to be included when determining whether the cost limitation has been met. The additional accounting services required to make sure that the cost limitation has been satisfied will involve no small amount of money, undercutting the potential benefit of the write-off.

It is also not entirely clear how several of the statutory requirements will apply. One of the more critical issues that needs to be addressed is whether participations and residuals should be counted for purposes of determining whether the cost limitation has been met—costs that are not normally included in film budgets. Despite the significant problems that including participations and residuals would cause, it was recently reported that Congress has indicated that it intends this result and may even introduce an amendment to that effect.10 The most obvious of the problems caused by including participations and residuals in the cost limitation calculation is that the producers of film or television projects that include participation or residual arrangements will not know at the time they claim the write-off whether the project actually qualifies because the participation and residual obligations will extend well beyond the completion of the project. In fact, the more successful the project becomes, the less likely a project is to qualify for the write-off if participations or residuals are a part of the package.

Unless Congress or the Treasury Department makes it clear that participations and residuals will not be included in calculating the cost of a project for purposes of Section 181, the Section 181 write-off will likely be reduced to no more than a potential surprise at the bottom of the box of cracker jacks for film and television productions in which participations and residuals have been granted. Financing parties will not be able to rely on a possible write-off when deciding whether to contribute funds to such a film or television production, even though they may get the write-off in the end. And if they do get the write-off it would often mean that the project was not very successful.

The question of whether participations and residuals will be taken into account for purposes of the cost limitation is certainly an important one, but by no means is it the only question that needs to be addressed before using Section 181.

The statutory language of Section 181 does not specify exactly what costs are eligible for the write-off or when the write-off can be claimed under certain circumstances. This lack of clarity in the statute raises numerous questions: Can the deduction be claimed on participation and residual payments? Can the deduction be claimed on “indirect” costs associated with the project, and if so to what extent? What about expenses incurred prior to beginning principal photography on a project? If expenses are incurred in a taxable year that ends prior to the date on which principal photography begins—or for that matter prior to the year in which the project is completed—and it can be determined whether the production meets all the requirements necessary to qualify for the write-off, when will these expenses be deductible? One possible answer is to allow the taxpayer to take a deduction for the expenses in the year they are incurred if the taxpayer makes a good faith determination that the project is likely to meet the requirements for taking the deduction.

Moreover, the statutory language of Section 181 does not specify who is entitled to the write-off, leaving certain questions unanswered in situations in which there are multiple ownership interests in a film or television production throughout the course of its life or when certain cost-sharing arrangements have been entered into with respect to a film or television production. What if a company purchases the rights to a film after it has been produced? Presumably the owner of the film during its production would be entitled to the deduction, but who is entitled to what if someone acquires the rights to the film during production? What if someone pays a production company to produce the film? And to venture further into this gray area, what happens to the company that agrees to bear a portion of the costs associated with a film project in exchange for certain rights with respect to the film? The need for guidance in this area can only be measured by the variety of financing, ownership, and distribution arrangements that can be entered into when producing a film project.

Other critical issues regarding the mechanics of Sections 181 exist. For example, on its face, the Section 181 write-off did not appear to be subject to recapture at ordinary income tax rates and was initially seen by some as a lucrative incentive for financiers of independent films. It now appears that this was not Congress’s intent and that an amendment can be expected to confirm that the recapture of the write-off is to be taxed at ordinary income rates.11

These issues are only representative of the many reasons that Hollywood should wait before celebrating the enactment of Section 181. In the end, depending on technical corrections and guidance that is issued (or not issued), what was once hoped to be a key provision to encourage domestic film financing may end up having the lifespan of just another would-be Hollywood star.

Income Forecast Method Changes

The income forecast method is a depreciation method that applies to motion picture films, sound recordings, and videotape productions. It allows taxpayers to recover the cost of the assets based on the level of income generated by the assets during a given year. The annual amortization deduction on a property is based on the percentage derived by dividing the income generated by the property during a given year by the total estimated income that the work is anticipated to generate in the first ten years after it is placed in service. This percentage is multiplied by the adjusted basis of the film, sound recording, or videotape in order to calculate the amortization deduction for the year.12

The new act clears up how participations and residuals should be treated in the income forecast method—an issue that has been the subject of much controversy over the years. Taxpayers generally have treated participations and residuals in one of two ways: either deducting the amounts as they were paid under the authority of Associated Patentees, Inc. v. Commissioner,13 or by adding an estimated participation and residual amount to the film’s basis at the time the film is placed in service and then amortizing the basis under the income forecast method, based on the holding in Transamerica Corporation v. United States.14 However, the IRS has taken the position that participations and residuals
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are to be included in the adjusted basis of income forecast property in the year that such expenses are paid.

The act settles things, hopefully once and for all, by offering taxpayers flexibility when using the income forecast method. Taxpayers can choose to include a participation and residual estimate in the property's adjusted basis in the year in which the property is placed in service and amortize their cost over time under the income forecast method, or taxpayers can exclude participations and residuals from the adjusted basis of the property and deduct the amount of any participations and residuals in the year they are actually paid. Thus, the act gives taxpayers a choice between the methods sanctioned by the Associated Patentees and Transamerica Corporation cases. The decision to currently deduct these expenses may be made on a property-by-property basis, but it must be applied consistently on any given property once the election is made.

In addition, the act provides that amortization deductions under the income forecast method should be calculated based on gross income rather than net income. This prevents taxpayers from deducting distribution costs when calculating current and total forecasted income with respect to income-forecast property, which can accelerate the amortization deductions. A Treasury Department memorandum indicates that if the taxpayer has used the net method for the same type of property on federal tax returns for two or more consecutive taxable years, a switch to the gross method represents a change in method of accounting that requires the filing of a Form 3115 for the current year.

The new income forecast method provisions are effective for property placed in service after October 22, 2004. Congress has instructed the Treasury Department and the IRS to expeditiously resolve open cases involving these issues, taking into account the principles set forth in the new provisions.

**The Manufacturing Deduction**

Perhaps the most surprising provision of the act for the entertainment industry is one that makes the production of certain films and videotapes eligible for a new “manufacturing activity” deduction available under new Section 199. Congress enacted the new manufacturing activity deduction to cushion the blow from its repeal of the extraterritorial income exclusion, which the World Trade Organization had determined to be an illegal export subsidy. The manufacturing activity deduction can be claimed on the production of any film or videotape (except for certain sexually explicit productions) as long as at least 50 percent of the total compensation relating to the production is paid for services performed within the United States by actors, production personnel, directors, and producers.

The amount of the new manufacturing activity deduction is a fixed percentage of the lesser of the taxpayer’s 1) “qualified production activities income” for the year, or 2) taxable income for the year, but in no event is the deduction allowed to exceed 50 percent of the total W-2 wages paid by the taxpayer during the tax year. The fixed percentage for determining the deduction will ultimately be 9 percent starting in 2010 but will be phased in at a 3 percent rate for 2005 and 2006 and a 6 percent rate for 2007 through 2009. The manufacturing activity deduction can also be claimed for alternative minimum tax purposes.

Guidance was recently issued by the Treasury Department on some of the specifics of the deduction. “Qualified film” will be limited to the master (or other copy from which the holder is licensed to make and produce copies) and does not include other tangible personal property embodying the film such as DVDs or videos. Under the statute, “qualified production activities income” is defined as the excess of domestic production gross income receipts (DPGR) over certain costs. DPGR is generally income from rent, royalties, or the sale of a qualified film. IRS Notice 2005-14 clarifies that box office ticket sales, amounts received for the sale of a script or screenplay, merchandising income, and receipts from the licensing of film characters are not DPGR. Notice 2005-14 also clarifies who will be treated as “production personnel” and that compensation for services includes participations and residuals. It leaves a taxpayer free to use a reasonable method of allocating compensation between services performed within and without the United States.

The manufacturing activity deduction cannot be claimed by a pass-through entity such as a partnership, S corporation, estate, or trust. Instead, the deduction is claimed, and the requirements are tested, at the owner level. Thus, qualified production activities income and wages of the pass-through entity must be allocated to the owners of these pass-through entities.

While the American Jobs Creation Act of 2004 provides some benefits to the entertainment industry by offering more certainty when using the income forecast method, it remains to be seen whether the perceived incentives for low-budget films will be eviscerated by technical amendments. As they say in the business: Stay tuned.

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2 According to the act’s legislative history, a recent

3 I.R.C. §181(d)(1). Only compensation relating to production is included in U.S. production compensation.


5 I.R.C. §181(a)(2).


7 H.R. No. 4520; I.R.C. §§244, 181(f).


9 I.R.C. §181(d)(2)(A). The legislative history indicates that the §181 write-off, including the cost limitation, applies separately to each episode of a television show.

10 See supra note 3.


12 Taxpayers that claim amortization deductions under the income forecast method are required to pay or receive interest based on a “look-back” recalculation of amortization. I.R.C. §167(g)(1)(D). The “look-back” recomputation is applied in any “recomputation year” by comparing amortization deductions that had been claimed in prior periods to amortization deductions that would have been claimed had the taxpayer used actual total income from the property and not estimated income and then determining the hypothetical overpayment or underpayment of tax based on this recalculated amortization. I.R.C. §167(g)(2). Generally, a “recomputation year” is the third and tenth taxable year after the taxable year in which the property was placed in service. I.R.C. §167(g)(4).

13 Associated Patentees, Inc. v. Commissioner, 4 T.C. 979 (1945).

14 Transamerica Corp. v. United States, 999 F. 2d 1362 (9th Cir. 1993).

15 I.R.C. §167(g)(7)(A). The participation and residual estimate can only be included to the extent that the participation and residuals relate to income estimated to be earned in connection with the property before the close of the tenth year after the property is placed in service.

16 I.R.C. §167(g)(7)(B)(i).


18 I.R.C. §167(g)(5)(E).

19 I.R.C. §199(c)(1)(B).

20 I.R.C. §§199(b), 199(a)(1).

21 I.R.C. §199(d)(6).


23 I.R.C. §§199(c)(1)(B).


25 I.R.C. §199(c)(4).


28 I.R.C. §199(c)(1)(B).

29 I.R.C. §199(c)(4).


32 I.R.C. §199(d)(1).
Negotiating Ownership of Video Game Engines and Tools

The first video game was created in the early sixties on a shoestring budget by a single programmer. Today, the average game generally costs more than $1 million to develop and requires a team of dozens or more people to complete. To mitigate the increasing costs to create games, modern developers have found ways to standardize certain elements of the process. The snowboarders in one game do tricks reminiscent of skateboarders in another. The martial arts fighting moves in a new game may be the same as those in a previous game, but the new game features different characters and settings. Most games include some of the computer programming code that was written for an earlier game. Sometimes a significant portion of the code in a later game is a literal copy of the code from the first game—even if the games were developed by different companies.

Software development tools and game engines are an essential building block for any video game project. A successful game engine can be utilized for multiple projects and sometimes may be licensed to third parties. As a result, the ownership of a video game’s development tools and game engine is a significant issue that may be contested by publishers and developers. Publishers typically demand ownership on the grounds that they pay for the development of the game’s tools and engine. Developers seek ownership because the tools and engine are a product of the developers’ work. When publishers are deemed the owners of a video game’s development tools and game engine, they often find that they are acquiring too much and too little. Without a continuing commitment from developers to update their work, publishers may find they have game engines of great potential but little real value. Publishers thus find they have legal rights in software that they cannot or will not use. And developers, of course, resent the fact that they have been stripped of credit and rights that they could utilize in future projects while their creations remain dormant with publishers.

Newly developed software can be difficult for even the most skilled software engineer to use if he or she did not create it. Also, technology is changing so fast in the video game industry that software must be continually revised to retain any value. A developer who does not have an ownership interest in software will most likely not continue to update it. In light of these industry realities, ownership of newly developed tools and game engines should reside with the developer, while the publisher should make sure that its licensing agreements for the use of the developer’s video game software contain provisions mandating that the developer provide technical support for the publisher. For their part, developers must assess how they might realistically exploit the game engines that they create.

Like an automotive engine, a video game engine consists of various parts or development tools. Engines and tools belong to the category of software known as middleware. The range of middleware used in the development of a video game includes software that is shipped as part of the game itself and some that is not. The tools that are part of a game include a physics engine, a particle system, a cinematic system, an entity manager, and a software scripting system. While developers use many software tools, most sets of tools do not constitute a game engine. A game engine generally consists of a set of tools that include a “renderer,” which is computer graphics software that helps to create the game images, a software tool for handling sound routines, other tools such as the physics engine, and software that allows each of the tools to operate with each other. Publishers and developers vie with each other for the right to license and exploit development tools and game engines.

Some tools and engines are licensed from companies dedicated to the development of middleware. Havok, Aurora3d, Butterfly.net, CRI Middleware, demonWare, and RAD Game Tools are a few of these companies. Criterion Software’s Renderware has been a vital part of many successful games, although in the months since Electronic Arts bought Criterion there has been some hesitation by other publishers to authorize their developers to use what are now EA products. Many developers invent tools in the course of making games, and occasionally create entire game engines that can be reused. The developers of Unreal Tournament have done very well with their game. Few people realize, however, that they have also made millions of dollars from licensing the Unreal game engine to other developers. Harry Potter and the Chamber of Secrets, TNN Outdoors Pro

Alan J. Haus is a partner in the San Francisco office of Lewis Brisbois Bisgaard & Smith LLP, where his practice focuses on the entertainment and software industries.
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Hunter, Klingon Honor Guard, among others, use the Unreal game engine. Id Software, developer of Doom, has also created one of the most successful game engines in Quake, and Valve Software offers a game engine called Half-Life. Some major engines that are licensed to developers currently have license fees that include up-front payments in the six-figure range for each game in which the engine is used—and sometimes the licensing agreements carry royalty obligations based on sales of the game. A publisher or developer that wishes to buy out the royalty rights as an initial matter can sometimes do so by paying double the amount of the up-front payment.

If a new game requires the development of entirely new software tools or an original game engine, and the publisher is financing the development of the game, an analysis of who owns, or should own, the resulting tools and game engine often begins with an awareness of the video game industry's golden rule—publishers possess the gold. However, this fact can create more problems for publishers than it solves.

Not Simply Software

In negotiating rights to software, certain fundamental considerations that should be addressed often are not accurately appreciated by lawyers. Even business negotiators who work for publishers sometimes lose sight of significant video game realities.

Developers often regard programming code as their offspring. Regardless of whether the software is a simple tool or a sophisticated game engine, developers want credit as the author of the code for personal and professional reasons. They know, even if others often do not, that many pieces of software cannot be efficiently used by anyone other than those people who developed the software in the first place. Many in the entertainment industry approach the video game industry with the mistaken idea that software tools and game engines are analogous to screenplays and other literary properties—assets that anyone can acquire and use.

It is understandable that lawyers tend to think of software tools and game engines as assets that anyone can acquire and use because of the confusion within the video game industry on this very point. The confusion arises because a publisher is not far off the mark when it considers the gold master of the “playable game” as an asset that it can exploit unilaterally. The reasoning is based on a fallacious syllogism: A playable game is software, the tools and an engine are software, and all software is the same and should be treated in a like manner. Indeed, software tools and game engines may fall under the rubric of software but they are different from other software in a host of ways—and the idea that game tools and engines are assets that can be acquired and used by anyone is erroneous.

The consumer software with which most computer users are familiar, such as word processing, is the most user-friendly and well-documented software that exists in the world. Other types of software present a variety of serious challenges to users. The person known as the tech lead at a developer’s shop will no doubt have the skill to learn to use software with which he or she is not familiar. But even when newly created code is well documented, it can be extraordinarily difficult for even a highly skilled tech lead to learn how to use it. In many cases it is quicker to write a program to produce the desired result than to use someone else’s tools or engine. Many developers share war stories about having to substantially rewrite a game engine to make it work in a new game—and, as might be expected, these games are not the ones developed on time or under budget.

Anyone who wonders about the extent of difficulty in using another programmer’s code should consider the experience of investors and lenders to tools and applications software development companies over the last five years. Many invested or lent money with control of the code as their ultimate collateral. However, if the investors or lenders had a rift with the programmers, often everyone ended up with nothing. Even when seven-figure sums have been invested in developing software, in a surprising number of cases the code has little or no liquidation value.

This is because the relationship between the execution of the commands contained in each line of computer code and the more general structure, sequence, organization, and user interface of a particular computer program (known in software copyright litigation as the “non-literal” aspects of a program) is something that must be ascertained in painstaking detail to understand the engine as well as its developer understands it. For a complete game engine, the connection between its code and a result that someone other than the original programmer can produce using the code with a computer keyboard and mouse is far more tenuous than the connection, say, between a piece of sheet music and the sound produced by a musician playing the notes contained in the sheet music on a piano. A more apt analogy is the relationship between sheet music for 50 instruments and the sound of a 75-piece orchestra not only following the sheet music but also changing the customary places for orchestral musicians—with the stage collapsing if more than a few wrong notes are played. Under these circumstances, to produce anything of value in the future, everyone in the video game process must be highly skilled and appropriately motivated—and the composer should be readily available for tech support.

This analogy applies less to particular software tools than to complete game engines. Other considerations, however, affect software tools as well as game engines and are the relevant constraints for negotiations over rights in software tools.

For example, publishers invariably employ their own staff of tech people, sometimes hundreds of them. Those people effectively serve as gatekeepers for the technology adopted by their employers. The tech people sometimes have little interest in undertaking the effort to learn about a game engine or particular software tools that were created by an outside developer that—at least indirectly—competes with them for work. The “not invented here” syndrome carries enormous weight in the video game industry. Tech people working for a publisher at one of its locations have refused to use software tools controlled by their employer merely because the tools originated at a location other than the one at which the tech people worked and thus they were not already familiar with them.

Thus, publishers and developers of video games need to approach the issues arising from the creation and exploitation of game tools and engines with an understanding that tools and engines are not simply software. All parties must grasp the relationship between the tools and engines and their envisioned uses and users. Secondary uses of video game tools and engines are complicated and fraught with potential difficulties. It is within this unusual business context that negotiations between publishers and developers over ownership and control of software tools and game engines can take place.

Works for Hire or Original Premium Console Games

Publishers enter into contracts with independent developers for video games that fall into two different categories. Under the first category, the parties agree that the game is a work for hire owned by the publisher. Games created under work-for-hire contracts often are based on characters and literary properties that are controlled by the publisher. Under the second category, the game is based on original rather than licensed characters and is developed for consoles—such as PlayStation, Xbox, or GameCube—and not for PCs. These games, sometimes referred to as original premium console games, frequently are the most eagerly anticipated of all video game releases. A contract between a publisher and a developer of an original premium console game includes a provision for the retention of intellectual property rights in the game by the developer, subject to significant exploitation rights in favor of the publisher.
In negotiating both kinds of contracts the issue of whether the publisher or the independent developer owns and controls any tools or game engine that the developer creates in the course of making the game may arise. The most common pattern, though, is that ownership of software tools is an issue in work-for-hire games, while ownership of game engines usually only emerges in deals for original premium console games.

Independent developers that create games on a work-for-hire basis frequently do not create an original game engine. Indeed, often the development deal will include the publisher’s obligation to furnish to the developer some form of game engine that the publisher controls. Even when the developer receives an engine, however, it will usually use other pre-existing tools that it has created in the past, or it may enhance those tools in the course of developing the new game, or it may develop entirely new tools in the course of developing the new game. A comprehensive development deal will specify who owns what software when the new game is delivered.11

Publishers well versed in these type of negotiations frequently approach the subject of ownership from the standpoint of the golden rule. Smaller and more desperate independent developers creating work-for-hire games will often succumb to the publisher’s demands. For more established developers in the work-for-hire market, the issue of ownership is nonnegotiable from their perspective. The lifeblood of these developers is their ability to furnish programmers and other staff as well as software and other assets, and this enables them to produce a better game at a cost that is usually comparable not just to other independent developers but to the publisher’s wholly owned development studios. In development deal negotiations, independent developers are successful when they make the case that the party with the gold needs talent to create games—and at the end of the development process the developer will deliver a game but not their lifeblood.

Independent developers of original premium console games are the stars of the video game industry. They are usually well aware of the tool and engine ownership issues and usually assign a fairly high priority to them in negotiations. Publishers are of course also aware of the issues, but so long as their minimum legitimate needs are satisfied, publishers vary in how much importance they assign to ownership issues. Statistically, publishers’ relative indifference is well justified: few original games produce game engines that ultimately are licensed for revenue to other independent developers. However, a publisher will often furnish a game engine for use in a subsequent and unrelated game to the publisher’s internal development studio or to its independent developer under a work-for-hire contract. The publisher may also want rights to tools that do not comprise a game engine. The rewards can be substantial for those games that produce a viable game engine if the engine can be correctly exploited. For developers who are prominent enough to obtain publisher funding for an original premium console game, rights to the game engine and tools are often classified as ancillary rights in the publishing agreement, along with potential spin-offs such as motion picture and television productions.12

When ownership of an original game engine is negotiated, publishers will argue that they deserve to own the engine based on the fact that their money is paying for its creation. Developers typically will argue that developing the engine requires money and talent, and in the customary deal the money source (the publisher) is getting paid first, while the talent source (the developer) is getting paid last, so the publisher does not deserve to own the game engine. Both sides must recognize, however, that the practical impossibility of marketing the game engine as a separate product without the developer’s enthusiastic involvement augurs for the developer to be the owner of the engine in order for either party to realize any practical and long-term benefit. It is fair for publishers funding the development of the engine to insist on a nonexclusive and royalty-free license so that they can use the game engine in future games that they publish.

Meeting Publisher Goals

In the case of software tools, the publisher that follows the golden rule in forcing a work-for-hire developer to deliver the tools it creates to the publisher as part of the work-for-hire contract may ultimately be dissatisfied. The publisher is acquiring absolute rights to something that it will probably not be able to use effectively. If a publisher requires the developer to deliver the tools on a work-for-hire basis that excludes the developer’s ability to profit from or use the tools again in the future, the developer will resent a bargain perceived as unfair and one the developer was forced to accept. In some ways the video game industry is following the path of the motion picture industry, which ended its “studio system” many decades ago. Now parties are trying to break away from the video game version of the studio system. If developer personnel believe that they are being abused, they may prevent a publisher from getting what it actually may be able to use: a nonexclusive, royalty-free license to use tools developed from the budget for its game, along with the developer’s commitment to provide tech support in the publisher’s future use of the tools. Unless the developer owns the tools and has the right to enhance them, it will not, as a practical matter, support the tools in a way that will ever benefit the publisher.

In the case of game engines, both parties typically overlook certain requirements for exploitation of an engine. As a technical matter, an original game engine created for a particular game must be in a programming language and style appropriate for continued use in future games. Companies involved in the creation and production of video game middleware appreciate that they are in a distinct business that requires a significant emphasis on marketing and customer support. For example, the developer of the Unreal game engine provides tech support to its licensees, funds instructors who assist developers during the early stages of game development, and sponsors a “Make Something Unreal” contest.

Barriers typically exist for publishers and independent developers seeking to exploit a game engine as a discrete business that they want to pursue. Publishers’ tech people often have little interest in undertaking the effort to learn about technologies that were created by an outside developer. A large majority of developers, even at the highest levels of the industry, lack the bandwidth to create and manage what is essentially a service business. In addition, in assessing the business culture of developers, they are typically “pizza boxes on the floor” creative companies rather than purveyors of “mint on the pillow” service. Many developers would frankly be unable to manage placing a pizza on a pillow, much less a mint—and are often proud of that fact.13 Publishers also often lack the business culture of a service business. Publishers and developers might look to whether there is an appropriate resolution to their differences by looking to middleware companies as potential partners in their exploitation efforts.14

Currently, most publicly traded publishers own hundreds of pieces of technology (and in some cases more than a thousand) that they have essentially forgotten about. The solution for publishers is to identify which piece they can actually profit from and to secure the appropriate rights. In addition to the legal rights that are enumerated in written agreements, a publisher also needs to ensure its access to software, since developers go out of business with some frequency. One method to accomplish this is a software escrow arrangement.

Even the most thoroughly tested games may include bugs and require technical support after release. While publishing agreements will often mandate that a developer provide technical support after a game is released, a publisher needs the ability to provide that support as well. The marketing
effort for some games might feature support for communities of gamers who become fans of the game. Regardless of whether it nurtures a gamer community for a game, a publisher should possess the rights necessary to use the developer’s software for supplements to the game—known in the industry as “expansion packs” or “add-ons.”

Development of sequels is also a legitimate need for publishers and a much easier task when the tools and game engine used in the original game are available. If the publisher is a company other than Sony, Microsoft, or Nintendo, it will want the option to “port” (that is, adapt) a console game to another console.

The publisher accordingly deserves a nonexclusive license to use the developer’s tools for any and all of these purposes. To the extent that furnishing this license may involve tools and game engines that were owned by the developer before it made the particular game that the publisher wishes to exploit, the developer may be able to fairly require a license fee for use of those tools. If the publisher is funding all the software development costs on a nonrecourse basis, the license should be fully paid and irrevocable. To the extent that the publisher requires ongoing support for its future use of the software, however, it should expect to pay for that support. If a publisher retains any interest in licensing a game engine to others, the publisher should be paid when the talent gets paid or afterwards.

In the video game industry, publishers and independent developers continue to wrangle over who owns software tools and the game engine. Each side resists giving away something that might be very valuable, but for various reasons both parties end up with unnecessary limitations on their opportunities to use the video game technologies. While a publisher may be somewhat accurate when it considers the delivery of the gold master of a playable game for which it has contracted to be an asset that it can exploit unilaterally, software tools and game engines require a different perspective. Using tools and engines in subsequent games is like using a different type of editing system in the postproduction of each new motion picture—and only the inventor of each system has ever used it before. A publisher acquires nothing except a bad reputation among developers unless its approach to software tools and game engines encompasses an awareness not only of the software but also of the relationships its use requires.

See generally Steven L. Kent, The Ultimate History of Video Games (2001).

In the video game industry, publishers are generally the larger companies, such as Electronic Arts and Activision, that finance and distribute games. Sony,
Microsoft, and Nintendo wear two hats: They are publishers of games and manufacturers of consoles. Developers are the generally smaller companies that create games, but they can become large and prominent as well. One developer, Rare Entertainment, was acquired by Microsoft for about $375 million. To date, this is the largest sum that has ever been paid for a developer.

Middleware is sometimes called A.I. middleware, a reference to artificial intelligence. While the term “artificial intelligence” may be redolent of science fiction, the use of the term in the entertainment industry is not wholly unjustified. Unlike most software, entertainment software makes extensive use of externally generated run-time data, which makes the operation of video game software less predictable and stable.

An industry observer with the moniker “Stupid Evil Bastard” observes that:

The software at the core of most 3D video games, commonly referred to as its “engine,” has been slowly improving the sophistication and realism of the environments they render. Some of the upcoming engines are coming close to rendering graphics on par with what would traditionally require hours of math-intensive ray-tracing normally used in commercial films. Toss in some surprisingly good physics and particle animation systems and you have a virtual movie studio driving your game.


Those who do not want an Unreal engine can license the Reality engine from Artificial Studios.

A licensor of a game engine to a developer will often want a license back from the developer so that the engine licensor will have the right to license the developer’s enhancements to the engine to other developers.

Entertainment lawyers should not overlook the fact that software sometimes can be patented, although this is not common in video games. If patent protection is a possibility, a agreement providing for the legally effective allocation of ownership should include patent-oriented implementing language in addition to the customary invocation of work-for-hire status. The lawyer also should exercise care in advising clients not to inadvertently allow disclosure of the software that would trigger the statutory bar to the filing of a patent application. Some legal commentators have noted that software is sufficiently different from works of authorship and tangible inventions that it could warrant development of a new and separate intellectual property statute. See Symposium Issue, Toward a Third Intellectual Property Paradigm, 94 COLUM. L. REV. No. 8 (Dec. 1994).

The term “tools and applications software” in this context is not limited to the tools used in developing video games but rather is a more general software industry category. In the United States, video games are often referred to by the term “entertainment software,” while in Europe the term “leisure software” is used.

People in the video game industry take note when a second developer uses an engine while having less than the original developer’s level of knowledge about the engine. However, a combination of an aversion to risk in light of the ever-present possibility that an engine will have to be substantially rewritten and organizational incentives among publisher and developer personnel leads to a frequent practice in which engines are not recommended by a publisher’s tech personnel unless they have complete knowledge of the engine. Thus, the bottom line is that engines rarely get reused unless their developers are fully available to provide their singular knowledge.

The various cross-currents at work in the video game field also include the fact that tech people working for publishers are expected to seek out new technologies. When a publisher’s tech people take an interest in outside technology and even propose buying it, they often confront another problem within most publishers: The business people are usually more interested in buying companies than technologies. As a result, publishers sometimes either buy too much—for example, an entire company—or too little—that is, they fail to acquire appropriate rights in selected technologies.

This topic is of particular interest because games are currently being developed in anticipation of releases of the next generation of PlayStation and Xbox, and tools usable on those platforms could have especially long and useful lives.

In some rare cases when the developer owns preexisting tools or a game engine, sophisticated parties may enter into a separate retained software agreement and create a third-party software escrow. See Stupid Evil Bastard, supra note 4. Game Developer magazine reported in February 2005 that a new command in Sony Online Entertainment’s EverQuest II allows players to order pizza from Pizza Hut while playing the game.

For example, publishers and larger developers could form small business groups whose task is to generate revenues and profits from the exploitation of tools and engines by cross-licensing rights among publishers, developers, and middleware companies.

A publisher also has a legitimate interest in ensuring that the code created for a game it will fund and market does not become part of a different product that competes in the marketplace with its game. When the developer has the same incentive, such as when it is named as the developer of an original title and its sequel, this does not become an issue.

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Combating Vertical Integration in Television Deal Making

**SMALL BUSINESS IS ALIVE AND WELL** in the United States. In fact, as President George W. Bush and Governor Arnold Schwarzenegger have proclaimed, small, independent businesses constitute the engine that sustains the American entrepreneurial spirit. However, for the network television industry, small, independent businesses hardly exist. Instead, with the elimination of the Financial and Syndication Rules (commonly known as the Fin-Syn rules) in 1995, including the elimination of the caps on the amount of programming the networks can own on their prime time schedules, the business prototype today for television production looks more like the Wal-Mart model than the small business model hailed as essential to America’s entrepreneurial success.

Government deregulation of the entertainment industry—and its assets—is in full bloom today. As a result, media corporations have grown into megaconglomerates. Television networks, which used to be solely in the business of broadcasting television programs, now own the entities that develop and produce the programs as well as the companies that distribute and air the programs through many different outlets. Indeed, a television network provides only one of the many revenue streams that comprise a media conglomerate’s bottom line, along with film studios, cable companies, billboard advertising, publishing, and radio, to name a few. Vertical integration of various media components in one entity is the reality of today’s entertainment industry.

The impact of vertical integration on entertainment talent is considerable. Artists such as lead actors and creators/executive producers face significant challenges when they seek to obtain financial rewards for the television projects they help create and make successful. Generally, for artists to gain access to the network prime time schedule, they are required to surrender ownership of their product, relinquish their artistic and economic independence, and hope to reap some modest economic benefits in the unlikely event that their series is a sustained network success. Entertainment lawyers assisting their artist clients to realize their goals face a plethora of hurdles.

Vertical integration became possible with the end of the Fin-Syn era. That era began in 1970, when the Federal Communications Commission adopted the Fin-Syn rules for the purpose of enhancing competition in the television industry. Under the Fin-Syn rules, television networks could not “sell, license, or distribute television programs to television station licensees within the United States for non-network television exhibition or otherwise engage in the business commonly known as ‘syndication’ within the United States.” Networks also were prohibited from acquiring profit shares and subsidiary rights in network programming. The Fin-Syn rules were further enhanced by legislation that prohibited networks from producing more than 40 percent of their prime time schedules.

Because the networks could not syndicate television programs, share in downstream profits, and produce more than 40 percent of their prime time schedules, they were effectively divested of any incentives to own the television programs they broadcast. Emerging from the Fin-Syn economic environment were independent producers owning and controlling programming licensed to the network as well as lead actors able not only to obtain significant control over the characters they portrayed but also to reap meaningful profit participation in their series. This development, in turn, strengthened the role of independently owned local television stations, which acquired programming inventory to rebroadcast off-network on their own outlets. During this time there were only three studio networks—ABC, CBS, and NBC—and their power over television programming was significantly diminished.

Many of the small, independent production companies that flourished during the Fin-Syn era were owned, controlled, and financed by creative talent. The most notable examples were MTM, Orion, Spelling Television, Reeves, Republic, and Cannell. The independent production companies developed and produced television series and licensed them to a network for a limited amount of time and a limited amount of runs. Since the network license fee covered most, but not all, of the production costs, the production companies covered their deficits through international sales. Profits were made when the series had spawned at least 66 episodes and was sold into off-network domestic syndication to locally owned and operated independent television stations. If the series was a big hit, such as *The Cosby Show*, the syndication profits were enormous. This competitive landscape of small, independent producers—each vying for a spot on the network schedule and each galvanized by the economic rewards that flowed from owning, licensing, and then selling a hit series into syndication—promoted innovative, diverse, and provocative programming, even though the number of network buyers was small.

In 1995, the FCC repealed the Fin-Syn rules and lifted the restraints on the number of programs a network could own on its prime time schedule. What happened next was the gradual expansion of media companies into all aspects of television—program development, production, network broadcasting, and off-network distribution, including syndication, cable, satellite, and DVD. The media companies

Lawyers who represent series lead actors and creators/executive producers face a major diminution in their bargaining leverage.

Barbara M. Rubin is an entertainment lawyer in Century City who primarily represents talent in the television and motion picture industries. She previously served as head of Business and Legal Affairs departments for Spelling Television, Rysher Entertainment, and A&E Television Networks, West Coast.
became media empires and virtually eliminated the small, independent production company from the television landscape.

Even though television viewers have access to a 300-plus channel universe today, most of the product that appears on those channels is controlled by only six companies: NBC/Universal, CBS/Viacom/Paramount, ABC/Disney, Warners/WB, FOX Broadcasting/FOX Studios, and Sony/MGM. The contrast in the television industry between today and the early 1990s is stark. In 1992, there were 16 new prime time series produced for the networks by small, independent production companies, and only 15 percent of the television series were owned by the networks. For the 2004-2005 television season, only one scripted series is produced by an independent production company for network prime time broadcast.

Avenues for Exploration

The television business model used today follows a structure created during the Fin-Syn era. The only difference is that the production company, network, foreign and domestic distribution arms, and the station groups are now owned by the same corporate parent—and each sits on the same side of the negotiating table.

Negotiating with media conglomerates is truly a David-versus-Goliath experience. Lawyers who represent series major broadcast networks face a major diminution in their bargaining leverage and a host of unusual business and legal practices. But lawyers must try, against enormous odds, to negotiate terms that will ensure that their clients reap benefits if their projects are a success. The best deals will enable clients to realize economic benefits that are substantial enough for the clients to consider creating their own independent production companies. Despite the current trends, perhaps in a future robust marketplace, the clients and their companies will compete effectively with the media conglomerates for space on the prime time schedule.

Although the traditional leverage that major talent and creators/executive producers used to possess may be severely reduced in this era of vertical integration, some avenues remain open for exploration during contract negotiations. Those areas include required services, repurposing, self-dealing, and perpetual licensing.

Required services. If a creator/executive producer has a good track record and is perceived by the network as integral to the success of a series, the network will want to “lock” him or her to the series exclusively as a show runner/executive producer for the life of the series. However, a creator/executive producer’s leverage prior to the launch of the series is not nearly as significant as it is after the series is a proven success. Therefore, once a series is a success, the creator/executive producer will be able to obtain far better economic terms for his or her upfront service fees and backend profits. For this reason, lawyers who represent artists should avoid locking their clients’ exclusive services to the life of the series at terms that are negotiated before the series is launched. Instead, counsel should attempt to provide the creator/executive producer (but not the network) with the option to cut back the creator/executive producer’s services to those of a nonexclusive executive producer or consultant after two production seasons. (Usually, it takes two seasons to determine whether a series is a hit with future economic value.) If the series is successful, and if the creator/executive producer’s exclusive services are perceived as integral to the continued success of the series, the creator/executive producer will have sufficient bargaining leverage to renegotiate new terms that are commensurate with the success of the series. Indeed, the creator/executive producer should be in a position to realize gains once a potential success has ripened into an actual success.

Repurposing. During the Fin-Syn period, when a production company and a network were two different entities and not under the same roof, the network typically licensed a series for up to four and a half years of programming and acquired the limited right to one initial run and one rerun of each episode of the series on the network during a 12- to 18-month period. This practice prevented overexposure of the series and helped preserve the intrinsic value of the off-network syndication rights and revenue. This traditional deal structure was the result of an arm’s-length transaction in an era when the network was prohibited by law to own an interest in the syndication rights to a series.

Today, because networks own the production companies that produce the series, as well as cable, satellite, and local television stations, the networks now engage in the new practice of repurposing. This practice generally consists of repeat broadcasts of a series episode on a network’s sister television, cable, or satellite station almost immediately after the episode’s original broadcast. “Downstream” repurposing occurs when the company’s initial broadcast takes place on the major broadcast network, and the rerun occurs on a smaller platform such as a cable network. For example, each episode of the series 24 was initially broadcast on FOX and repurposed within the same week on its sister cable station FX. “Upstream” repurposing occurs when the episode appears initially on a cable network and is then presented on a broadcast network. For example, the series Monk was initially aired on USA Cable and later repurposed on ABC.

For the vertically integrated company, the value of the repurposed off-network run may be substantial, since it increases advertising revenue to the company, enhances the asset brand value of a series, and allows the series to be seen by a wider audience. However, immediate and expansive exposure for a series significantly diminishes its long-term syndication value. While the media conglomerate obtains considerable value from repurposing, that value usually is not translated into revenue for the series. As a result, the profit participants in the series, such as lead talent and creators/executive producers, do not receive any meaningful economic benefit from repurposing, and their expectation of future profits is significantly diminished.

To ensure economic fairness, attorneys for creators/executive producers and lead actors can adopt a strategy of negotiating, before the series is produced, a fair market fee for a repurposed run. That fee would be credited as revenue to the series and would immediately decrease any production deficits. It also would increase the likelihood for potential downstream profits for the client. In addition, a fair market fee for repurposed runs increases the residual payment due to the creator of the series, under Article 58 of the Writer’s Guild of America Basic Agreement, as well as to the lead actor, under the Screen Actors Guild Television Agreement. These residual formulas, created during the Fin-Syn era, are premised on the notion that television programs repeated on a different platform are sold to the highest bidder and, hence, the residual is calculated on a percentage of the gross sales revenue received.

Another approach for increasing talent participation in the economic value of repurposing is for the attorney to negotiate a “repurposing bonus” that immediately rewards the talent with a specified sum whenever the repurposing occurs, whether upstream or downstream. For example, a repurposing bonus could be calculated as a percentage of the per episode acting fee or executive producing fee. If the artist’s fee is $100,000 per episode and the bonus is 10 percent of the fee, then $10,000 per episode would be payable upon the airing of each episode of the series on its repurposed platform.

Eventually, however, controlling the proliferation of repurposing and creating fair economic rewards for the client should be an agenda item for the next entertainment industry guild negotiations. Until controls are instituted, counsel for talent and creators/executive producers must address this issue and attempt to capture economic benefits that flow to the media conglomerate but do not result in significant direct series revenue.
Self-dealing. The media conglomerates are vertically integrated in order to maximize their profit streams. During the Fin-Syn era, when the off-network distribution rights were controlled by independent production companies, a production company and the profit participants were united in wanting to receive as much revenue as possible from the exploitation of a series. Now, in the vertically integrated environment, the goals of the media conglomerates and profit participants often are divergent. The media conglomerate, in considering its various businesses in the production and distribution chain, may have legitimate strategic reasons for licensing rights at below-market rates from one subentity to another. Or, as several commentators have suggested, the media conglomerates may deliberately undervalue the license fee in order to avoid paying revenue to profit participants. Whatever the motivation is, the result is that profit participants in television programs, such as lead talent and creators/executive producers, are likely to receive less profits in a vertically integrated television market.

The media conglomerates are savvy. Most of the current talent contracts specifically state in the profit participation section that the corporate entity is “diversified and multifaceted” and can self-deal in the “unilateral exercise of its sound business judgment.” In addition, the media conglomerates have constructed their agreements so that mandatory arbitration clauses are standard provisions. By doing this, the media conglomerates avoid publicity in the form of judicial scrutiny or jury nullification of their right to engage in self-dealing.

To decrease the effect of the self-dealing of conglomerates, counsel for lead actors and creators/executive producers should attempt to include provisions in their series contracts that require all license fees—even those paid by one related entity to another—to be fixed at market rates based upon an arm’s-length transaction. If counsel represents a highly sought-after client, it may be possible to command a provision that requires the media conglomerate to obtain competitive bids before it licenses any broadcast rights to an affiliate. (However, in this era of vertical integration, a competitive marketplace arguably may not exist.)

Still, many creative solutions may be proposed to combat self-dealing. Some lawyers have demanded and received the right to sit in and be “meaningfully” consulted on any negotiations between sister companies. Others have been granted the right to retain the services of an independent consultant to appraise what would be the true fair market value of the syndication rights to a series if competitive bidding actually occurred.
Even when a lawyer successfully wrests contract terms from conglomerates that maximize the profit participation of their artist clients, the remedy for breach of those terms by the corporate giant is limited to contract damages. In the past several years, media conglomerates have faced high-profile claims of self-dealing. As a result, the conglomerates now include specific provisions in their contracts that purport to dispel any fiduciary obligations to profit participants. These provisions appear to be enforceable.

A recent case, Wolf v. Walt Disney Pictures and Television, involved a lawsuit brought by the profit participants in an entertainment project against Disney, which controlled the production and distribution rights to the project. In Wolf, the California Court of Appeal rejected the claim that any fiduciary duties flowed from Disney to the profit participants. The court held that neither a contingent entitlement to future compensation nor a right to profit-sharing (or the failure to properly account for revenue under either circumstance) gives rise to fiduciary duties or a claim for breach. Instead, something more must exist, such as a partnership or a joint venture relationship. Thus, even if a media conglomerate fails properly to account for revenue or to pay a profit participant, its only liability is the amount it was supposed to pay in the first place.

The practical unfairness of Wolf has led many to question its longevity. Indeed, Justice Earl Johnson Jr. filed a concurring and dissenting opinion in the case in which he queried whether a fiduciary duty should exist "when two parties enter into a profit-sharing relationship but one of those parties retains full control over the books...[and] whether the other party’s right to audit the books provides a strong enough incentive to ensure an honest report of those receipts and remedies." Johnson answered this query by stating that "I am not quite prepared to determine Disney assumed a fiduciary duty to maintain honest and accurate records....But I am close to such a conclusion. More importantly, I am unprepared at this early state of the proceedings, in the absence of evidence before the trial court, to determine no fiduciary duty exists as a matter of law." For now, at least, Johnson’s dissent is a small consolation for profit participants. In practice, lawyers must negotiate agreements with media conglomerates with the assumption that tort remedies are not available for improper accounting and self-dealing.

Perpetual licenses. With the advent of vertical integration, networks typically demand and receive perpetual licenses to air scripted series. The result is that networks may broadcast a series for as long as it wants without facing significantly increased licens-
ing and talent costs. (In fact, the networks are now branding themselves with a particular type of programming that spawns multiple spin-off series. This is precisely what NBC has done with the Law and Order franchise, and CBS has done the same thing with CSI.)

During the Fin-Syn era, when the broadcast license term expired after four or four and a half years, the studio or production company that owned the series would offer to continue production of new episodes. This offer usually was made first to the original network that broadcast the series, but if the network offered less than fair market value, the series was taken to the open marketplace for bidding. Under that process, the production company could maximize the network broadcast value for a successful series and thereby reward the studio, production company, and talent for their contributions to a successful product.

Today, the media conglomerates have attempted to replicate the marketplace by providing for pick-up and ratings bonuses and increased license fees when a series is successful. This added value is helpful to the sister studio and its effects may trickle down to the talent and creator/executive producer, but it will never equal the financial rewards that come from a truly competitive marketplace. Moreover, while the networks reap the increased advertising revenue that comes from a series that sustains itself for more than four years, the creator’s profit participation remains marginal.

Lawyers may demand the return of the practice of paying “sum certain” advances against profits after 67 episodes of a series are produced, or a meaningful revenue participation from the sale of the series into the DVD and home video markets, or even control over a piece of the network advertising revenue. However, even if all these demands were realized, the lawyers’ clients will not receive the equivalent of the economic rewards that an independent marketplace can bring. Unless independent production companies have some access to the scripted network prime time marketplace, talent will continue to be shortchanged in the arena of profit participation.

Some have argued that one solution to the problem for television artists is a government regulation that requires networks to broadcast a minimum amount of prime time hours per week of scripted programs produced by independent production companies or unaffiliated studios. (See Closing Argument, “The Need to Rethink the Fin-Syn Reforms,” page 60.) However, until the playing field is leveled, lawyers who represent talent and creators/executive producers in connection with television programs will continue to negotiate against Goliath with little more than a slingshot. Under current circumstances, the key is to aim strategically.

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3. Id.
4. See Lorber, supra note 1.
7. Id.
14. Id.
15. If the contract has an attorney’s fees provision, the profit participant may be able to recover attorney’s fees in the case. However, the media conglomerates typically resist contractual attorney’s fees provisions.
17. Id. at 42.
In subsequent decisions, the Ninth Circuit seems to have retreated from its interpretation of the extrinsic test in *Metcalf v. Bochco* by Andrew J. Thomas.

**Access Hollywood**

In dismissing a copyright suit over a motion picture, the Ninth Circuit once proclaimed that “in Hollywood, as in [life] generally, there is rarely anything new under the sun.” Television viewers surely would agree. Once inundated with westerns, detective shows, and police dramas, they now are deluged with reality TV programming in the form of game shows, dating shows, judge shows, hidden camera shows, and makeover shows. Producers combine and recombine familiar formulas within the popular genres of the day. So much familiarity in television programming inevitably breeds litigation.

For instance, the producers of the British show *Wife Swap* recently sued the American producers of *Trading Spouses* for copyright infringement in Los Angeles federal court, and last fall a Venice-based entertainment company sued Donald Trump and the producers of *The Apprentice* for copyright infringement and included idea submission claims under state law. When a plaintiff claims that the hit show of the moment has “ripped off” a script the plaintiff wrote or an idea the plaintiff had first, how is a court to decide whether the defendant is a scheming plagiarist or an innocent creator working within the expectations and limitations of the same popular genre?

Andrew J. Thomas is a partner in the Los Angeles office of Davis Wright Tremaine LLP, where his practice focuses on intellectual property and media litigation.
Copyright law answers that question primarily by testing whether the works in question are “substantially similar.” However, following the Ninth Circuit’s 2002 decision in Metcalf v. Bochco,3 it has become considerably more difficult to apply that test consistently and predictably. In an uncharacteristically cryptic opinion by Judge Alex Kozinski, the court held that even though all the alleged similarities between the plaintiffs’ screenplay and the defendants’ television series were generic and thus not protected by copyright law, the parties’ respective arrangements of those generic elements were sufficiently alike to require a trial on the issue of substantial similarity. Ensuing Ninth Circuit decisions—most notably, the court’s 2003 ruling in Rice v. Fox Broadcasting Company—have grappled with questions left open by Metcalf but have yet to completely unmud the what Metcalf described as the “turbid waters” of the substantial similarity test.

In Metcalf, a husband-and-wife writing team sued television producer Steven Bochco, the creator of Hill Street Blues and NYPD Blue. The plaintiffs asserted that Bochco’s urban hospital drama City of Angels infringed on the urban hospital drama envisioned in screenplays they had previously submitted to Bochco.

Jerome and Laurie Metcalf claimed that in 1989 they conceived a story about a county hospital in inner-city Los Angeles and the struggles of its mostly African American staff. They wrote a summary, or “treatment,” and gave it to actor Michael Warren, a friend who also knew Bochco. Warren allegedly told the Metcalfs he liked the treatment and would relay it to Bochco, then later told them that Bochco also liked it but was too busy to use it. In 1991, the Metcalfs wrote a screenplay based on their treatment. That screenplay also was submitted to Bochco. Warren again told the Metcalfs that Bochco liked the script but lacked the time to develop the project. In 1992, the Metcalfs revised a second screenplay and submitted it to Bochco, Warren, and CBS. Eight years later, CBS began airing City of Angels, a weekly drama about a county hospital in inner-city Los Angeles with a predominately African American staff. The first episode was produced and written by Bochco and starred Warren.

The Metcalfs sued Bochco, Warren, CBS, and other individuals and production companies for claims including copyright infringement. The Metcalfs did not allege that the defendants copied specific scenes or dialogue from their treatment and screenplay. Instead, they pointed to a host of alleged similarities in setting, theme, character types, and plot structure in the respective works. On summary judgment, the defendants argued that the works were not substantially similar because the purported similarities between the with the idea itself and is not subject to copyright protection.9 Similarly, under the scenes à faire doctrine, expressions that are naturally associated with the treatment of a given idea—that are “common to a particular subject matter or medium”—are treated like ideas and do not receive copyright protection.10 As with the merger doctrine, the rationale for the scenes à faire doctrine is that standard, obvious, and generic expressions of a basic idea cannot be protected without giving the copyright owner exclusive control over the underlying idea.11

Invoking these doctrines, defendants typically will catalog a multitude of prior works that have similar themes, plots, settings, or characters in an effort to show that the only similarities between the works in question consist of abstract ideas or staple literary devices that naturally follow from the treatment of a particular idea. Plaintiffs, on the other hand, will compile lengthy lists of purported similarities in an effort to show that the two works have much more in common than a bare, abstract idea. The protean nature of this exercise has led the Ninth Circuit to caution that such lists of purported similarities “are inherently subjective and unreliable.”12 Nevertheless, these lists are unavoidable, since the Ninth Circuit has held that the court must first identify the similar elements in the works in question before the works can be considered and compared as a whole.13

Metcalf is illustrative of this process. The plaintiffs’ tally of proffered similarities, which the Ninth Circuit described as “striking,” included the following:

- Both works “are set in overburdened county hospitals in inner-city Los Angeles with mostly black staffs.”
- Both works “deal with issues of poverty, race relations and urban blight.”
- Both works’ main characters are “young, good-looking, muscular black surgeons who grew up in the neighborhood where the hospital is located.”
- Both surgeons “struggle to choose between the financial benefits of private practice and emotional rewards of working in the inner city.”
- Both surgeons “are romantically involved with young professional women when they arrive at the hospital, but develop strong

Infringement suits over the genesis of television shows or motion pictures rarely involve allegations that the defendant producer, network, or studio lifted an entire script or slavishly copied entire scenes from the plaintiff’s pilot or screenplay.
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claiming copyright infringement “may place
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lytic dissection” requires the court to distin-
that are not protected. This process of “ana-
to filter out any parts of the copyrighted work
under the extrinsic test, courts are supposed
of events in the respective works.15 The intrin-
mood, setting, pace, characters, and sequence
sive elements: It focuses on “articulable sim-
resulting from unprotectable elements.17
In Metcalf, the court held that the simi-
larities proffered by the plaintiffs were “not
protectable when considered individually; they
are either too generic or constitute ‘scenes a faire.’”18 In a departure from prior holdings,
however—and without engaging in an analy-
is of the dialogue, mood, setting, pace, and
other traditional extrinsic test factors—the
court held that the plaintiffs satisfied the
extrinsic test because the generic similarities
were numerous and arose in common “patterns
or ‘arrangements’ in the two works.”19 Noting
only that “the presence of so many
generic similarities and the common patterns
in which they arise do help the Metcalfs sat-
ify the extrinsic test,” the court tersely con-
cluded that the “cumulative weight” of those
generic similarities enabled the Metcalfs to
survive summary judgment.20

Common Patterns Plus Access
Although this “sequence and arrangement” principle has long been acknowledged by the
Ninth Circuit, it has seldom been applied. Before Metcalf, the Ninth Circuit had not
held that an arrangement consisting entirely of generic, unprotectable elements was suffi-
cient to satisfy the extrinsic test. To the con-
trary, the decisions leading up to Metcalf
stressed the importance of analytic dissection
in filtering out unprotectable similarities. In a
case decided just a month before Metcalf, for
example, the court held that when applying the
extrinsic test, it “must filter out and disregard
the nonprotectible elements” in making its
substantial similarity determination.21
Those cases that have acknowledged the principle that infringement could be based on
an original arrangement of unprotectable ele-
ments also have emphasized that such
arrangements enjoy only a very narrow copy-
right protection against wholesale plagia-
rism. The Ninth Circuit has described this
narrow scope of protection as a “thin copyright
that protects only against “virtually identical”
copying.22 In finding a triable issue of fact as
to substantial similarity in the arrangement of
otherwise generic story elements, Metcalf
does not even mention the concept of thin
copyright protection.

Instead, the Metcalf court explained that the
“particular sequence” in which an author
“strings together a significant number of
unprotectable elements” can itself be a pro-
tectable element: “Each note in a scale, for
example, is not protectable, but a pattern of
notes in a tune may earn copyright protec-
tion.”23 Described in such an extreme form,
however, the “sequence and arrangement” principle is not very enlightening. The indi-
vidual letters of the alphabet likewise are not
copyrightable, but a poem composed by
arranging those letters into words may be. The
real question is at what point does the
sequence or pattern of unprotectable ele-
ments become sufficiently expressive that it
may support a claim for copyright infringe-
ment and enable a claimant to satisfy the
extrinsic test?

Metcalf provides scant guidance on this
question. Trial courts and practitioners are left
to wonder whether Metcalf merely stands
for the proposition that sometimes a plaintiff’s
arrangement of stock literary devices will
raise a genuine issue of fact on the question
of substantial similarity and sometimes it
will not. On the other hand, observers may
question whether Metcalf signals a funda-
mental shift in the circuit’s approach to the
extrinsic test. The end of the Metcalf opinion
suggests that a narrower reading may have
been intended by the court.

In the next to last paragraph, Kozinski
observes that the Metcalfs’ case “is strength-
ened considerably by Bochco’s concession
of access to their works” and by the connection
that Warren and Bochco had to the Metcalfs
and City of Angels.24 The court’s emphasis on
the unusually high degree of access shown by
the Metcalfs suggests that the Ninth Circuit
may be more accepting of a plaintiff’s argu-

MCLE Test
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1. To establish copyright infringement, a plain-
tiff must prove ownership of a valid copyright
and copying by the defendant of a nontrivial
portion of the plaintiff’s work.
True. False.

2. In the absence of direct evidence, a plain-
tiff may establish the defendant’s copying cir-
cumstantially by proving that the defendant
had access to the plaintiff’s work and that
there is substantial similarity of protected
expression between the respective works.
True. False.

3. Copyright law protects the ideas in a work
of authorship and the author’s expression of
those ideas.
True. False.

4. When an idea is capable of being expressed
in only one way, courts hold that the expres-
sion “merges” with the idea and is not subject
to copyright protection.
True. False.

5. The scenes à faire doctrine is similar to the
merger doctrine but applies only to theatrical
works.
True. False.

6. Under the Ninth Circuit’s intrinsic test for
substantial similarity, the court must consider
the plot, themes, dialogue, mood, characters,
setting, and other objective, concrete expres-
sive elements in a literary work.
True. False.

7. The merger and scenes à faire doctrines
deny copyright protection to standard, obvious,
and generic expressions of an idea in order to
avoid giving the copyright owner exclusive
control of a particular idea.

True.
False.

8. The term “analytic dissection” refers to the process courts use to distinguish between protectable and unprotectable expression and to filter out unprotectable elements.

True.
False.

9. In Metcalf v. Bochco, the Ninth Circuit held that the plaintiff’s arrangement or combination of expressive elements could not support a claim for copyright infringement because the allegedly similar elements were unprotectable when considered individually.

True.
False.

10. In applying the Ninth Circuit’s extrinsic test, the court must perform a subjective analysis of whether the ordinary, reasonable audience would recognize the defendant’s work as a dramatization or picturization of the plaintiff’s work.

True.
False.

11. The term “thin” copyright refers to a narrow scope of copyright protection that applies only in the context of computer software.

True.
False.

12. Under the Ninth Circuit’s inverse ratio rule, a court will require a lower quantum of proof on substantial similarity if the plaintiff demonstrates a high likelihood of significant, ongoing damages from infringement.

True.
False.

13. When the plaintiff demonstrates a striking similarity between the plaintiff’s and defendant’s works, infringement may be established without proof of access by the defendant to the plaintiff’s work.

True.
False.

14. To satisfy the threshold requirement of originality under copyright law, a plaintiff need only show that he or she is the author of a work that displays some minimal degree of creativity.

True.
False.

15. In Rice v. Fox Broadcasting Company, the Ninth Circuit reversed a summary judgment for the defendant because it found a triable issue of fact as to whether the sequence and arrangement of otherwise unprotectable elements in the parties’ respective “masked magician” programs were substantially similar.

True.
False.

16. In order to prove the element of access, a plaintiff generally need only show that the defendant had an opportunity to view or copy the plaintiff’s work.

True.
False.

17. Although the Ninth Circuit’s decision in Metcalf did not expressly invoke the inverse ratio rule, it noted that the plaintiff’s case was strengthened by the defendants’ concession of access to the plaintiffs’ treatment and scripts.

True.
False.

18. In Ets-Hokin v. Skyy Spirits, Inc., the Ninth Circuit affirmed summary judgment for the defendant on the ground that copyright law does not protect commercial photographs.

True.
False.

19. The Ninth Circuit in Satava v. Lowry, while distinguishing the case from Metcalf, held that the defendant had infringed the plaintiff’s copyright in lifelike glass jellyfish sculptures.

True.
False.

20. In its initial articulation of the two-part substantial similarity test comprising the intrinsic test and the extrinsic test, the Ninth Circuit explained that the extrinsic test was designed to analyze whether the defendant had copied the idea of the plaintiff’s work.

True.
False.
ment that there is substantial similarity in the arrangement of generic elements when the defendant has had extensive, first-hand experience of the plaintiff’s arrangement of those elements.

Such a reading of Metcalf would be consistent with the Ninth Circuit’s “inverse ratio” rule, though the opinion did not mention it specifically. Under that rule, the court requires a lower standard of proof on substantial similarity when a high degree of access is shown.25 Conversely, a plaintiff may be excused from proving access if it can establish a very high degree of similarity that is termed “striking similarity.”26

Ultimately, however, it is not clear what factors the Ninth Circuit considered decisive in finding that the Metcals had raised a triable issue of fact under the extrinsic test. In discussing the number and arrangement of stock elements, the court noted merely that “the presence of so many generic similarities and the common patterns in which they arise do help the Metcals satisfy the extrinsic test.”27 Similarly, in noting the plaintiffs’ heightened showing of access the court simply stated that their case was “strengthened considerably” by that evidence.28 Obvious questions remain open.

**Post-Metcalf Decisions**

Subsequent Ninth Circuit decisions indicate that Metcalf does not herald a fundamental change in the court’s application of the extrinsic test. These include two cases involving the originality of sculptural works, a case featuring competing photographs of a vodka bottle, and an important decision involving two nondramatic television programs in which a masked magician revealed the secrets behind famous illusions.

In the first of these decisions, Ets-Hokin v. Skyy Spirits, Inc.,29 the Ninth Circuit held that two advertising photographs of Skyy’s “iconic” blue vodka bottle were not substantially similar because the alleged similarities were inherent in the idea of photographing a blue vodka bottle.30 Citing Apple Computer but not Metcalf, the court explained that when features of a work “are as a practical matter indispensable, or at least standard, in the treatment of a given idea,” they are treated like ideas and are therefore not protected by copyright.31 Finding the “range of protectable expression” to be constrained by the “subject-matter idea” of the photograph and the “conventions of the commercial product shot,” the court held that once the unprotected elements were subtracted from the analysis, the plaintiff enjoyed only a thin copyright against virtually identical copying.32

In Satava v. Lowry33 and Lamps Plus, Inc. v. Seattle Lighting Fixture Company,34 both decided in 2003, the Ninth Circuit considered the separate but related question of when a work is sufficiently “original” to qualify for copyright protection. To meet the threshold requirement of originality, a claimant need only show that he or she is the author of a work that displays some minimal degree of creativity. This test is easily satisfied in the context of literary works, and usually can be met by showing that the author indeed wrote the book, story, poem, or screenplay in question.35 Hard questions about originality arise more often in the context of functional, nonliterary works such as product designs and factual directories.36

In Satava, the court considered a dispute between two glass sculptors. Richard Satava, a California artist, began selling colorful, lifelike glass-in-glass sculptures of jellyfish in 1990. A few years later, artist Christopher Lowry began making lifelike glass-in-glass jellyfish sculptures to sell in Hawaii. Satava sued Lowry for copyright infringement and got a preliminary injunction that prohibited Lowry from making or selling glass-in-glass jellyfish sculptures. The Ninth Circuit reversed, holding that the allegedly similar aspects of the two artists’ sculptures were unprotected elements that “naturally follow from the idea” of a glass-in-glass sculpture of a jellyfish, and that Satava’s selection and arrangement of those unprotected elements were not sufficiently original to merit copyright protection.37

The court explained that copyright law did not protect the idea of a glass-in-glass jellyfish sculpture or any aspects of such a sculpture dictated by the physiology of jellyfishes or the constraints of the glass-in-glass medium.38 Judge Ronald M. Gould—who had been a member of the Metcalf panel—proceeded to address the plaintiff’s “sequence and arrangement” argument and to distinguish Metcalf forcefully. He noted that although it is true that “a combination of unprotected elements” may qualify for copyright protection, “it is not true that any combination of unprotected elements automatically qualifies for copyright protection.”39 Instead, such a combination is eligible for copyright protection “only if those elements are numerous enough and their selection and arrangement original enough” that their combination constitutes an original work of authorship.40

Satava connected this application of the “sequence and arrangement” doctrine to the underlying policies of copyright law—an analysis not undertaken in Metcalf—and stated that copyright protection is not available for such a “basic combination of elements” because it would result in an effective monopoly over an idea, which is contrary to the purpose of copyright law.41 Citing Ets-Hokin, Gould reasoned that Satava possessed merely a “thin copyright that protects against only virtually identical copying.”42

Though it arose in a much different context, Satava suggests that Metcalf should be read narrowly in light of these limiting principles and policy considerations. The court’s subsequent decision in Lamps Plus teaches a similar lesson.

In Lamps Plus, the Ninth Circuit held invalid the plaintiff’s copyright in a Victorian-style Tiffany table lamp. The court found that Lamps Plus’s lamp was a compilation of preexisting components—including a shade made from ceiling lamp parts and a base purchased from China—that was not sufficiently original to qualify for copyright protection. Judge Arthur L. Alarcon’s opinion relied on Satava, which it described as holding that “the combination of six unprotected elements did not rise to the level of sufficient originality to merit copyright protection.” Extrapolating from this reading of Satava, the court concluded that Lamps Plus’s “mechanical combination” of four preexisting ceiling lamp elements with a preexisting table-lamp base lacked the “quantum of originality” needed for copyright protection.43

The court’s focus on the raw number of unprotected elements comprising the combination under scrutiny is unfortunate, for it suggests that a claimant might obtain copyright protection simply by combining a sufficient number of generic, utilitarian, or otherwise unprotected elements. In addition to tallying the preexisting elements, however, the court also concluded that Lamps Plus did not create any design features that were “conceptually separate” from the utilitarian aspects of the lamp’s component parts.44

**Comprehensive Response**

While Ets-Hokin, Satava, and Lamps Plus serve as useful markers of the limits of the “sequence and arrangement” principle endorsed by Metcalf, a more comprehensive response to Metcalf is found in a fourth 2003 infringement decision, Rice v. Fox Broadcasting Company.

Rice involved two television shows that revealed the secrets of professional magicians. Plaintiff Robert Rice owned the copyright to a 1986 home video entitled The Mystery Magician, in which a masked magician revealed how to perform well-known magic tricks. About 17,000 copies of this video were sold worldwide. In 1996, Fox Broadcasting began developing a series of television specials in which a masked magician revealed the secrets behind famous magic tricks and illusions. Fox aired four of the specials in 1997 and 1998.45

Rice sued Fox for copyright infringement and false advertising. Fox successfully moved

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for summary judgment on the copyright claim. In an opinion by Judge Diarmuid F. O’Scannlain, the Ninth Circuit affirmed, holding that Rice failed to satisfy the substantial similarity extrinsic test because his list of purported similarities between the two shows consisted entirely of “generic” and “inconsequential” elements.46 Finding that there “are only a discrete number of ways to express a magician revealing the secrets behind magic tricks and illusions while disguising his identity,” the court held that the expressive elements common to the two works were left unprotected by operation of the merger and scenes à faire doctrines.47 These similarities included an unidentified masked magician in a traditional magician’s tuxedo and cape as the host, a “secret” location for filming without an audience, magic tricks that first were performed and then revealed and explained, a message that the purpose of the shows was to “inspire children,” and an “overall mood of secrecy and mystery.”

Rice sought to rely on Metcalf for the proposition that the “cumulative weight of similarities” may allow a plaintiff to survive summary judgment under the extrinsic test.48 The Rice court, however, distinguished Metcalf in two ways. First, it construed Metcalf as presenting an unusual “totality of similarities” and found that Rice’s claim did not involve “the same pattern of generic similarities as in Metcalf.”49 This approach may signal that the Ninth Circuit will read Metcalf narrowly in the future as limited at least to cases presenting patterns of generic similarities that are uniquely alike. Such an approach, however, offers little concrete guidance to trial courts, and even less comfort to infringement defendants, as plaintiffs invariably will claim that the pattern or totality of otherwise unprotected elements is “unique enough” to survive summary judgment in any particular case.

Second, the Ninth Circuit distinguished Metcalf by reading it as “based on a form of inverse ratio rule analysis.”50 O’Scannlain noted that although the court’s opinion in Metcalf did not expressly invoke that rule, Metcalf found the defendants’ concession of access in that case to be an “important factor in its substantial similarity analysis.”51 It should be noted, however, that Metcalf involved an unusually high degree of access—including repeated, direct submissions of the plaintiffs’ materials to the producer of the allegedly infringing work, who read and responded to those submissions. This showing goes well beyond a simple concession that the defendant had access, since “access” typically is defined merely as “an opportunity to view or copy” the plaintiff’s work.52 Indeed, although prior Ninth Circuit decisions have applied the extrinsic test on summary judgment in cases in which the defendant admitted access, those decisions did not attach any special significance to the defendant’s concession,53 and Metcalf does not purport to overrule those decisions.

Ultimately, Metcalf and Rice are not easy to reconcile. Whether these decisions represent a tension or a dialogue, they leave a number of questions unanswered. In the current reality TV era, the value of an unscripted program may lie almost entirely in its basic concept rather than in the “plot, themes, dialogue, mood, setting, pace, [or] characters” of a traditional scripted drama or comedy. Does Metcalf indicate that a plaintiff may successfully invoke copyright law to protect a particular arrangement or combination of generic elements common to all game shows, or dating shows, or hidden camera shows? Or does Rice mean that the Ninth Circuit will apply the extrinsic test more searchingly to filter out stock devices common to a particular genre, so that creators of reality programs are left with only thin copyright protection against virtually identical copying?

Since it was decided in June 2002, Metcalf has not been followed by a single published Ninth Circuit decision upholding a copyright infringement claim—or, as in Metcalf, a holding that an infringement plaintiff could survive summary judgment—based on an allegedly protectable arrangement or pattern of generic elements that were individually unprotectable. It has been distinguished by separate panels, however, in Satava and Rice. If Metcalf continues to gain little traction, two factors may explain why. The first is the Metcalf opinion’s cut-to-the-chase exposition: by providing so little guidance on how to locate the line between protectable and unprotected combinations of generic expressive elements, the opinion may be serving as little more than a repository of general precepts. The second is Metcalf’s emphasis on the unusually high degree of access shown by the plaintiffs in that case. Ultimately, Metcalf may have little application in cases in which the plaintiff on summary judgment cannot establish such an extraordinarily high degree of access by the defendant to the plaintiff’s copyrighted work.

1 Berkic v. Crichton, 761 F. 2d 1289, 1294 (9th Cir. 1985).
3 Metcalf v. Bocco, 294 F. 3d 1069 (9th Cir. 2002).
4 Rice v. Fox Broadcasting Co., 330 F. 3d 1170 (9th Cir. 2003).
5 The defendants also moved for summary judgment on a work-for-hire theory. That aspect of their motion was granted by the district court but affirmed only in part. See Metcalf, 294 F. 3d at 1072-73. Ultimately, the Ninth Circuit based its discussion of substantial similarity on a comparison of the first episode of City of Angels with the plaintiffs’ treatment and portions of one iteration of their screenplay.
7 See, e.g., Olson v. National Broadcasting Co., 855 F. 2d 1446, 1448 (9th Cir. 1988).
8 Feist, 499 U.S. at 348.
10 Satava v. Lowry, 323 F. 3d 805, 809 (9th Cir. 2003); see also Cavalier, 297 F. 3d at 823; Berkic v. Crichton, 761 F. 2d 1289, 1293 (9th Cir. 1985); See v. Durang, 711 F. 2d 141, 143 (9th Cir. 1983).
11 See Apple Computer, Inc. v. Micro Technical Corp., 35 F. 3d 1435, 1443 (9th Cir. 1994) (“Similarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market.”).
12 Litchfield v. Spielberg, 736 F. 2d 1352, 1356 (9th Cir. 1984); accord Kouf v. Walt Disney Pictures & M’Lard, 971 F. 2d 1045 (9th Cir. 1992); see also Shaw v. Lindheim, 919 F. 2d 1353 (9th Cir. 1990).
13 The Ninth Circuit in Shaw noted sardonically that the defendants had provided a list of similarities between The Wizard of Oz and Star Wars “that is virtually as compelling as” the plaintiff’s “list of ‘26 strikingly similar events.’” Id. at 1363.
14 Apple Computer, 35 F. 3d at 1446.
15 See Metcalf v. Bocco, 294 F. 3d 1069, 1073-74 (9th Cir. 2002).
16 Berkic, 761 F. 2d at 1292, accord Kouf, 16 F. 3d at 1045; see also Narel v. Freeman, 872 F. 2d 907, 912 (9th Cir. 1989) (adding “characters” to the list).
17 Berkic, 761 F. 2d at 1292. In its initial articulation of the two-part test in 1977, the Ninth Circuit explained that the extrinsic test was designed to analyze whether the defendant had copied “the work’s idea, which is not protected by the copyright.” Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F. 2d 1137, 1165 (9th Cir. 1977). Later decisions, however, reformulated the test to consider “objective details of the works,” until the court finally acknowledged that the test had been transformed into an objective analysis that considers “virtually every element that may be considered concrete in a literary work.” Shaw, 919 F. 2d at 1357 (discussing Litchfield, 736 F. 2d at 1356); see also Cavalier v. Random House, 297 F. 3d 815, 822 (9th Cir. 2002).
18 Apple Computer, 35 F. 3d at 1446.
19 Metcalf, 294 F. 3d at 1074.
20 Judge Kozinski is famously well-versed in popular culture. See United States v. Syfy Enters., 903 F. 2d 639 (9th Cir. 1990). Still, the judge curiously made no reference to ER, Chicago Hope, or other hospital dramas set in cities.
21 Metcalf, 294 F. 3d at 1074.
22 Cavalier, 297 F. 3d at 822 (emphasis added); see also Alomito v. R. Dalek & Co., 831 F. 2d 889, 901 (9th Cir. 1987) (The party claiming infringement may place “no reliance upon any similarity in expression resulting from [unprotectable elements].”). A few courts have gone further, filtering out otherwise protectable similarities in expression in some circumstances. In Apple Computer, for example, the Ninth Circuit held that similar elements in the graphical user interfaces used by Apple and by Microsoft for personal computers had to be filtered out under the extrinsic test because they had been licensed by the defendant from the plaintiff. 35 F. 3d at 1439 (“Infringement cannot be founded on a licensed similarity.”). More recently, the Sixth Circuit held that even protectable expressive elements of a literary work must be filtered out and disregarded in the substantial similarity analysis if the defendant can establish that those elements were independently created and contained in a prior work of the
defendant. Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp., 361 F. 3d 312, 326 (6th Cir. 2003) (“[W]here an element occurs both in the defendant’s prior work and the plaintiff’s prior work, no inference of copying can be drawn.”).

22 Apple Computer, 33 F. 3d at 1446, 1447.

23 Metcalf, 294 F. 3d at 1074.

24 Id. at 1074-65 (citations and quotations omitted).

25 Id. at 1075-66.

26 Id. at 1076. The court summarized its holding succinctly: “This long-running litigation is fundamentally about how many ways one can create an advertising photograph, called a ‘product shot,’ of a blue vodka bottle. We conclude there are not very many.” Id. at 1076.

27 Satava v. Lowry, 323 F. 3d 805 (9th Cir. 2003).

28 Lamps Plus, Inc. v. Seattle Lighting Fixture Co., 345 F. 3d 1140 (9th Cir. 2003).

PROTECTING RIGHTS in media and entertainment products overseas requires an understanding of reciprocal international copyright agreements and the law of the foreign forum. In the area of international copyright law, for example, a U.S. film production company may have to anticipate how, in Japan, Japanese law will apply toward the rights that the company has to a particular movie, even when those rights are identical to those that the company has in the United States. Similarly, if the film’s copyright is infringed in Spain, the company may have to consider whether to bring suit in Spain or in the United States. Whether a signatory to an international treaty or not, each country has its own way of recognizing, granting, and protecting copyrights, and these variances often are rooted in cultural traditions regarding the rights of artists and inventors. International copyright law concerns the interplay of these diverse national copyright laws and reciprocal treaties.

A network of treaties exists to provide common conditions for international copyright recognition. Although these treaties were made with the intention of simplifying international copyright law, they do not create an international copyright that protects a work throughout the world. Unfortunately, a true international copyright law has been a clear but unrealized goal since the late 1800s, when the Berne Convention originated.1 The oldest and most widely adopted of the international copyright agreements, the convention now has 154 signatories. Vietnam is the most recent, having joined in October 2004.

Before a country may become a signatory to an international copyright agreement such as the Berne Convention, that nation’s copyright laws are required to conform at least minimally to the agreement. A problem can arise, however, when a prospective member nation finds that its domestic laws do not comply with the international agreement and therefore must be changed. The United States is no exception; some legislation to bring U.S. copyright law into compliance with international standards has met great controversy, and the United States did not
become a signatory to the Berne Convention until 1988.

Such historical considerations, however, are not the immediate concern of the U.S. copyright holder seeking to reap its due rewards in a foreign market. For the copyright holder, the primary concerns are how the law of another country may affect the holder’s rights and how to protect against infringement. Evaluating these issues requires an appreciation of what law will apply and what venues are available for enforcement.

For example, although the United States is a signatory to the Berne Convention, American copyright owners should not take it for granted that they will enjoy full copyright protection in all member countries. Rather, the convention’s basic contribution to international business was and is to promulgate standards. The convention requires its members to meet certain minimum copyright standards, including reproduction (translation, adaptation, arrangement, or other alteration), term (life plus 50 years), and moral rights to attribution of authorship and restraint of prejudicial modification. The treaty also incorporates an equal protection clause that assures that the signatory’s national law of infringement will be applied uniformly to foreign and domestic authors.2

The Berne Convention directly concerns international copyright, but the various trade agreements among nations also play a role in international intellectual property issues.3 The Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS Agreement, for example, is one of the components of the trade agreement establishing the World Trade Organization and promulgating the General Agreement on Tariffs and Trade (GATT). The TRIPS Agreement includes provisions on all aspects of intellectual property, including patent, trademark, design protection, trade secrets, and geographical indications of origin, as well as copyright. Trade agreements provide grounds for protecting foreign works and productions, but they operate differently from multilateral treaties such as the Berne and the Rome Conventions. As a practical matter, trade agreements may supplement the Berne Convention, especially regarding technology, but their intent is to ensure that the obligations of the Berne Convention are implemented by its members. The Berne Convention is more detailed and is specifically designed to accommodate the world’s different legal traditions.

Local Law and Foreign Copyrights

On the other hand, differences between national laws may likely have considerable ramifications for exporters of creative works. For example, U.S. copyright law recognizes the concept of “work for hire,” under which the employer is deemed the author of a work and has complete rights to the work. In a nation where the law does not recognize the work-for-hire concept (e.g., Germany, Sweden, and Switzerland), the balance between the interests of the author and the employer shifts. There, the question of who is the author of a movie, for example, will be defined by the law and courts of the protecting country. Sometimes the author will be the producer and other times the director, or both, or perhaps others on the creative team. Swiss law grants protection for works that are not fixed in a tangible medium, while British law protects only works that are recorded. American law permits an author to assign a copyright; German law does not.

Hence it is crucial to consider the individual nuances of the copyright laws in the jurisdiction in which business is contemplated. Research into the copyright laws of the country in which the client wishes to do business is required to ensure the property will be properly protected.4

Once the law of the nation or nations in which business may be transacted has been examined, the U.S. copyright holder must next evaluate how the principles of reciprocity under the international conventions affect its rights. A practical example can be found in the decision of the French Court of Appeal of Versailles in 1994 in Turner Entertainment Co. v. Huston.5 The court applied French law to hold that colorization of the original black-and-white creation of The Asphalt Jungle constituted copyright infringement.

The dispute was over a planned television broadcast of the film in France. This 1950 movie was made in the United States by MGM, a subsidiary of Leow’s. It was shot in black and white by John Huston, an American, who was also coauthor under contract as a salaried writer to Leow’s, an American production company. Leow’s obtained copyright to the film in 1950, renewed it in 1977, and then transferred it to Turner Entertainment. Turner had the movie colorized and registered a U.S. copyright for the colorization. In 1988, Turner entered an agreement with the French Channel 5 to broadcast the colorized version on French television.

When the broadcast was announced, John Huston’s heirs—Angelica, Daniel, and Walter Huston—immediately raised objections. They were joined by a host of French organizations, all of them opposing the broadcast because they “deemed it a violation of the author’s moral right, aggravated by the fact that John Huston had opposed colorization during his life.”6

The Paris lower court forbade the colorized version as “likely to cause unacceptable and irreparable damage.” The court distinguished the economic rights of the Turner company from the moral right in a work which attaches to the person and is perpetual, inalienable, and imprescribable. There followed an extensive series of appeals up through the Paris Court of Appeal and the French Supreme Court to the Versailles Court of Appeal (the court of remand). The decisions involved the issue of what nation’s law should apply. If French law applied, then the heirs would prevail; if U.S. law applied, then Turner would prevail.

In the end, the heirs won, based on the application of the Berne Convention Article 14(2)(a)—a provision that ownership of copyright in a movie shall be a matter for legislation in the country where protection is claimed. The Versailles Court reasoned that the United States protects only economic rights, while Article 6 of the French Copyright Act makes moral rights inalienable. The court held that while it was undisputed that Turner held the economic rights to the work, colorization was not just an adaptation but a violation of the moral right of the authors, which was protected under French law. The Asphalt Jungle case highlights the Berne Convention’s respect for cultural diversity. Within its general standards, the convention permitted the French courts to apply what is essentially a cultural approach to the issue of moral rights.

Another example of the blending process of the reciprocal convention with local law is the opinion issued by the New York Second Circuit Court of Appeal in Itar-Tass Russian News Agency v. Russian Kurier,7 a choice-of-law case involving ownership of copyright. In Itar-Tass, the issue raised was which country’s law should apply to determine who—the newspaper or the author—owns the copyright of an article published in a Russian newspaper in the United States, and whether the copyright has been infringed. Russian law was held to apply to the ownership issue, and U.S. law was used to find whether infringement had occurred.

On the ownership issue, the appellate court first looked to the Berne Convention and found it no help, noting that the convention “does not purport to settle issues of ownership” with the exception of ownership of film works. Next, the court reasoned that Russian law applied to the issue of who owned the copyright, on the basis that copyright is a form of property and is therefore governed by the most significant relationship rule, which clearly favored Russia. Under Russian law, the work-for-hire doctrine expressly excludes newspaper publishers and vests ownership interests with the journalist authors. On the infringement issue, however, the court found that U.S. law applied under the principles of lex loci. Following this rea-
sioning, the court concluded that the defendant, a U.S. corporation, had infringed upon the rights of the Russian journalists.

**Venues for Enforcement of Foreign Copyrights**

Foreign copyright owners must consider not only what laws may apply but also what courts may be available to them. In general, the law of the country in which the infringing behavior has taken place, which is known as the infringing country, governs rights infringed within that country. In the United States, the fundamental rule is that American courts will accept jurisdiction over an alleged infringing activity outside the United States only if a significant part of the infringement takes place in the United States. Thus, counsel for copyright holders must be familiar with which activities constitute a part of the infringing process.

The Ninth Circuit held in 1994 in *Subafilms, Ltd. v. MGM-Pathe Communications Company* that the mere authorization within the United States of infringing acts that occurred abroad did not state a claim for relief. In 1966, the Beatles, through Subafilms, Ltd., entered into a joint venture with the Hearst Corporation to produce the animated motion picture *Yellow Submarine*. Hearst entered into distribution and finance agreements with United Artists in May 1967. In early 1982, UA entered into several licensing agreements to distribute its films on videocassette but refused to license *Yellow Submarine* because it was unsure whether home video rights had been granted by the 1967 agreements. In 1987, UA's successor, MGM/UA, authorized its subsidiary UA/MGM Home Video to distribute the picture for the domestic home video market and notified its distributor, Warner Home Video, that the picture had been cleared for international videocassette distribution.

In 1988, Hearst and Subafilms sued MGM/UA and Warner Home Video, contending that videocassette distribution of *Yellow Submarine*, foreign and domestic, constituted copyright infringement and a breach of the 1967 agreements. The court found for Hearst and Subafilms and awarded damages. On appeal, a Ninth Circuit panel affirmed, finding that domestic and foreign distribution of the picture constituted infringement of the Copyright Act. Next, in an en banc review, the Ninth Circuit reversed the panel's holding on grounds that it conflicted with the circuit's decision in *Lewis Galoob Toys v. Nintendo of America, Inc.* The court held that mere authorization of an act of infringement overseas did not support a claim for infringement under the act.

When authorization includes the physical copying of material for foreign unauthorized distribution, however, this is sufficient to constitute infringement. The 1998 case *Los Angeles News Service v. Reuters Television International* involved an unauthorized exploitation of footage of the Rodney King riots in 1992. Los Angeles News Service (LANS) covered the event and produced two videotapes. It copyrighted the works and licensed them to NBC, which used them on the *Today* show. LANS retained ownership and licensing rights. Reuters is a television news agency that gathers and provides audiovisual material to their subscribers for a fee. Visnews International (USA) Ltd., a joint venture of Reuters and the BBC, had a news supply agreement with NBC News Overseas.

NBC broadcast the show and simultaneously transmitted it to Visnews in New York. Visnews made a copy and transmitted it to subscribers in Europe and Africa, as well as to Reuters, which made a copy for its subscribers. LANS brought an action for copyright infringement against Visnews and Reuters.

The district court applied the finding of *Subafilms* that the Copyright Act does not apply territorially, and that as the infringement had occurred extraterritorially, the defendants were not liable. The Ninth Circuit rejected the *Subafilms* precedent, which localized infringement at the point of ultimate exploitation. Instead, the court harked back to older U.S. precedent that found infringement at the point of copying. It reversed the lower court and held that Visnews completed acts of infringement when it copied the shows in New York and transmitted them to Reuters, enabling further exploitation abroad.

On the other hand, the *Subafilms* approach was followed in a recent case concerning software that was illicitly licensed in Sweden, the Netherlands, and the United Kingdom. In that case, a French court rejected the argument that French law should apply when evaluating damages because the plaintiff was headquartered in France. Instead, the court applied Swedish, Dutch, and British laws to assess the damages that had been incurred in each country.

The Second Circuit also departed in 1988 from the general rule applying the law of the infringing country in *Boosey & Hawkes Music Publishers Ltd. v. Walt Disney Company*. 12 Boosey & Hawkes is an English corporation and the assignee of Igor Stravinsky’s copyrights for *The Rite of Spring*. It brought the action alleging that the Walt Disney Company’s foreign distribution in video cassette and laser disc format of the film *Fantasia*, which features Stravinsky’s work, infringed Stravinsky’s rights.

Under U.S. law, Stravinsky’s *The Rite of Spring* was in the public domain, and Disney needed no authorization to record or distribute it in this country. Permission was required, however, for distribution in countries where Stravinsky had copyright protection. In 1939, Disney acquired from Stravinsky the rights to use the work in the motion picture *Fantasia* for $6,000. The agreement specified that Disney’s license to the work was limited to its use in the motion picture. For more than five decades Disney exhibited *Fantasia* under the 1939 license. The film was rereleased for theatrical distribution seven times. Neither Stravinsky nor
Boosey ever objected to any of the distributions.

In 1991, Disney first released Fantasia in video format. The video sold in foreign countries as well as in the United States and generated more than $360 million in gross revenue for Disney. Boosey & Hawkes, which acquired Stravinsky's copyright in 1947, filed its infringement claim in 1993, contending that the license did not authorize distribution in video format. The district court found that while the broad language of the license gave Disney the right to record the work on video and laser disc, it did not cover the distribution of a video format. However, while the district court declared Disney an infringer, it denied Boosey relief and dismissed the case on the ground that its claims involved the application of foreign law. The court directed that the claim should be tried in each of the nations whose copyright laws were invoked. Then the Second Circuit vacated the dismissal of the foreign copyright claims and remanded the case for trial in New York on the ground that although the infringement took place elsewhere, New York was the the proper venue as the subject contract was substantially negotiated and signed in New York and was governed by New York law.

As these decisions show, the general premise of application of the law of the infringing country does not always apply. Other circumstances affecting initiation of the infringement may come into play and need to be taken into consideration in determining the venue for foreign infringement suits.

Globalization of trade and commerce has led to a strong impetus to remove the barriers created by the disharmony of national laws with the international agreements, and countries found not in compliance are facing financial penalties. In June 2000, a panel of the Dispute Settlement Body of the World Trade Organization (WTO) issued its first opinion, alleging a violation by the United States of the copyright provisions contained in the TRIPS Agreement. Although international copyright agreements have existed for more than a century, no dispute regarding member state compliance had ever before been submitted to a formal dispute settlement process, much less one supported by effective enforcement mechanisms. Yet, after the adoption by the DSB of the panel's report finding that a recent amendment of the U.S. Copyright Act (a music licensing exemption to a songwriter's right of public performance) violates this country's obligations under the TRIPS Agreement, the United States is obliged to amend its copyright law or face damages or trade sanctions for its violation of TRIPS.

A major treaty over which debate has raged is the draft Hague Convention on
Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. This treaty is intended to harmonize jurisdictional rules governing cross-border commercial litigation between private parties, including copyright disputes, by allowing enforcement of judgments obtained in one country in another. Powerful opposition has developed. If the convention is ratified, U.S. courts could be obliged to enforce foreign judgments even against people and companies whose actions were entirely legal in the United States. In addition, there are strong fears that the convention as drafted presents a serious threat to the integrity of the Internet. Public rights to privately held copyrighted material would be potentially subject to the laws of the country with the weakest levels of protection. On the other hand, support for the convention is found among the software companies and the recording and motion picture industries, for whom the treaty extends their ability to battle software, film, and music copiers.

Tremendous advances in international copyright agreements have been made, but it does not seem that a comprehensive international agreement is anywhere on the horizon. Despite numerous treaties and conventions, intellectual property laws continue to be applied by nations in local courts. Copyright issues continue to be a matter of culture.

6 Id.
7 Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F. 3d 82 (2d Cir. 1998).
8 Subafilms, Ltd. v. MGM-Pathé Communications Co., 24 F. 3d 1088 (9th Cir. 1994) (en banc), cert. denied, 513 U.S. 1001 (1994).
9 Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc. 964 F. 2d 965 (9th Cir. 1992), cert. denied, 113 S. Ct. 1582 (1993).
10 Los Angeles News Serv. v. Reuters Television Int’l, 149 F. 3d 987 (9th Cir. 1998).
THOSE WHO WORK IN THE ENTERTAINMENT INDUSTRY will tell you that this is a time of unprecedented ferment. From FCC indecency crackdowns to the explosive growth of file sharing, from the studio floor to the executive suite, new challenges are arising daily. The entertainment transactional lawyer is at the nexus of many of those changes, struggling to adapt business models to the new realities of the television marketplace. A few developments in particular present the greatest challenges to lawyers working in television.

One is increased competition for the entertainment consumer’s time and dollar: the explosion of cable channels, the maturation of video games, the charms of the Internet, and the increased ability of foreign producers to satisfy their markets. New technologies such as the DVR (or digital video recorder, such as TiVo) promise to challenge current economic models, while other technologies that facilitate piracy threaten them. In addition, consolidation and vertical integration have virtually wiped out the independent television producer and enabled six companies to control creative production from development to broadcast. For the entertainment attorney, this can be good, bad, or both, depending on the circumstances. It is important for entertainment lawyers to stay ahead of these changes so that they can counsel clients effectively.
Lawyers representing talent need to be sure that all possible revenues are included in gross receipts, preferably in a pot from which unrelated production and distribution costs are not recouped. The major entertainment companies have the ability to market entertainment properties across media and platforms. The creators of those properties will make every effort to receive from the companies what they perceive as a fair share of the benefits that the companies realize across the full spectrum of exploitation. Studios customarily are willing to recognize merchandising revenues in gross receipts; disputes can arise as the attorneys for talent push to expand the definition of merchandising to include new means of exploitation such as video games. Talent with sufficient motion value from a tie-in. As entertainment lawyers seek out new sources of compensation for their clients from vertically integrated companies, cross-promotion is an area in which negotiating pressure can be brought to bear. Similarly, for theme park exploitation of a property, it is difficult to monetize the value that a single attraction brings to the park owner without a separate admission charge. For example, it is possible to negotiate a formula based upon a percentage of the gate using a particular attraction’s “penetration rate” (i.e., what proportion of theme park guests visited it), but from the studio standpoint, this approach overlooks the question whether and to what degree the attraction influenced the guest’s decision to visit the park in the first place. The simplest solution is to negotiate for a one-time payment. Regardless of the outcome in a particular case, these are questions that are likely to arise when deals are negotiated regarding what are known as tent pole movies.

One intriguing argument pertains specifically to scripted theme park shows. It has been argued successfully that such shows trigger sequel royalties. The Writers Guild of America, west (WGA) commenced an arbitration in 1996 against Universal, asserting this claim on behalf of the writers of the motion picture Waterworld. Universal had produced a theme park stunt show based on the movie. This was a case of first impression, and the arbitrator relied on various sources having nothing to do with a theme park show to conclude that a theme park show based on a motion picture can constitute a sequel under the WGA agreement, triggering a payment to the credited writer. The case settled before the damages hearing and so is not a useful precedent on the question most important to the transactional attorney—money.

Another issue arises from cable repurposing, in which a show that airs on a broadcast network will be run a few days later on a cable network. For example, when NBC was airing The Last Comic Standing, Comedy Central aired the show within a week of its debut; when ABC aired Karen Sisco, USA aired the show 9 days later; NBC’s Crossing Jordan was repurposed by A&E; and WB’s Charmed was repurposed by TNT, to name a few. The entertainment lawyer should anticipate such uses and address the issue whether there should be additional payments and when they are due. Reverse repurposing has also occurred. For example, the series Monk originated on USA and was rebroadcast on ABC. A new residuals agreement was negotiated to cover this arrangement.

Despite the decreased number of competitors, the competitive pressure on traditional network television has increased. Foremost among the reasons is the proliferation of cable channels. Thirty years ago, the broadcast networks commanded about 93 percent of the prime time television market. Today, the networks’ share of prime time viewing is only about 60 percent, with no one network having more than 20 percent. In a sign of the changing times, during the November 2004 ratings sweeps, for the first time ever total cable viewing exceeded that of the broadcast networks. Other, newer home entertainment media are also battling for consumer attention. In 2004, a dramatic decline in prime time television viewing by young men occurred, attributed at the time to video game viewing. Internet use is also luring eyeballs away from television viewing. International competitive factors also affect television deal-making. Foreign markets have become more selective and are consequently a less reliable source of revenue for American producers. Foreign competition has had an effect on the supply side as well. Like many other labor-intensive industries, much television production has moved outside the United States to locations where costs are lower. The natural cost advantage of many of these countries is exacerbated by government subsidies, many of which require the engagement of native writers, directors, and performers.

This competitive climate affects the entertainment client in a number of ways. Foremost, less money is going to talent. On the broadcast side, fewer rich deals await producers and writers. To cut back on escalating development costs, the networks are ordering fewer pilots. When a series reaches the airwaves, there is intense pressure to succeed quickly. Initial orders are frequently less than the traditional 13 episodes, and networks are quicker to pull the plug when ratings are borderline. Networks are demanding to amortize costs by obtaining rights to take a greater number of network exhibitions of a program, plus repurposed cable exhibition, without payment of an additional license fee.

Cable offers many opportunities for work—but for substantially less compensation—than broadcast. The number of viewers of even a successful cable show are less than the broadcast equivalent, so fees are correspondingly lower. For unionized writers, directors, and performers, this disadvantage is echoed in the fees and residuals under the applicable guild agreements. Cable industry practices differ from those of the broadcast networks, so a lawyer familiar with the latter needs to be alert. For example, most cable networks run multiple services (e.g., HBO, HBO2, and HBO Family). Every effort should be made to address whether a show can be exhibited over more than one channel without additional compensation. Exclusivity can also be a contentious issue in a cable negotiation. With lower fees and more attenuated option periods than broadcast, clients will need to preserve their opportunities to accept other work.

The networks have adapted in other ways as well. In order to retain viewers, new programs are developed and launched virtually year round. While this expands the overall opportunities available to talent, much of this off-season programming in recent years has been of reality series—because of their novelty, low cost, and the speed with which they can be brought to the air. This trend is good news, of course, to creators and producers working in this genre, but it is less helpful to writers, directors, and performers whose backgrounds are in scripted programs. For the lawyer, it means developing a broader client base and learning different sets of deal parameters. Budgets of reality shows are generally lower than for scripted shows (although reality budgets are creeping up), and so the fee scales for producers are lower. Orders are usually shorter—six or eight episodes rather than thirteen—but it is more common to see multiple cycles produced during a single year, so a lawyer must pay particular attention to option patterns and the timing of fee increases.

Attorneys also will find themselves making nonunion deals more often. It is still true for broadcast and cable scripted programs
that writers, directors, performers, and most producers are engaged subject to a guild agreement, but production companies have resisted strenuously the expansion of guild jurisdiction into nonfiction, reality, animation, game, and comedy-variety programs. The performers’ unions have been more successful than the others in organizing these programs. The lawyer negotiating a deal for one of these programs must negotiate specific benefits that would be automatic under a union deal, such as credits, reuse fees, and working conditions.

Runaway production presents its own distinct set of challenges. Competition from lower cost production in other locales exerts constant price pressure on California talent, particularly middle-tier elements who are seen as more replaceable. The tax incentive programs in many jurisdictions also impose limits on the engagement of individuals from other places, thus limiting opportunity. Clients also are forced to weigh the disadvantages of extended absences from home against the importance of a particular job. For talent with enough leverage, this can be a specific negotiating point, as when David Duchovny was able to require The X-Files to move to Los Angeles after several seasons in Vancouver.

Just as the feature film business was reshaped forever by television and home video, so will newer entertainment technologies provide audiences with the ability to skip commercials entirely, which renders ads virtually meaningless. The industry is developing a number of strategies to anticipate this potential sea change in its economic model. One that is commonly discussed is product placement integration, in which commercial messages of various kinds are made an intrinsic part of programs. This can be by simple product placement, in which the advertiser’s wares are used by the characters, or more sophisticated applications such as in The Apprentice, in which the contestants are assigned to fulfill tasks on behalf of particular consumer products companies. Another approach gaining currency is sponsored programming, reminiscent of the early days of television, in which advertisers pay substantially all the production costs of a program and control the commercial inventory.

At least in this early stage of its evolution, product integration faces both creative and economic hurdles. On the creative side, there is a consensus among producers and advertisers that product placement is only really effective as advertising if it is organic to the program. Generally, this has limited product integration to reality programs, which lend themselves more to it. The challenge on the business side is in valuation. Buyers and sellers understand the market in 30-second spots and are comfortable setting prices based on cost per thousand viewers as determined by ratings. The value of an impression from product integration, on the other hand, is measured not only by the gross number of viewers of a program but also by the context in which the product is used. To date, there is still no set pricing or valuation standard to guide advertisers and content providers when making product placement deals.

Product integration strategies also affect the way production companies license programs to networks. Under the current model, sponsor and the network, or the sponsor may simply buy the entire inventory. Considerations such as these require that the network be brought into negotiations between the production company and advertiser and add many new wrinkles to what used to be much simpler negotiations.

DVR technology itself offers a basis for other adaptive strategies. TiVo has announced that it is developing a technology that will send advertisements to viewers’ screens while they fast forward through commercials. Another strategy is to make commercials themselves more compelling to watch. The interactive features of DVRs provide very detailed information regarding the user’s viewing habits. These can be used to send highly tailored commercial messages customized for that viewer.

These developments are just the beginning of technological change. Convergence, the holy grail of the dotcom boom, is progressing inevitably, if not as speedily as predicted in those heady days. TiVo will be rolling out TiVo to Go in its next generation of set top boxes. This new device will permit users to download recorded programs to computers or other devices, freeing the viewer from the television screen. Hewlett-Packard, meanwhile, announced that it will produce a multimedia hub that will control network all the electronic gizmos in the home. Wireless is another frontier, as content providers jockey to deliver everything...
Weiland, Golden, Smiley, Wang Ekvall & Strok, LLP, formerly Albert, Weiland & Golden, LLP, congratulates its founding partner, Theodor C. Albert, on his pending appointment as United States Bankruptcy Judge, Central District of California, Los Angeles Division.

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from sports scores to ring tones to video clips to users’ cell phones. All this content must be produced, financed, licensed, and marketed—transactions to which entertainment lawyers are no strangers.

Video games are also making their impact felt in the world of television. Games are an important source for new creative properties and, conversely, a potential source of ancillary revenue for the television producer. (For example, Wheel of Fortune, Jeopardy, Hollywood Squares, Star Trek, Alias, and American Idol are all video games.) There is also potential for intriguing rights issues as gaming technology develops and becomes more mixed with television and film.

For example, synthesized performances have already gained some attention. There will come a time when the voice and likeness of well-known performers can be recreated digitally. What rights of the performer will be implicated? This is a step beyond the digital integration of old clips into a new work. In this scenario, the voice and likeness of a celebrity can be created for an entirely original “performance” without any actual present or past involvement of the celebrity. If the performance is created for a sequel, can the studio claim unencumbered rights based upon its ownership of the underlying character and the original performance? These questions may be hypotheticals now but they will become real soon enough. The lawyer representing performers will do well to keep these possibilities in mind when negotiating contractual provisions pertaining to the use of a client’s name and likeness.

Interested parties are arrayed on all sides of these emerging technological, economic, and political issues. All members of the entertainment industry are aligned against piracy. Digital content is by nature relatively easy to copy and distribute. As a result, the MPAA estimates annual piracy losses to the U.S. entertainment industry to be $3.5 billion. The motion picture industry began as a model of vertically integrated business. On the production side, talent was locked to long-term contracts and employed on a virtual production-line basis. On the exhibition side, the studios owned their own theaters as a guaranteed outlet for their products, whether they were good and bad. This was brought to an end by the Paramount consent decrees, which forced the studios to divest their theaters and prohibited certain other anticompetitive practices. (Chief among these was block booking, in which the studios required independent exhibitors to book a package of B movies in order to be able to show major A releases.)

In television, the financial interest and syndication rules (or Fin-Syn) accomplished a similar result. Adopted by the FCC in 1970, these rules sought to limit the potential monopoly power of ABC, NBC, and CBS by forbidding them from acquiring a financial interest in independently produced programs, from owning rights to distribute programs in syndication after their network runs, and from competing in the syndication market.

As the television industry (and attitudes toward governmental regulation) evolved, the FCC came under increasing pressure to repeal these rules. The networks argued that their prime time monopoly was superseded by the growth of cable channels, and so production companies no longer required regulatory protection. Another significant source of pressure came from Fox as it moved from production into broadcasting. As Fox Broadcasting added hours to its schedule, it approached the point at which it would be defined as a network under FCC rules and thus required to comply with Fin-Syn. This would have required the Fox network, on one hand, and its production and syndication companies, on the other, to be separately owned. Rather than simply seek an FCC waiver for itself, Fox argued that the rules should be reopened for all broadcasters, because the rules were actually stifling competition by preventing the strongest players—the studios—from entering the broadcast market. The FCC accepted these arguments in 1995 when it repealed the Fin-Syn rules.

The result was a frenzy of consolidation, as broadcast and cable networks, studios, cable system operators, and satellite distributors...
were brought together under common ownership. For the lawyer representing talent, this new reality has changed the ground rules for the negotiation of deals. The domination of the market by fewer, larger companies exerts downward pressure on fees, royalties, and other fixed payments. In backend compensation, however, vertical integration has caused a virtual paradigm shift. When talent negotiates for net profits or other compensation that is based upon the revenues of a program, there is an expectation that the program owner has an interest in maximizing those revenues. This expectation is called into question when the program owner licenses the show to networks owned by its corporate parent. For example, in August 1999, David Duchovny sued Fox Entertainment Group alleging that he was shortchanged millions of dollars because the studio sold reruns of *The X-Files* at bargain prices to Fox’s sister cable company, FX. The case was settled prior to commencement of trial. Similarly, Alan Alda sued Fox for 1) selling reruns of *M*A*S*H* to the FX cable network without actively seeking competitive offers from other cable networks with far more subscribers and 2) significantly discounting license fees to its broadcasters in order to obtain nonexclusive licenses to facilitate the arrangement with FX. Alda’s complaint also alleged that Fox did this so that revenues would remain within the Fox empire in the form of cost savings and increased profits to the Fox broadcasting entities. This case also settled before trial. Although the studios will typically agree to promise that licenses to related companies will be on terms comparable to those of third party, arm’s length deals, one may understandably be skeptical of the vigor with which purely internal negotiations are conducted, and there are fewer and fewer truly arm’s length deals to serve for comparison. As a result, lawyers have developed new strategies in negotiations for backend compensation. One approach is to sidestep these questions by negotiating imputed payments that escalate based on the longevity of a program.

The broadcast network deal has served for years as the paradigm for the transactional entertainment lawyer who works in television. A lawyer’s mastery of this paradigm, however, will no longer suffice. As network opportunities shrink, clients will need to find work in other markets, especially cable but also increasingly in new media such as video games, the Internet, and wireless content. The last several years have also seen the beginning of a lasting change in the network model.

Entertainment attorneys can read trade publications and attend CLE programs, but
there is still no substitute for face-to-face communication. A television lawyer, for example, should never miss an opportunity to establish relationships with lawyers and businesspeople who operate in other media and draw on their knowledge when faced with a novel business problem.

Entertainment lawyers can consider themselves lucky in many ways. They service an industry with a bedrock domestic market that is largely immune from foreign competition. Entertainment is one of the leading export industries of the United States and will likely remain so for years to come. The service that entertainment lawyers provide is necessary and difficult to outsource. For the attorney who can stay ahead of the curve, the twenty-first century will offer continued opportunities.

1 Traditional sources of backend revenue include theatrical revenue, television license fees, home video revenues, music publishing, book publishing, and merchandising. Nontraditional sources of backend revenue include video games, Internet exploitation, video-on-demand products, product placements, and theme park revenues.
2 Tie-ins are promotional relationships between an entertainment property and a commercial product. Examples include Lego's link with Star Wars and Winnie the Pooh, Celine Dion's 2003 promotion of her One Heart album by appearances and television commercials, Kodak's advertising theme in the 1992 Olympics, and the relationship between McDonald's Happy Meals and Disney.
3 The guild agreements for writers, directors, and performers provide for residual payments for these uses, but producers and other nonunion talent have to negotiate separately for repurposing.
4 See http://www.leaderu.com/humanities/poortv.html.
8 See, e.g., Elizabeth Guider, Despite Slump, Buyers Go for Drama, VARIETY, May 27-June 2, 2002, at 18.
9 Canada has coproduction treaties with 54 countries that enable Canadian and foreign producers to coproduce projects qualifying for government subsidies and tax incentives in the home territories of partners involved. Tamson Tilson, Sharing the Wealth, VARIETY, Apr. 3-9, 2000, at 155.
10 100 Get In on the Act, TELEVISION, Sept. 6, 2004, at 41.
entertainment/main537964.shtml.
13 Brian Lowry, Special Ty: Budget Ratings; Nets Call on Producers to Deliver Numbers—On a Shoestring, DAILY VARIETY, Mar. 26, 1996. Comparable pressure
Most producers on scripted programs are also writers subject to the WGA Agreement.


Other examples include product placement in plot points, by actor’s contact, mentioning, and in the background and foreground of settings, which are reflected in movies such as *Terminator 3: The Matrix*, and in television programs such as *Extreme Makeover: Home Edition*.


Levi Buchanan, *Sony Plays Games with PST Launch; Release Date Delayed, Price Still a Mystery*, CHICAGO TRIBUNE, Jan. 9, 2005, at 15.


47 C.F.R. § 573.68.


See http://www.leaderu.com/humanities/pooradv.html. For example, when the Fin-Syn restrictions were adopted, the major Hollywood studios, all of which were independent of the broadcast networks, provided 39 percent of the network prime time schedules. Since then, each of the networks is under common ownership, with a major studio, and the percentage of prime time programming furnished by the majors has soared to 70 percent. Interestingly, this trend may be reversing to some extent, as evidenced by the recently proposed split of Viacom. See, e.g., Carol Hymowitz & Joe Flint, *Shari Redstone Waits in Wings to Head Viacom*, WALL ST. J., Mar. 21, 2005, at B1.


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Litwak begins with a broad overview of organizational options for production entities. The text mostly emphasizes California law, with selective references to differences in New York. Residents of other states are on their own, which may be Litwak’s not-so-subtle hint that working outside the mainstream is the quickest way to find oneself swimming upstream. There is specific information, including filing fees, but that information is incomplete—omitting, for instance, Section 206 of New York’s limited liability company law, which contains a six-week publication requirement for new or foreign LLCs that can cost more than $3,000. For state filing details, readers instead should rely on the Web sites noted in convenient insets.

Litwak also discusses collaboration, international coproductions, and production incentives, but only in broad strokes. This section is most notable for its list of Web links to domestic and international film commissions that provide additional information about coproduction incentives. A helpful appendix also summarizes production incentives offered by many U.S. states and foreign jurisdictions.

The text covers some basic strategies for raising production funds, such as presale agreements, gap financing, and equity investments. This section comes off dry and uninventive, perhaps because these sources of funding have become so scarce. Success stories these days tend to have found their own unique path, and strategies beyond the obvious may be difficult to conjure in the abstract. If Litwak has anecdotes that could trigger light bulbs for filmmakers seeking imaginative ways of parting dentists from their disposable income, he must be saving them for his lectures.

The most informative portion of the financing discussion, and potentially the most surprising to new filmmakers, concerns the state and federal regulations that may be triggered by solicitations for equity investment. Cobbling together funds from various contributors often is the only avenue for filmmakers lacking the track record required to obtain gap financing or presale commitments. The mere solicitation of an out-of-state stranger, however, could require time-consuming and expensive registration of a public offering or other filings.

As in his previous books, Litwak includes sample agreements. The samples should not serve as substitutes for legal counsel, but they are useful in educating readers about important issues and some common strategies for addressing these issues. The agreements appearing in Risky Business are probably of mixed value to Litwak’s intended audience. The Co-Production Agreement is too sophisticated for untrained eyes and could benefit from commentary. In contrast, a lengthy introduction of terms and intermittent commentary effectively demystify the Distribution Agreement that appears later.

Risky Business comes alive with the transition from financing to distribution. Once a project has overcome the hurdles of production, the obstacles to securing distribution can be just as daunting. Some readers may be surprised to learn that theatrical release, the object of every filmmaker’s affection, is largely a loss leader for the foreign and domestic video sales that generate the majority of a film’s revenue.

Daniel Meisel is a partner with Márquez Bond & Meisel, LLP in San Jose and a founder of Kapok Pictures, LLC.
Filmmakers may be further disheartened to learn that how an audience responds while watching a film may be less important than whether the audience recognizes the lead actors before the film is shown.

Recognizable talent, festival awards, and good reviews are the quickest tickets to distribution, but films lacking all the above are not out of options. The trick, as Litwak aptly poses it, is to make the distributors’ job easy by doing it for them—the filmmaker should convince distributors that the film is desirable by showing how the distributors will convince others of its desirability.

Litwak offers several strategies for enhancing desirability, including the placement of preproduction announcements in trade magazines and orchestrating a film’s release through film festivals, film markets, and private screenings. Other texts, such as Chris Gore’s The Ultimate Film Festival Survival Guide, are better sources for festival tactics and creative marketing, but Litwak, like any good lawyer, excels at pointing out common mistakes that can expose his client’s downside, such as prematurely disclosing the film’s budget, offering sneak previews, screening without a supportive audience, and failing to keep track of who has seen the film.

He also excels at identifying contractual details that can make a big difference to a filmmaker’s bottom line. The chapter on the distribution agreement itself is worth the purchase price. It includes a sample agreement with helpful explanations, neither of which were provided in the seminar that inspired this book. (Much of the book is otherwise repetitive of the materials from his seminar entitled Financing and Distributing Independent Features.) Litwak also offers some filmmaker-friendly provisions of his own design, including what he calls a 50/50 Guarantee, under which distributors of low-budget films lacking name actors apparently have agreed to delay reimbursement of their expenses and receipt of their distribution fee until at least 50 percent of gross revenues has been paid to the filmmaker in lieu of an advance.

New forms of Web-based broadcasts and video-on-demand that reduce the difficulty and expense of reaching consumers will certainly alter the economics of film distribution. Litwak mentions these changes but refrains from exploring strategies for dealing with them. Risky Business concerns itself with the current distribution model, which ultimately may curtail the book’s useful shelf life.

Information is indeed power, and Risky Business certainly furthers Litwak’s efforts to level the playing field for new entrants to the realm of independent film. How the players perform will depend upon their ability to hone the skills necessary to forge a consistent path from pitch to profits.
How Smart Is Your Wireless Phone?

**WHETHER YOU’RE** a litigator or a transactional attorney, keeping in touch with your clients and your office by cell phone is important. A plain cell phone, however, no longer seems to be enough. Instead, new cell phones that combine the functions of a cell phone with a PDA are de rigueur. In addition to making and receiving calls, they allow their users to take along a virtual phone book, read and answer e-mail, surf the Web, and take pictures. These features can soon become indispensable to the busy practitioner.

Lawyers should be aware however, that most courtrooms and government agencies that ban cameras extend those bans to cell phones with cameras. According to Rule 4.1 (c) of the Los Angeles Superior Court: “Camera-enabled devices and digital image capture devices, such as cell phones, PDAs or watches, may be brought into the courtroom, as long as the image capturing features are turned off and not used, unless the judge has expressly otherwise permitted by written order.”

A recent report by Jupiter Research indicates that people do want cell phones to have multiple capabilities but that the telephonic functions remain the most valued. The report indicates that 62 percent of users prefer to carry a single device that adds features beyond telephony even if those features lead to a larger-sized device or reduced battery life. Seemingly to oblige those users, manufacturers continue to add new functions to their phones. Seventy-four percent of users in the report, however, said that the telephone functions remain the most important feature on a mobile device. Whatever you want your phone to do, chances are that you can find one that will do it.

**The Treo 650**

Probably the best-known combination cell phone and PDA is the Treo 650. This unit combines just about all the features a busy attorney could want in a cellular phone with a full-featured Palm OS handheld computer. It boasts a color screen, a camera, and up to six hours of talk time on a user-replaceable battery. The Treo has a speakerphone and can operate on a variety of protocols and frequencies. (The Treo operates on GSM—or Global System for Mobile—the digital cellular transmission standard of Europe, much of the rest of the world, and some U.S. cell phone service providers. Also, the Treo operates on CDMA, or Code Division Multiple Access, a cellular transmission standard used in Canada, the United States, Australia, Hong Kong, and South Korea.)

As a handheld computer, the Treo is powered by an Intel 312 MHz processor and Palm’s operating system. The PDA functions include e-mail, Web surfing, word processing, contact management, and calendaring. It also includes Bluetooth to connect to peripherals, for example a headset. One complaint can be the device’s paltry 23 MB of user-accessible internal storage. To those who need more memory, the Treo offers an expansion slot. The GSM version of the Treo is available from Cingular for about $400 (after rebate) and the CDMA version is available from Sprint for $329 (after rebates).

Better known for its LCD computer monitors and projectors, BenQ offers a phone that looks nearly as smart as the Treo. The P50 is based on Microsoft’s Windows Mobile Operating System and boasts a hefty 64 MB of internal memory, Bluetooth, wireless Internet access capability, audio playback, an integrated QWERTY keyboard, a color screen, a camera, and video recording. Like the Treo, it functions on a range of standards and frequency bands, allowing it to work almost anywhere. In addition to the on-board memory, it features a memory card expansion slot and an Intel processor. With its abundant memory and built-in Wi-Fi, this device could offer serious competition to the Treo. Retail and cell phone service suppliers, however, have yet to offer the support the Treo already has.

The new LG VX8000 multimedia-capable cellular phone promises fast data transfer because it supports a new wireless broadband Evolution Data Only (EvDO) download standard. EvDo promises wireless data connections 10 times faster than standard 56k dial-up modem connections. LG has also packed numerous multimedia features into the phone, including the ability to receive streaming video and music, an MP3 player, and a 1.3 megapixel camera with 15 seconds of video recording capability. The camera’s CCD lens promises photos that will make good prints. Other features include dual color screens, a speaker phone, a phone book, voice dialing, and text and multimedia messaging. Despite the phone’s impressive list of functions, one lament is this phone’s lack of Bluetooth capability.

Audiovox turns cell phone design on its ear, or on its side. To give users a wider screen for navigating menus, viewing Web pages, and composing messages and e-mail, Audiovox has rotated the CDM-180’s main screen from the standard portrait (vertical) orientation to a landscape (horizontal) one. This phone features a built-in camera with a flash that doubles as light source when using the camera to shoot video. It also includes a speaker phone, voice dialing, text and multimedia messages, and a voice recorder. While lightweight and fairly slim, the phone is shorter and wider than average.

Whether you opt for a high-end smart phone or a device without all of the PDA functions, there is bound to be a device out there that can help you work smarter.

Carole Levitt and Mark Rosch are principals of Internet For Lawyers and coauthors of *The Lawyer’s Guide to Fact Finding on the Internet.*
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Los Angeles, CA 90008
(323) 291-5733

El Monte Health Center
2163 Durfee Rd.
El Monte, CA 91733
(626) 401-1515

Fontana Health Services
9880 Sierra Ave., Suite E
Fontana, CA 92335
(Sierra Plaza, Entrance on Marygold)
(909) 829-6300

San Fernando Health Center
500 S. Brand Blvd.
San Fernando, CA 91340
(818) 838-1158

Huntington Park Health Center
3033 E. Florence Ave.
Huntington Park, CA 90255
(323) 582-8401

Highland Park Health Center
5421 N. Figueroa St.
(Highland Park Plaza)
Highland Park, CA 90042
(323) 478-9771

Ontario Health Services
602 N. Euclid Ave., Suite B
Ontario, CA 91764
(909) 395-5598

 Pomona Health Center
1180 N. White Ave.
Pomona, CA 91768
(909) 623-0649

So. Central Health Center
4721 S. Broadway
Los Angeles, CA 90037
(323) 234-3100

Victory Health Center
6420 Van Nuys Blvd.
Van Nuys, CA 91401
(818) 988-8480

Whittier Health Services
13019 Bailey Ave. Suite F
Whittier CA 90601
(562) 698-2411

1-800-624-2866

*Medical facilities in Montebello only
CLE Preview

37th Annual Family Law Symposium
ON SATURDAY, MAY 7, the Family Law Section will present its 37th Annual Family Law Symposium, offering important updates presented by panels of judicial officers, leading family law practitioners, and CPAs. Judicial officers and experienced practitioners in the areas of family law, bankruptcy, estates, trusts, wills, and juvenile dependency will provide their insight in dealing with recurring issues affecting family law practice. For example, California has taken the bold step of expanding its domestic partnership law and granting to domestic partners almost every state-conferred right and responsibility of married spouses. A panel will address this issue and review the implementation of the law since January 1, 2005. Another discussion will focus on how to collect from a sophisticated debtor. In addition to lesser known subtleties of writs, liens, and garnishments, attendees will learn about setting aside fraudulent conveyances, obtaining charging and assignment orders, and levying on concealed assets. A third session will address the rules for valuing businesses. Finally, authorities in their fields will review the latest cases and statutes affecting family law and its related practice areas. The symposium will take place at the Sheraton Universal Hotel, 333 Universal Hollywood Drive in Universal City. The registration code number is 008907. On-site registration and the reception will begin at 8:00 A.M., with the program continuing from 8:30 A.M. to 4:30 P.M., with a lunch break at noon.

- $135—CLE+Plus members
- $235—Family Law Section members ($145 for materials)
- $285—all others ($175 for materials)
- $295—all at-the-door registrants

6 CLE hours, includes 6 hours in family law legal specialization

FOSTER CHILDREN’S ADOPTIONS PROJECT TRAINING
ON TUESDAY, MAY 24, the Barristers Section will sponsor a training session for attorneys who are interested in representing adoptive parents on a pro bono basis. Staff attorneys from the Alliance for Children’s Rights will offer guidance on how to finalize an adoption. Participants will receive instruction and a training manual that explains step-by-step how to 1) complete necessary legal documents to finalize the adoption, 2) obtain necessary documents from the Los Angeles County Department of Children and Family Services, 3) file the case at Children’s Court, 4) appear with the adoptive parents and the child at the adoption finalization hearing, and 5) advocate for the adoptive parents to make sure that they are receiving the appropriate amount of Adoption Assistance Program benefits. After the training, attorneys willing to make a time commitment of approximately 10 to 15 hours will be given an opportunity to take cases referred to the Alliance from DCFS. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. On-site registration and the meal will begin at 5:30 P.M., with the program continuing from 6 to 7:30 P.M. The registration code number is 08945. Those who want to attend this session may do so for free ($15 meal not included).

- 1.5 CLE hours

Why Can’t We Be Friends?
ON TUESDAY, MAY 10, the Labor and Employment Law Section will host a symposium on Lyle v. Warner Brothers regarding sexual harassment in the writers’ room. The California Supreme Court is considering the case dealing with the boundaries between free speech and sexual harassment. Nancy Bornn, Adam Levin, and Michael A. Robbins will discuss the case and its implications, which include sexual harassment in the entertainment industry generally, where free speech ends and harassment begins, when being crude and vulgar may be job-related, and individual liability for doing one’s job or going overboard. This event will take place at the Fairmont Miramar Hotel, 101 Wilshire Boulevard in Santa Monica. On-site registration will begin at 6 P.M. and the reception at 6:30, with the program continuing from 7 to 8 P.M. The registration code number is 008983. CLE+Plus members may attend for free ($45 meal not included). The prices below include the meal.

- $70—Labor and Employment Law Section members
- $80—other LACBA members
- $90—all others

1 CLE hour

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/.

For a full listing of this month’s Association programs, please consult the County Bar Update.
The Need to Rethink the Fin-Syn Reforms

THIS COMING NOVEMBER, the major television broadcast networks will celebrate a decade of deregulation from the judicial and regulatory restraints previously imposed by the Financial Interest and Syndication Rules on their dealings with program suppliers. But will American viewers or the creative community equally celebrate the last 10 years? Has network prime time programming improved, as the networks and their suppliers predicted? Has it become of higher quality or more diverse, as the networks claimed throughout the period that resulted in the deregulatory judicial and political change?

The strident and Ironically activist decision of the Seventh Circuit in Schurz Communications, Inc. v. FCC,1 the change in FCC composition leading to its 1993 Order and Report,2 and the agreement between the Justice Department and networks to eliminate constraints imposed by consent decrees against the three networks3 resulted in total freedom on the networks’ part to negotiate—or demand—supplier deals on any terms they desired. These terms include grabs for longer license terms and increased ownership or distribution rights—even as the networks put the brakes on funding the more expensive drama series and sitcoms.

The deregulation also led to a spate of mergers (Disney-ABC, Viacom-CBS, NBC-Universal), as a result of which each major network today is a sister company to a studio that was formerly an independent supplier of programming. In the prime time schedules announced for 2004-05, ownership of programs by the networks or affiliated entities escalated to approximately 85 percent of the available shelf space. The number of independent suppliers of scripted programming—one important measure of source and program diversity—has decreased from more than 25 companies in the 1980s to less than a handful today. And, as accurately reported in a recent trade magazine, one network devoted about 40 percent of its sweeps schedule to reruns of its franchise shows but only three hours of its schedule to scripted programming created elsewhere. Diverse?

To foster new investment in the prime time network business, we must support a new proposal that will allow those who want to invest capital to gain access to the airwaves. Unlike the original Fin-Syn rules established 35 years ago, this new proposal is not an all-or-nothing proposition. Proponents seek only to have a minimum of 25 percent of available shelf space reserved for independently produced programming under noncoercive conditions. The balance of the schedule would remain under network control, and each of them would continue to enjoy 100 percent of the advertising-generated revenues from its entire prime time schedule. This content neutral regulatory remedy, which the FCC should adopt (and which I hope concerned interest groups on all sides of the political spectrum will support), would work as follows:

1) A “major network” is defined as an over-the-air network with 95 percent or more national coverage and greater than a 4.0 household rating. Programs emanating from any major network or their affiliates would not qualify for the carve-out. Only an entity unaffiliated with a major network would qualify as an independent producer.

2) Not only must the project be produced by an independent producer but the program itself must also be “qualified.” To qualify the license period for a series could not exceed six full seasons (plus a half season in the event of a winter start). In addition, a major network could not have more than a 33 percent financial interest in the program nor have any postterm distribution rights in any qualified program.

3) Independent producer programming will be computed on a semi-

annual basis, after a reasonable transition period. Exhibitions of motion pictures initially released theatrically and then aired on the network are excluded from the computation.

If these rules are adopted (whether by Congress as amendments to the 1996 Telecom Act, or by the FCC as a result of court decisions forcing it to reexamine its “deregulation at all costs” approach), the independent producer community would have the opportunity to produce, on reasonable terms, an average of five hours per week on each of ABC, CBS, and NBC and close to four hours on the Fox Network. In fact, based on their published, regular schedules, Fox and NBC would qualify under these rules for the current semiannual period.

This level of shelf space set aside for new and existing independent producer entities should be sufficient to encourage investment in improved quality programming for companies that are oriented toward quality and willing to accept high risk-reward ratios rather than focused on immediate cash flow or short-term earnings. The public would benefit by knowing which programs were developed by outside sources, and of even greater importance, those sources of diverse programming would directly advance the political, congressional, and regulatory goals of promoting competition and diversity in what is now the network-dominated prime time programming marketplace.

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1 Schurz Communications, Inc. v. FCC, 982 F. 2d 1043 (7th Cir. 1992).

Kenneth Ziffren is a cofounder and partner of Ziffren, Brittenham, Branca, Fischer, Gilbert-Lurie, Stifelman & Cook LLP. He is also an adjunct professor at UCLA School of Law.
Whittier Law School

is pleased to announce its

Thirty-Seventh Commencement

Sunday, May 22 at 2:00 p.m.

Long Beach Terrace Theater

The Law School will award 239 Juris Doctor degrees.

LL.M. degrees in U.S. Legal Skills will be awarded to seven students representing Cameroon, Costa Rica, France, Korea, Spain, Taiwan, and Yugoslavia.

John Van de Kamp, President of the State Bar of California, will give the Commencement Address.

Honorary degrees will be presented to:

John Van de Kamp, President of the State Bar of California

Paul Kiesel, Raymond Boucher, and William Larson, Partners of the law firm, Kiesel Boucher Larson LLP

The Honorable Nho Trong Nguyen, Judge, California Superior Court, Orange County, West Justice Center

Judith Swayne, Community Leader

Professor John Heilman will receive the Teacher of the Year Award.
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