GAME OVER
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Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

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very year, the editors of Los Angeles Lawyer’s annual Entertainment Law issue survey the movers and shakers of show business in search of something to discuss in this column that reflects on the changing state of the industry. This year, we found an industry moving and shaking at a pace not seen since the day Gutenberg first attempted to move (and shake) type. Almost daily announcements of new technologies and the nascent business models they spawn have kept the legal community abuzz with talk of iVods, downloads, podcasts, mobisodes, and direct beaming of episodes of The Simpsons into our cerebral cortex (not due until early next year).

Over the past year we have officially gone from a “push” environment in which we are forced to choose our entertainment from among a handful of broadcast channels, theater venues, and audio inventory supply points (once called “record stores”) to a “pull” model that not only expands the shelf space of our programming choices to “virtual” infinity, but routinely answers the question, “What’s on tonight?” with “Everything.” Digital video recorders like TiVo have rendered program schedules irrelevant, services like “HBO On Demand” are making the concept of a “televised run” meaningless, and “day and date DVDs” designed to accompany feature film releases promise to devalue the theater-going experience faster than you can say “Orville Redenbacher.”

Equally seismic have been the movements in the “where” of viewing and listening. Video screens are getting larger and larger almost as rapidly as they’re getting smaller and smaller. The sheer portability of video entertainment has caused a mad rush to make the deals that fill the palms of our hands and empty the $1.99 holes in our wallets. But a million hours of television and a hundred years of movies are not enough content for our insatiable media lust. We must have new “made-for” shows that capitalize on the grandeur of handheld devices. Programs that go by the cobbled-together names of “webisodes,” “netisodes,” “soapisodes,” and “microseries” are themselves being cobbled together by producers—many of whom are called producers simply to avoid guild contracts that would require them to be called (and paid as) writers, directors, and even cobblers. It’s all part of the effort to get entertainment consumers to use their phones to play games, listen to music, watch films, download episodic TV series, and (only when absolutely necessary) make phone calls.

Throw a rock in Hollywood and you’ll hit a media giant. And hurling stones seems to be what the newly reactivated guilds in this town have in mind, casting themselves as Davids to the corporate Goliaths in a battle of biblical proportions. But these media empires are also being both wooed and assaulted by the equally ominous Silicon Valley of the Giants with which they must cooperate, collaborate, colicense, and even collude to compete. Aside from full employment for lawyers, these cobrandings of cable, telecom, satellite, software, and Internet outlets have made for even bigger, badder behemoths. Advertisers are forming strange bedfellows with these conglomerates to allow them to build commercials right into programming so that techno-savvy viewers can’t speed through the 30-second spot. Expect more rocks from writers and actors to go with these new roles.

These developments have all taken root since the last Entertainment Law issue. What will happen between now and the next one? Who knows, but fear not—we’ll just beam it into your cerebral cortex.

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**Authorship Issues in Entertainment Contracts**

**MOST ENTERTAINMENT COMPANIES** operate through agreements, whether formal or informal. A clearly written contract makes the rights and duties of the parties easier to understand and enforce and avoids struggles about the facts of the agreement. Some creative types, however, rely on a handshake and are loath to engage in written contracts. Even more troubling is their reluctance to seek legal counsel prior to sealing a deal. After seemingly casual conversations between writers and producers at parties or over lunch regarding story ideas and concepts, many creative people get into difficulties.

In the absence of a written agreement, courts may recognize the existence of an implied contract. As one court has observed, “Whether or not an implied contract has been created is determined by the acts and conduct of the parties and all the surrounding circumstances involved and is a question of fact.”

Protection of the ideas and concepts pitched may be sought under contract theories and in equitable doctrines of unjust enrichment (in which a duty to pay compensation is imposed when a benefit has been conferred with a reasonable basis of compensation) and quantum meruit (in which an implied promise to pay the reasonable worth of services performed is found). If a writer took some action in reliance on the existence of an agreement, and the producer was aware of the writer’s reliance, an agreement may be inferred.

If the pitch goes beyond the conversation stage and involves a writing, even in the form of a short treatment or synopsis, but no offer is made by the producer, an eventual production by the producer’s company that resembles the writer’s concept may be challenged.

When a producer offers to buy the property, the terms offered will be influenced by a number of factors, including the size of the company, the budget available, and the stature of the writer. Independent film production has created its own style of negotiations and contract terms. A small budget film may only promise screen credit to the writer, with a promise of future earnings if the film gets distribution and makes a profit.

Contracts that are exploitative and not based on legitimate business factors may be challenged as contracts of adhesion. A producer accused of offering a contract of adhesion may be able to justify the offer as reasonable and consistent with small productions and industry practices, and that the contract terms are necessary for the production company to survive.

Entertainment projects are generally collaborative endeavors with separate contributions merging into a unified whole. Writers put their properties in the hands of directors, designers, and actors, among others. Confusion and conflicts arise as to copyright ownership and entitlement to credit and compensation. Under U.S. copyright law, a joint work results from the merging of contributions when the “authors” intend such a result. If a writer does not consider his or her work to be a shared creation, a claim of joint authorship may be defeated. At the same time, the standard practice is to engage creative participants on a work-made-for-hire basis, whether on an employment or specially commissioned basis rendering the employer the author and copyright owner. Credit, compensation, and other benefits are then contractually negotiated.

The traditional deal to acquire a writer’s property necessitates that the writer transfer and assign all rights under copyright, but negotiations may result in the writer’s retaining certain rights (for example, the right to dramatize for the stage). Writers who are shopping scripts are well advised to register their properties with the U.S. Copyright Office and not solely with the Writers Guild. The benefits of registration, including statutory damages under 17 U.S.C. Section 504 and attorney’s fees under 17 U.S.C. Section 505, are not minor considerations in the event of a copyright dispute.

The Copyright Act also provides that a valid transfer of copyright requires a writing. The interpretations of “a writing” have given rise to numerous legal skirmishes. As one court has noted, “The writing in question ‘doesn’t have to be the Magna Carta; a one-line pro forma statement will do.’”

Creative clients should be encouraged to seek written agreements at the start of a creative endeavor before the deadlines are tight and memories clash. Memorializing intentions and expectations in writing will go a long way in preventing disputes, strained budgets, and spoiled relationships.

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2 Desny v. Wilder, 46 Cal. 2d 715 (1956).
3 Id. at 722.
5 Childress v. Taylor, 945 F. 2d 500, 507 (2d Cir. 1991).
7 Lyrick Studios, Inc. v. Big Idea Prods., Inc. 420 F. 3d 388 (5th Cir. 2005) (citing Effects Assocs., Inc. v. Cohen, 908 F. 2d 555, 557 (9th Cir. 1990)). See also Radio Television Espanola S.A. v. New World Emm’t, Ltd., 183 F. 3d 922, 927 (9th Cir. 1999); Graham v. Scissor-Tail, 28 Cal. 3d 807 (1981); Civ. Code §1670.5.

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IN FEDERICO FELLINI’S 1959 film, La Dolce Vita, one of the characters is a freelance news photographer who confronts his subjects in public to create memorable—and lucrative—images. The character is named Paparazzo—Italian for “a kind of annoying insect.” Although a minor character in the film, his name (and its plural) has been adopted to denote photographers whose particular interest is to capture pictures of celebrities at their most vulnerable, in the throes of scandal and personal crisis. Paparazzi know that photos of the wedding are good, and photos of the divorce are better, but the best photos are of the peccadilloes that actually broke up the marriage.

Today’s paparazzi are, in large part, far more dangerous than Fellini ever could have imagined. What may once have been merely annoying has now often become a significant threat to the physical safety of celebrity targets and their families. In the wake of several widely reported perilous encounters between celebrities and paparazzi, the California Legislature has amended a statute so that, effective January 1, 2006, paparazzi face an increased risk of enhanced penalties for their unlawful actions.

With the value of candid celebrity photos climbing to more than $100,000, and with a greater number of paparazzi in search of the next big “money shot,” the competition for those six-figure photos has become increasingly fierce. Indeed, an alarming number of photographers appear ready, willing, and able to resort to highly aggressive means to be the first to locate, pursue, and corner their celebrity prey, including tailgating celebrities at speeds in excess of 100 miles per hour, intentionally ramming vehicles in which celebrities are traveling, and physically assaulting celebrities and their companions traveling on foot.

Photographer Todd Wallace epitomizes a growing breed of paparazzi with seemingly little or no regard for the safety and security of the celebrities they photograph. In September 2005, Wallace was arrested and charged with battery and child endangerment after he allegedly accosted recent Academy Award winner Reese Witherspoon, her children, and some close friends during a visit to Disney’s California Adventure theme park. When Witherspoon refused to pose for him, Wallace allegedly hit one of the children with his camera and battered the child’s mother (a friend of Witherspoon’s), along with two theme park employees. The incident left some of the children in tears. The following month, Wallace was ordered to stay at least 300 yards from Witherspoon as a result of his conduct at the theme park. Arrest warrants were issued after Wallace missed a December 2005 bail hearing in the Witherspoon case, as well as an arraignment on a separate felony petty theft charge.

Unfortunately for Hollywood celebrities, this is by no means an isolated incident. Actress Scarlett Johansson, for example, side-swiped a car in 2005 while fleeing paparazzi who had pursued her for over an hour. Months earlier, actress Lindsay Lohan was chased in her car by a swarm of paparazzi and wound up on a dead-end street. When she attempted to make a U-turn, paparazzo Galo Ramirez smashed his minivan into her vehicle, causing Lohan to suffer multiple cuts and bruises. The incident was photographed by other members of the pursuing paparazzi and immediately found its way into the tabloids. Ramirez was subsequently arrested for assault on suspicion that the collision was deliberate. The Los Angeles County District Attorney’s Office ultimately decided not to charge Ramirez, finding that there was insufficient evidence to prove that he intentionally rammed Lohan’s car.

Notwithstanding such incidents, historically it has been difficult to generate much public sympathy for a celebrity complaining of a loss of privacy. In light of the many benefits—fortune and otherwise—that accompany fame, to many celebrity watchers a loss of privacy seems a very small price to pay. It is perhaps this general lack of public outrage that has until recently left besieged celebrities without the protection of a statutory or even common law remedy to effectively thwart any but the most egregious offenders. And the remedies that were available carried only modest penalties that many paparazzi likely viewed as simply the cost of doing business. The minimal risk of a fine or restraining order was far outweighed by the potential for a massive payday. Consequently, these remedies did little to dissuade aggressive conduct by the paparazzi.

Ann Loeb is a partner, and Jonathan E. Stern is an associate, in the Entertainment and Media Department at Alschuler Grossman Stein & Kahan LLP.
There Are Many Stars In Entertainment...Some Shine Brighter Than Others

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A 1998 statute, Civil Code Section 1708.8, attempted to expand the liability of the paparazzi by creating a specific cause of action targeting individuals who commit a physical trespass or “constructive invasion of privacy” with the intent to capture a photograph or other image of a person engaged in a “personal or familial activity” and if the invasion occurs in a manner that is “offensive to a reasonable person.” Although that statute established enhanced penalties for this type of trespass or invasion of privacy—specifically, punitive damages, the disgorgement of proceeds, and employer or agency liability—it was entirely inapplicable to the most dangerous conduct of the paparazzi occurring on streets and freeways and in other public locales. Thus, while the 1998 version of Section 1708.8 may have discouraged some paparazzi from scaling the walls of celebrity homes or utilizing telephoto lenses to snap topless sunbathing photos from afar, it almost certainly had no deterrent effect on aggressive tactics in places where celebrities have no reasonable expectation of privacy (for example, at theme parks or in their cars).

The amendment to Section 1708.8—effective January 1, 2006—extends the enhanced penalties of the section to any assault committed by an individual with the intent to capture a photograph or other image of another person, without regard to whether the subject of the photograph has an expectation of privacy at the time of the assault or whether he or she is participating in a personal or familial activity at that time. In theory, by drastically increasing the penalties on a paparazzo who engages in aggressive conduct, the risk of being identified as the individual who committed an assault—or the employer of that individual—no longer can be dismissed as the cost of doing business. In reality, the deterrent impact of the amended Section 1708.8 will depend entirely upon the frequency with which it is successfully invoked by celebrities, which in turn depends upon counsel to celebrities understanding how the statute operates, including the evidence needed to establish a claim.

Early Shots at the Paparazzi

Other remedies have been available prior to Section 1708.8 and its recent amendment. Simply put, however, this arsenal of weapons against increasingly aggressive paparazzi has been decidedly unsatisfactory.

For example, in 1971, the Ninth Circuit confirmed that “[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering.” Prior to the 2006 version of Civil Code Section 1708.8, however, this pronouncement has been small consolation to most celebrities. While civil or criminal liability of the paparazzi has always been a theoretical possibility, celebrities actually have had few means to effect the imposition of liability, and virtually no means by which to prevent tortious or criminal conduct in the first place. Until recently, celebrities targeted by the paparazzi have had to resort to injunctive relief—either under common law or California’s antistalking statute—or claims for violation of traditional common law privacy rights. Underlying all these actions is the requirement that the defendant paparazzo (assuming he or she can be identified) has already engaged in some extreme and possibly dangerous conduct.

The leading case involving injunctive relief against a paparazzo is Galella v. Onassis. In Galella, Jacqueline Kennedy Onassis obtained an injunction from a New York federal district court against Ronald Galella, a freelance celebrity photographer and self-described paparazzo. On repeated occasions, Galella had “intentionally physically touched [Onassis] and her daughter, caused fear of physical contact in his frenzied attempts to get their pictures, followed [Onassis] and her children too closely in an automobile, [and] endangered the safety of the children while they were swimming, water skiing and horseback riding.” Notwithstanding that Onassis, widow of President John F. Kennedy, was a newsworthy public figure, the court found that Galella “went far beyond the reasonable bounds of news gathering…[by his] constant surveillance, his obtrusive and intruding presence.” The court ordered Galella to remain 25 feet from Onassis and to refrain from blocking her movement in public places or jeopardizing her safety. However, Galella was permitted to profit from the sale of any photographs of Onassis taken outside of the protected zone.

Perhaps because the required showing to obtain a restraining order is so severe, there are few other examples of successful applications for injunctive relief against the paparazzi in the United States. In Galella, the court applied a balancing test and found that the totality of the photographer’s conduct was “extreme, intentional, and outrageous” and that there was reason to believe—as a result of Galella’s own admissions—that the photographer’s conduct would continue if not enjoined. Indeed, the facts of Galella were extreme. Celebrities may encounter difficulty meeting this high standard in the more typical case in which a paparazzo has engaged in “only” one dangerous act or professes an intent to continue his or her aggressive tactics (at least with respect to the celebrity plaintiff). In any event, even if an injunction is issued, absent the voluntary compliance of the restrained party, further court proceedings may be required to enforce the injunction. Galella, for example, made it perfectly clear that he intended to continue to pursue Onassis regardless of the issuance of any restraining order—and he did precisely that. Ultimately, his persistence forced Onassis to file a motion to enforce the injunction.

Attorneys also may look to California’s antistalking statute, Code of Civil Procedure Section 527.6, but that remedy has similar limitations. The statute provides that a “person who has suffered harassment…may seek a temporary restraining order and an injunction.” “Harassment” is defined as “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.” The Achilles heel of the antistalking statute is that, absent outright violence or a credible threat of violence, injunctive relief will only be provided if it is established that the harassing conduct “serve[s] no legitimate purpose.”

The First Amendment provides significant protection to media defendants when they are engaged in activities that are newsworthy or matters of legitimate public concern. “Newsworthy” and “legitimate public concern” are broadly defined. The Restatement (Second) of Torts, for example, provides that the term “legitimate concern to the public” encompasses information given to the public “for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.” Under this relatively low standard for newsworthiness, a court is unlikely to grant injunctive relief pursuant to this statute, no matter how aggressive the photographer’s behavior, so long as the photographer is engaged in newsgathering activity for the amusement of the public.

Nor have celebrities met with much success in attempting to thwart harassing photographers by alleging violations of their common law or constitutional privacy rights. The right to privacy is a legal doctrine that has been enshrined in American legal jurisprudence for over 100 years. Responding to the increasing assault on “the sacred precincts of private and domestic life” by the press, Samuel Warren and Louis Brandeis wrote in 1890 that the law “affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.” Seventy years later, William L. Prosser identified four common law privacy torts that are actionable in a nongovernmental
setting: 1) intrusion upon a person’s seclusion or solitude, or into his or her private affairs, 2) public disclosure of embarrassing private facts about a person, 3) publicity that places a person in a false light in the public eye, and 4) appropriation for the defendant’s advantage of a person’s name or likeness.22 False light is a species of defamation and is generally inapplicable to the activities of a photographer. Appropriation refers to the use of a person’s name or likeness for advertising or commercial purposes—and expressly excludes this type of use in news reporting. The tort of public disclosure of private facts (at least in California) includes lack of newsworthiness as an element of the claim. That leaves only the tort of intrusion, which is essentially a species of trespass. Because public locales such as streets and roads are, by definition, not places of “solitude or seclusion,” the tort of intrusion is inapplicable to the very situations in which celebrities are at the greatest physical risk.

Developing Statutory Remedies
In 1998, when the California Legislature passed the law that became codified as Civil Code Section 1708.8, the intent of the lawmakers was to rein in the worst excesses of the paparazzi. The legislature’s action followed an incident in which then-actor Arnold Schwarzenegger and his wife, Maria Shriver, were trapped in their Mercedes by London tabloid photographers Giles Harrison and Andrew O’Brien. Harrison and O’Brien had tried to get exclusive shots of Shriver, who was pregnant, as she and her husband were taking their son to school. The photographers were both charged with misdemeanors, and O’Brien was charged with battery for shoving the school’s principal. In that same year, Princess Diana and Dodi Fayed were killed in an automobile accident that occurred when their driver sped through a Paris tunnel allegedly to evade several paparazzi in cars and on motorcycles.23

The 1998 version of Section 1708.8, however, did little to address the sorts of dangerous conduct by paparazzi, like highway pursuits, that seemingly motivated the passage of that statute. Instead, the 1998 law focused on preserving the privacy interests of celebrities while out of the public eye and engaged in “personal or familial” activities. This is not to say that those privacy interests are unimportant but only to point out that they are interests distinct from celebrities’ interests in physical safety while engaged in activities not classified as “personal or familial.” Notably, the statute appears to be largely untested, perhaps confirming that few celebrities or their lawyers perceive it as a remedy for the threat to physical safety about which they are most concerned.

Subsections 1708.8(a) and 1708.8(b) provide that any person who knowingly commits a physical or constructive trespass is liable for “invasion of privacy,” either physical or constructive, when the trespass is committed “with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity” and the invasion occurs “in a manner that is offensive to a reasonable person.”24 An invasion of privacy is “constructive” when the defendant uses “a visual or auditory enhancing device” to capture a visual image or sound recording “under circumstances in which the plaintiff had a reasonable expectation of privacy,” and the image or recording “could not have been achieved without a trespass unless the visual or auditory enhancing device was used.”25 A “personal or familial activity” includes, but is not limited to, “intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of [the] plaintiff’s private affairs or concerns.”26 Thus, a “physical invasion of privacy” occurs when a paparazzo enters private property to photograph a celebrity having sexual relations with his or her spouse, while a “constructive invasion of privacy” occurs when the same photograph is taken from neighboring property using a telephoto lens.27

By their very elements, claims for physical or constructive invasion of privacy are inherently inapplicable to aggressive paparazzi tactics in public places. A paparazzo does not commit a trespass on the property of another person by taking photographs on a public sidewalk or street, and it is generally unnecessary for paparazzi to use “video or auditory enhancing devices” in close proximity to their celebrity subjects. Moreover, it is doubtful that celebrities have a “reasonable expectation of privacy” in a public locale, and many circumstances in which celebrities are targeted by the paparazzi likely do not qualify as “personal or familial activities.” Thus, although the enhanced penalties of the 1998 version of Section 1708.8 might well discourage paparazzi from invading the privacy of celebrity subjects while in their homes or other nonpublic locales, that statute could be expected to have no impact on their aggressive tactics in public.28

The Reach of the Amended Statute
With last year’s amendment to Section 1708.8 now in effect, the section’s enhanced penalties—and their deterrent effect—are extended to any “assault” committed by a paparazzo “with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff.”29 Subsection 1708.8(c) may be invoked by a celebrity target without regard to whether the assault occurred on private property, whether the celebrity had an expectation of privacy at the time of the assault, or whether the celebrity was engaged in a “personal or familial activity.” The only relevant factors are whether an assault occurred, and whether it occurred while the defendant was attempting to take the plaintiff’s photograph.30

The penalties embodied in Section 1708.8(d) plainly are designed to dissuade the paparazzi from putting the physical safety of celebrities at risk in an attempt to obtain a high-price photograph. Those penalties include “three times the amount of any general and special damages that are proximately caused by” the assault, punitive damages, and “disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of” the assault.31 Thus, the risks for the paparazzi who engage in aggressive conduct to capture a photo with a hefty price tag have been drastically increased. In addition, the agency employing an offending paparazzo, or any other person “who directs, solicits, actually induces, or actually causes” the paparazzo to commit the assault, is liable for any damages resulting from the assault, as well as punitive damages.32 The agencies employing aggressive paparazzi now have an incentive to police those individuals, lest the agencies be held accountable for their misconduct. Section 1708.8(h) authorizes the court to grant equitable relief to prevent future violations of the statute.33

As with all its common law precursors, an action under Section 1708.8 requires the celebrity to identify the particular paparazzo engaging in the offensive conduct.34 This can be a daunting task in light of the swelled ranks of the paparazzi and their swarm-like presence. Of course, if the deterrent penalties of Section 1708.8 in fact decrease the frequency of assaults by paparazzi, this may simultaneously increase the visibility of those who fail to abandon their aggressive tactics. But in the meantime, celebrities targeted by the paparazzi may take measures to maximize their ability to successfully invoke Section 1708.8.

The simplest advice is for celebrities to turn the cameras around. Celebrities who are consistently targeted by paparazzi should consider arming their bodyguards or assistants with cameras of their own to film or photograph the paparazzi, especially in situations in which physical danger may develop. Similarly, celebrities should record the license plate number of any vehicle engaged in dangerous, reckless, or otherwise illegal maneuvers, thereby putting the celebrity’s safety in jeopardy. Through the paparazzi’s own weapon of choice—a camera—celebrities can make more effective use of Section 1708.8 by
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DAY 1 — MONDAY, JUNE 5

KEYNOTE ADDRESS
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Kevin Harrang
Deputy General Counsel
Microsoft, Inc.

Advanced Electronic Discovery: Strategies and Techniques
This track is designed for LegalTech attendees who understand the basics of e-discovery and are looking for more advanced ways to improve their e-discovery process. Learn strategies and techniques that leading corporations and law firms are using to improve efficiency and reduce the overall risk and expense of electronic discovery.

Business Continuity and Disaster Recovery
Disaster recovery and business continuity issues continue to become more pressing as law firms grow, expand their operations, and rely more heavily on technology. This track will feature a panel of individuals who lived through Katrina and are working to get the New Orleans legal community back to business. Then join us for a session with thought leaders who realize that protecting the livelihood of their law firms means integrating business savvy and technical know-how, as well as making DR/BC part of firm culture. Finally, one of the Gulf Coast’s largest law firms will discuss the importance of crisis communication.

Computer Security and Forensics
Experts will discuss the technical, legal and strategic components of responding to computer crime and abuse, securing law firms against computer intrusion and data loss or theft, and using forensics to bolster compliance plans. Our panelists, including former Department of Justice cyber-crime prosecutors, the former director of the Enron Task Force, law firm partners, IT personnel and chief knowledge counsel, will present case studies based on real computer hacks, obstruction by mass deletion and wiping of data, denial of service attacks, cyber-extortions, thefts or loss of computer hardware, software and data, and compliance plans gone-awry.

DAY 2 — TUESDAY, JUNE 6

KEYNOTE ADDRESS
JUNE 6, 2006

Stuart A. Forsyth
Executive Director
Los Angeles County Bar Association

Practice and Litigation Support: Technology, Trends and Tactics
Whether you are an attorney practicing in a law firm, internal counsel protecting the interests of your only client, a compliance officer or an IT professional, you most likely have heard of the group, “Practice or Litigation Support.” While most of the stories about long hours and managing expectations are probably true, here is your chance to hear all about this exciting field in person. And of course, if you are representing this wonderful profession, come and share your opinions, successes and challenges!

Practice Management
Practice management systems employ front/back office and imaging technologies to help make law firms and law departments more efficient in handling case and matter information. Practice management systems will change the way lawyers work, making them more effective and more productive for their clients. This track is designed to load you up with information for your firm or law department to help it move into a “client-centric” environment using practice management technologies.

Collaboration Technologies
Healthy information flow is crucial in the evidence management process. Using technologies that facilitate collaboration can save you time and money. Learn how applying collaboration technologies can and will enhance overall team productivity in this educational track, designed for attorneys, litigation support experts, paralegals and others involved in evidence management.

The Tech Savvy Corporate Legal Department: What In-House Counsel Needs to Know
In this age of stringent corporate governance, compliance and high profile litigation, modern day in-house counsel rely on technology to get the job done. Today’s in-house counsel must be not only great lawyers, but savvy information technology practitioners too. Whether in-house counsel is dealing with litigation or the day-to-day challenges of managing a law department, an understanding of data and the technology that supports it is critical. This track will discuss the role of information technology in the legal strategy development of the corporate counsel’s office.

FROM THE PUBLISHERS OF:

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gathering the evidence needed to pursue the available remedies. In addition, private investigators may be employed to learn the identity of the most aggressive paparazzi, and this information can then be turned over to law enforcement agencies in appropriate situations. Celebrities must be assiduous in reporting to the police every incident involving a trespass or a threat to the safety of the celebrity or his or her family by a member of the paparazzi.

If Section 1708.8 is to have its intended deterrent impact, it must be invoked by celebrities and invoked successfully. When enough paparazzi have been forced to disgorge their profits and pay sizeable damage awards to their celebrity targets, perhaps the paparazzi will finally get the picture.

2 According to Frank Griffin of the well-known picture agency Bauer-Griffin, there were only 10 to 12 paparazzi working in Los Angeles in the early 1990s. Today, by contrast, there are about 200. David M. Halbfinger & Allison Hope Werner, Shooter vs. Shooter in Paparazzi Wars, N.Y. TIMES, Jul. 19, 2005.
3 Id. One relatively new paparazzi agency is, perhaps tellingly, named for the Los Angeles street gang that the owner belonged to as a teenager. The owner of the agency trains other reformed gang members in the business. Robert Winton & Tonya Alanez, Paparazzi Flash New Audacity: As Competition Grows, Photographers Trail L.A.'s Celebrities Become More Aggressive, L.A. TIMES, Oct. 16, 2005, at A1.
4 This was not Witherspoon’s only dangerous brush with the paparazzi. Months earlier, photographers used their vehicles to box her in her car outside her gym, then followed her home and blocked her from entering through her security gate. Pamela McClintock, Governor Snaps Back at Paparazzi, DAILY VARIETY, Oct. 3, 2005, at 1.
6 Nor was this an isolated incident for Wallace. Prior to Wallace’s encounter with Witherspoon, employees of the fashion boutique Lisa Kline sought a restraining order against Wallace after he ignored the store’s “paparazzi curtain”—a motorized black curtain used to protect celebrities from view—by trying to photograph actress Mischa Barton while she visited the boutique. Wallace, who reportedly has used a dozen aliases and spent four years in jail for burglary and theft, ultimately left the store after yelling obscene threats at Lisa Kline’s assistant manager. In a further angry outburst, Wallace drove his truck into cars located behind and in front of his parking space. Winton & Alanez, supra note 3, at A19.
8 CIV. CODE §1708.8(a), (b).
9 CIV. CODE §1708.8(d), (e) (prior to the 2005 amendment of this statute, these penalties were set forth at CIV. CODE §1708.8(c), (d)).
10 CIV. CODE §1708.8(c).
11 Dietemann v. Time, Inc., 449 F. 2d 243, 249 (9th Cir. 1971).
13 Id. at 994. Galella also jumped out of bushes in Central Park, hid in a coat rack at a Chinese restaurant, nearly knocked the Onassis children off their bicycles in an effort to snap a photo of John Kennedy Jr., and
14 Galella, 487 F. 2d at 995, 998.
15 Galella, 333 F. Supp. at 231.
17 CODE CIV. PROC. §527.6(a).
18 CODE CIV. PROC. §527.6(b).
19 For example, the First Amendment would likely prohibit the creation of a “floating bubble” or “floating buffer zone” to entirely ban specified activities by paparazzi within a certain distance around a particular celebrity. By way of analogy, in Schenck v. Pro-Choice Network, healthcare providers sought a preliminary injunction prohibiting abortion protesters from engaging in allegedly illegal efforts to prevent women from obtaining abortions and other family planning services. The injunction issued by the district court banned “demonstrating within fifteen feet...of...doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of [clinic] facilities” (“fixed buffer zones”), or “within fifteen feet of any person or vehicle seeking access to or leaving such facilities” (“floating buffer zones”). Schenck v. Pro-Choice Network, 519 U.S. 357, 366 n.3 (1997). The U.S. Supreme Court upheld the provisions imposing “fixed bubble” or “fixed buffer zone” limitations—but held that the provisions imposing “floating bubble” or “floating buffer zone” limitations violated the First Amendment because they burdened more speech than necessary to serve the relevant governmental interest. Id. at 377.
24 CIV. CODE §1708(a), (b).
25 CIV. CODE §1708(b).
26 CIV. CODE §1708.8(f) (formerly 1708.8(k) under the 1998 version of the statute).
27 See Richard Winton, Aniston Sues over Photos, L.A. TIMES, Dec. 6, 2005 (describing lawsuit filed by Jennifer Aniston claiming that a paparazzo invaded her privacy by using a telephoto lens to take photos of her topless or partially undressed in her home).
28 With the exception of the creation of enhanced monetary penalties, the 1998 statute did not go very far in crafting protections that did not already exist in California. Prior to the enactment of Section 1708.8—which went into effect on January 1, 1999—trespass and invasion of privacy were already actionable offenses. See Miller v. National Broad. Co., 187 Cal. App. 3d 1463, 1480-81 (1986); Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 236 (1998).
29 CIV. CODE §1708.8(c).
30 An “assault” occurs when a defendant’s intentional or reckless conduct causes a plaintiff to experience an imminent apprehension of harmful or offensive contact. RESTATEMENT (SECOND) OF TORTS §21 (1977).
31 CIV. CODE §1708.8(a).
32 CIV. CODE §1708.8(b).
33 CIV. CODE §1708.8(e).
34 Theoretically, even if the celebrity cannot identify the specific paparazzo, the celebrity might have an action against a paparazzi agency if the celebrity can at least identify the paparazzo’s employer—for example, by the license plate number of a vehicle used to commit the assault. Still, it is difficult to conceive of many situations in which the celebrity will be able to do so.
New Tax Rules Governing the Use of Private Aircraft

TAX AUTHORITIES HAVE RECENTLY TAKEN ACTION to clip the wings of two popular strategies that previously produced significant tax savings for owners and users of private aircraft. The first was sanctioned by Sutherland Lumber-Southwest, Inc. v. Commissioner.1 That ruling permitted an employer to obtain a business deduction for all expenses attributable to the personal use of the employer’s aircraft while requiring the recipient of the personal flight to include as taxable income only the Standard Industry Fare Level attributable to the flight.2 (The SIFL is the range of commercial airfares, which are typically much lower than the actual cost of a flight on a private aircraft.) The Sutherland Lumber-Southwest rule was amended as part of the American Jobs Creation Act of 2004 (AJCA).3

The second strategy was the avoidance of California sales and use taxes on the purchase of an aircraft by a California resident. This was accomplished by purchasing the aircraft outside California, keeping the aircraft outside the state for 90 days following the purchase, and conducting the aircraft’s first functional flight outside California. The California State Board of Equalization, however, recently issued revised use tax regulations for out-of-state purchases of aircraft.

While these two changes will have a substantial effect on the entertainment industry’s use of private aircraft—by media companies and talent loan-out corporations alike—tax planning opportunities still exist under the modified tax rules, despite the effort of federal and state tax authorities to reduce their benefits.

Sutherland Lumber-Southwest Loses Altitude

The AJCA amended Internal Revenue Code Section 274(e) to modify the rules for the deductibility of trade or business expenses attributable to the entertainment-, amusement-, or recreation-related use (i.e., personal use) of “facilities” in certain circumstances. Within the meaning of Section 274(e), an airplane is considered a facility.4 Airplane expenses subject to the deduction limitation of Section 274 include all expenses of maintaining and operating the airplane, including all fixed and operating costs, such as hanger fees, lease payments, charter fees, depreciation, and fuel, regardless of whether the airplane is owned, leased, or chartered.5 The amendments to Section 274(e) are effective for aircraft expenses that are incurred after October 22, 2004.

Under the new law, deductions for expenses attributable to the personal use of an airplane by a “specified individual”6 are limited to the amount that is actually included in the specified individual’s taxable income.7 If the specified individual is an employee, the income must also be treated as wages subject to withholding.8

The term “specified individual” is defined as any individual who is either subject to the requirements of Section 16(a) of the Securities Exchange Act of 1934 with respect to the taxpayer or who would be subject to those requirements if the taxpayer were an issuer of the equity securities referred to in Section 16(a).9 Based on that definition the term “specified individual” includes, for both private and publicly held companies:

1) Officers, as defined by Section 16(a): the president, principal financial officer, principal accounting officer (or, if there is no accounting officer, the controller); any vice-president in charge of a principal business unit, division, or function (such as sales, administration, or finance); any other officer who performs a policy-making function; or any other person who performs similar policy-making functions.
2) Directors.
3) Direct or indirect beneficial owners of more than 10 percent of any class of equity securities.

For example, a specified individual with respect to a corporation (regardless of whether it is an S, C, or personal service corporation) will generally include any officer, director, and any stockholder with more than 10 percent of any class of the corporation’s stock. As applied to a partnership or limited liability company, a specified individual will generally include any officer, managing member, or general partner, and will also include any limited partner or nonmanaging member with more than a 10 percent equity interest.

Use of an airplane by a specified individual’s spouse or family member or by any other person because of the person’s relationship to the specified individual is considered use by a specified individual for purposes of the deduction limitation of Section 274.10 For example, use of an airplane for a vacation by a specified individual and his or her spouse and two children is treated as personal use of the airplane by four specified individuals. The “directly related to or associated with” standard of Section 274(a)(1)(A) must be satisfied—and in the case of a spouse and children, the additional requirement of Section 274(m)(3) must be satisfied—in order to avoid the requirements of Section 274(e) and for the associated expenses to be deductible under Section 274(a)(1)(A).

In order to claim a business deduction for expenses attributable to an airplane, the use of the airplane to which the expenses relate generally must fall within one of four categories. First, airplane expenses attributable to its use for entirely business-related purposes and that have no element of entertainment, amusement, or recreation are deductible if the expenses are reasonable and “ordinary and necessary” within the meaning of I.R.C. Sections 162 or 212.

Second, Section 274(a) provides a higher hurdle for the deductibility of airplane expenses attributable to its use for entertainment, amusement, or recreation purposes. In order to be deductible under Section 274(a), such use must meet two requirements. First, it must be “directly related to or associated with” the active conduct of the taxpayer’s trade or business, which generally requires that the principal character of the trip must be the conduct of the taxpayer’s business, and the actual conduct of business with an expectation of income must occur during the trip.11 In addition, the expenses must be reasonable and “ordinary and necessary” within the meaning of I.R.C. Sections 162 or 212.

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Sections 162 or 212.

Third, if the use of the airplane is for entertainment, amusement, or recreation without a sufficient business purpose for the trip to qualify under Section 274(a)(1)(A), taxable compensation must be recognized. Effective October 22, 2004, expenses that are attributable to the personal use of an aircraft by specified individuals are deductible only to the extent that the specified individuals using the airplane are treated as receiving taxable compensation income from the flight.12

Finally, if the airplane is used for entertainment, amusement, or recreation and there is not a sufficient business purpose for the trip to qualify under Section 274(a)(1)(A), expenses attributable to the use by a specified individual before October 22, 2004, or at any time before or after October 22, 2004, by a nonspecified individual, are deductible in full if the persons using the airplane are treated as receiving taxable compensation income equal to the SIFL value of the personal use airplane flights. That is, the deduction is not limited to the amount treated as compensation by the persons using the airplane and is governed by the rule under the Sutherland Lumber-Southwest case.13

Thus, the rule of Sutherland Lumber-Southwest continues to be the standard with respect to the personal use of aircraft by nonspecified individuals. Because the SIFL value of an airplane flight is typically far lower than the expenses attributable to the flight, the Sutherland Lumber-Southwest rules provide a significant nontaxable fringe benefit to a nonspecified individual using the airplane for personal use, while permitting the taxpayer a full deduction for the associated airplane expenses.

Section 274(e) in Practice

The rules for deductibility of airplane expenses can be illustrated by the following example: An entertainer's loan-out company owns an airplane. The entertainer's use of the airplane owned by the loan-out company (of which the entertainer is the sole shareholder) for vacation travel constitutes an "entertainment facility"14 subject to the deduction limitation rules of Section 274. Because the entertainer is a specified individual with respect to the loan-out company, the new rules of Section 274(e) will apply to his or her personal use of the airplane after October 22, 2004, unless the trip has sufficient business elements to allow expenses to be deducted under Section 274(a)(1)(A). Assuming that is not the case, the loan-out company's deduction for expenses attributable to the use of the airplane for the personal trips will be disallowed under Section 274(e)(2)(B) unless the entertainer recognizes additional compensation income attributable to the personal airplane trips.

Taxpayers should proceed with caution in the manner in which a specified individual recognizes additional compensation income in order to permit the taxpayer a full deduction for all expenses attributable to the personal use of an airplane. While Treasury Regulation Section 1.61-21(g) provides for the inclusion of the SIFL rate for the personal use of an aircraft as income and Treasury Regulation Section 1.61-21(b) provides for the inclusion into income of the fair market value of a fringe benefit, the regulations under Section 1.61-21 do not permit the inclusion of a separate amount into income for a fringe benefit, whether representing the amount of the employer's expenses attributable to a personal flight or otherwise. However, the Section 1.61-21 regulations and Section 274(e) should be satisfied—and the employer permitted a full deduction for the expenses attributable to the personal use of an aircraft by a specified individual—if the specified individual pays the employer an amount equal to the expenses attributable to the flight (assuming the expenses exceed the SIFL rate, as will almost always be the case) and the employer in turn pays additional taxable compensation to the specified individual in the same amount. This should leave both the employer and the specified individual in roughly the same after-tax position with respect to the personal use of the airplane as if the employer had been permitted to merely include an amount equal to the flight's expenses on the specified individual's Form W-2.

This example can also illustrate the tax consequences of Section 274(e): The loan-out corporation allows its owner/entertainer to use the corporation's aircraft to fly the entertainer and his or her family to a vacation destination, a flight valued under the SIFL at $1,000. The corporation's expenses attributable to the flight are $10,000. If the corporation treats only $1,000 as wage compensation (subject to withholding) to the entertainer, the corporation may deduct no more than $1,000 of the cost of the flight provided to the entertainer and his or her family (unless the corporation can establish that the flight was for business reasons). However, if the aircraft is used for vacation travel by a personal assistant of the entertainer (assuming the personal assistant is not a specified individual), the loan-out corporation will be able to deduct the full $10,000 of expenses attributable to the personal trip while treating the personal assistant as having received only $1,000 of wage compensation income.

As a result of the new rules under Section 274(e), taxpayers will have three basic choices in the future. First, if the airplane will be used for personal purposes by specified individuals, the taxpayer will need to treat the full amount of all expenses allocable to the personal use of the airplane by the specified individuals as wages of the specified individuals in order to obtain a full deduction for the expenses attributed to their use. This can be accomplished by the specified individual paying to the taxpayer an amount equal to the taxpayer's expenses for the personal flights, followed by the taxpayer's payment of additional compensation to the specified individual of the same amount. If the taxpayer and the specified individual operate on different tax years, care should be taken to ensure that the payments are made prior to the close of the tax year in which the personal aircraft use occurs of either the specified individual or the taxpayer.

This may not be an appealing option due to the potentially large amount of additional income that must be included in the income of specified individuals. However, the taxpayer could eliminate the financial impact on the specified individual by making agrossed-up tax payment to the specified individual in an amount sufficient to pay the added tax liability (much as employers frequently agree to compensate employees for the tax liability associated with parachute payments under Section 280G). For example, if $10,000 is included in the income of a specified individual in order for his or her employer to obtain a $10,000 deduction for the specified individual's personal use of the employer's airplane, the employer could make an additional payment of $5,385 to cover the specified individual's additional tax liability (assuming the specified individual's effective tax rate is 35 percent).

Under the second option, the taxpayer could elect to forego or limit its income tax deduction by not treating all expenses allocable to the personal use of the aircraft as compensation to specified individuals. Finally, the taxpayer could limit the use of the employer's aircraft to activities that qualify as business use under Section 274(a)(1)(A). That would allow the taxpayer to deduct all expenses of the aircraft without allocating any additional income to specified individuals.

IRS Notice 2005-45

Last May, the IRS issued Notice 2005-45,15 which provides detailed rules for allocating airplane expenses between personal and business use of the airplane for the deduction limitation of Section 274(e) attributable to personal use of the airplane by specified individuals. All the expenses of maintaining and operating the airplane (including all fixed and operating costs) must be taken into account in applying the allocation rules. Under Notice 2005-45, the total deductible expenses attributable to the airplane must
be allocated between 1) expenses for personal use of the airplane by specified individuals and 2) expenses for all other uses. Expenses for each tax year must then be allocated between personal and business use of the aircraft by reference to the number of either “occupied seat hours” or “occupied seat miles” flown by the aircraft during the tax year. (The taxpayer must choose one method, which must be used consistently for the tax year.) Occupied seat hours or occupied seat miles represent the sum of the hours or miles flown, respectively, by an aircraft multiplied by the number of seats occupied by any person (not just specified individuals) for each hour or mile. For example, a flight of 6 hours with three passengers results in 18 occupied seat hours.

The aggregate amount of expenses for the aircraft over the year (both fixed and variable) are then divided by the aircraft’s total number of occupied seat hours or miles in order to obtain the average cost per single occupied seat hour or mile (which, when computed in terms of seat hours, is referred to as the hourly cost). Each aircraft trip must be independently analyzed to determine the number of hours or miles that each specified individual used the plane for personal purposes, and that number is multiplied by the hourly cost to determine the amount of the taxpayer’s deductions that are subject to limitation by Section 274(e).

The allocation rules of Notice 2005-45 can be illustrated by the following example: A loan-out corporation’s total expenses for its aircraft for the year were $3,600, and the aircraft had 18 occupied seat hours for the year, resulting in an hourly cost of $200 per seat hour. If one flight consisted of a six-hour vacation plane trip by three passengers, but only one of the three passengers was a specified individual (assume the other two are rank-and-file employees of the loan-out company), the cost of the flight allocable to the specified individual when applying Section 274(e) would be $1,200 (the six-hour flight multiplied by the $200 hourly cost). The loan-out company would be entitled to deduct $1,200 of expenses allocable to the specified individual’s personal use of the aircraft only if that amount is attributed as income to the specified individual. If the value of the flight under the applicable SIFL valuation rules is $200 per person, and the specified individual includes only $200 in income, then the loan-out company may claim only a $200 deduction for the specified individual’s use of the plane, and the company would be denied a deduction for the remaining $1,000. For the nonspecified individuals, the company would need to treat each of them as having $200 of income attributable to the flight in order to deduct the full expenses of $1,200 per non-specified individual.

The allocation rules of Notice 2005-45 must be used for the deduction of aircraft expenses incurred after June 30, 2005. The notice also provides that taxpayers may elect to apply its provisions to aircraft expenses incurred after October 22, 2004 (the effective date of amended Section 274(e)), and before July 1, 2005 (the effective date of the notice).

Notice 2005-45 also provides that it applies to both regularly scheduled flights and to flights on private airplanes that are necessitated by security concerns, as provided in Treasury Regulations Section 1.132-5(m). In general, if an employee travels on a personal trip in an employer-provided aircraft for bona fide security concerns, the employee may exclude from income the employer’s actual costs of the transportation beyond the amount the employee would have paid for the same mode of transportation absent the security concerns. The additional expense for security reasons is excluded from the income of the employee as a working condition fringe benefit.

In order to qualify as an excludable working condition fringe benefit under Treasury Regulations Section 1.132-5(m), the employer must establish a specific basis for the concern for the safety of the employee, such as a death threat, kidnapping threat, threat of bodily harm, or terrorist activity in the region. A generalized and theoretical concern for the safety of the individual is not sufficient. An independent security study conducted to establish an overall security program is typically required.

Because Notice 2005-45 provides that it applies to the personal use of aircraft irrespective of security concerns, airplane expenses attributable to personal use remain subject to the deduction limitations of Section 274(e), even if the costs are otherwise excludable from the specified individual’s compensation as a security-related fringe benefit. Therefore, if the purpose of the trip is personal, classifying an airplane trip by a specified individual as necessary due to security concerns will not avoid the deduction limitations of Section 274(e). In order for the employer to deduct the expenses of the airplane travel for personal trips (whether required by security concerns or not), an amount equal to the airplane expenses will need to be treated as the compensation of the specified individual under Section 274(e).

Rough Landing in California

Generally, California sales tax applies to the sale in California of tangible personal property. If title to the personal property occurs outside of California, California sales tax does not apply. However, California use tax applies to the use of any property purchased for storage, use, or other consumption and use in California, if the sale of the property was not subject to California sales taxes. California’s use tax serves as a backstop to the sales tax, and exemptions from California’s use tax frequently have onerous requirements. For example, California taxpayers sometimes attempt to purchase an airplane outside of California in order to avoid the imposition of California sales tax. However, if the airplane is immediately brought into California, the California use tax will nonetheless be imposed on the airplane.

To avoid the imposition of California use tax on an airplane that is purchased outside California but will ultimately be brought into California, California taxpayers need to comply with the “first functional use” exception unless another exemption from use tax is applicable. However, the first functional use exception was revised by Senate Bill 1100 and by the California State Board of Equalization pursuant to revised use tax regulations issued on March 3, 2005, extending the period an aircraft generally must remain outside of California from 90 days to 12 months.

The revised first functional use test is applicable to aircraft purchased on or after October 2, 2004, and on or before June 30, 2006. However, the California Legislative Analyst’s Office has been instructed to conduct a study of the revenue raised from this change and to report its finding to the legislature no later than June 30, 2006. The legislature will presumably consult this report in determining whether to extend the sunset date or to enact other changes.

The first functional use exception, as revised, provides that an airplane is not subject to California use tax if its first functional use occurs outside of California and the airplane is not brought into California within 12 months after the airplane is purchased. For the purposes of this rule, “functional use” means use for the purposes for which the property was designed. If an airplane is brought into California within 12 months after purchase and assuming the aircraft’s first functional use occurred outside of California, the airplane may still avoid California use tax if it has very limited other contacts with California. California use tax will be avoided if all the following requirements are met: 1) The aircraft was not purchased by a California resident, 2) the aircraft was not subject to California property tax during the first 12 months of ownership, and 3) the aircraft was not used or stored in California more than half the time during the first 12 months of ownership.

For aircraft purchased prior to October 2, 2004 (the effective date of the March 3, 2005, revisions to the first functional use excep-
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tion), and after June 30, 2006, an airplane needs to remain outside California for only 90 days following purchase in order to avoid California use tax.26 If the aircraft is brought into California within 90 days after its purchase, the aircraft will be subject to California use tax unless the aircraft is used or stored outside California half or more of the time during the six-month period immediately following its entry into California.27 If the first functional use of an aircraft is within California, even if the aircraft was purchased outside California, the aircraft will be treated as having been purchased for use in California and will be subject to California use tax.28

Regardless of when an aircraft is purchased or brought into California (assuming the first functional use of the aircraft is outside California), California use tax will not apply to the aircraft if half or more of the flight time traveled by the aircraft during the six-month period immediately following its entry into California is commercial flight time in interstate or foreign commerce.29 For this purpose, commercial flight time includes business use of the aircraft but does not include personal use.

Despite the restrictions on tax savings imposed by the modified rules on the deductibility of airplane expenses under IRC Section 274(e) and on the first functional use exception from California use tax, with proper planning taxpayers may be able to structure their activities to avoid the impact of the new rules. For example, a specified individual can avoid the new rules under Section 274(e) by conducting sufficient business during a trip in order for the flight to be characterized as business and not personal under Section 274(a)(1)(A). Additionally, California residents purchasing aircraft outside California may do well to investigate 12-month leases for aircraft hangers in other states, such as a location near an out-of-state home owned by the taxpayer—depending, of course, on the foreign state’s own domestic sales and use tax rules.

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1 Sutherland Lumber-Southwest, Inc. v. Commissioner, 114 T.C. 197 (2000), aff’d 255 F. 3d 495 (8th Cir. 2001), acq. 2002-1 C.B. XVII, Action On Decision 2002-002 (Feb. 19, 2002); Chief Council Advisory 200344008. However, a bill currently under consideration in a House-Senate conference committee would set the value of any employee’s personal use as the greater of the fair market value of such use or its actual cost, less amounts paid by or on behalf of such employee for such use.
2 Treas. Reg. §1.274-2(b)(1).
6 The term “specified individual” is defined in I.R.C. §274(e)(2)(B)(ii). All section references are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.
11 Treas. Reg. §1.274-2(c)(3).
12 I.R.C. §§274(e)(2) and 274(e)(9).
13 I.R.C. §§274(e)(2) and 274(e)(9); Sutherland Lumber-Southwest, Inc. v. Commissioner, 114 T.C. 197 (2000), aff’d 255 F. 3d 495 (8th Cir. 2001), acq. 2002-1 C.B. XVII, Action On Decision 2002-002 (Feb. 19, 2002); Chief Council Advisory 200344008. However, a bill currently under consideration in a House-Senate conference committee would set the value of any employee’s personal use as the greater of the fair market value of such use or its actual cost, less amounts paid by or on behalf of such employee for such use.
19 CAL. SALES & USE TAX REGS. §1620(a)(1).
20 CAL. SALES & USE TAX REGS. §1620(b)(1).
21 In addition to the first functional use exception, California’s use tax does not apply to the use of property, including aircraft, purchased for use and used in interstate or foreign commerce prior to entry into California and thereafter used continuously in interstate or foreign commerce both within and without California and not exclusively in California. CAL. SALES & USE TAX REGS. §1620(b)(2)(B)(1).
22 SB 1100 (enacted Aug. 16, 2004).
23 CAL. SALES & USE TAX REGS. §1620(b)(5).
24 CAL. SALES & USE TAX REGS. §1620(b)(3).
26 CAL. SALES & USE TAX REGS. §1620(b)(4).
27 CAL. SALES & USE TAX REGS. §1620(b)(4)(A).
28 CAL. SALES & USE TAX REGS. §§1620(b)(4) and (5).
29 CAL. SALES & USE TAX REGS. §§1620(b)(4)(B)(3) and 1620(b)(5)(C)(3).
Game Over

Termination for convenience clauses are less favorable to video game developers than to artists in other segments of the entertainment industry

The video game development contract is a little like a prenuptial agreement. Both are negotiated and signed when there is love in the air; expectations run high for great happiness and success, and the hardball positions taken during negotiations are the only sign of a chill in a blissful courtship. Like the basic prenup, a video game development contract is typically an expression of a sincere hope that once signed, the contract can be tossed in the drawer and never referenced again (at least until royalty checks start to arrive). However, not every marriage lasts, and not every game development contract leads to a hit or even a completed project. At such times, the parties need to examine their earlier agreements and the rights of each party.

In the early days of video games, 20 years ago or so, a game could be designed and programmed by one to three people in six to eight months at a cost of five or six figures. Developers and publishers traveled in the same circles, game publishers were making money hand over fist in an as-yet “undiscovered” industry, and publishers were still primarily privately held businesses. In such an environment, the risk of investing in development was low. When the game did not materialize in the form or time frame contemplated in the deal, the parties could rationalize and commiserate, share a drink, try to learn from the experience, and move on.

These days, the capital cost of competing in the games business is high, budgets for franchise Xbox 360 and Play Station 3 games equal those for independent feature films, development requires teams of 120 or more working 18 months or longer, profits are harder to come by in an increasingly competitive market, and game publishers are primarily public companies that must meet shareholder demands for profits and growth. These factors make it more difficult for a publisher to simply walk away when its expectations for development are not realized.

Just as a prenup contains the terms of a settlement in the event the marriage does not work, every game development contract contains termination language that applies when results do not equal expectations. Termination
clauses are hotly negotiated because of the financial baggage they carry. For the developer, a favorable termination clause can provide a critical nest egg while it transitions from a canceled project to a new one. Because of the competitive nature of game development and the careful screening process of publishers, it is not unusual to take six months or longer, and a substantial investment in demos and preliminary design work, for a developer to land a new project. This dry period has the potential to drain a developer of its cash reserves or even put the developer out of business. For the publisher, on the other hand, paying a large settlement for a canceled project is throwing good money after bad. Settlements paid to developers when games are canceled directly affect the publisher’s bottom line.

Publishers, as the financing entities of video games, typically issue the development contracts and control the drafting process. As a result, first draft termination language is often far from generous, with publishers offering terms that are often far more onerous than those encountered in other segments of the entertainment industry. For instance, unlike movie contracts, game contracts very rarely contain “pay or play” language. It is the job of a game developer’s counsel to improve the termination terms. To do so requires an understanding of the standard termination language alternatives that may be available.

An example of a publisher-friendly but not atypical termination clause can be offered from a hypothetical development contract. The clause includes six sections, each of which appears below, followed by analysis and commentary.

“SECTION 1: DEVELOPER’S RIGHT TO TERMINATE. In the event of a material breach of this Agreement by Publisher, Developer may terminate this Agreement by giving sixty (60) days’ prior written notice. Notwithstanding the foregoing, this Agreement will not terminate at the end of the notice period if Publisher has cured, or taken reasonable steps to cure, the breach about which it has been notified. Developer agrees that its sole remedy for failure by Publisher or its licensees to cure, or attempt to cure, any breach hereof, shall be a legal claim for damages, and Developer hereby waives all rights to seek injunctive and other forms of equitable relief.”

Any analysis of a developer’s right to terminate as a result of a game publisher’s material breach must start with consideration of the material obligations of the publisher that may be subject to breach. It is generally accepted that a material breach is any breach that goes to the heart of the agreement, or that is identified by the parties as being material.

The publisher’s obligations that may be breached are limited by the terms of the contract. The publisher’s representations and warranties in the first drafts of these deals are generally limited to the publisher having the right and power to enter into the agreement and to perform its obligations under the deal. These obligations may be as few as providing the intellectual property assets required if the game is based on a licensed character or property; reviewing and approving (or rejecting) the developer’s milestone submissions in its sole, unfettered, and subjective discretion; and paying for development milestones when they are approved. Once the game is completed, the publisher may be required to account and pay royalties as negotiated by the parties.

Default of any of these may or may not rise to the level of material breach. And if a default is not material, the developer’s remedy is limited to an action for damages without the right to terminate the agreement. The developer’s counsel may want the agreement to provide that the publisher’s obligations to timely review milestones, give feedback, give approvals, and make payments to the developer are material obligations.

Termination for material breach frequently provides for a cure period. The language above provides for an unusually generous 60 days in which to commence or attempt (but not complete) the cure. Compare that to the 15-day cure period provided in the second section below for a developer’s default. From the developer’s perspective, a shorter and more definite cure period for publisher material breach is desirable.

The language above also provides that the developer waives its right to seek injunctive and other forms of equitable relief in connection with any breach by the publisher. This language is common in motion picture industry agreements. It serves as a sort of insurance policy to protect the producer from the risk of having distribution or exhibition of the finished project disrupted as a result of a dispute.

Producers and game publishers need to protect their investments, but it is inappropriate for developers to waive their right to seek equitable relief in all circumstances. For example, a developer client may complete a game and have it accepted by the game publisher and submitted to the hardware manufacturer for approval prior to manufacturing (this is the final step in the process to publish a game for the Nintendo, Sony, or Microsoft game console systems). The client may be owed a substantial final payment, but despite repeated invoicing and requests, payment may not be forthcoming.

Having waived the right to seek injunctive relief that could stop release of the game, as well as other forms of equitable relief, such as specific performance that could compel the final payment, the client’s only alternative is to threaten litigation in the California Superior Court. Given the backlog, even if an action were to be commenced, it could delay recovery for an extended time—perhaps longer than the sales life of the game. If, on the other hand, the client were able to threaten and pursue injunctive relief, the pressure on the publisher could lead to quicker payment.

Another situation in which waiver of the right to pursue equitable remedies puts the game developer at a severe disadvantage may be one in which limited rights to a developer’s proprietary tools and technology are granted to a publisher in connection with assignment of ownership of the underlying game. If the publisher were to use these tools and technology in a manner that goes beyond the limited rights granted by the developer—for example, if the publisher were to incorporate the technology without consent into a sequel (a subsequent game using the same underlying property, game world, and/or characters) or a port (a version of the game designed to operate on a different hardware platform than the developer’s version)—the developer’s best remedy could be to enjoin release of the infringing sequel or port. Without such a right, the developer’s only remedy may be to sue for damages. It may be extremely difficult to quantify those damages in connection with unauthorized expropriation.

“SECTION 2: PUBLISHER’S RIGHT TO TERMINATE. In addition to Publisher’s other termination rights hereunder, Publisher may upon written notice to Developer terminate this Agreement as a result of a material breach of this Agreement by Developer, provided that Developer may cure such breach in fifteen (15) days from the date said notice is given except for termination by Publisher for material breach in connection with timely delivery of Work Product, in which case termination shall be deemed effective immediately. A material breach may include, but is not limited to, Developer’s failure to finish the Game, Developer’s ceasing to do business, Developer’s failure to have the Work Product approved by Publisher, and/or Developer’s failure to finish the Game on time or on budget as per the Milestone schedule. In the event of such termination, Publisher shall have no obligation to pay Developer any additional
installments of the Fee, and Publisher shall be entitled to be paid back or to recover any and all payments made to Developer hereunder."

The publisher’s termination rights differ markedly from the developer’s. The developer’s cure period is limited to 15 days rather than 60, and the developer has no right to commence but not complete a cure within that period. There is also a material breach by the developer for which there is no cure period. Failure of the developer to timely deliver its work product subjects the developer to immediate termination, presumably with notice but without the opportunity to remedy. The disparity in the publisher’s termination rights is particularly disadvantageous to the developer because the factors constituting breach include elements that are outside the developer’s control.

The heart of every game development contract is an exchange of the developer’s services and work product for the compensation provided by the publisher. Game development is undertaken in increments, called milestones, in which predetermined work product content must be completed on or before designated dates. The publisher then compares each milestone against the already agreed requirements for the applicable milestone, and the publisher’s own subjective standards of quality. If a milestone is found to meet these requirements, it is approved, and the resulting payment is processed. If it fails, even on the publisher’s subjective grounds, it can be rejected, and the developer must take steps to remedy the failure to the publisher’s satisfaction. This is not always easy.

The developer may rely on the publisher to provide certain elements of game content, hardware support, timely review, feedback, approval of milestones, and prompt payment of amounts due. If the game is based on licensed intellectual property, one or more third parties may reserve the right to review and approve material prepared by the developer. For example, in a sports game based on a professional league, approvals may be required by the league, the players union, and by the sports celebrity or personality whose name and likeness appears on the package. If the game is being prepared to operate on a Nintendo, Microsoft, or Sony hardware system, it will require review and approval of the applicable hardware manufacturer. All these factors may be out of the developer’s control.

Delay in providing these materials, approvals, or payments can lead to delay in development of the game. Rejection of materials that the developer has prepared and submitted in good faith can also upset the development calendar set forth in the milestone schedule. Business or operating considerations of the publisher that are external to the development effort have been known to delay approval and payment of invoices that provide the necessary cash flow to the developer.

But Section 2 provides for immediate termination without any cure period in the event of any delay in timely delivery of milestones, without regard to the cause of such delay. Section 2 goes on to list certain developer defaults that will be deemed to rise to the level of material breach. The most significant issue to consider in describing a default as a material breach is that it escalates the potential remedy from an action for damages, and continuation of the agreement, to termination of the agreement.

There may be defaults that truly go to the heart of the agreement and that can give rise to treatment as material breach. For example, the developer’s failure to finish the game, and the developer’s permanent ceasing to do business, may well rise to the level of material breach. However, Section 2 also identifies as a material breach the developer’s failure to have the work product approved by the publisher (a circumstance that is controlled in its entirety by the subjective determination of the publisher), or the developer’s failure to finish the game on time or on budget as per the milestone schedule, whether or not the fault lies with the developer. Finally, Section 2 provides that failure of the developer to deliver any milestone on time, even if it is one hour late, is a material breach that the developer will have no opportunity to cure. It is difficult to accept that garden-variety defaults truly rise to the level of a material breach. They certainly do not appear to go to the heart of the contract.

The publisher’s advantages do not end there. The publisher has a remedy for breach: an action for damages. In a contract action for breach of any of these garden-variety provisions, if they were not designated as material in the agreement, the publisher could be hard pressed to prove any actual damages when, for example, a milestone is one day or one week late.

The final sentence of Section 2 provides a special remedy for the publisher in the event the agreement is terminated as a result of a material breach by the developer. Given the economics of game development, which is a highly cash-flow intensive and low-profit-margin business, being required to refund all amounts previously paid by the publisher can amount to a prescription for bankruptcy for a developer. Typically, the money a publisher pays for completed milestones is spent on salaries, overhead, and equipment utilized by the developer to meet its development obligations. Gross profit margins in the game development business are low to nonexistent.

If the defaults described in Section 2 were to be treated as simple breaches, and not material, the publisher’s remedy would be to seek contract damages. Any such action would permit the developer to present evidence disputing liability. Treating defaults as material and providing for the extreme remedy of full reimbursement makes it tactically advantageous for the publisher to make a claim of material breach. What is more, if a publisher decides for business reasons to stop development of a game, a broad category of material defaults in the development contract may prove tempting for use as pretexts for termination. For these reasons, counsel for the developer should strive to add safeguards to Section 2 of the sample development contract.

“SECTION 3: THE PUBLISHER’S RIGHT TO TERMINATE FOR CONVENIENCE.
In addition to Publisher’s other termination rights hereunder, Publisher may terminate this Agreement, or any platform under this Agreement, at any time prior to the Final Delivery Date, without cause, by providing Developer with written notice of such termination. In the event of such termination, Publisher shall have no obligation to pay Developer any additional installments of the Advance; provided, however, if Publisher has given written approval of a Milestone as set forth herein, then Publisher shall honor its payment obligations as per that Milestone. Further, in the event of such termination and in the event Publisher elects to have a third party complete the Game or Publisher completes the Game, Publisher shall have no obligation to pay Developer any additional or further amounts hereunder.”

“Termination for convenience” is a contract term unique to the video game industry. This permits a publisher, upon notice, to stop
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development of any game at any time under any circumstances. If market conditions change, if the publisher decides to reallocate resources, if an executive change results in reappraisal of the project, if any reason, or even if no reason should motivate the publisher to terminate, it may. For the developer, a termination for convenience can be unsettling, disruptive, and highly damaging. To perform its obligations under the development agreement, the developer typically hires or retains staff (including anyone listed in “key man” requirements in the contract), invests in equipment and technology, makes commitments for facilities, assigns a material part of its work force to the project on an exclusive basis, and refuses other work or stops seeking it. Some development contracts provide that the developer will work exclusively for the publisher (and forsake all others) during the duration of game development. Exercising the publisher’s right to terminate for convenience in such a circumstance can jeopardize the developer’s existence.

Motion picture producers certainly enjoy the right to not produce, or to shut down a production if they are not satisfied with the way a project is developing. However, contracts for talent are often signed on a “pay or play” basis. Under such terms, the talent is paid the full fee whether or not it has provided services for the completion of the project. There is no “pay or play” language in a typical video game development deal. Termination for convenience provisions also typically omit compensation that is not negotiated. Termination can be among the most contentious issues in video game development deals.

When considering how to negotiate the issue of the publisher’s payments upon termination for convenience, the developer needs to analyze its cash flow and the realities of being left without a publisher after having undertaken a project. The developer should insist that it be paid for all milestones that have been delivered up to the point of the publisher’s notice of termination. The developer should also negotiate for payment for all work performed in connection with the milestone that is under development but not delivered at the time of termination, as this amounts to getting paid for work that has been performed. Additional consideration should include overhead incurred by gearing up for the project (equipment leases, office space that is now redundant, commissions to headhunters), plus an incremental payment to cover overhead expenses while the company shuts down the terminated project and goes through its business development process to locate other work. Upon termination, the developer must also look at its staffing levels to decide whether layoffs are required.

Once the publisher exercises its right to terminate for convenience, if it should decide to complete development of the game without the developer, there is no further payment obligation, including royalties, to the developer. Section 3 indicates that the right to terminate for convenience can be exercised until the final delivery date of the game. The publisher may determine that it is economically advantageous to terminate the developer for convenience at a very late stage in order to avoid a final payment and royalty obligation. This may be an act of bad faith, and counsel for the developer may seek to provide terms to prevent or mitigate exercise of termination for convenience at a late stage in development.

A final consideration when negotiating termination for convenience is the risk that a publisher may attempt to wrap what is really termination for convenience into a termination for cause. This forces an examination of what constitutes a material breach by the developer. Financial stakes for a publisher may be high. It may determine that it no longer wants the game for any number of reasons. If a termination for convenience is going to prove expensive because it involves some sort of contractual payment, the publisher may find fault with the developer’s performance and try to find an instance that rises to the level of material breach.

If the developer was one day late or slightly over budget when it delivered any milestone, or if the developer failed to have work product approved by the publisher, the default may rise to the level of material breach and permit the publisher to terminate the agreement with no cure period and no further payment obligation. At an extreme, the publisher could not only terminate for a trumped-up cause but also demand a refund.

“SECTION 4: TURN AROUND. In the event of termination under Section 3 and in the event Developer elects to complete the Game with or without a third party publisher and/or with or without different licensed content, Developer shall reimburse Publisher any and all of the amount paid to Developer up to the date of termination. In the event Developer completes the Game with a third party publisher, then reimbursement shall be made by Developer within thirty (30) days of commencement of such agreement with the third party publisher. Alternatively, if Developer completes the Game without a third party publisher, then Developer shall reimburse Publisher by paying Royalties to Publisher at a rate of 25% of Net Sales until all amounts paid up to the date of termination has been fully recouped.”
Section 4 brings the concept of “turn around,” familiar to those in the motion picture business, to video games. Once the publisher decides it no longer wants the game and has stopped development, the developer, who is at least as invested in the project as the publisher, can have the opportunity to find it a new home. The terms under which the publisher is reimbursed for its investment in the game are highly negotiable. As long as it is sitting on the publisher’s shelf, the game is a sunk cost. There is no one more qualified than the developer to complete the game, and no one is more passionate than the developer about promoting the game to another publisher. Once a substitute publisher is found, the terms under which the original publisher can recover all or a portion of its investment can be worked out. In this case, all but the most stubborn publisher recognizes that half a loaf is better than none.

“SECTION 5: PUBLISHER TERMINATION AFTER COMPLETION. In addition to Publisher’s other termination rights hereunder, after approval of the final Work Product by Publisher, Licensor(s), and any Third Parties, Publisher may terminate this Agreement at any time for a breach of any of the representations, warranties, obligations, or indemnifications made, or agreed to, by Developer herein, or any material breach of this Agreement.”

Developers need to be careful about language that permits the publisher to terminate a development agreement in the event of any postcompletion default, unless the survival clause provides that the publisher’s obligation to make all payments, account, pay royalties, and permit audits survives termination of the agreement. The developer should never be put in a position in which it has delivered a game that has been released and is on store shelves but risks loss of contractually mandated compensation because of a purported postdelivery default. Without this language, the publisher already has a remedy in the event of default—the action for damages. Nothing further should be required.

“SECTION 6: TERMINATION FOR BANKRUPTCY OR FINANCIAL FAILURE. In addition to Publisher’s other termination rights hereunder, if a receiver, administrator, administrative receiver or manager shall be appointed or any distress or execution or other process shall be levied on or enforced (and not being discharged within 30 days) over the whole or any part of Developer’s assets, or if Developer offers to make or makes any arrangement with or
for the benefit of its creditors, or commits an act of bankruptcy, or if any petition to consider a resolution for the making of an administration order or to wind up or dissolve Developer shall be passed or presented, or if Developer ceases or threatens to cease to carry on business, or is unable to pay its debts as they fall due, or suffers any analogous proceedings under foreign law, then Publisher shall have the right to immediately terminate this Agreement upon written notice to Developer. If this Agreement is terminated pursuant to this Section 6, neither this Agreement nor any right or interest herein shall be deemed an asset in any insolvency, receivership, bankruptcy arrangement proceedings, and neither Developer, its receivers, representatives, trustees, agents, administrators, successors and/or assigns shall have any right to sell, exploit or in any way deal in any of the Game or Work Product. In the event this Agreement is terminated by Publisher hereunder, any and all Work Product created by Developer hereunder shall be immediately delivered to Publisher.”

Section 6 provides for the publisher’s right of termination in the event of the standard financial failures of the developer. Some consideration should be given to how to handle similar circumstances on the part of the publisher. Particularly when dealing with a smaller, second- or third-tier publishing company, the developer may want to reserve its rights to terminate and to retain (or reacquire) ownership of the work product in the event its publisher suffers a serious financial setback. Financial upheavals, consolidation, and rumors thereof are a fact of life in the games industry. Rights in the event of adverse financial circumstances should go both ways. The second half of the section reserves rights in the event of bankruptcy. This is very common language in game development agreements, but bankruptcy experts may have their own opinions about what is enforceable.

Counsel for game developers have come to appreciate that termination provisions, like all contract language in game development deals, are driven by the generally commanding bargaining position enjoyed by game publishers. Like a prenuptial agreement, the typical video game development contract is driven by the side with the greatest assets. But by careful negotiation and an understanding of the issues, counsel for the developer can take steps to give his or her client a more even-handed agreement. Once this contracting hurdle is passed, developer and publisher may focus on game development and work together to live happily ever after.
PRACTICING WAGE and hour law has become a cottage industry. Indeed, many employment lawyers would describe the current appetite among lawyers for wage and hour cases as a feeding frenzy. The entertainment industry, like many others, will likely face several different types of wage and hour lawsuits in the foreseeable future. Already one large-scale, industry-wide class action wage and hour case has been settled. The suit, Greenberg v. EP Management Services, LP, involved nearly every production company, talent agency, and studio in Los Angeles.1 Substantial exposure remains, however, because many entertainment industry practices are particularly ripe for class action litigation.

In order to properly understand the entertainment industry’s vulnerability, it is necessary to examine the legal landscape against which wage and hour law claims arise. California wage and hour law is a mixture of both statutory and administrative regulations. For the most part, the relevant statutes are contained in Division 2 of the Labor Code. These statutes include laws relating to mandatory overtime, reporting and record-keeping obligations, and meal and rest periods. Additionally, regulations affecting the entertainment industry are contained in documents known as wage orders.

The California Industrial Welfare Commission maintains different wage orders for different types of jobs and industries. In the entertainment sector, three wage orders come into play. Wage Order 10 covers the amusement and recreation industry and regulates businesses that furnish entertainment or recreation to the public, such as theaters, night clubs, and theme parks. Wage Order 11 covers businesses that are operated for the purpose of broadcasting programs through radio or television. Wage Order 12 covers businesses that engage in motion picture or television production.
television production. When a wage order applies to an employer, it will cover all the jobs in the company, including the administrative positions unrelated to production work. Wage Order 12 covers almost all the motion picture and television production work in Los Angeles.

In addition, one cannot discuss wage and hour issues related to the entertainment industry without differentiating between union and nonunion productions. There is a generalized (and mistaken) belief in the entertainment industry that a collective bargaining agreement can ward off wage and hour lawsuits in much the same way that garlic can ward off vampires. While there are many types of civil claims that cannot be brought in a unionized workplace due to federal labor preemption, courts have allowed workers to maintain wage and hour lawsuits outside the established grievance and arbitration system. Preemption analysis is a complex topic worthy of an article all its own, but in the context of the entertainment industry, it can be boiled down to a single question: Do wage and hour obligations reflect a minimum standard set by law regardless of a collective bargaining agreement?²

In most wage and hour disputes, the answer is yes. This is why courts regularly reject most preemption defenses to wage and hour actions.³ For a claim to be deemed preempted, it is not enough for the claim to refer to the collective bargaining agreement for the determination of workers’ rates or hours. However, if a court must examine the collective bargaining agreement to resolve disputes between the parties, then preemption may attach.⁴ Navigating through the preemption minefield, even in wage disputes involving unionized workers, is inherently fact specific.

California recognizes an express exemption for some unionized workplaces when it comes to overtime. Labor Code Section 514 and the wage orders provide an overtime exemption for employees (with the exception of minors) who are covered by a collective bargaining agreement, as long as the agreement contains three elements: 1) the minimum wages, hours, and working conditions for the employees, 2) a regular rate of pay that is at least 30 percent above the state minimum wage, and 3) “premium wage rates” for all overtime hours worked. Thus, for this exemption to have any effect, employees must be paid at least a straight time wage of $8.78 (30 percent more than $6.75, the current minimum wage).⁵ Note that the exemption only requires that some type of “premium” be paid, not necessarily that workers be paid time and one-half for all overtime.⁶

The Section 514 collective bargaining exemption extends to Labor Code Sections 510 and 511, which govern working hours and overtime pay, but not necessarily to other minimum standards imposed by California law. Prior to a legislative amendment in 2002, however, the collective bargaining exemption covered the entire Labor Code, including meal and rest periods, reporting time pay, and other obligations. In 2005, the legislature amended Labor Code Section 512 to restore a limited collective bargaining exemption for entertainment production but, even then, penalties will be imposed for a company’s failure to provide meal periods or breaks. Though there are several different types of statutory exemptions for workplaces covered by collective bargaining agreements, production companies that simply defer to rights established through those agreements as a proxy for wage and hour compliance face significant liability exposure. Past practice and union consent will not trump a worker’s right to pursue remedies under California law.

The vulnerability of unionized companies, however, pales in comparison to their nonunion counterparts. While the collective bargaining exemption may not be comprehensive, it does guard against the potential for overtime class actions, which are perhaps the most typical type of wage and hour class action and carry the potential for large damages given the rigorous demands of production work. Moreover, should a nonunion production company seek to alter a legally mandated eight-hour day, it must comply with the secret ballot election procedures established by Labor Code Section 511, which requires a two-thirds majority to approve alternative work schedules.⁷

Production Practices Creating Potential Liability

Unionized or not, many production companies and studios face additional (and often unnecessary) exposure to wage and hour lawsuits because of certain legally suspect production practices. One of the most common of these practices involves “box rental”—the fee that many entertainment industry workers in the skilled trades are paid for their tools and equipment, in addition to their regular rate. On a set, producers may pay box rental to anyone from lighting grips to makeup artists. The amount of the box rental usually is set forth in the worker’s individual deal memo as opposed to being a fixed amount that is paid pursuant to the collective bargaining agreement.

The concept of box rental can serve two completely different purposes. Smaller, independent production companies may not have the necessary tools and equipment for a shoot, and bona fide equipment rental makes economic sense. Larger production companies actually may have the requisite tools and equipment but nonetheless pay box rental as a way of increasing de facto compensation for certain trades people while still preserving the union’s scale as a sacrosanct ceiling on wages.

Companies need to be aware that under California law, a worker cannot be required to provide his or her own tools and equipment unless the worker is paid twice the minimum wage (that is, $13.30 per hour).⁸ Even then the worker must be reimbursed for the use of his or her tools pursuant to Labor Code Section 2802, which governs workers’ indemnification rights. Moreover, many box rental agreements purport to shift the risk of loss onto employees if their property is damaged on the set, which gives rise to additional liability issues under Labor Code Section 2802.

One of the open issues concerning box rental relates to the fact that in most cases a worker’s “regular” hourly rate for overtime purposes does not include money paid as box rental. Under both California and federal law, overtime must be based on a regular rate that is determined by dividing total remuneration by hours worked.⁹ To the extent that box rental is a thinly veiled form of compensation (and exceeds the fair market rental value of the tools and equipment at issue), one could argue that it should be part of an employee’s regular hourly rate. However, if the box rental truly reflects reimbursement for use of personal tools and equipment, then it should not be considered part of the regular hourly rate.¹⁰

In a unionized environment, it remains to be seen whether or not an individual can sue under state law for unpaid overtime based upon the failure to account for inflated or arbitrary box rental compensation. To qualify for an exemption, an employer must pay some premium (not necessarily time and a half) for overtime hours worked. So long as producers pay an actual premium above the “correct” hourly rate for overtime (that is, a rate that includes box rental compensation), the production company may be able to claim a state law exemption. However, there are at least two arguments supporting the assertion that the collective bargaining exemption does not apply. First, the exemption was intended to allow for alternative work schedules in a unionized context and not to compromise the integrity of the hourly rate. Second, the requirement that some form of a premium be paid for overtime hours contains an implied obligation to pay that premium based upon a correct hourly rate. Regardless of state law remedies, however, the potential for overtime liability exists under the federal Fair Labor Standards Act, which also relies upon the concept of a “regular” rate for
1. By complying with provisions in a collective bargaining agreement, motion picture and television producers do not have to worry about complying with California’s unique wage and hour laws.
   True.
   False.

2. An employer cannot require production workers to bring their own tools to the set unless the workers are paid at least:
   A. Minimum wage.
   B. $25,000 per year.
   C. Union scale.
   D. Twice the minimum wage.

3. The wage and hour laws allow producers to use unpaid interns so long as they are either active students or have graduated from college within two years of their hire date.
   True.
   False.

4. Individuals may be held personally liable for wage and hour violations under federal law.
   True.
   False.

5. A production company only has to pay overtime based upon a worker’s hourly rate.
   True.
   False.

6. A unionized employer will be exempt from California’s requirements to pay daily overtime if the collective bargaining agreement provides for 1) wages, hours, and working conditions, 2) a regular rate of pay that is at least 30 percent above California’s minimum wage, and 3) some type of premium for all overtime hours worked.
   True.
   False.

7. Wage Order 12, which governs motion picture and television production, contains an exemption for anyone appearing on screen.
   True.
   False.

8. When an employee is terminated for misconduct, the employer must provide the employee’s final paycheck:
   A. Within one week of the date of termination.
   B. Within three days of the date of termination.
   C. On the next regularly scheduled payday.
   D. On the employee’s last day of work.

9. Unionized production companies may have more flexibility in adopting meal and break periods than nonunionized production companies.
   True.
   False.

10. A worker only can seek relief for wage and hour violations against the entity that pays payroll taxes on the worker’s behalf.
   True.
   False.

11. The entertainment industry is subject to the same rules and regulations as other types of businesses.
   True.
   False.

12. A nonunion production company may compel employees to have “on duty” meal periods if the nature of the work prevents an employee from being relieved of all duty.
   True.
   False.

13. Nonunion production companies must provide a 10-minute paid break period for every four hours of working time.
   True.
   False.

14. Federal and state law recognize exemptions for workers who are considered artistic professionals.
   True.
   False.

15. A unionized production company is subject to exactly the same obligations to pay daily overtime as a nonunionized production company.
   True.
   False.

16. To fall within an exemption for artistic professionals, a worker must either be a professional actor or an artist.
   True.
   False.

17. California law requires that overtime be paid to a nonexempt worker only when the worker exceeds 40 hours in any given workweek.
   True.
   False.

18. Under certain circumstances, a unionized worker’s wage and hour claims may be preempted by federal labor law.
   True.
   False.

19. A production company may defend a wage and hour action by proving that its payroll practices comply with “industry standards.”
   True.
   False.

20. The minimum wage in California is currently:
   A. $5.75 per hour.
   B. $6.75 per hour.
   C. $7.25 per hour.
   D. $5.75 per hour.
Another production practice that has potential liability exposure involves internships and free labor. The entertainment industry has no shortage of people willing to volunteer their services as so-called interns so that they can learn the ropes and develop professional contacts. But calling someone an intern does not create an exemption from wage and hour law.

The law allows for unpaid volunteers, not only when the services are for humanitarian, public service, or religious reasons. While many entertainment executives may view themselves as deities, it is highly unlikely their interns will qualify as exempt volunteers. About the only time when unpaid internships will pass muster is in the context of a bona fide academic program in which the student receives no remuneration or economic benefits.

Anyone who has ever attended a silent auction has undoubtedly seen the industry practice of donating walk-on roles as a means of raising money for charity. It is not clear whether or not these uncompensated roles violate wage and hour law. A walk-on part may arise in a charitable context but the service itself is not humanitarian in nature. It is fair to wonder whether the walk-on part exists only as a means to support charity or whether the walk-on recipient is actually displacing a professional actor who would have been cast and paid for the performance. While Wage Orders 11 and 12 contain certain exemptions for “professional actors,” this exemption does not cover unpaid amateurs performing as extras. Moreover, whether “cast members” of reality television shows or game shows must be paid minimum wage, given that they are not professional actors, remains an unresolved issue.

In the reality television lawsuits, the positions at issue are, for the most part, story editors and producers, who develop and create story lines for reality shows. In order to claim an artistic professional exemption under the wage and hour laws, an employer must show that its employees are performing “original and creative” work in a “field of recognized artistic endeavor,” and exercising “discretion and independent judgment” over their tasks.

Unlike writers on scripted television series and films, it is not at all clear that reality writers and editors operate under those conditions.

For entertainment productions, it is not a given that employees holding certain positions will be treated as artistic professionals and those filling other positions will not. The strongest analogy is to news writers. On occasion, newspaper columnists are considered exempt professionals but, for the most part, “the reporting of news, the rewriting of stories received from various sources or the routine editorial work of a newspaper” is not considered original and creative for purposes of an artistic exemption. The same may be true for the type of storytelling occurring in reality television.

Entertainment tends to attract people who describe themselves as “creative” in one way or another. Companies, however, simply cannot expect courts to take an overly generous view of who is and is not sufficiently “artistic” for purposes of a wage and hour exemption. While lawsuits have been filed over the story editor/writer jobs, this is just the tip of the reality television iceberg. The “actors” themselves may not qualify for any type of recognized exemption, and some of them work 24 hours a day, seven days a week for months. A reality show’s cast does not con-
sist of trained professionals, no matter how many of them are trying to break into show business through their exposure on the show. The fact that strippers may view themselves as artistic exotic dancers did not stop a court from rejecting an artistic professional exemption for them because of their lack of training.20 “Actors” in reality television should be no different. About the only thing that is clear at this point is that the stakes are extremely high when companies rely on exemptions as a substitute for wage and hour compliance.

Further potential exposure exists regarding the many types of skilled tradespeople on a set who are “daily hires” and who have no contractual guarantee of continued employment (even if they have worked on the same show for years). Generally speaking, a daily hire is someone who is hired to work on a production for a single day—usually for a specific, short-term project. By calling large portions of a regular crew daily hires, a production company can open up a Pandora’s Box of legal problems when these workers are required to wait for the normal payroll period to receive their paychecks.

Some production companies have tried to defend wrongful termination claims through the legal fiction that the worker in question was hired and laid off on a daily basis—that is, a producer’s decision not to rehire is different from a decision to terminate.21 If, however, a company contends that workers are laid off and rehired on a daily basis, one can query whether or not the workers should be paid as daily hires.

Labor Code Section 201.5, which applies to “employees engaged in the production of motion pictures,” requires that when employees are “laid off” (meaning that they are terminated while retaining eligibility for reemployment), they may be paid on the next regular payday (as opposed to paying them on their last day of work). This provision, however, may not cover television production. One could argue that by excluding television production from the scope of Section 201.5, the state legislature intended for laid off workers to be paid immediately—at the end of every workday. Thus, an employer that does not pay wages on a daily basis may be liable for a statutory “waiting time penalty” under Labor Code Section 203, which requires employers to promptly pay terminated workers on their last day of work. The penalty for violating Section 203 is equal to a day’s wage for every day that payment is late (up to a 30-day maximum). With a daily hire, however, one could argue that waiting time penalties accrue with each day’s work (and layoff), and that each violation triggers a new and different penalty period.

A case currently pending before the California Supreme Court may have an impact on wage and hour analysis pertaining to daily hires. Smith v. Superior Court (L’Oreal USA, Inc.),22 which is not an entertainment industry case, involves a model who was hired to work at a one-day trade show. She waited several months before receiving her fee. At issue is the definition of the term “discharged” for the purposes of Labor Code Section 203 and whether waiting time penalties are available for employment that is for a fixed and set duration, such as a daily hire.24

Another production practice that elicits concern—and often avoidance—is the observance of meal and break periods. Production schedules are hectic, and breaks are often taken on a catch-as-catch-can basis without any type of regularity. Many workers are expected to just grab a quick bite to eat at the craft services table and resume their duties shortly thereafter. Uncontrolled meal and break periods, however, may create substantial liability for production companies.

California’s meal and break rules are codified in Labor Code Section 512. In 2005, the California legislature amended the statute to include a limited exemption for work per-
formed pursuant to a collective bargaining agreement in the motion picture or broadcasting industries—as long as the workers are covered by Wage Orders 11 or 12. Under this exemption, if the collective bargaining agreement provides for meal periods and includes a monetary remedy for employers who fail to provide a meal period—a remedy that presumably may differ from the statutory remedies that are otherwise provided under California law—then the terms of the collective bargaining agreement will control.25 For unionized employers, while there may be an exemption under state law, pre-emption will not likely rescue an employer who abides by union rules while ignoring California’s unique requirements.26

Nonunion productions, however, must comply with the strict statutory meal and break rules imposed by law. Under Wage Order 12, employers may not employ a worker for more than six hours without a meal period.27 Moreover, the meal period cannot be less than 30 minutes, and employers also need to provide subsequent meal periods no later than six hours after the termination of the preceding meal period. Unless the employee is relieved of all duty during his or her meal period, the law requires employers to count the meal period as time worked. This type of “on duty” meal period is only permitted when the nature of the work prevents an employee from being relieved of all duty and, even then, an employee must consent in writing to the “on duty” meal period. Employees may revoke their consent at any time, and the written agreement must reference this right.28

Employees are entitled to take a 10-minute break for every four hours of worked time, and the workers must be paid for these rest periods. Moreover, “swimmers, dancers, skaters and other performers engaged in strenuous physical activities” may be entitled to additional breaks.29 If an employer fails to provide mandated meals and breaks, the employer may be ordered to pay the worker one hour of his or her regular rate for each respective violation.30

Entertainment industry companies also may face legal exposure as a result of the practice known as working off the clock. Production companies cannot allow the work schedule to dictate wages, which must be determined by work that is actually performed. During the production of an entertainment project, some companies have been known to request hourly workers to record their hours worked in a pro forma fashion for a standard workday—which could be 8, 10 or 12 hours—regardless of the time that is actually worked. Moreover, on some sets, workers are not given credit for the time they work after “wrapping” for the day, even if the workers need to pack up equipment or attend to other types of incidental cleanup. Requiring employees to work off the clock is an invitation to wage and hour claims.

**Joint Liability and Personal Liability**

All these employment practices not only can lead to substantial liability for wage and hour violations, they also should raise concerns regarding joint—and even individual—liability. It is common in the entertainment industry for a network, a studio, one or more production companies, and several “loan-out” companies to work together on a given project. While this collaborative business model has served the industry well, it can create joint liability for wage and hour claims as well as other types of employment claims.

In certain cases, two or more companies may be deemed the joint employer of one or more employees, especially when networks and studios exert significant control over personnel decisions and production schedules. Indeed, when this occurs, the joint employers are jointly and severally liable for compliance with state and federal wage and hour laws.31 Additionally, if a joint employment relationship exists, the hours worked by an employee for each employer are combined when determining the total number of hours worked in a day or workweek for wage and hour purposes.32 For example, a studio may
be liable for overtime violations even when its records indicate that its employees had not worked more than 40 hours in a workweek or eight hours in a workday if those employees also performed services for the production company—the joint employer—on the project.

While there is no bright-line test to determine when a joint employer relationship exists, courts generally will make a finding of joint employment if: 1) the employers arrange to share the employee’s services, or 2) one employer acts directly or indirectly in the interest of the other employers, or 3) one of the employers, either directly or indirectly, controls or is controlled by the other employers. Conversely, if the employers are acting entirely independently of each other and are completely disassociated from one another regarding the employment of the employees, then no joint employment relationship exists.34

The entertainment industry is ripe for joint liability claims. In some cases, employees of a production company that partners exclusively with a studio may be deemed employees of both the production company and the studio, especially if studio executives exert significant control over the production. A judge or jury could find that, in many situations, personal assistants, drivers, security personnel, and others hired by an actor’s or director’s loan-out company are jointly employed by the company and a studio. Joint employer liability is a trap for the unwary, and companies should consider its consequences any time they are collaborating on a project.

Even if no joint employer relationship exists, companies are not necessarily free from joint or dual liability. Separate business entities will be treated as a single employer for purposes of liability when they are deemed to be an “integrated enterprise.” Courts consider four factors in determining whether separate entities should be considered as a single employer: 1) interrelation of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership and financial control.35 While centralized control over labor relations is an important factor, no single factor is conclusive, and all four factors need not be present for the integrated enterprise doctrine to apply.36

The integrated enterprise doctrine usually attaches to parent corporations and their subsidiaries—and, of course, there is no shortage of corporate parent/subsidiary relationships in the entertainment industry. If a studio owns a significant interest in a production company or oversees all human resources matters for the production company, a court could find that the studio and production company operate as a single, integrated enterprise and hold both entities liable for the wage and hour claims of employees of either company. Parent and subsidiary companies should employ separate upper management and maintain separate human resources departments if they want to avoid this type of claim.

Under federal law, certain individuals—such as show runners, directors, and studio executives—may be held personally liable for wage and hour violations. The Fair Labor Standards Act defines an employer as “any person acting directly or indirectly in the interest of any employer in relation to an employee,” and defines a person as “an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons...”37 Several courts have held corporate officers and executives liable as an employer under the FLSA, in addition to the corporate defendant, and they have done so especially when the executives have a significant ownership interest in the company, control significant functions of the business, determine salaries, make hiring decisions, and have operational control of the business.38

Personal liability under California law is less clear. The California Supreme Court recently held that individual officers, directors, and shareholders could not be held personally liable for nonpayment of overtime wages under California law.39 The court noted several instances, however, in which state wage and hour law may subject individuals to personal liability. For example, the Department of Labor Standards and Enforcement may hold individuals personally liable for wage and hour violations when it prosecutes or adjudicates these claims in an administrative setting.40 Further, Labor Code Section 558 allows for civil penalties to be assessed against “any employer or other person acting on behalf of an employer who violates, or causes to be violated, California wage and hour law.” Because the penalties available under Section 558 include the amount of underpaid wages, it remains to be seen whether or not individuals will be held personally responsible for underpaid wages through an action brought under California’s Private Attorney General Act.41 A recent appellate decision, however, suggests that these alternative theories of personal liability will not likely be available under California law.42

The wage and hour issues confronting the entertainment industry will no doubt have an impact on the way production companies structure their employment relationships. Some industry practices, like paying phantom box rental to personnel who do not have boxes, will have to change. Producers of nonunion programming may decide that, given the several collective bargaining agreement exemptions under California law,
it is cheaper to sign a union contract than to engage in union avoidance. There are many open issues facing production companies, and the prospect of liability exposure for wage and hour violations will alter many business practices that are now considered to be standard operating procedure. While the Greenberg class action was certainly a wake-up call to many industry employers, it is only the first of what will likely be several industry-wide class actions challenging the status quo. Greenberg involved fairly narrow issues, including waiting time penalties and reporting obligations, and it did not purport to cover the full panoply of legal claims that may be brought under federal and state law. Unless production companies begin to assess their wage and hour exposure and change the way that they do business, several large scale, industry-wide lawsuits are undoubtedly on the horizon.

1 Greenberg v. EP Mgmt. Servs., 1998, LASC Case No. BC237787 (filed Oct. 2, 2000). The case represents a consolidation of several different class actions. The class was defined as “all persons who worked in the motion picture and/or broadcasting industries, including commercial advertising, between September 30, 1996 and the present.”

2 Valles v. Ivy Hill Corp., 410 F. 3d 1071, 1075 (9th Cir. 2005) (“The Supreme Court has sought to preserve state authority in areas involving minimum labor standards.”).

3 See, e.g., id. (involving a civil claim for meal and break penalties); Gregory v. SCIE, LLC, 317 F. 3d 1050 (9th Cir. 2003) (regarding a claim of overtime by a member of the International Association of Theatrical and Stage Employees union); and Balcorta v. Twentieth Century Fox-Film Corp., 208 F. 3d 1102 (9th Cir. 2000) (involving an IATSE member’s claim for waiting time penalties). In all these cases, the claims were not preempted by federal labor law.

4 See, e.g., Firestone v. Southern Pac. Gas Co., 219 F. 3d 1063 (9th Cir. 2000), rehearing denied, 281 F. 3d 801 (9th Cir. 2002) (In an overtime claim preempted by federal law, the workers’ proper “regular rate” could not be determined without interpreting the collective bargaining agreement.).

5 8 CAL. CODE. REGS. §11000.

6 Gregory, 317 F. 3d 1050.

7 The Labor Code §514 exemption for collective bargaining agreements allows unionized work forces to opt out of the §511 election procedures. See LAB. CODE §§510(a)(2), 514.

8 See, e.g., Wage Orders 11-2001(9), 12-2001(9).


10 See 29 C.F.R. §778.217.

11 29 U.S.C. §§201 et seq. Unlike California law, federal law does not recognize the concept of “daily” overtime for working more than eight hours in a day. Federal overtime liability exists only when eligible employees work more than 40 hours in a week. Moreover, there are differences between federal and state law regarding how to compute the regular rate. The federal rule generally divides compensation by hours worked, while state law presumes a 40-hour workweek. See LAB. CODE §515(d).

12 Alamo Found. v. Secretary of Labor, 505 U.S. 1204 (1992); DLSE OPERATIONS AND PROCEDURE MANUAL
§43.6.7. 13 2002 MANUAL, supra note 9, §43.6.8.
17 Under federal law, fields of recognized artistic endeavor include “music, writing, theater, and the plastic and graphic arts.” 29 C.F.R. §541.302(b); 2002 MANUAL, supra note 9, §54.9.
18 2002 MANUAL, supra note 9, §54.1.
19 29 C.F.R. §541.302(i)(2).
23 In Smith, the lower court held that when an employee completes a set period of employment, the employee is not deemed to be discharged—and waiting time penalties are not available as a remedy for untimely payment. Smith v. Superior Court (L’Oreal USA, Inc.), 123 Cal. App. 4th 128 (2004), rev. granted, Jan. 19, 2005.
24 In November 2005, the Los Angeles Superior Court approved a settlement of a “waiting time penalty” class action involving nearly every type of worker in the entertainment industry. The settlement contained a release period ending in late 2005, which affected the rights of workers to seek waiting time penalties during that period.
25 LAB. CODE §512(d).
26 Valles v. Ivy Hill Corp., 410 F. 3d 1071, 1075 (9th Cir. 2005).
27 In other industries, mandatory meal periods must be provided within five hours. See, e.g., Wage Order 1-2001(11) (Manufacturing).
28 Wage Order 12-2001(11).
29 Wage Order 12-2001(12).
30 There is currently a split in authority over whether these monies are owed as a form of wages or as a penalty, which affects the limitations period. The California Supreme Court has granted review in a case that should resolve this debate. Murphy v. Kenneth Cole Prods., Inc., Cal. Sup. Ct. Case No. S140308 (rev. granted Feb. 22, 2006).
31 Torres-Lopez v. May, 111 F. 3d 633 (9th Cir. 1997); 29 C.F.R. §791.2; 2002 MANUAL, supra note 9, §37.1.2.
31 29 C.F.R. §791.2.
32 Id.; Chao v. A-One Med. Servs., Inc., 346 F. 3d 908 (9th Cir. 2003).
33 29 C.F.R. §791.2.
35 Armbruster, 711 F. 2d at 1337-38.
37 Department of Labor v. Cole, 62 F. 3d 775 (6th Cir. 1995).
39 Id. at 1084-86. See also Wage Order 9, §2(f), which defines an “employer” as “any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.” Labor Code §18 defines a “person” as “any person, association, organization, partnership, business trust, limited liability company or corporation.”
40 LAB. CODE §2699.
The advertising and entertainment industries have merged. While product placement and brand sponsorship have been features of entertainment programs since the early days of radio, the efforts to integrate brands and brand messages into entertainment programming during the past few years have become more systematic and sophisticated than ever before.

This is so because content producers are looking in nontraditional places for source material and partners to finance and promote their programs. Producers also are seeking to lend authenticity to their programs by having their characters interact with real people, places, and things. At the same time, an increasingly fragmented media landscape—replete with blogs, DVRs, video iPods, and other personal media “game changers”—has prompted marketers to look for innovative opportunities to engage with consumers. So-called branded entertainment—also known as product integration, plot placement, advertainment, or whatever other name is in fashion to describe the process of embedding products and services into entertainment—is emerging as a popular means to that end.

Product integration can work extremely well for advertisers and producers if it strikes a balance between being noticed while also being transparent and germane. The practice is likely to be more successful with consumers if the product fits in seamlessly and naturally with the program’s story line, fulfills an actual need presented by the story, and serves that need in a way that is not awkward or contrived.

But seamless and natural product integrations are causing consumer watchdog groups to complain. One group, Commercial Alert, claimed in its petition to the Federal Trade Commission that the failure to clearly and conspicuously identify and disclose product placements has risen to the level of false and deceptive advertising. Although the FTC rejected Commercial Alert’s petition late last
year, the rejection nevertheless forebodes an even greater risk—the exposure of product placement and brand integration in entertainment programs to scrutiny under Section 5 of the FTC Act, which has been reserved historically for pure commercials. In addition, the Writers Guild of America recently expressed concerns about the expanding practice of product integration in episodic and reality television. The guild has threatened to petition the Federal Communications Commission to impose restrictions unless producers agree to a code of conduct that would increase what they pay WGA members and give writers more creative control over the practice.2

Examples of product integration abound in feature films, video games, print publications, online media, and television. For films, the placement of Reese’s Pieces in E.T. is mentioned most frequently as representing the start of the current bandwagon, with honorable mentions to the placement of the Mini Cooper in The Italian Job (in which the car was expertly positioned as a character in the film through exciting chase scenes down stairs and narrow Italian roads), a plethora of futuristic product integrations in Minority Report, the weaving of references to Federal Express throughout the plot in Castaway, and plugs for Starbucks and other brands in the Austin Powers film franchise.

Companies like Massive Inc. have partnered with video game publishers to deliver real-time ads across an online video game network. In this way the companies essentially sell and rotate postproduction product placements in lieu of hard-coding advertisements into the game in a single, fixed placement.

Online media features search engines selling “sponsored links” in their search results pages. In print media, advertisers can purchase all the advertising space in a publication—as Target did in the August 22, 2005, issue of The New Yorker—or sponsor special sections of an issue. Advertisers, most particularly auto makers, are increasingly pressing to buy their way into the editorial pages of magazines—a move that threatens the church-and-state separation of editorial and advertising espoused by the American Society of Magazine Editors.

Product integration appears extensively on broadcast, cable, and pay television every day. The Apprentice is often singled out for placing brands front and center by making teams compete to see who can create the best marketing or brand positioning strategy for a real advertiser that has paid or provided other consideration for the opportunity to appear in the program.

Beyond entertainment programming, brands and other commercial influences are becoming more apparent in the presentation of local and national television news. The involvement of advertisers in news programming has included paying networks to produce segments about an advertiser’s industry, sending paid experts on satellite media tours to conduct interviews about the industry, or creating advertiser-produced “video news releases” (VNRs) and providing them—prepackaged and ready-to-use—to stations that may not have the resources to produce 100 percent of their news programming and can choose to air the VNRs in their entirety.

With the increased scrutiny of branded entertainment, it appears that the FTC and the California Attorney General are trawling for a test case that will have major implications for the commercial speech doctrine and state law publicity rights. Producers, networks, and advertisers—particularly those that appear in television—need to be carefully advised regarding the existing law in this area and where it may be headed. No attorney wants his or her client to be named in that sought-after test case or the others that are sure to follow.

Current State of the Law

Under a straightforward application of existing law, producers and networks who embed brands into television entertainment programming must disclose that they are doing so. Under the Communications Act of 1934, as amended, and the FCC regulations promulgated under it, production personnel must disclose when they receive consideration or free products or services in exchange for including products or mentioning products or services in a program. The law also requires disclosure up the production and distribution chain to the broadcaster, who must identify the sponsor or sponsors during the program using language such as “promotional services or other valuable consideration provided by...”

If a paid spokesperson or VNR is used as part of news programming, the advertiser or other entity that is associated with the spokesperson or VNR should be disclosed as well, unless the association is reasonably clear under the circumstances. Failing to disclose this type of association may expose the advertiser and the station or network that broadcast the program to fines. It could also expose the advertiser to public embarrassment or even the type of outright condemnation that the Bush administration received in mid-2005 for paying conservative commentator Armstrong Williams to promote the No Child Left Behind Act in radio and television appearances without disclosing that he had been paid for his supportive statements. The Government Accountability Office found that Williams’s activities constituted illegal covert propaganda.

Complying with the Communications Act disclosure requirements is relatively easy. What is harder for advertisers and broadcasters—and the real issue lurking on the edge of this television industry phenomenon—is trying to figure out if and when a branded entertainment program should be legally characterized as a “program-length commercial.” For example, in a bona fide program about fashion, the host could almost certainly list the names of celebrities seen wearing a particular designer’s clothes. The program could even feature footage of those celebrities wearing the clothes in public. But what if the program were also available online, with an accompanying article containing hypertext links to places where the designer’s clothes could be purchased? Moreover, what if the designer paid to be mentioned in the online article? Or paid for the television program to be produced?

Fundamentally, the line that separates entertainment programming from advertising is the same line that separates noncommercial speech from commercial speech under the First Amendment. How a program is characterized for First Amendment purposes is critical because the characterization affects, among other things, whether product claims must be substantiated as well as the latitude that content producers have in using third-party trademark and publicity rights.

Product integrations in entertainment programming have not historically risen to the level of product claims that need to be substantiated. So entertainment programs may, and often do, depict products being misused or used to accomplish things they are not truly capable of accomplishing. Similarly, entertainment programs have broad latitude in referring in nondefamatory ways to people or third-party brands without their consent. The programs also can generally feature real people without violating their publicity rights and depict third-party trademarks without violating the owners’ trademark rights, unless the unauthorized use falsely implies that the trademark owner originated, endorsed, or approved of the program or is affiliated with the program.

But if the program is deemed an advertisement, the latitude that traditional entertainment programs enjoy under right of publicity and trademark law goes away. In addition, advertising law requires advertisers to be able to substantiate all express and implied product claims that are made in their advertising. Moreover, an advertiser must be able to substantiate the claims before they are made. The typical analysis of whether a product claim is substantiated involves 1) a review of the ad in question for express and implied claims, 2) an identification of the substantiation that exists for those claims, and
3) an evaluation of whether the substantiation actually supports the claims.

Thus, if the Mini Cooper sequences in The Italian Job were deemed advertisements, the advertiser would need to have prior substantiation for the express or implied claims made during those sequences. The advertiser must support the claims that the car can withstand major shrapnel without affecting its ability to perform and is perfectly safe to drive even after it has been severely damaged during a high speed chase down stairs and through narrow roads. Similarly, there would need to be substantiation for claims espoused about a product featured as an integral element of a challenge during The Apprentice.

Distinguishing Commercial Speech and Noncommercial Speech

According to FCC policy in the early 1970s regarding whether a program can be characterized as a program-length commercial, “the primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to the sponsor’s advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor’s products or services.” If that were the legal standard, producers and broadcasters probably could breathe easy, because even when a product is deeply woven into the plot on a program such as The Apprentice, the program arguably involves much more than a single commercial promotion for the named sponsor’s products or services. But case law on the distinction between commercial and noncommercial speech has evolved much differently and does not give as much comfort or predictability as the FCC pronouncement.

Courts have concluded at various times and in various contexts that noncommercial speech includes matters that are in the broadly defined public interest, such as the reporting of current or recent events. In addition, courts have concluded that expressive, artistic, or entertainment content is a significant medium for communicating ideas. Therefore, this type of noncommercial expression also is entitled to the full breadth of First Amendment protection.

But rather than precisely define what noncommercial speech is, the cases have preferred to define noncommercial speech by what it is not. Essentially, noncommercial speech, according to the cases, is not commercial speech. In deciding whether something constitutes commercial speech, the U.S. Supreme Court has instructed that “the core notion of commercial speech is that it does nothing more than propose a commercial transaction.” The cases have done little to expound on what has been characterized by the Supreme Court as nothing more than a “common sense” standard for distinguishing between speech that proposes a commercial transaction and other varieties of speech. But the facts of two cases from the Ninth Circuit and a troubling opinion from the California Supreme Court give some guidance on the distinction.

One of the Ninth Circuit cases is Hoffman v. ABC/Capital Cities, in which the court held that the use in question was noncommercial and, therefore, the First Amendment trumped the plaintiff’s publicity rights. The other is Downing v. Abercrombie & Fitch, in which the court held that the use in question was commercial and, therefore, the plaintiff’s publicity rights trumped the First Amendment.

So what was it about Dustin Hoffman’s...
suit against the publisher of Los Angeles magazine that doomed his claim to failure on appeal. Hoffman claimed that the magazine violated his state law publicity rights and his rights under Section 43(a) of the Lanham Act when the magazine used a still photograph of him from the motion picture Tootsie—in which Hoffman’s character impersonated a woman—to create a computer-generated composite image that depicted Hoffman wearing a fashion designer’s clothes for women. The photograph appeared in an article titled “Grand Allusions,” which used computer technology to alter classic film stills of famous actors to make it appear that the actors depicted in the photos were wearing Spring 1997 fashions. In the Hoffman photo, the American flag and Hoffman’s head were retained from the original still from Tootsie, but Hoffman’s body and the long-sleeved red sequin dress that he was wearing were replaced by the body of a male model in the same pose wearing a spaghetti-strapped silk evening dress and high-heeled sandals. The text on the page announced that the still was from Tootsie and stated: “Dustin Hoffman isn’t a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels.”19 Los Angeles magazine did not ask Hoffman for permission to publish the altered photograph, and Hoffman sued.

The district court entered judgment in favor of Hoffman, but the Ninth Circuit reversed, holding that the magazine’s use of Hoffman’s image was not pure commercial speech and thus was entitled to the full protection of the First Amendment. In his argument to the court that the magazine’s use of his likeness constituted a commercial use, Hoffman emphasized that the body double in the Tootsie photograph was identified as wearing Ralph Lauren shoes and that there was a Ralph Lauren advertisement (which did not feature shoes) elsewhere in the same issue of the magazine. Hoffman noted the existence of a “Shopper’s Guide” in the back of the magazine, which provided stores and prices for the shoes and gown. The Ninth Circuit held that these facts were not enough to make the Tootsie photograph pure commercial speech.

In dicta, the Hoffman court explained that, if the altered photograph had appeared in a Ralph Lauren advertisement, then the case would have been similar to a trio of well-known rights-of-publicity cases—Waits v. Frito-Lay,20 White v. Samsung,21 and Midler v. Ford Motor Company.22 But Los Angeles magazine did not use Hoffman’s image in a traditional advertisement printed merely for the purpose of selling a particular product: “Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are ‘inextricably entwined’ with expressive elements, and so they cannot be separated out ‘from the fully-protected whole’.”23

Reciting the “common sense” distinction between speech that does no more than propose a commercial transaction and other varieties of speech, the Ninth Circuit stated that “common sense tells us this is not a simple advertisement and therefore the Los Angeles Magazine’s publication of the altered ‘Tootsie’ photograph was not commercial speech.”24 Accordingly, the court held that Los Angeles magazine’s noncommercial use of the photograph was entitled to the full protection of the First Amendment.

Just two months later, however, in Downing, the Ninth Circuit determined that the use of a photograph in the context of a clothing catalog, which also contained articles tailored to the catalog’s surfing theme, was less like the protected use in Hoffman and more akin to a simple advertisement. Abercrombie & Fitch is a clothing retailer that sells casual apparel for men and women through stores nationwide and also through its subscription catalogue, the Abercrombie & Fitch Quarterly. The quarterly contains photographs of models wearing Abercrombie’s garments as well as pictures of the clothing displayed for sale. In addition, approximately one-quarter of each issue is devoted to stories, news, and other editorial pieces. The Spring 1999 quarterly contained a section titled “Surf Neekid,” which included an article recounting the history of surfing. The section also contained a 700-word story titled “Your Beach Should Be This Cool,” which described the history of a famous California surfing beach. The page following this story featured a photograph of the plaintiffs when they were surfers at the 1965 Makaha International Surf Championship in Hawaii. The two pages immediately thereafter featured T-shirts that were replicas of the T-shirts worn by the surfers in the photograph.

The surfers depicted in the photograph sued Abercrombie & Fitch for using the photograph without their permission, asserting statutory and common law commercial misappropriation claims under California law and the Lanham Act. The Ninth Circuit overturned the district court’s grant of summary judgment on First Amendment grounds in favor of the defendants.

Although the Ninth Circuit acknowledged that a First Amendment defense extends “to almost all reporting of recent events” as well as to publications about “the people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and wide-spread attention to their activities,”25 it concluded that the quarterly’s use of the plaintiffs’ names and photograph was distinguishable from protected uses.

Under the facts presented, the court held that Abercrombie used the plaintiffs’ photograph “essentially as window-dressing to advance the catalogue’s surf theme.”26 The quarterly did not indicate that the plaintiffs were legends of the sport and did not in any way connect the plaintiffs with the story pre-
ceding the photo. In distinguishing *Hoffman*, the court held that while Abercrombie used the plaintiffs’ images in its catalogue to promote its clothing, *Los Angeles* magazine was unconnected to and received no consideration from the designer for the gown depicted in the article in question in *Hoffman*. Further, while *Los Angeles* magazine had a shopping guide buried in the back of the issue that provided stores and prices for the gown, Abercrombie placed the plaintiffs’ photograph on the page immediately preceding pictures of T-shirts that were not only replicas of the T-shirts worn by the plaintiffs in the photograph but were also available for purchase. Based on these factors, the court concluded that Abercrombie’s use was more commercial in nature than *Los Angeles* magazine’s use of Hoffman’s image and, therefore, was not entitled to the same First Amendment protection accorded to *Los Angeles in Hoffman*.

The Ninth Circuit’s opinion in *Downing* echoes the U.S. Supreme Court’s reasoning 18 years earlier in *Bolger v. Youngs Drug Products Corporation*. In *Bolger*, a manufacturer and distributor of contraceptives brought an action challenging a federal statute that prohibited the unsolicited mailing of contra-
ceptive advertisements. The district court found the statute unconstitutional and the Supreme Court affirmed, holding that the statute was an unconstitutional restriction on commercial speech. The *Bolger* case is useful in the context of branded entertainment to the extent that it helps distinguish between commercial and noncommercial speech.

The plaintiff in *Bolger* publicized the availability and desirability of its products using various methods, including mass mailings. The Supreme Court explained that most of the plaintiff’s mailings fell within the core notion of commercial speech—“speech which does no more than propose a commercial transaction.” The plaintiff’s informational pamphlets, however, could not be characterized merely as proposals to engage in a commercial transaction. Instead, the Supreme Court explained that the reference to a specific product does not by itself render the pamphlets commercial speech. Further, the fact that the plaintiff had an economic motivation for mailing the pamphlets was deemed to be clearly insufficient by itself to turn the materials into commercial speech. The Court found, however, that the combination of these characteristics, in a manner that closely resembled a traditional advertisement, provided strong support for the district court’s conclusion that the informational pamphlets were properly characterized as commercial speech, even though they also contained discus-
sions of important public issues such as venereal disease and family planning.

Together, *Hoffman*, *Downing*, and *Bolger* instruct that a hybrid medium comprising commercial and newsworthy elements, such as a branded entertainment program, will retain its noncommercial character so long as the program maintains its focus on primarily providing information that can be characteristic as news or entertainment as opposed to offering “no more than [a proposal for] a commercial transaction.” The First Amendment protection afforded to *Los Angeles* magazine in *Hoffman* is analogous to the protection extended to motion pictures and television programs that are not branded entertainment. Those films and programs are prototypical protected speech even though they are distributed for a profit, may contain liberal amounts of product placement, and may even be surrounded and interrupted by paid advertising.

The distinction between protected non-
commercial use and commercial use is one of degree. The *Hoffman* case can be cited for the conclusion that the closer a branded enter-
tainment program is to “a combination of...photography, humor, and visual and verbal editorial comment on” something of public interest, something newsworthy, or something creative or entertaining, as opposed to doing nothing more than proposing a com-

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commercial transaction, the more likely it will be characterized as noncommercial speech entitled to the full protection of the Constitution. In contrast, the Bolger and Downing cases support the contention that the more a branded entertainment program is structured to provide information or entertainment merely as “window-dressing” for an advertiser’s effort to sell products, and the more that branded logos and third-party advertising predominate over the content of the program, the more likely it is that the program will be deemed commercial speech.

The Kasky Decision

This analysis of the extent of branded entertainment’s protections from liability in the light of Hoffman, Downing, and Bolger has been complicated by the California Supreme Court’s unnecessarily broad opinion in Kasky v. Nike, Inc. in 2003. In a 4-3 opinion, the court in Kasky held that Nike could be found liable for false advertising under California Business and Professions Code Sections 17200 et seq. for statements made in press releases. The Kasky case arose after the footwear company issued a press release in response to television and newspaper stories that alleged injurious labor practices at its overseas factories. The state supreme court held that Nike’s statements were commercial speech, which meant that the statements received a lesser degree of First Amendment protection than they would if they had been found to be noncommercial speech. As a practical matter, this decision allowed Nike to be sued for its decision to join the public discourse on a topic in the public interest.

The court reasoned that “[b]ecause the messages…were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker’s own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages.” The court admonished that “when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully.”

One of the dissents to Kasky warned that it was improper and unconstitutional to restrict Nike’s ability to engage in the “important worldwide debate” regarding the use of foreign labor to manufacture goods sold in the United States. The dissent emphasized that Nike’s campaign had not been made through product labels, inserts, packaging, or commercial advertising intended to reach only Nike’s actual or potential customers but rather via press releases, letters to newspapers, and letters to university presidents and ath-
letic directors. Thus Nike’s statements, whether true or false, should have been treated as noncommercial speech entitled to the full breadth of protection under the First Amendment.32 Another dissent excoriated the majority for creating an overbroad test that, taken to its logical conclusion, renders all corporate speech commercial speech: “Because all corporate speech about a public issue reflects on the corporate image and therefore affects the corporation’s business goodwill and sale value,” all statements by a corporation about any topic may be found to be “commercial speech under the articulated test.”33

The distinction, or lack thereof, by the Kasky court between commercial speech and noncommercial speech has far-reaching and likely unintended consequences in the area of branded entertainment. But even if Kasky is distinguished on its facts and the comments about the press releases are characterized as dicta, it is now difficult to define with confidence what constitutes a program-length commercial. To some extent, maybe the best definition is the one used by U.S. Supreme Court Justice Potter Stewart to define “hardcore pornography”: “I know it when I see it.”34 Against this ambiguous backdrop, attorneys must try to advise their clients on how best to proceed.

Branded entertainment is evolving and unlikely to disappear in the near future. Not everyone is a proponent, however. Besides skeptical regulators, there are those on the creative side who do not care for it either. John Densmore, the drummer for The Doors, recently refused to allow the group’s songs, including “Light My Fire,” to be used in television commercials for a deodorant. His reasoning is reminiscent of the lyrics of the band: “People lost their virginity to this music, got high for the first time to this music. Kids died in Vietnam listening to this music…On stage when we played these songs, people felt mysterious and magic. That’s not for rent.”35 Perhaps that’s true, or perhaps that just means that advertisers will need to use someone else’s songs to help them break on through to the other side.

5 FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 255.5 Disclosure of material connection, 46 Fed. Reg. 3873 (Jan. 18, 1980). In its Policy Statement on Deception, the FTC further

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40. See supra note 7.
43. Hoffman v. ABC/Capital Cities, 255 F.3d 1180 (9th Cir. 2001).
44. Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001).
45. Hoffman, 255 F.3d at 1183.
47. White v. Samsung, 971 F. 2d 1395, 1396 (9th Cir. 1992) (as amended) (use of game show hostess’s “identity” in print advertisement for electronic products not protected).
49. Hoffman, 255 F.3d at 1185.
50. Id. at 1186.
51. Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001).
52. Id. at 1002.
54. Id. at 66.
56. Id. at 946.
57. Id.
58. See id. at 971.
59. Id. at 984.
60. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not attempt further to define [hard-core pornography]; and perhaps I could never succeed intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).
Produced By...: Balancing Art and Business in the Movie Industry
By Paul N. Lazarus III
Silman-James Press, 2005
$18.95; 229 pages

In a town where almost everyone is a movie producer, Produced By...: Balancing Art and Business in the Movie Industry is the introductory book that aspiring producers should read for a basic understanding of the motion picture making process. The book is very easy to read and is structured simply, following the chronology of motion picture development, production, and distribution. Produced By is not a book for motion picture industry veterans or lawyers with significant experience in motion picture transactions. Nor is it a book for those who want a deep insight into or an analysis of contracts concerning motion picture projects. Instead, it is a primer that explains the role of the producer through the life cycle of motion picture projects. Despite its simplicity, there are some nuggets of information and insights that may be helpful even to those with significant experience in the motion picture industry.

The book is divided into three sections: development, production, and marketing. The first section contains the most useful information for lawyers and independent producers, especially the first chapter concerning acquisition of rights. Lazarus (who does not indicate whether he is an attorney) does a good job of explaining the legal, business, and practical issues that arise in rights acquisitions. The primary target audience of the book is the independent producer, who is likely to spend much time attempting to develop motion pictures without the benefit of legal counsel, and Lazarus provides useful information to this target audience. For example, Lazarus explains the importance and use of option agreements and purchase agreements for motion picture rights and screenplays, as well as practical issues that typically arise during the acquisition process. Lazarus also explains the importance and roles of agents and lawyers during the development process and provides practical advice in pitching projects to studios.

Unlike the chapter devoted to acquisition of rights, the chapter on independent film financing is thin and not very useful to independent producers. In an era in which most independent producers must obtain at least some independent financing, they need a clear understanding of the independent motion picture financing market. Although Lazarus does explain, in broad strokes, the nature and type of independent financing for motion pictures, the discussion is insufficient. Most of the economic decisions an independent producer must make during development and preproduction (such as pay-or-play offers, deferments, and profit participation) will be affected by the nature of the financing that is procured. Therefore, independent producers need to know more specifically the material terms various types of financiers will require, and the failure to understand such requirements may be disastrous to the life of the project. For example, an independent producer must know whether and to what extent a financier will require profit participation, a preferred return, or a producing fee paid out of the budget. An independent producer who enters into an option or purchase agreement with a writer but fails to consider terms that a financier may require later may find an irreconcilable conflict between what was agreed to with the writer and what is required by the financier.

The second section of Produced By, concerning production, is not as useful as the first. With the exception of the chapter on preproduction, this section often is meandering and contains far too many personal anecdotes. One of the unpleasant experiences that comes from reading Produced By is the overexposure to Lazarus’s war stories about producing a particular motion picture. The reader may feel that every time the book turns to a new production topic, Lazarus’s mind diverts to: “That reminds me of the time when....” One of his editors should have controlled this compulsion. If they had, this section would have been shorter and more focused. This is not to say that the second section is void of good information, it is just that the information gets lost in a sea of anecdotes and obvious observations.

The third section, on marketing, does a better job of providing general information that is useful for independent producers. In fact, independent producers often are too focused on development and production and ignore the marketing and distribution side of the business. Produced By therefore provides a good introduction to and reminder of the marketing aspects about which the independent producer should be concerned (even during the development stages).

Fundamentally, Produced By is a good book that is easy to read and easy to understand. And, despite its grammatically casual style and excessive anecdotes, the book includes important information in a manner and format that is, for the most part, enjoyable.

Gary S. Raskin is a member of Raskin Peter Rubin & Simon in Century City.
Putting Internet Search Engines to New Uses

SEARCH ENGINES HAVE EVOLVED. They still locate information on Web sites, but they have expanded the type and amount of materials indexed and added new tools, all of which can assist attorneys in their online research and in their practice in general. For example, a desktop search tool (Google, Yahoo, Alta Vista, and MSN offer them for free) can assist attorneys in their practice simply by helping them find documents on their local hard drives. In addition, there are a number of tools that, for a price, will search in a networked enterprise environment, and Google has recently introduced a desktop tool that can search multiple computers.

Desktop search tools can save time. Windows users who search for a document among their Word files using the “Search for files” feature in the Start menu, only to learn after many frustrating searches that the desired document is in an e-mail message, can benefit from one of the new desktop search tools. Google’s desktop search engine (desktop.google.com) creates an index of documents on a computer’s hard drive and maintains cached versions of the documents as the user makes changes. Other desktop search tools function in a similar manner. Google’s desktop tool conducts its searches on its index of the local hard drive, which includes Word documents, Excel spreadsheets, Power Point presentations, Outlook e-mail, Web history, chats, and even Web pages previously visited but not currently online. Desktop search tools may even find the sought passage in deleted documents, as long as they are still in the Recycle bin. The desktop tool searches more quickly than the “Search for files” feature because it uses an index, not the files themselves. (The “Search for file” feature searches each word of each document.) Desktop search tools also permit more targeted searches than the “Search for File” feature because they permit users to add Boolean connectors to search words.

To download Google’s desktop search tool, which takes only seconds with a high-speed connection, visit desktop.google.com. Windows XP or Windows 2000 Service Pack 3+ and Microsoft Internet Explorer version 5.5 or higher are required. Once the download is complete, an icon appears on the computer’s desktop labeled Desktop Setup.exe. Double click on this to begin the installation. The user is given the opportunity to opt out of providing Google with nonidentifying search usage information and can set other preferences. After the installation is complete, documents on the user’s hard drive will be indexed (this will happen behind the scenes). To use the Google Desktop Search, double click the icon that appears on the desktop. The Google Desktop Search page appears, looking very similar to the Google search engine page. Enter key words or phrases (with or without Boolean connectors) into the search box and select Search Desktop.

Attorneys need to consider some security issues before installing a desktop search tool. Typically, a desktop search tool runs simultaneously with a regular Web search and displays summaries of documents from the local hard drive and the Web. Anyone who uses the computer to search will view results from the local hard drive. This could expose a client’s confidential information. However, there is a way to switch off this preference when first installing the desktop search tool. In a network environment, users should check with the firm’s IT staff prior to installation.

Tool Bars

Some search engines (Google, Alta Vista, and Yahoo) have created specialized tool bars that allow a searcher to perform a Web search no matter what Web page they are visiting. Generally free, tool bars seamlessly integrate with a Web browser and are easily downloaded and installed. To install the Google Tool bar, for example, go to toolbar.google.com. The features allow one to:

- Conduct a Google search from any Web page.
- Search only the pages of the site being viewed.
- Highlight search terms on the Web page—each word is highlighted in its own color and the highlighter can be turned on and off.
- Block pop-ups.
- Complete Web forms with information that is saved securely on the local computer.
- Post links to blogs.

Alta Vista’s tool bar (at altavista.com/toolbar) features a Translate tab, which when clicked translates a Web page into one of 10 languages. Yahoo’s tool bar can be downloaded from its home page. Internet search tool bars can help attorneys speed up their online research, first by saving them from the extra step of going to a search engine’s home page before searching, and second by allowing them to scan results more quickly by using the highlighter feature. Competition may also keep improvements coming.

Google offers an easy way to retrieve phone numbers and addresses from its database. The search engine has added street addresses and phone numbers (for residences and businesses) to standard Google search results. The phone numbers and addresses are limited to published U.S. phone listings. Phone number and address results are displayed at the top of results pages. Residential results have a phone icon to the left, while business results feature a compass icon to their left.

To retrieve business listings, type the business name, city, and state into the Google search box. The business’s zip code can be substituted for the city and state. To retrieve residential listings, users can type any of the following combinations into the Google search box: first name (or initial), last name, city; first name (or initial), last name, state; first name (or initial), last name, area code; first name (or initial), last name, zip code; last name, city, state; or last name, zip code. A reverse search can be conducted to retrieve a complete listing for a business or residence by entering only the area code and phone number. A free search may be all that is needed to find someone.

Google’s Glossary allows attorneys to quickly find the definition for a word. Type the word “define” and the word to be defined into

Carole Levitt and Mark E. Rosch are principals of Internet For Lawyers (www.netforlawyers.com).
the google query box (e.g., define clew). A definition of the word is displayed along with Google’s regular results page. To find multiple definitions of a word, use this search format—define:clew.

Google and Yahoo offer free alert services. These services allow a user to be notified by e-mail when a Web site or a news article is placed online that contains matches to the user’s chosen topics. Notification can be on a daily or as-it-happens basis. Yahoo’s My Web service allows a user to keep track of Web pages visited by saving specific pages or links to them and assigning key words or tags to those pages in order to group similar pages together. Yahoo also allows for sharing lists of saved pages and tags with a group of other My Web users (all or a select group). The service is free, but it does require setting up a Yahoo account. Anyone who has a Yahoo e-mail address has a Yahoo account.

**Indexing More File Formats**

Google was the first major search engine to index non-HTML files (including Word and Excel documents, Power Point presentations, and PDFs) that until then had been relegated to obscurity. Recently additional search engines have begun to index more file formats. Not only does this provide searchers with more results but also sometimes more useful results. For example, one may want to search for a Power Point presentation about a new law rather than an article on the topic. Google, Yahoo, and Alta Vista index Power Point files; using a search engine’s Advanced Search page, a user can limit the results to Power Point documents and not have to sift through results.

Until recently, Google had very little competition, but recently Yahoo Search and MSN Search have made impressive progress. In mid-2004, Google claimed to have indexed nearly 8.2 billion pages of the Internet. (No independent confirmation of this self-reported number is available.) In late 2005, after attempting to refute Yahoo’s claim that it had indexed more than 20 billion pages, Google removed the reference to the size of its index from its home page.

In February 2004, Yahoo implemented a new search index reportedly based on an index and spidering technology created by Inktomi, which Yahoo had acquired in 2002. Previously, Yahoo had been receiving its Web search results from Google. Yahoo’s new index is returning relevant, high quality results—many of which are very similar to Google results. In an August 2005 posting to the Yahoo Search Blog, Yahoo claimed that its search index had grown “to over 20 billion items...[that] includes just over 19.2 billion web documents, 1.6 billion images, and over 50 million audio and video files.” Because no definitive evidence is available, searchers have to take Yahoo’s word for it. (Some veteran search engine watchers have not embraced that claim.)

Google has created a separate search engine that searches only blogs (blogsearch.google.com). Blogs can be an excellent source of news, commentary, and public opinion on companies and their products. At the blog search site users will find the standard search term box and a link to the Advanced Blog Search. Some search engines, including Google, also include blogs in their standard search results. Users may therefore opt for results that include blogs and results that refer only to blogs.

Finally, attorneys who are too busy to stay informed about the advances that search engines are making can visit Searchenginewatch.com for news and information. Another way to learn about new search engine features and tools is by browsing a search engine’s help pages. For those who are curious about future Google features, Google Labs (labs.google.com) offers a preview. According to Google, this site “showcases a few of our favorite ideas that aren’t quite ready for prime time.” Taking the time to learn about new tools will save attorneys time in the long run.
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**CLE Preview**

**Practical Persuasion**

ON THURSDAY, MAY 11, the Los Angeles County Bar Association will present a program led by Scott Wood on the key principles for writing motions and briefs. In addition to these principles, the workshop includes a brisk review of 10 tips for clarity and concision. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal will begin at 5:30 P.M., with the program continuing from 6 to 9:15. The registration code number is 009161. The prices below include the meal.

- $100—CLE+PLUS members
- $75—LACBA members
- $225—all others
- 3.25 CLE hours

**Reel Images of Environmental Lawyers**

ON TUESDAY, JUNE 13, the Environmental Law Section will present a program featuring Paul Bergman, Sean B. Hecht, Thomas V. Meador III, and Randolph C. Visser, who will examine the portrayal and the glaring misportrayal of environmental law and lawyers in the movies. Contemporary films often portray environmental lawyers as lead characters in a morality tale in which the “little guy” is fighting “big” corporate wrongdoing and in which the legal work is fast-paced and compelling. How realistic are the portrayals in films of environmental lawyers and of their moral role in society? What do films such as *A Civil Action*, *Erin Brockovich*, and *The Pelican Brief* have to say on the matter? Those who attend will receive a complimentary copy of *Reel Justice: The Courtroom Goes to the Movies*, an informative and entertaining book for film enthusiasts and anyone who is interested in the various legal, social, and ethical dilemmas in the films discussed. The program will take place at the LACBA/LexisNexis Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal will begin at noon, with the program continuing from 12:30 to 2 P.M. The registration code number is 009340. The prices below include the meal.

- $15—CLE+PLUS members
- $40—Environmental Law Section members
- $55—LACBA members
- $70—all others
- $75—at-the-door payment for all
- 1.5 CLE hours

**TRIAL TIPS FROM THE BENCH**

ON TUESDAY, MAY 16, the Litigation Section will present a discussion of trial tips with Judges Emilie H. Elias, William F. Highberger, Samuel James Otero, and George P. Schiavelli, including things to keep in mind from the outset of the case and at every stage, the differences between state and federal court pretrial preparation, what to include and what not to include in pretrial briefs, jury selection tips, voir dire in federal court, and some favorite war stories. The discussion will take place at the Omni Los Angeles Hotel, 251 South Olive Street, Downtown. Hotel valet parking with validation costs $10. On-site registration and the meal will begin at 11:30 A.M., with the discussion continuing from 12:30 to 1:30 P.M. The registration code number is 009326. The prices below include the meal.

- $45—CLE+PLUS members
- $65—Litigation Section members and judicial officers
- $75—other LACBA members
- $85—all others
- $95—at-the-door registrants
- $750—firm tables
- 1 CLE hour
Who’s Afraid of Digital Downloads?

NOT LONG AGO, I HAD A BITTERSWEET EXPERIENCE. I discovered that the DVD of a client’s television show had completely sold out on the very day the DVD was released. Naturally, I was thrilled for my client (and just the tiniest bit for me). But as I stood in my local video store trying to resist the jumbo bag of M&Ms and watching everyone from preteen girls to WWII vets request the DVD, I felt a little burned. Some of you already know why: Under the current home video royalty agreement (under which DVD sales are categorized) 80 percent of the wholesale revenues for the sale of the DVDs will be excluded from my client’s profit participation, meaning that my client’s profit participation will be based only on 20 percent of wholesale revenues. In addition, after distribution fees, distribution expenses, dues, and assessment are deducted, what began as a background profit participation based on a 20 percent royalty will likely be reduced to a profit participation based on a royalty of 10 percent to 12 percent.

But the problem with the current home video royalty arrangement is not limited to sales of DVDs. Our clients and their respective guilds are on the frontier of a new set of issues, which are the unfortunate legacy of an unusual concession the guilds made for what was then “unknown and untested” video technology. We have reached the point where the demand of that technology—which now includes video iPods, Blackberries, and cell phones—for content such as my client’s is exploding.

Unfortunately, there are no appropriate formulas in the respective contracts between SAG, WGA west, WGA East, DGA, AFTRA, and IATSE and the studios or networks that specifically cover residuals for new delivery systems such as digital downloading to a video iPod. I am afraid that the digital downloads residuals could be paid at the outdated home video royalty based on 20 percent of sales, a formula that has haunted the guilds for almost 25 years.

The origins of the 20 percent of sales formula can be traced back to the 1970s, when Andre Blay, the owner of Magnetic Video, negotiated with 20th Century Fox to license Fox’s feature film library on Betamax. The negotiations between Fox and Blay covered manufacturing, packaging, marketing, and the risk of starting a new industry. The parties agreed that Blay would pay Fox a royalty of 20 percent of sales. Eventually, all the studios adopted the 20 percent royalty for the license to their libraries, and contracts were rewritten to limit reportable home video revenue to 20 percent of wholesale revenues. Accordingly, guild residuals were paid on only 20 percent of wholesale revenues—purposefully excluding 80 percent of the revenue from calculations. In 1982, when it could cost $40 to manufacture a single copy of a video, this was reasonable. Today, as the actual video manufacturing cost has been reduced to $3, it is obsolete.

The most recent chapter in the new-technology drama dates from the October 2005 introduction of the video iPod, which Apple hopes will do for the digital download of video what the iPod has already achieved for music. Through its iTunes store, Apple hopes to offer individual episodes of different television shows. Initial video offerings include the popular ABC series Desperate Housewives and Lost, with episodes available the day after their initial broadcast for $1.99 each—with virtually no distribution costs. In addition, on April 10, 2006, ABC announced that it plans to test online streaming of four shows on its Web site, ABC.com. This service, which includes interactive advertisements, will be offered free of charge.

The Writers Guild of America west believes that the proper formula for compensating writers is the existing residual agreement for pay television, a rate that is four times that of the home video rate. The pay television residual agreement entitles the WGA and the DGA to 1.2 percent of the entire distributor’s gross, while SAG gets 3.6 percent, and IATSE receives 5.4 percent. However, in February 2006, ABC announced—as the guilds feared—that it would pay digital download residuals at the lower home video rate, instead of the pay TV rate. No big surprise here. In response to ABC’s decision, the presidents of the respective guilds promised various actions, including “arbitration,” “filing claims,” and aggressively pursuing “all legal options at our disposal.”

Although the digital download residual is only one debate, it is to a large extent, the first debate in what will likely be marathon negotiations. And I am afraid, because, in reality, what is truly being determined is not just the digital download issue, but the extent to which creative talent will be allowed to participate in current—and future—profits. More to the point, the true issue lurking beneath this negotiation and its outcome—which will most likely result in protracted negotiations, arbitration, or even the potential S-word (shame on you if you weren’t thinking “strike”)—is the manner in which creative talent will be valued and compensated in the rapidly expanding new technologies. This is not a fight that the guilds can afford to lose. Much is at stake, and the guilds cannot create a precedent—as they did with home video—that could haunt them for another quarter century or longer.

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