Substantial Similarity in Idea Submission Cases


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There’s no business like show business. Writers, directors, producers, performers, executives, agents, managers, financiers, distributors, exhibitors, broadcasters, and many others, continue to dedicate themselves to the business of entertainment—and the tireless fight to protect their respective rights. Of course, if show business were not also big business, the disputes among the various players in the entertainment industry would not be noteworthy, and very few would require legal representation. Since that is not the case, each year we fill the pages of *Los Angeles Lawyer’s* Entertainment Law special issue with articles that address various legal issues involving the entertainment industry, including those in the forefront of industry concern.

Recently, the word most on the minds of those in the entertainment industry is “strike.” The Writers Guilds of America ended their 100-day strike in February, and the industry is bracing for another potential strike this summer by the Screen Actors Guild and the American Federation of Television and Radio Artists. Although much has been written about the WGA strike, not much has been written by those who were involved directly. This month, we have the pleasure of publishing a Closing Argument written by Patric M. Verrone, president of the WGA, West.

Verrone, who served as a coordinating editor for *LAL’s* annual Entertainment Law issue for 10 years, provides an interesting insight into the issues faced by the WGA during the strike as well as a partial postscript. Verrone’s words exemplify the mindset that many share: the studios, part of international conglomerates, are Goliath, and those challenging the studios are David.

Ironically missing from all entertainment labor negotiations are the producers who actually acquire and develop a good portion of the written works that are transformed into entertainment content. Over the past several years the studios have become less inclined to develop projects from scratch. The result is that many writers sell or option their works to independent producers rather than studios. Although some of those projects are later sold to a studio, most either are produced independently or do not proceed through the development stage. Therefore, any collective bargaining agreement entered into with the WGA significantly affects independent producers, because they are required to pay at least the guild minimum amounts when they acquire or commission scripts, treatments, rewrites, and polishes.

Perhaps someday there will be a guild or association that represents independent producers. If that ever occurs, and it results in labor negotiations with the existing guilds, it will be interesting to see which party is portrayed as Goliath.

Our cover features Sophia Loren and her son Edoardo Ponti. As Schuyler M. Moore discusses in his article, the business of international film financing was created around Loren’s stature as an international motion picture star. If only Loren was entitled to a residual payment for each independent film financed by investors who were involved directly. This month, we have the pleasure of publishing a Closing Argument written by Patric M. Verrone, president of the WGA, West.

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Although the business of show business definitely is not as attractive as Sophia Loren, we hope that it will mature as well as she has.

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David A. Schnider is general counsel for Leg Avenue, Inc., a leading distributor of costumes and apparel. Gretchen D. Stockdale is an associate with Hill, Farrar & Burrill, LLP, where she practices business and intellectual property litigation. Raskin, Schnider, and Stockdale are coordinating editors of this special issue.
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I HAVE PRACTICED in the field of entertainment and sports law for over two decades. My wife and I are the two attorneys at our firm, which is located in Philadelphia. Our home town is a bit off the beaten track for most entertainment law firms, whose operations are generally concentrated in Los Angeles, New York, or Nashville. Nevertheless, our firm is living proof that it is possible to be successful as small practitioners working in an entertainment law practice from a location outside the capitals of the industry. In order to build and sustain any practice, however, a lawyer needs to focus on a few core ideas.

Be a general practitioner first. I am a musician and songwriter; my wife and law partner is a former Hollywood film producer, screenwriter, and director. Although we could have both jumped into the practice of entertainment law, we instead spent the first several years of our careers in the general practice of law. Although our clients appreciate that we understand their art, they do not hire us to be their fans. Entertainment law is really general practice law for talented clients.

We negotiate celebrity endorsements and record deals, but if we had not first spent time learning the basics of a law practice, we would only be able to help our clients on matters pertaining to entertainment. Our clients are entertainers and creators, but their legal needs are much like those of other people—they pay taxes, they marry and divorce, they plan their estates, they get into auto accidents, and so on.

Therefore, prior to specializing in any field of the law, it is incumbent upon a new attorney to learn the basics of what I like to describe as my top 10 simple legal matters. These matters are what are most likely to bring average and famous people to the legal system. I have personally performed all the items on this top 10 list: 1) drafting a simple last will and testament, 2) forming a corporation, partnership, or limited liability company, 3) reviewing or preparing a simple tax filing, 4) applying for adjustment of a potential immigrant’s visa status, 5) administration of a simple estate, 6) filing a no-fault divorce, 7) representing a defendant in a small criminal defense matter, 8) representing a client in an insurance claim, 9) representing a client in the prosecution or defense of a simple personal injury or negligence case, and 10) representing a client in a simple real estate closing.

Love what you do. Lawyers spend 20 years in school before earning the right to practice law. After all that hard work and study, there is no point in having a job that makes us feel like we are on an assembly line, waiting for the whistle to blow. It is vital that we truly enjoy our work. A lawyer who actually likes to go the office and is passionate about the field in which he or she practices will be a much more learned and zealous advocate for the client, simply because of personal interest and motivation. That being said, we cannot be consumed by our jobs. A well-rounded person with hobbies and interests outside of the office can keep the life-work-family relationship in balance, and can bring his or her experience of the world outside the office to the benefit of clients and cases.

Get out there. No entertainment law practice was ever built from a desk inside an office building. Most entertainment clients are very intimidated by just setting foot in an office. In order to build a practice, the budding sports lawyer needs to be at the gym, campus, or training camp where athletes are. Potential music attorneys need to be in nightclubs, recording studios, and at music conferences. Those who want to be film attorneys should attend screenwriting workshops, independent film festivals, and other industry events. Give answers and be a mentor at these events. The clients will soon follow.

Learn to say no and yes. One of the most challenging parts of an entertainment law practice is the art of combining talent with investors. Generally, new entertainment lawyers represent the talent side of the deal, while more established practitioners tend to represent the money side of the deal. Unfortunately, most budding talent cannot afford to pay lawyers by the hour, and so offer percentages to potential representatives. The difficulty for potential representatives is that if they accept every contingent fee client that needs advice, they will be the busiest and the poorest lawyers in town. Like everyone else, lawyers have bills to pay, so we need to evaluate potential clients and create a good mix of retainer, flat fee, hourly, and contingent fee arrangements. To do this, we have to politely reject clients who will upset this equation.

It also serves the existing client base if the lawyer is not too overburdened. Statistics show that a large percentage of malpractice claims stem from a simple breakdown of communication between attorney and client. If the lawyer properly calculates the number of clients and matters that the firm can handle, the existing clients are served in an attentive and timely fashion. Learning how to say no is thus a major part of malpractice avoidance.

Saying yes to the right potential client at the correct time is also an art. Today’s captains of the entertainment industry need to make deals with stars of tomorrow. Do not be afraid to take a chance by being the first professional to recognize potential talent in a client. Do not be afraid to passionately announce to everyone who will listen that this client is worthy of consideration. This will show the lawyer’s scouting ability and will also serve to build a loyal client base. That being said, reputation is everything in our industry, so be honest in that passion. Avoid needless puffery and exaggeration, as it will eventually be exposed, to the chagrin of attorney and client.

Our clients are entertainers and creators, but their legal needs are much like those of other people.

Bernard M. Resnick is an entertainment attorney practicing in Philadelphia.
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FROM THE PUBLISHERS OF:
Applying Copyright Law to User-Generated Content

ON THE INTERNET, user-generated content (UGC) has created the need for lawmakers and copyright owners to find ways of addressing intellectual property issues specific to this new media form. The need grows daily, as UGC becomes an increasing portion of the media that the average American consumes. Articles concerning UGC are no longer relegated to the tech press and now are regular features in the entertainment and business sections of numerous periodicals. This importance is reinforced by the enormous prices being paid for services that rely on UGC: “Indeed, in the year since the News Corp purchase, MySpace’s net worth has nearly tripled, to $1.5 billion, according to Soleil-Media Metrix.”1 In a recent statement by Nokia, following a study it commissioned of its over 900 million customers worldwide, “up to 25% of the entertainment consumed by people in five years time will have been created, edited and shared within their peer circle rather than coming out of traditional media groups.”2 In addition to an avalanche of new content, the virtual worlds popping up on the Internet represent significant real as well as virtual economies.

Many players earn a living within virtual worlds by buying and selling game items in the real-world marketplaces. A study of the Sony-created virtual world, Norrath, part of the massively multiplayer online game (MMOG) Everquest, reveals that Norrath’s per capita wealth, in the real-world value of its virtual goods, ranked Norrath 77th in the world, slightly higher than Bulgaria.3

UGC encompasses numerous types of media content that is produced and submitted by everyday consumers or users of Web services. Unlike traditional media content, which is usually produced only by professional writers, directors, and media companies, UGC content is frequently created by people with virtually no level of technical or creative experience. Some of the most popular Web sites that incorporate UGC—and there are hundreds—are the video-sharing site YouTube, the social networking site MySpace, the Internet-based virtual world Second Life, and the virtual worlds of such MMOGs as World of Warcraft and Everquest.

UGC differs from traditional content not only in the manner in which it is created but also in the way rights to and liabilities arising from such content are allocated. Typically, with traditional content, creators and distributors enter into binding, bilaterally negotiated contracts, including representations and warranties, indemnification clauses, and other familiar language allocating their respective liabilities and designating ownership rights. In the UGC universe, these issues are typically dealt with through end user license agreements (EULAs). Despite such license agreements, however, copyright infringement issues continue to emerge from the use of UGC in new media. Some of those disputes are between individual users and creators of UGC. The deep pockets in the relationship are services that host UGC and Internet service providers (ISPs), and they are particularly likely to be subjected to claims that arise.

Passed in 1998, the Digital Millennium Copyright Act (DMCA) protects copyright holders from technology that facilitates piracy while offering protection to certain ISPs by limiting their liability in cases in which their customers are found guilty of copyright infringement.4 More specifically, Section 512 of the DMCA governs the relationship between certain ISPs and individuals who upload content on their sites.5 While there is some ambiguity associated with what constitutes an ISP, generally, an entity owning or operating a Web site that does not alter the content uploaded by its users is likely to be considered an ISP for Section 512 purposes, provided the ISP implements certain notice and takedown procedures. Under Section 512, if an ISP qualifies for the safe harbor exemption, only the infringing user or creator or uploader is liable for monetary damages. The Web site through which the infringing user engaged in the alleged infringing activities is not.

Section 512 is particularly important for online services such as YouTube and MySpace, and the virtual worlds such as Second Life, where users upload third-party content (including clips from movies, television shows, record albums, and concerts) without proper authorization from the copyright owner. Without the provisions of Section 512, an ISP that hosted such infringing content would find itself liable as a direct copyright infringer (e.g., for displaying allegedly infringing works) or as a vicarious or contributory infringer—alogous to being an accomplice of the infringer—and subject to large damages awards, statutory fines, and other liability. However, despite the safe harbor provided by Section 512, ISPs that comply with Section 512 have still found themselves the subject of litigation by aggressive copyright owners.6

Takedown
At the core of the protection that ISPs enjoy from Section 512 are its notice and takedown provisions. In general, Section 512 provides that an ISP will not be liable for damages associated with copyright infringement if it develops notice provisions and takes down allegedly infringing materials upon receiving the proper notice. However, the notice and takedown steps are not as simple as they might seem: Even if an ISP complies with the safe-harbor provisions of Section 512, the ISP will not obtain safe-harbor protection from claims of copyright infringement.

Charles J. Biederman is a partner and Danny Andrews an associate at Manatt Phelps & Phillips in Los Angeles. They practice in the areas of entertainment, Internet, advertising, and new media law.

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infringement 1) if the ISP has actual knowledge that the materials in question are infringing, 2) if the ISP receives a financial benefit directly related to the infringement and the ISP has the ability to control the infringing activity, or 3) the ISP is aware of facts and circumstances that should have put it on notice that infringing activity was taking place.8

The ISP must create and conspicuously post a copyright law compliance policy on its site, which must include a notice, takedown, and counter notice policy consistent with the provisions of Section 512. This copyright compliance policy must also include the contact information of an agent specifically designated by the ISP to receive notices of copyright infringement on behalf of the ISP. The ISP must also register the designated agent in a public database at the U.S. Copyright Office.

In practice, Section 512 works in the following manner: A copyright owner browsing a site that incorporates UGC sees what it believes to be its copyrighted material being used without authorization. The owner finds the site’s copyright infringement takedown policy (including the contact information for the designated agent) and sends a takedown notice to the designated agent. To be effective, the takedown notice must include the following information: 1) the name, address, and electronic signature of the complaining party, 2) a description of the allegedly infringing materials and their Internet location, or if the Internet service provider is an “information location tool” (such as a search engine), the reference or link to the infringing material, 3) sufficient information to identify the copyrighted works, 4) a statement by the owner that it has a good faith belief that there is no legal basis for the use of the allegedly infringing materials, and 5) a statement of the accuracy of the notice, and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner.8

Once the copyright owner has issued an effective takedown notice, the ISP is required to expeditiously remove or disable access (including links) to the allegedly infringing material. Although the ISP has no affirmative duty to determine whether material that has been uploaded to its site is infringing before receiving a takedown notice, if the ISP discovers that there is infringing material on its site, the ISP will not receive Section 512 protection unless it promptly removes the allegedly infringing material. The takedown provisions of Section 512 do not require the ISP to notify the individual responsible for the allegedly infringing material before removing it, but it does require that the ISP notify the alleged infringer after the material is removed and provide the alleged infringer with an opportunity to send a written counter notice to the ISP stating that the material does not infringe any third party’s rights and was wrongly removed.9 To be effective, the counter notice must contain the following information: 1) the user’s name, address, phone number, and physical or electronic signature,10 2) identification of the material and its location before removal,11 3) a statement under penalty of perjury that the material was removed by mistake or misidentification,12 and 4) consent to local federal court jurisdiction, or if overseas, to an appropriate judicial body.13

Once a user has provided the counter notice, the ISP must then promptly notify the claiming party of the alleged infringer’s objection.14 If the copyright owner does not bring a lawsuit in federal district court within 14 days, the ISP must re-post the material to its location on its site.15 Moreover, if the copyright owner is found to have misrepresented its claim regarding the infringing material, it may become liable to the ISP for any damages resulting from the removal of the material.16

**Copyright Ownership of UGC**

Existing copyright laws, including the DMCA, do not always resolve the issue of copyright ownership of UGC. UGC copyright ownership issues are usually dealt with at two distinct periods in the content creation process, either: 1) the front end (contractually), or 2) the back end (through litigation). Many sites that utilize UGC include language in their terms and conditions and EULAs requiring users to warrant that their submitted content does not infringe on any third party’s intellectual property rights. These sites generally allow users to retain ownership of the content they create (to the extent that the content is noninfringing and otherwise permissible by law); require users to grant the ISP and its users very broad licenses to reproduce, transmit, or otherwise use the content; and provide dispute resolution procedures, which often include mandatory arbitration and other provisions required by the DMCA. The most binding of these contracts are those that are click-wrapped—i.e. those that require users to affirmatively agree to be bound by the terms, such as by clicking a check box, before they can use the Web site or upload content.17

Perhaps as a result of the pervasive use of click-wrap contracts, there have been relatively few instances in which, despite the dispute resolution clauses or an ISP’s compliance with Section 512 notice and takedown provisions, a copyright holder has sued an ISP, the alleged infringer, or both. However, there is little established case law dealing specifically with copyright infringement as it relates to UGC. A few cases, nonetheless, may provide some guidance to ISPs and content makers. One recent case, which has not yet been decided, is *Lenz v. Universal Music Group*. This case deals with YouTube and the Section 512 takedown provisions.18 In June, Universal Music sent YouTube a takedown notice requesting that YouTube remove a clip of Lenz’s toddler dancing to the Prince song “Let’s Go Crazy,” claiming copyright infringement. On June 6, 2007, in accordance with its Section 512 provisions, YouTube notified Lenz that it had removed the video. On June 27, 2007, Lenz

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**UGC for Webmasters**

The following is a list of steps that ISPs, content makers, and those otherwise involved with UGC may reference to protect their rights and limit their liability.

✔ Become familiar with and incorporate the provisions of the DMCA, including Section 512, into Web site terms and conditions and other EULAs.

✔ Take actions to make the terms and conditions for Web site usage a binding contract. Place them in a conspicuous manner on your site. Do not embed them among other unrelated language. Require users to scroll through terms and conditions and click a submit button (electronic acceptance of the terms of conditions) before they can enter the site. The text of terms and conditions should include language that the user has read the terms and conditions and agrees to be bound by them.

✔ Incorporate identification technology and/or a human screening and blocking monitoring system for infringing content. It is not enough to have terms and conditions; you have to enforce them.

✔ Adopt a policy for terminating the accounts (or access to the site) of repeat infringers.

✔ Keep good records of all takedowns, such as the number of terminated works and user accounts, the reason for termination, the date of notice, and the date of termination.

✔ To the extent possible, provide precleared, creative content for customers to use. For example, ISPs can enter into agreements with copyright owners—such as musicians, record labels, and producers—that grant the ISP and its users the right to use their copyrighted material without the risk of infringement. While this alternative may not completely resolve the issue of consumers uploading infringing material, a consumer may be less likely to upload infringing material if an ISP provides cutting-edge, creative, and up-to-date material for use on their Internet pages. —C.J.B. & D.A.
filed a counter notice asserting that the video was noninfringing and thus improperly removed from YouTube. After being unavailable on YouTube for more than six weeks, and as a result of Universal’s failure to file a copyright infringement suit against Lenz pursuant to Section 512(g)(2)(C), YouTube placed the video back on its site in July.19

On July 24, 2007, Lenz filed a lawsuit against Universal alleging that Universal violated her right to free speech because it sent a Section 512 takedown notice, which resulted in the removal of her video, when the studio knew or should have known that the video was a noninfringing fair use of the Prince song. Section 512(h) of the DMCA provides that a person who sends a takedown request knowingly misrepresenting that the material is infringing will be responsible for resulting damages to the party whose material was removed. Lenz seeks damages for misrepresentation of copyright claims under the DMCA and interference with contract (i.e. the contract between Lenz and YouTube to host the video pursuant to YouTube’s terms of use). In addition, Lenz seeks a declaratory judgment that her use of the song was noninfringing and an injunction to prohibit Universal from bringing or threatening to bring a copyright infringement suit in connection with the video.

Universal may assert the defense that its takedown notice was supported by a good faith belief that the video was infringing, as required by Section 512, and thus that it did not violate Lenz’s right to free speech by sending the takedown notice.20

At the center of the case is whether fair use is ever self-evident (as Lenz claims) or is a fact-specific determination that must be made on a case-by-case basis in court. While many understand the fair use defense to be a fact-specific inquiry, Lenz’s legal theory is that her specific use of the copyrighted work is so clearly fair use that a copyright infringement suit based on the use should be deemed frivolous and a blatant violation of her right to free speech. If the court agrees with Lenz, then Universal and other copyright owners will be forced to make an analysis of fair use, in each instance, and decide whether a work is fair use before they send takedown notices to potential infringers—or risk exposure to liability for damages associated with the removal of the content. If, however, the court decides that fair use is never self-evident, then copyright owners who send takedown notices may avoid liability under Section 512(h) by simply exercising subjective good faith. Of course, the court might also decide only that Lenz’s particular use was not self-evident fair use, leaving for another day whether any use could be.

In another guiding case, Rossi v. Motion Picture Association of America,21 the MPAA...
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requested that an Internet service provider shut down the site www.internetmovies.com, which offered users the ability to download movies in an allegedly infringing manner. It was later discovered that the Web site did not contain any infringing material. Nevertheless, the court found that because the MPAA had a subjective good faith belief that the site, which allowed users to download movies, was infringing its copyrights, the MPAA did not violate Rossi’s right to free speech. This case demonstrated that, at least in the Ninth Circuit, a subjective and not an objective good faith belief is the requisite standard for sending a takedown notice. While such a standard does little to encourage copyright owners to work cooperatively with ISPs, it is consistent with the literal wording of Section 512, which appears intended to avoid imposing a high bar on copyright owners seeking to protect their rights.

The copyright issues related to UGC also plague virtual worlds. Second Life, a popular Internet virtual world, has been the center of many novel intellectual property related issues. One such issue arose in a case filed in Florida in June 2007.22 Second Life is an online virtual world where users, called residents, interact through computer graphic representations of people and places. Individual users have characters, virtual people called avatars, for which they control the appearance, names, and other qualities. Residents interact with each other through their avatars. The Second Life world also has virtual objects, such as clothing and houses, which can be interacted with and exchanged, and a system of currency, Linden dollars (named after the company that runs the world, Linden Labs), which can be converted into real currency. Kevin Alderman runs an adult content company called Eros LLC. He also has an avatar in Second Life, named Stroker Serpentine. Through Serpentine, Eros sells virtual items in Second Life, including a piece of furniture called the SexGen bed, which contains more than 150 sex animations.

Serpentine sells the SexGen bed to Second Life residents for L$12,000, which has a value of roughly $45.23 Eros filed a copyright infringement lawsuit against Second Life resident Volkov Catteneo (an avatar)24 accusing Catteneo of making and offering for sale unauthorized copies of Eros’s SexGen bed and other items. Because Eros did not know the identity of the resident who owned the Catteneo avatar, however, it had to file the case against John Doe. Filing copyright infringement cases against John Doe is an established practice in Internet cases. Eros later served a subpoena on Linden Labs to force disclosure of the alleged infringer’s identity.

Section 512(h)(2)(c) of the DMCA permits a copyright owner to subpoena the identity of the individual allegedly responsible for
copyright infringement on the condition that the information about the individual’s identity can only be used in connection with protecting the intellectual property rights of the copyright owner. The subpoenas Eros filed led to two computers allegedly used by Robert Leatherwood. Eros later named Leatherwood as the defendant in the case. He did not answer or otherwise respond to the complaint, so a default judgment was entered, which operates as a judgment on the merits and allows Eros to seek damages, fees, and injunctive relief and use the judicial system to attach Leatherwood’s assets to satisfy any award of damages.

While the court did not have to reach the substantive legal issues in the Eros case, it did at least establish that copyright owners have rights in virtual worlds and that existing laws and procedures can be used to enforce those rights.

**Content Owners**

In addition to courts and lawmakers, major content owners and distributors are trying to play an active role in balancing the varied interests of those using and creating UGC. On October 18, 2007, companies including CBS, Dailymotion, Disney, Fox, NBC Universal, Microsoft, Veoh, and Viacom released a document titled “Principles for User Generated Content Services.” The UGC principles document incorporates many of the provisions of the DMCA and Section 512 and urges Web site operators to adopt the principles. Although the principles are obviously not law and compliance is voluntary, they are intended to guide the discourse about UGC. To that end, the text of the UGC principles expressly states the principles are not intended to be construed as a concession or waiver with respect to any legal or policy position or as creating any legally binding rights or obligations.

The broadly stated objectives of the UGC principles are to: 1) eliminate infringing content on user-generated services, 2) encourage uploading of wholly original and authorized user-generated audio and video content, 3) accommodate fair use, and 4) protect legitimate interests of user privacy. The UGC principles provide some specific steps that user-generated services may incorporate to achieve these objectives, such as: 1) include relevant and conspicuous language on Web sites that incorporate UGC that promotes respect for intellectual property rights and discourages users from uploading infringing content, 2) inform users during the uploading process that uploading infringing content is prohibited and causing the user to affirm that the content is not infringing, 3) incorporate content identification technology, which blocks the uploading of any infringing content that matches with the reference materials provided by copyright owners, 4)
identify Web sites that are predominantly used for the dissemination of infringing content and block or remove all links to such sites, 5) incorporate searching mechanisms that would allow copyright owners registered with the service to search for infringing content, and 6) implement a notice, takedown, and counter notice procedure, similar to that required by Section 512 and other policies that accommodate fair use. The UGC principles also include various liability-limiting provisions for those complying with the principles.

UGC continues to grow in popularity and is increasingly a feature of major new media projects. As UGC becomes more prevalent, its economic value will become more significant, likely resulting in increasing disputes over ownership and rights. Existing laws and contracts, such as the DMCA and individual EULAs, will govern how many of those disputes are resolved, but they are only a starting point. Cases like Lenz and Eros require courts to apply existing laws in new and unusual situations and will inevitably lead to new standards governing relationships between rights holders and users in new media. For now, ISPs, content makers, and hosts are best served by becoming familiar themselves with the detailed requirements of the DMCA and taking traditional steps to protect themselves from contributing to or supporting infringement while new law develops around use of UGC in new media.

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4. The DMCA may be found online at http://thomas.loc.gov with a search of Bills and Resolutions under the 105th Congress. See http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281:ENR:
8. Id. at §512(c), (d).
9. Id. at §512(g).
10. Id. at §512(g)(3)(A).
11. Id. at §512(g)(3)(B).
12. Id. at §512(g)(3)(C).
13. Id. at §512(g)(3)(D).
14. Id. at §512(g)(2).
15. Id. at §512(g)(2)(C).
16. Id. at §512(l).
20. The issue of good faith has proven to be a deciding issue in cases of this nature in the past. See Rossi v. Motion Picture Ass’n of Am., Inc., 391 F. 3d 1000 (9th Cir. 2004).
23. As this example illustrates, virtual worlds are becoming a much more significant economic force, drawing the attention of lawmakers and regulators. In April, two Belgian newspapers, De Morgen and Het Laatste Nieuws, reported, “‘[T]he Brussels public prosecutor has asked patrol detectives of the Federal Computer Crime Unit to go on Second Life’ to investigate ‘virtual rape’…” See http://www.virtuallyblind.com/2007/04/24.
24. Questions have also begun to arise about whether these online transactions could be taxed in the future to provide a new revenue stream to state or federal governments.
25. The term “avatar” describes a computer user’s virtual representation of himself or herself, including the three-dimensional characters used in computer games such as Second Life.
26. The subpoena provisions of 17 U.S.C. §512(h) only apply to users of hosting or linking functions, for which a takedown notice may be sent under §512(c)(3)(A). As a practical matter, the DMCA identity subpoena cannot be used to find the identity of users engaged in peer-to-peer file sharing. See Recording Indus. Ass’n of Am. v. Verzion Internet Servs., Inc., 351 F. 3d 1229 (D.C. Cir. 2003).
27. The full text of this initiative can be found at https://www.ucgprinciples.com. Examples of online discussions criticizing the UGC principles can be found with searches at http://seekingalpha.com and http://blog.cprinciples.com. See also http://www.publicknowledge.org/node/1230.
Calculation of Damages in Right of Publicity Claims

CIVIL CODE SECTION 3344. California’s right of publicity statute, derives from the state’s common law rights of publicity and privacy. The statutory right protects an individual against the appropriation of the commercial value of his or her image, voice, or likeness. The common law rights protect a person from an intrusion on his or her solitude, the disclosure of private facts, and the placement of the individual in a false light. Section 3344 expands the remedies available to a plaintiff whose name, voice, signature, photograph, or likeness have been knowingly misappropriated by another for commercial purposes. In addition to actual damages, which have always been available under a common law claim for this type of misappropriation, a plaintiff who pursues a Section 3344 claim may also recover any profits attributable to the unauthorized use of his or her name, voice, signature, or likeness.

Enacted in 1971, Civil Code Section 3344 attracted significant attention in 2005 when a previously unknown model who brought suit under the statute was awarded more than $15 million by a Los Angeles jury. The award was for damages resulting from the unauthorized use of the model’s photograph by the defendant, Nestlé USA, on the label of its Taster’s Choice instant coffee jar. The damages award was predominantly based on a percentage of Nestlé’s profits from the sale of Taster’s Choice instant coffee jars bearing the plaintiff’s image on the label. While the court of appeal in Christoff v. Nestlé USA reversed the award, the case is currently under review by the California Supreme Court on the issue of whether the single publication rule is applicable to claims under Section 3344.

The Nestlé case raises three legal issues that are likely to emerge in misappropriation of likeness cases:
1) The determination of what constitutes a “readily identifiable” plaintiff pursuant to Section 3344.
2) The methods that plaintiffs may use to establish the amount of profits attributable to the unauthorized use of their identity.
3) The applicability of the single publication rule to a right of publicity action.

The first and second issues are relevant to every claim under Section 3344, while the third issue may be applicable to a variety of tort claims, including defamation and invasion of privacy, as well as a claim for invasion of the right of publicity.

According to the court of appeal’s recitation of the facts in Nestlé, the plaintiff, Russell Christoff, a professional model, posed in 1986 at a photo shoot arranged by Nestlé Canada. He was photographed gazing at a cup of coffee as if he were enjoying the aroma. Christoff was paid $250 for his time. In 1997, Nestlé decided to redesign its label for Taster’s Choice instant coffee. For three decades, the Taster’s Choice label had prominently featured the same “taster”—a person peering into a cup of coffee.

Nestlé USA searched for high-resolution artwork portraying the image of the original taster for its redesigned label but was unable to locate anything that met the necessary specifications. However, Nestlé found the image of Christoff from the 1986 photo shoot and decided that it satisfied the company’s requirements.

Christoff’s image was chosen because of his “distinguished” look and because the image would create a sense of continuity with the original taster. Nestlé believed that it had the authority to use Christoff’s image and, in 1998, began to use the image in the redesigned Taster’s Choice label. Only a portion of Christoff’s face was visible on the label, and the picture was cropped just above the eyebrows. The redesigned label was used on several different Taster’s Choice jars and in multiple advertising campaigns for Taster’s Choice.

On June 4, 2002, Christoff discovered the use of his picture when he was shopping at a Rite Aid store and happened to see a jar of Taster’s Choice instant coffee. In 2003, Christoff sued Nestlé, alleging, among other causes of action, a violation of Section 3344. Nestlé moved for summary judgment, arguing that under the single publication rule the accrual date of the cause of action was from the first general distribution of the publication to the public—that is, 1998, the date that Nestlé first began marketing Taster’s Choice with Christoff’s label—and, therefore, Christoff had filed his action outside the applicable limitations period. Christoff responded by argu...
ing that his claim was not based on a communicative act, such as defamation, and that the single publication rule did not apply to product sales. The trial court denied Nestlé’s motion, holding that the single publication rule was not applicable to nondamages actions. The court instead applied the delayed discovery rule, thereby leaving to the jury the question of whether the plaintiff discovered, or should have discovered, all the essential facts within the applicable statute of limitations period.

The case proceeded to trial, after which the jury concluded that the profits attributable to the use of Christoff’s photograph or likeness were $15,305,850—a sum that represented 5 percent of the profits from Taster’s Choice coffee for the years during which Christoff’s likeness was on the label. Nestlé appealed from the judgment. The court of appeal reversed and remanded for further consideration of the applicable statute of limitations and the damages award.

Readily Identifiable

One of the elements requisite to proving a misappropriation claim under Civil Code Section 3344 is that the plaintiff must be “readily identifiable.” A finding that the plaintiff is readily identifiable justifies the attribution of a defendant’s profits to the misappropriated likeness. Section 3344(b)(1) defines “readily identifiable” in a deceptively simple fashion:

A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

In a practical sense, however, a mere comparison of the disputed image and the plaintiff may not be adequate. Unfortunately, not many cases directly address this requirement as it relates to Section 3344. Furthermore, the published cases are of questionable assistance in determining the legislative intent regarding the appropriate methodology for proving that a plaintiff is readily identifiable.

In Nestlé, for instance, the trial court instructed the jury to determine whether the plaintiff, appearing in the courtroom, looked like his image on the Taster’s Choice label. This methodology seems flawed, however, because Nestlé never disputed that Christoff was the person depicted on the defendant’s label. Most likely the California Legislature intended for plaintiffs to prove that their image was recognizable while that image was being utilized to promote the defendant’s commercial purposes. Moreover, the use of the word “one” in defining the requirement of “readily identifiable” indicates that the legislature wanted the trier of fact to apply an objective standard in determining this issue—the “reasonable person” standard, not the perception of the jurors.

No California cases deal with the methodology for establishing whether a plaintiff is readily identifiable. But California courts have held that a complaining party may be identifiable even if the product or promotional material does not feature or display the plaintiff’s actual photograph or voice. For example, the plaintiff in Newcombe v. Adolph Coors was Don Newcombe, a famous baseball player who pitched for the Brooklyn Dodgers in the fifties and sixties with a unique and recognizable windup and delivery. In 1994 Adolf Coors, a beer company, used a silhouette of a baseball player in one of its advertisements. Newcombe’s family and friends as well as baseball fans knowledgeable about the game as it was played during Newcombe’s era recognized the image as that of Newcombe delivering a pitch. In addressing how identifiable an image had to be to constitute a likeness under Section 3344, the court stated that “neither common law nor section 3344 indicated to whom or to what degree the plaintiff must be identifiable from the alleged likeness.” The court held that an issue of fact existed as to whether Newcombe was readily identifiable in the silhouette, thereby denying Coors’s motion for summary judgment on that ground.

The court in Motschenbacher v. R.J. Reynolds Tobacco Company reached a similar result. The plaintiff, a well-known race car driver, could not be seen in the image in dispute through the window of his race car, and therefore his likeness was not “itself recognizable.” Nonetheless, he was identifiable through the “distinctive decorations” appearing on his car.

However, in some instances, the use of a likeness may not be enough to comply with the statute’s prerequisite, even when the defendant uses a likeness that is intended to be identified with the plaintiff. In Midler v. Ford Motor Company, Ford used an artist who sounded very much like Bette Midler to sing one of her hit songs for a Ford automotive advertising campaign. The court rejected Midler’s Section 3344 claim because the defendant did not use Midler’s actual “voice nor her name or anything else whose use was prohibited by the statute.” The court did not preclude Midler from pursuing her common law claims. Likewise, in White v. Samsung Electronics America, Inc., the court found that Samsung’s use of a robot with features resembling Wheel of Fortune hostess Vanna White did not constitute a use of White’s likeness under Section 3344.

Practitioners seeking to apply the statutory definition of “readily identifiable” are essentially on their own because of the absence of case law defining the method to be used to prove that a plaintiff is readily identifiable. That issue is considerably less problematic when plaintiffs are celebrities who have previously established their recognizability through the exploitation of their likeness. Noncelebrity plaintiffs likely cannot prove through anecdotal witness testimony that 1) they were readily identifiable and 2) consumers purchased a product because they viewed the plaintiffs’ image on the product’s packaging. Therefore a marketing survey, with its objective analysis, is the most appropriate manner of proving that these plaintiffs were readily identifiable.

Marketing surveys can take numerous forms. The typical surveys used in intellectual property cases to prove secondary meaning or likelihood of confusion may be adapted to establish that a Section 3344 plaintiff was readily identifiable. As an example, a “qualified” subject is shown the image of the plaintiff as it appeared on the product or advertisement in question, for whatever length of time the subject feels is needed to become familiar with the image. After the subject examines the plaintiff’s photograph, the subject is shown another picture of the plaintiff, taken at about the same time as the one on the product or advertisement, along with pictures of other models of the same gender, age, and race. The subject is then asked if he or she can identify, out of that set of photographs, which one features the individual in the first picture shown to the subject—the image on the product or advertisement. If the results of the survey indicate that the statistical probability of recognition is significant, an argument could be made that the plaintiff is readily identifiable.

Attribution of Profits

Once the plaintiff is deemed readily identifiable, Section 3344 provides that “[a]ny person who knowingly uses another’s name, voice, signature, photograph or likeness, in any manner, on or in products...for purposes of advertising or selling...products, goods or services, without such person’s prior consent...shall be liable for any damages sustained by the person...in an amount greater than $750 or the actual damages suffered by him...and any profits from the unauthorized use that are attributable to such use....” What makes the statute both attractive and prohibitive to a potential plaintiff is the prospect of recovering a substantial portion of the defendant’s profits while bearing the burden of proving that those profits are directly attributable to the unauthorized use of the plaintiff’s name, voice, image, or likeness. The amount of profits that may be recovered
are indeed significant, yet the evidentiary barrier that must be surmounted to attribute those profits to a noncelebrity plaintiff may be difficult to overcome.15

In Nestlé, for instance, the plaintiff’s marketing/damage expert testified that 5 percent to 15 percent of Nestlé’s Taster’s Choice profits were attributable to the plaintiff’s likeness on the label. This conclusion was based on the expert’s analysis that a consumer looking at products on a grocery shelf is attracted to a human face. The expert acknowledged that the image of the taster was an icon, a visual clue that identified the product, and that it was the image of the taster, not Christoff the person, that was responsible for the attribution of profits. That testimony was a death knell for the plaintiff’s attempt to attribute Nestlé’s profits to the use of his picture, because the expert admitted that it was the “functional illustration of a person enjoying a cup of coffee,” not Christoff, that was responsible for generating sales of Taster’s Choice.

The court of appeal rejected the testimony as insufficient, reasoning that attributable profits recoverable under Section 3344 must “flow from [the plaintiff’s] identity...the critical question being his ability to attract attention and evoke a desired response in a particular consumer audience. That response is a kind of good will or recognition value generated by that person.”16 In contrast, “profits flowing from the decision to place an icon of a taster on the Taster’s Choice label are not attributable to Christoff because the icon of the ‘taster’ existed well before Christoff’s likeness was used.”17

Determining which methodology a plaintiff can effectively use to meet the burden of proving that the defendant’s profits are attributable to the unauthorized use of the plaintiff’s image can be problematic. First, a distinction must be drawn between proving the value of the use to the plaintiff and doing the same for the defendant. The value of the use to the plaintiff is the economic value of the plaintiff’s name, identity, or likeness—and this sum represents the injured plaintiff’s actual damages.

Determining the value of the use to the defendant involves establishing that a portion of the defendant’s profits are directly attributable to the unlawful appropriation of the plaintiff’s likeness. If the plaintiff is a celebrity, the value of the use might be established through that celebrity’s licensing agreements or standard appearance or use fees.

Even if a plaintiff does not have an established licensing, appearance, or use fee, expert testimony may be used to establish a “use value” based on the plaintiff’s historical earning capacity or the comparable earnings of similarly situated individuals in the marketplace (for example, other models, actors, and the like). However, when the use value of a plaintiff’s likeness cannot be established—and this generally occurs when the plaintiff is neither a celebrity nor a model or actor with a significant earning history—the minimum measure of actual damages allowed under Section 3344—$750—will apply. When this happens, proving the attribution of profits becomes the sole basis for an economically meaningful damage award.

As a general rule, an increase in profits that occurs at the same time as the unauthorized use of the plaintiff’s name or image may be one method of proving the existence, and amount, of attributable profits. Absent such evidence, the plaintiff must resort to expert testimony. But expert opinion evidence must have a foundational and empirical basis.

Instructive on this issue is the unpublished case of Walter v. Kia Motors America, Inc.18 The plaintiff was photographed unwittingly as he was staring at a Kia automobile. A photograph bearing his image was used, without his permission, in Kia print advertisements that appeared in 23 issues of 6 different newspapers and magazines from January 1995 through January 1996. Kia spent approximately $58 million in advertising...
during 1995. The cost of placing the advertisements containing the plaintiff’s image was $120,000—0.00206 percent of the total amount of Kia’s 1995 advertising budget. In attempting to fashion an attribution of profits formula based on Kia’s use of the plaintiff’s image in its advertising, the trial court adopted an analysis based on the calculation of what percentage of Kia’s total advertising costs in the applicable time period (January 1995 through January 1996) was spent on the advertisement featuring the plaintiff’s photograph. The plaintiff argued that the same percentage of Kia’s revenues could be deemed attributable to the advertisement at issue, resulting in an award to the plaintiff of more than $7 million in damages.

The appellate court rejected that formula as speculative. It held that the methodology failed to establish a causal connection between Kia’s advertising and any revenues attributable to the use of the plaintiff’s image, as required by Section 3344. The court held that Section 3344 required the plaintiff to submit admissible evidence, through expert testimony or otherwise, of the causal connection between the unauthorized use and the profits the defendant generated during the period of use.

Consequently, in attributing profits to the noncelebrity plaintiff, the plaintiff’s expert is compelled to utilize some form of test or survey employing standard quantitative methodology—such as field work, studies, marketing analysis, data calculations, or other empirical tests—to present a nonspeculative and admissible opinion on profits attribution. “Controlled store testing,” for example, might be used to determine what effect, if any, the appearance of a plaintiff’s image on a product or on promotional materials has on the sales of that product. This method can be used to track any changes in the purchasing habits for the product dependent upon whether or not the plaintiff’s likeness appears on the product.

A “trailer test” is another viable method. Supermarket consumers are directed to a trailer outside the supermarket, where they are encouraged to spend poker chips on products that contain the plaintiff’s image on the packaging and others that do not. This test, which gauges the effect of the plaintiff’s image on sales, can be performed in a relatively inexpensive manner by an expert survey company.

More expensive surveys, frequently employed in intellectual property cases to establish secondary meaning or likelihood of confusion in trademark cases, may be conducted as well for the attribution of profits in Section 3344 cases. These are often conducted in shopping malls throughout the geographical areas in which the product with the plaintiff’s image is distributed. They too determine consumer reaction and willingness to purchase a product with, and without, the use of the plaintiff’s image. No matter what test or survey is chosen, the methodology employed will often be determinative of its admissibility and, secondarily, the weight that a jury will assign to it.

A trial court cannot simply accept a plaintiff’s unsubstantiated assumptions of attributed profits as sufficient to meet the requirement of attribution under Section 3344. Attribution of profits must be proven by admissible, reliable evidence, which is generally presented through an expert that has engaged in empirical testing prior to reaching a conclusion. For the noncelebrity plaintiff that burden of proof may be daunting, even though the potential reward may ultimately make the effort worthwhile.

The Single Publication Rule

In a right of publicity case brought under Section 3344, the statute of limitations period that will govern the scope of the defendant’s profits may be affected by the single publication rule. Civil Code Section 3425.3 codifies this common law rule, which is applicable to tort claims based on mass publications. The section provides that “no person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single
publication or utterance.” Under the single publication rule the statute of limitations begins to run on the “first general distribution of the publication to the public.”

Thus “the period of limitations” commences “regardless of when the plaintiff…became aware of the publication.”

Without the single publication rule, a new cause of action for defamation would arise, and a new statute of limitations period would commence, with each republication. As a result, a plaintiff could refrain from filing suit while additional copies of the offending publication are distributed—and watch the recoverable damages multiply. The single publication rule, which seeks to prevent such an injustice to the defendant, confers a contravening benefit upon the plaintiff by allowing “recovery in any action [to] include all damages for any such tort suffered by the plaintiff in all jurisdictions.”

Numerous cases address whether the single publication rule applies to a right of publicity claim. They also examine whether a statutory claim under Section 3344 should apply solely to the “standard” modes of publication—such as newspapers, books, radio, television, or movies—that are specifically referenced in Section 3425.3.

As a general rule, California cases have held that the single publication rule applies to a Section 3344 claim. In Johnson v. Harcourt Brace, Josvavich, Inc., for example, the plaintiffs sought Section 3344 damages based on a news article about them that subsequently appeared in a textbook. The court held that although the plaintiffs had failed to state a claim under Section 3344 for appropriation of likeness, even if they had done so “it would be barred by the statute of limitations” under Section 3425.3.

The court in Long v. Walt Disney Company also followed the single publication rule. The plaintiffs sued because their yearbook pictures had been transformed into cartoon-like characters for a children’s television program. The court applied the single publication rule to “claims for violation of the right of publicity” and for “appropriation of likeness.” The Ninth Circuit addressed the issue in a case in which an ex-member of the band Kiss asserted claims for infringement of his right of publicity when his photographs were used without his permission in a book. The court held that the single publication rule applied to a Section 3344 claim and that the statute began to run “when the book was initially published,” thus barring his claim. The Ninth Circuit has also held that “neither the rule of discovery nor any exception to the single publication rule saves the claim.”

The court of appeal in Nestlé noted that the single publication rule applies to “any other tort” founded upon any single publication or utterance,” citing prior decisions that the rule “applies to many types of lawsuits, including personal injury, civil rights fraud and deceit.” The court concluded that the “use of the phrase ‘any other tort’ signals the Legislature intended broad application of the single publication rule,” and that “California courts have held that the USPA (Uniform Single Publication Act)’s phrase ‘any tort’ means exactly that....”

California courts have recognized that “the rule...is not aimed at the particular tort alleged, but rather the manner in which the tort is executed [so that] if the wrong arises out of a mass communication” the rule applies. Most recently, the California Supreme Court in Hebrew Academy of San Francisco v. Goldman affirmed that the single publication rule as embodied in Section 3425.3 “applies without limitation to all publications.”

Although holding that the single publication rule was applicable, the Nestlé court nonetheless found that, under certain scenarios, the delayed discovery rule could be used to toll the statute of limitations imposed by that rule. While recognizing that the single publication rule generally precludes application of the delayed discovery rule, the court held that the discovery rule may be used to equitably bar the running of the relevant statute of limitations if a plaintiff can demonstrate that he or she lacked a meaningful ability to discover the mass publication. That ruling appears to have been reversed by Hebrew Academy, which concluded that “the discovery rule, which we held in Shirley [v. Bozanich] does not apply when a book or newspaper is generally distributed to the public, does not apply even when...a publication is given only limited distribution.”

Rather, the discovery rule applies only to works that are “published in an inherently secretive manner” and does not apply when the plaintiff has “had access to the document from the time it was published.”

The single publication rule does not shield a defendant from claims that are based on a republication, which triggers the running of a new statute of limitations period. The distinction between a single publication and a republication can be critical to the assessment of when a cause of action accrued under Section 3344.

There is no hard and fast rule defining what constitutes a republication. However, courts use certain guidelines to determine whether a republication has occurred. For instance, the publication of a paperback edition of a previously published hardback book constitutes a republication, because it is deemed to be directed toward a new market of readers and sold for a price that is not the same as the one for the hardback edition.
Thus a new target market and a different format are major factors to consider in determining whether a republication has occurred.

In California, different editions of a single newspaper constitute a single publication. At least one federal district court, outside of California, has taken a different view. A New York court has held that the rebroadcast of a television show is a republication, even where there is no change in the content of the show. Other jurisdictions have held that neither the modification nor updating of a Web site constitutes a republication.

The Nestlé court, in remanding the issue of republication to the trial court, reiterated that the key factors to be considered in determining whether a republication has occurred are: 1) whether the publication was directed to a new and different audience, and 2) whether the original publication had been modified. Nestlé’s criteria appear to constitute the current guidelines under California law for determining if there has been a republication triggering the running of a new statutory period.

As case law, including the recent Nestlé decision, demonstrates, a right of publicity claim under Section 3344 provides a viable avenue for redress for celebrities and non-celebrities. A celebrity plaintiff whose name, signature, voice, or image has been misappropriated by a defendant for a commercial purpose may have an easier time proving that he or she is readily identifiable. Nevertheless, even the non-celebrity plaintiff can meet that burden by applying the objective standard set forth in the statute. Once that identity is established, both types of plaintiffs are entitled to recover the defendant’s profits that are attributable to the unauthorized use, provided that the plaintiffs can prove a sufficient nexus between the use and the resulting profits. Once again, the celebrity plaintiff has the advantage in proving the attribution, but the non-celebrity plaintiff may use market surveys and expert testimony to establish the requisite causal link.

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2 Civil Code §3344 also allows the prevailing party to recover reasonable attorney’s fees.
4 In Christoff, the court of appeal reversed the damages award. The case is presently on appeal before the California Supreme Court regarding the unrelated issue of whether the single publication rule is applicable to Civil Code §3344, so it has been decertified.
5 Nestlé USA is a corporation affiliated with, but separate from, Nestlé Canada.
6 This issue was not on appeal in Christoff.
7 See Newcombe v. Adolf Coors, 157 F. 3d 868 (9th Cir. 1998); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F. 3d 821 (9th Cir. 1998).
8 In Christoff, the plaintiff was not easily identifiable since his photograph had been cropped prior to its use.
on the Taster’s Choice label. In fact, as the plaintiff admitted, for a period of over four years, neither he nor his friends, business associates, wife, or any other member of his family recognized him as the taster despite Nestlé’s mass publication of the Taster’s Choice label. Complicating the in-court identification of the plaintiff was the fact that almost 20 years had passed between the time the original photograph was taken (1986) and the date of trial (2005).

9 Newcombe, 157 F. 3d at 692.
10 Motschenbacher, 498 F. 2d at 824.
11 Midler v. Ford Motor Co., 849 F. 2d 460 (9th Cir. 1988).
12 Id. at 463.
13 White v. Samsung Elecs. Am., Inc., 971 F. 2d 1395, 1397 (9th Cir. 1992). While holding that a robot resembling Vanna White was not a use of her likeness, the court found in White’s favor on a Lanham Act claim.
14 The qualification of a subject is a factual inquiry based on the type of product being sold.
15 The Nestlé court held that §3344 applies whenever any person “knowingly” uses another’s likeness, whether or not the plaintiff is a celebrity. Moreover, the court found that the legislature’s use of the term “knowingly” did not require that the defendant have “actual knowledge that [the plaintiff] did not consent to the use of his likeness.” Christoff v. Nestlé USA, 152 Cal. App. 4th 1439, 1464 (2007), petition for review granted, 67 Cal. Rptr. 3d 468 (Oct. 31, 2007).
16 Id. at 1467.
17 The same problems exist in determining the attribution of profits as an element of the plaintiff’s damages under the federal Copyright Act in cases involving the promotion of sales using infringing materials. Copyright Act, 17 U.S.C.A. §504. The copyright statute only requires that the plaintiff prove the defendant’s “gross revenues” derived from the sale of an infringing product. However, in the case of indirect profits—which generally flow from the use of infringing promotional materials that are likely to have increased the defendant’s sales—a copyright owner must prove that a revenue stream bears a legally sufficient relationship to the infringement: “[A] plaintiff seeking to recover indirect profits must ‘formulate the initial evidence of gross revenue duly apportioned to relate to the infringement.’” Polar Bear Prods., Inc. v. Timex Corp., 384 F. 3d 700, 711 (9th Cir. 2004); 4 NIMMER ON COPYRIGHT §14.03[B], at 14-39.
21 Nestlé argued that a one-year statute of limitations period applied under Code of Civil Procedure §340. However, the Nestlé court applied a two-year statutory period under Code of Civil Procedure §339, holding that Christoff was not seeking damages for injury to his personal dignity but instead for the commercial use of his likeness. The court concluded that §339 applied to torts protecting property rights. Christoff v. Nestlé USA, 152 Cal. App. 4th 1439, 1462-63 (2007), petition for review granted, 67 Cal. Rptr. 3d 468 (Oct. 31, 2007).
22 Shivley, 31 Cal. 4th at 1245-46.
24 Civ. Code §3425.3.
25 In Nestlé the plaintiff attempted to distinguish between a communicative act, such as a defamatory publication, and a product label, arguing that only the former was within the ambit of the single publication rule.
28 Curran v. Klein, 264 F. 3d 950 (9th Cir. 2001).
32 Nestlé, 152 Cal. App. 4th at 1461.
33 Hebrew Acad., 42 Cal. 4th at 890.
34 Id. at 895. In Hebrew Academy only 10 copies of the allegedly defamatory publication were available in public libraries.
Most films lose money. This is not a recent economic trend or a cyclical phenomenon. The poor investment performance of films has been a fact of life for a very long time. Nevertheless, hundreds of films are produced each year. The reason is simple: sex appeal. At a cocktail party, most people would rather say, “I make movies,” than “I make widgets.”

The law of supply and demand does not seem to apply to the world of films. For example, while approximately 600 to 700 films are produced each year, only about 200 movies obtain the type of release that could lead to any return at all, much less a profit. Many events may cause films to lose money, such as budget overages, third-party claims, misappropriation and, of course, artistic failure.

The film industry has a saving grace. When the rare blockbuster occurs, it can make up for the losses on myriad other films. Investing in a film thus is a form of gambling akin to wildcat oil drilling. The problem is that significant capital is required to make enough films to ensure favorable odds that the investor will hit paydirt and produce the money-gushing blockbuster. Few film companies have the necessary financial stamina to prevail. The studios, however, have the economic might to withstand a string of flops.

But the film business continues to attract gamblers. Only those with a high tolerance for risk invest equity in a single film, or even in a small slate of films, particularly when the film company does not control distribution. Indeed, despite the oversupply of production and the dire investment outlook for independent film financing, films continue to be financed. This perilous marketplace has profound implications on the strategies and transactions used by lawyers and their clients involved in film financing. Time-tested methods of film financing remain viable but are becoming more problematic, while other techniques are emerging as attractive alternatives for investors.

One of the most important and widely accepted business models for financing films is the casting of popular actors. Put simply, con-

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sumers are more likely to watch a film that includes actors with whom they are familiar. Thus, a film that has one or more well-known and well-liked actors is more likely to be a financial success than a film with unknown actors.

Nevertheless, most films—even those with a star attached—require additional strategies and steps to garner financing in an amount to pay for their production budget. Sometimes one financing strategy will be sufficient, but on most occasions, the producer must employ several financing techniques. Lawyers involved in structuring the transactions must balance and reconcile many different legal and business issues for their clients.

The most common film financing technique has been and continues to be banking presales. This approach involves several steps. Typically, the producer first assembles a film package that usually consists of a script, director, and key cast members. Once the film package is complete, the producer engages a sales agent to present the film on a country-by-country basis throughout the world. These presales commonly take place at film markets, with major ones held each year in Cannes, Toronto, Berlin, and Los Angeles.

Many films do not make it past the film markets. If the film buyers do not respond to the film package and thus do not license the film as a presale, the film will not be able to obtain bank financing. If sufficient presales are obtained, the producer requests a bank to loan funds for production secured by the presale contracts. This type of bank loan is very complicated and requires a significant amount of legal work. As part of the bank loan, the bank will require a completion guarantor to issue a completion guarantee, in which the guarantor guarantees completion and delivery of the film to the distributors. The completion guarantee triggers the commencement of payments owed under the presale contracts.

If all goes well, the film is produced and delivered to the distributors, triggering payments owed under the presale contracts that can be applied toward paying off the loan. If presale loans are secured by fixed payments owed under existing contracts, the lenders tend to be banks, and the pricing tends to be relatively modest. The loans typically require an up-front fee equal to 2 percent of the amount of the loan and interest at two points over LIBOR (the London Inter-Bank Offered Rate).

While this approach remains popular, it is losing ground. Preselling films is becoming more difficult. Distributors are electing to wait until films are in production or have been completed until making a firm commitment to license them. Average worldwide presales have shrunk from about 100 percent of a film’s budget in the heyday of the financing technique to less than 70 percent today. The result is an ever-widening gap in film financing that needs to be filled from other sources. Another problem is that presale lenders will not lend the required funds until the completion guarantee is issued. That typically does not happen until just before commencement of principal photography. This means that the loan is not available to fund preproduction expenses, such as paying deposits for actors, which may be as high as 20 percent of a film’s total budget. These drawbacks have required producers to turn to “gap” and “bridge” lenders.

A number of companies are in the market to offer gap and bridge loans to make up the shortfall caused by the decrease in presale loans. Gap loans are made based on a sales agent’s estimates of expected license fees from unsold territories. For example, if a $50 million film has $30 million of presales in place that a presale lender would loan against, a sales agent might estimate that the remaining unsold territories would sell for another $30 million, with total sale proceeds at $60 million. If a gap lender accepts these estimates, it will loan the $20 million needed to complete the film. Since gap loans are more risky than presale loans, the loan costs are higher, typically with up-front fees equal to 10 percent to 12 percent of the loan and interest at three to five points over LIBOR.

Gap loans usually are conditioned on the issuance of the completion guarantee, so they do not solve the problem of funding preproduction expenses. Enter the bridge lenders, who are willing to make loans to fund preproduction expenses with no completion guarantee in place. Bridge lenders do not make loans based on presales or on sales estimates. They base their loans on one source of repayment: the presale or gap lender when the completion bond closes. Thus, if the film collapses before the close of the completion bond for any reason, the bridge lender is out of luck. Since these loans are the most risky when compared to bank presales and gap loans, they bear the highest cost, typically with up-front fees equal to at least 10 percent of the loan and interest as high as 1 percent per week. Some bridge lenders also are gap lenders, and a few permit one-stop shopping by providing presale financing and loans secured by tax credits.

State and Federal Tax Credits

The most important recent development in film financing is the drastic expansion of state tax credits for film production. These credits come in two basic forms: assignable and nonassignable. Assignable tax credits can be sold to third parties, and an entire industry has evolved around brokering these tax credits. When the tax credits are nonassignable, the state typically refunds the production company the amount of the credit that is not offset against the production company’s state tax liability. Nonassignable tax credits are much more difficult to monetize. Generally the production company has to seek a loan from a third party, and the loan must be secured by the potential tax refund. It is difficult, although not impossible, for lenders to obtain direct payment of the tax refunds, so assignable tax credits are far preferable to nonassignable ones.

While state laws vary, their basic premise is to permit a tax credit for costs incurred in the state. Not surprisingly, producers attempt to classify as many costs as they can to qualify for the credit, including costs that are difficult to source to any particular location, such as completion bond fees, financing costs, and overhead. The real benefit occurs when the state permits above-the-line costs to qualify, such as payments to actors, the director, and producers. Some states limit the amount of annual tax credits they permit, which drastically reduces the attractiveness of making a film in those states. In the nascent days of state tax credits, production companies were able to sell or borrow against the tax credits for approximately 70 percent to 75 percent of the credits. Through increased competition, this percentage has gradually crept up to about 82 percent for credits that are payable within one year.

IRC Section 181, which permits a 100 percent write-off against federal taxable income for the cost of films that meet certain requirements, has become another viable film financing technique. It permits a film company to sell the Section 181 deduction in exchange for 10 percent of the budget of a film. Due to various restrictions on deductions by individuals—such as the passive loss rules, alternative minimum tax, and at-risk rules—the buyers of the Section 181 deduction generally are limited to corporations.

There are several basic requirements for qualification under Section 181:

• The principal photography of the film must commence by the end of 2008.
• The aggregate cost of making the film cannot exceed $15 million (increased to $20 million if the costs are “significantly incurred” in certain designated low-income communities). Unfortunately, costs include all deferments, participations, and residuals, which means that films can be disqualified retroactively if they are too successful.
• Seventy-five percent of the total compensation relating to the film must be paid for services rendered in the United States.
• The taxpayer taking the Section 181 deduction must own the film.
for tax purposes—based on owning the benefits and burdens of the film—but the taxpayer is allowed to pay an independent production company for physical production of the film. It is not entirely clear just what the taxpayer has to “own.” It is probably not necessary to own the film’s copyright. Ownership of distribution rights should suffice, since that is the real value of a film.

While a film company could, in theory, use the Section 181 deduction, it is usually drowning in net operating losses, because most films lose money. Also, the company needs cash, not more tax losses. Thus, a film company usually monetizes the Section 181 deduction. This is typically accomplished by the assignment of the film rights to a third-party corporation that can use the deductions. This corporation, frequently referred to as the buyer, hires the film company to produce the film on the buyer’s behalf in exchange for 100 percent of the budget. The film company then proceeds to license the film rights from the buyer for 20 years in exchange for 90 percent of the budget. Thus, when the dust settles, the buyer has the Section 181 deductions, and the film company receives 10 percent of the film’s budget.

**Advertiser Equity**

Another strong trend in film financing is an influx of equity from advertisers. The large advertisers each spend hundreds of millions of dollars per year advertising their products, and they know the value of being associated with theatrical films. Product placement alone, however, is not fully satisfactory to advertisers for a number of reasons.

First, advertisers cannot control whether or how their product will be used. This decision is left to the creative choices of the studio, producer, or director, who may not have an advertiser’s best interests foremost in their priorities. In a worst case scenario for advertisers, the product placement may be left on the cutting room floor.

Second, advertisers cannot control the content of the film. They often are chagrined to find that the completed film contains more graphic violence, sex, or language than they contemplated, leaving them concerned about possible negative associations for their products.

One important development accelerating film investment by advertisers is the prevalence of digital video recorders, such as Tivo and the like. Increasing numbers of television viewers can use these devices to fast forward through commercials. As more viewers add a DVR component to their satellite or cable systems, advertisers are seeking ways to integrate their messages into entertainment content. Every week, another advertiser joins the fray, opening a dedicated entertainment division whose goal is to invest in movies for television, the Internet, DVD, and theatrical distribution. The first evidence of this foray by advertisers into the theatrical arena was a trilogy of soccer films, titled *Goal!*, that was financed by Adidas and discreetly featured Adidas products. The films were considered to be a creative success.

Equity investment by advertisers raises a host of business and legal issues that need to be resolved to make the transactions work. For example, advertisers may believe they are entitled to exercise ultimate creative control, including final cut. This belief may stem from the size of the investment and the sophistication of the advertiser. However, advertisers may not be as deft as they need to be to create a viable final product. A careful balance must be struck to prevent the film from becoming one extended commercial. Indeed, products can be woven into the fabric of a film in a way that strengthens its artistic, as was the case in the motion picture *Transformers*. The trick is structuring a deal that assures advertisers their desired exposure yet gives the producer the flexibility to make a compelling film. The solution may involve provisions for mutual script approval by advertisers and producers as well as guarantees of a specified amount of time on screen for the product and preestablished guidelines for how the product placement will be implemented.

The return on an equity investment from an advertiser does not have to be structured in the same way as other equity investments. Advertisers have motivations that go far beyond the economics of a particular film. Thus it is possible to structure a tradeoff involving the ceding of certain controls to the advertiser in exchange for economic advantages for the producer. These arrangements are limited...
only by the imagination. Given the level of control that accompanies a significant equity investment, advertisers may ask for adjacent advertising, such as a brief advertisement prior to the start of the film, or the inclusion of a short special feature on the DVD, and even a promotional song on the soundtrack.

One of the most difficult aspects of these arrangements is they may require the approval and cooperation of parties who are not at the bargaining table—the distributors, foreign and domestic. In addition, advertisers may insist on a minimum number of theaters or P&A (prints and advertising) in particular territories, or they may demand confirmation that distributors will not edit the film. In these situations, all or part of the financing may be subject to the condition that have an indefinite value. Today’s box office bomb may become a windfall on laser wristwatch video-on-demand (VOD) tomorrow. So it may take some time to sort out the winning and losing investments.

Some investors are opting to reach for the top of the film financing food chain by funding distribution companies rather than production companies. By doing so, the financiers receive revenue “at source,” which is the first stop of a dollar after the public pays it to a theater, retailer, or cable company. The most significant transaction of this nature in the last year was the conversion of Summit Entertainment from a foreign sales company into a domestic distributor backed by a billion dollars of financing. The law of supply and demand favors distributors, since everyone wants to be a producer.

Negotiations for film financing deals involving advertiser equity can be very tough and take months to complete. The issues are many and complicated, but the rewards are worth the effort.

the producer obtains distribution agreements that comply with provisions agreed to by the advertiser and the producer. The producer must effectively impose these provisions on the distributors, and the distributors may be disinclined to acquiesce.

A key issue for advertisers is the right to use the images of actors from the film for advertising products. This demand creates a difficult bind for producers, since they are being asked to promise rights they do not control and may not be able to obtain. Using actors’ images is a touchy subject, particularly for top talent—and especially when the advertising blurs the distinction between cross-promotion for the film and outright advertising for products. Actors certainly may expect to be compensated for this right to their likeness, and advertisers should expect to foot the bill.

Negotiations for film financing deals involving advertiser equity can be very tough and take months to complete. The issues are many and complicated, but the rewards are worth the effort, since advertisers have an unparalleled capacity to breathe life into a film project.

Private Funds
Recently, private equity funds and hedge funds have arrived on the Hollywood scene with an unprecedented level of investment. Indeed, these investors are making prior funding waves look like mere ripples. This trend has a number of important implications. Most of the funding is going into production, not distribution, so film budgets will trend up, and revenues will trend down. The equity funds do have high target yields (typically about 18 percent), but most producers would rather pay a lot for a film that gets made than nothing for a film that never gets past the development stage.

One of the popular financing devices for equity funds is “slate financing,” which involves financing 50 percent of the cost of a slate of studio films in exchange for 50 percent of the profits (after the studio has recouped its costs and a distribution fee). These transactions have been consummated at every major studio with aggregate funding of several billion dollars. Now that the studios are happy and well fed, the equity funds are looking for other financing needs to fill, and there is no shortage of those needs in Hollywood. The list includes independent producers, television, distribution, P&A, made-for-DVD releases, Internet ventures, and acquisition of entire companies or libraries.

The private equity funds are, well, private, so their financial results are not published. Moreover, films are intangible assets that So distributors can exact favorable terms from producers, and distributors are in the enviable position of having third parties hound them for payment rather than having to do the hounding. Similar motivations have spurred the financing of distribution costs or P&A, since this financing is typically the first to be repaid from at source revenue.

Worldwide Developments
At the same time, some foreign financing techniques that used to be favorable are no longer available. For example, the big party funded with German tax deals is over, for the most part. These deals were used to fund between 10 percent and 50 percent of a film’s budget.

Germany has enacted legislation that eliminates “public” German tax funds, and even “private” deals are under attack. If that were not enough, the head of VIP—a major German tax fund—is languishing in jail, and German authorities are investigating a number of common practices, including “defeased” deals and reinvestment schemes. While some deals are being done, the flood has slowed to a trickle for now.

In a purported move to “get rid of the middlemen,” the United Kingdom replaced the prior sale-leaseback tax shelter structure with a tax credit structure that looks generous on paper but is not so in practice. In particular, the new system prevents costs incurred outside the U.K. from qualifying, as used to be the case. In addition, film companies cannot fund film costs if their tax return states that the companies are entitled to a tax credit at some future date. Thus, the only way that the U.K.’s new method works is with those dreaded middlemen making the tax credit useable during production by loaning against it. And they can charge more for this service than they did for brokering the sale-leasebacks.

Another significant development for film distribution and financing in the last year is the VOD revolution. VOD has stepped out of the shadows on a path to equal status with, and eventually overtaking, DVDs. Now that iPods have acclimated consumers to owning content in a digital format, CDs are on the wane, and the same will be true for DVDs. The expansion of VOD via the Internet will wreak havoc on the standard per-country presale film financing business model. If one company handles worldwide VOD rights, foreign distributors will have to buy rights to a film that will not include any piece of the VOD pie. Ultimately, this trend will result in lower per-country presales, which will have to be supplanted by a presale to a worldwide VOD distributor.

Foreign governments continue to provide direct and indirect film
Dear Friends,

As recently featured in the Los Angeles Times (February, 2008), Good Samaritan Hospital in downtown Los Angeles has launched a new state-of-the-art VIP Program that includes a Comprehensive Executive Health Examination. This program has been designed with your health and wellness in mind. It showcases our knowledge, confidence, and ability to deliver the highest quality of care to our friends in the community.

Good Samaritan Hospital, recognized by Healthgrades as one of the Top 50 Hospitals in the United States for 2007 and 2008, and voted by Los Angeles Downtown News readers as the number one hospital in downtown Los Angeles 8 years in a row, invites you to become a member of the Good Sam VIP Program. By signing up as a Good Sam VIP Cardholder, you will have access to Good Samaritan Hospital's world class services delivered by its team of highly skilled healthcare professionals. It is easy to register and you will have no obligations – just the benefits we wish to offer to our VIPs.

We understand that when you need medical care, it can be a stressful time. Our goal is to ensure that you receive quality care promptly and to answer the questions you may have.

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Sincerely Yours,
Andrew B. Leeka
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subsidies. One form of indirect subsidy is derived from quota requirements. For example, the European Community requires its members to implement legislation mandating that a majority of television broadcasting time in member countries be devoted to “European Works.” Each EC country is free to be even more restrictive, and France is clearly the leader in this regard. By establishing a minimum quota for European Works, the legislation dramatically increases the value to broadcasters of qualifying films—and their sale prices. For example, distributors in the EC will pay far more for work that qualifies as a European Work than one that does not because television broadcasters will pay more as well.

A European Work generally requires the authors of the work to be European. Most countries interpret the word “authors” to mean the writer and director of a film. In addition, the film must be shot within the EC. In countries with more restrictive requirements, such as France, the film must be shot in the local language. The requirements and procedures for qualifying a film vary from country to country, so those seeking to do so should obtain the services of a local adviser or producer to shepherd their film projects through the maze.

Because it is so difficult to make a film meeting all the quota requirements of a single country, many countries have entered into coproduction treaties permitting production activities within any of the signatory countries to count toward meeting the quota requirements. For example, a film produced in France and the U.K. can qualify as meeting the French and U.K. quota requirements, even if it would not meet either country’s requirements separately. An important aspect of this approach is that it permits English-language films to meet the French quota requirement through the back door of the coproduction treaty. The ideal scenario involves a film that can be produced in three coproduction countries, permitting the film to meet the quota requirements for all three countries. This will vastly increase the sales price of the film in all three countries.

The next frontiers are India and China. India is known for having the world’s second largest entertainment industry, referred to as Bollywood. Moreover, practically everyone in India speaks English, and India’s economy continues to grow and perform well. China currently holds enough U.S. dollars to buy half of America, so a few billion spent on the film industry would be a drop in the bucket. The same motivations that have driven film financing over the years—the glamour of the movie business—could bring Chinese financiers in droves to Hollywood. It may be time for all participants in the entertainment industry to learn Mandarin.

1 See World Auxiliary Power Co. v. Silicon Valley Bank, 303 F. 3d 1120 (9th Cir. 2002) (discussing the perfecting of a security interest in a copyright under the UCC versus a filing in the U.S. Copyright Office).
2 One important legal issue for completion guarantees is whether they constitute “insurance” for state licensing and federal tax purposes. A guarantee should not be considered as insurance because the completion guarantee has the right to recoup any funds it expends out of the film’s income.
3 For loans otherwise subject to California’s usury laws, an exception exists for lenders that obtain a lender’s license. Fin. Code §22002.
4 For example, Louisiana has an assignable tax credit, while New York’s tax credit is not assignable.
8 The total investment by these funds (including debt financing) through 2007 is approximately $10 billion, based on the aggregate of reported deals.
9 These transactions involve complex legal issues, including 1) application of the securities laws, 2) characterization for state law purposes, and 3) characterization for tax purposes.
10 Schuyler Moore, The Next Wave of Film Financing: German Tax Shelter Funds, ENT. L. REP. (July 2001).
11 See Schuyler Moore, Pushing the Video-on-Demand Envelope, ENT. L. REP. (Sept. 2005).
It seems that just about everyone who has ever watched television has an idea for a television program, and anyone who has sat in the dark in a movie theater with a bucket of popcorn has an idea for a script. Despite the number of would-be filmmakers, novel ideas are few and far between. This makes idea submission an arena ripe for breach of contract claims, with conflict and claims of stolen ideas as predictable as most plots.

Those seeking guidance from courts on whether they have an actionable claim regarding an idea submission often assert that the applicable standards seem ephemeral. However, a close look at case law reveals a relatively straightforward test and guidelines for potential plaintiffs to consider. Moreover, while no bright-line rule has emerged to apply in every situation, there are two basic questions that must be answered affirmatively if a plaintiff wants to succeed in an idea submission case:

1) After considering the level of similarity between the plaintiff’s idea and the defendant’s work, is it fair for the plaintiff to receive some compensation for performing the service of disclosing his or her idea?  
2) If the plaintiff should be compensated, is it fair for the defendant to be the person or entity required to do the compensating?

Central to whether an actionable breach of contract claim exists are two issues. First is the similarity between the two works—that is, whether a comparison of the works reveals enough similarity that the plaintiff is entitled to recovery. Second is whether the plaintiff’s idea in fact has some value—an issue that encompasses access and independent creation. If the defendant did not have access to the plaintiff’s work or independently created his or her own work, the defendant will prevail in an idea submission case.¹

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Not every set of two seemingly similar works will be deemed sufficient to establish a cause of action. Indeed, an examination of California case law over the last 50 years reveals a “substantial similarity” test in idea submission cases. Even where the court does not use the phrase “substantial similarity,” it is clear that the standard was still being employed. In applying this test, courts compare the plots, themes, characters, storytelling techniques, and gimmicks of the subject works to determine whether they are similar enough to warrant a breach of contract claim. And contrary to many plaintiffs’ assertions, the myth.” Indeed, a portion of the basic dramatic core of the works “might be found similar,” including the characters of Tarzan, Jane, and Cheta appearing in an African locale within the context of a mythical fountain of eternal youth.

Although the court stated that it was applying a substantial similarity test, it noted that if the defendants agreed to pay Weitzenkorn for the use of “any part” of her work, an even lower standard of similarity may be required. Though dubious that the defendants had made such a broad agreement with the plaintiff, the court permitted the substantial similarity test, as applied by the courts, requires a high threshold of proof that the similarity is indeed substantial.

**Weitzenkorn and Its Progeny**

The substantial similarity test was first advanced by the California Supreme Court in 1953 in *Weitzenkorn v. Lesser*. Although plaintiffs commonly cite Weitzenkorn for the notion that only a very low standard of similarity is required to support a claim, they are misinterpreting the court’s analysis in that case.

Plaintiff Ilse Lahn Weitzenkorn wrote a literary composition titled “Tarzan in the Land of Eternal Youth” about the already famous Tarzan character. Weitzenkorn alleged that she entered into an express oral agreement with the producer defendants entitling her to compensation if the producers used “all or any part of” her composition. The defendants produced a motion picture titled *Tarzan’s Magic Fountain*, which was also about Tarzan and eternal youth, but did not compensate Weitzenkorn.

Weitzenkorn brought causes of action for breach of express and implied contract. In evaluating whether a demurrer to Weitzenkorn’s complaint should be overruled, the supreme court considered “whether there is substantial similarity between [the two works].” Without substantial similarity, “as a matter of law” the plaintiff’s complaint could not survive a demurrer.

The court decided to overrule the demurrer, holding that “similarity may exist because of the combination of characters, locale, and the claim to survive demurrer because of the possible existence of supporting evidence. Less than two months after the Weitzenkorn decision, the California Court of Appeal applied the substantial similarity standard in *Sutton v. Walt Disney Productions*. The court explained that to state a cause of action for breach of contract on an idea submission theory, the plaintiff must “demonstrate a substantial similarity between her ideas as embodied in her [work]” and the defendants’ work. After reviewing the two works, the court held that they were not substantially similar and affirmed dismissal of the plaintiff’s case on demurrer. The court reasoned that a single, general instance of similarity between two works—in *Sutton*, both works were about animals—was not sufficient to state a claim.

An idea submission case was again before the California Supreme Court approximately three years later. Victor Desny, the plaintiff in *Desny v. Wilder,* submitted a well-developed synopsis of the life and death of Floyd Collins to defendant Paramount Pictures Corporation. He then claimed that the defendants used his synopsis in the creation of a motion picture but failed to pay him for the use of his property. In permitting the case to proceed past summary judgment on a breach of contract theory, the supreme court did not articulate any particular standard of similarity that was required for the plaintiff to recover. However, after considering the two works in great detail, the court simply stated that the defendant’s work “closely paralle[led]” and “closely resemble[d]” the plaintiff’s work. When the California Court of Appeal granted the plaintiffs a new trial on their idea submission case in *Donahue v. Ziv Television Programs, Inc.—10 years following* the Desny decision—the court found a high degree of similarity between the two works in dispute. The plaintiffs had created a television series titled *The Underwater Legion*. They alleged that they entered into a contract with defendant Ziv Television Programs, Inc. in which Ziv agreed to pay the plaintiffs if it used their work. Subsequently, Ziv created a program called *Sea Hunt* that was arguably based on *The Underwater Legion* but did not compensate the plaintiffs, who sued for damages.

At trial, the jury found for the plaintiffs, but the court granted Ziv’s motion for judgment notwithstanding the verdict and for a new trial. The court of appeal reversed the judgment notwithstanding the verdict but affirmed the order granting a new trial. Without announcing a bright-line standard, the court of appeal based its reversal of the judgment notwithstanding the verdict on the high degree of similarity between the works. In particular, it stated a jury could find the format of each work “quite similar” to the other—indeed, according to the court, “[t]he list of differences is shorter than that of the similarities.” The court further noted a strong similarity in the “basic dramatic core[s]” of the works, their use of “various types of equipment for operating under water,” and their extensive use of underwater photography. In addition, “[s]imilarities in basic theme and dramatic situations” could be found, as well as similarities in “basic plot ideas, themes, sequences and dramatic ‘gimmicks.’” Indeed, the court explained that the defendant’s work followed the plaintiffs’ “format in most of its important facets.”

The court of appeal again applied a high degree of similarity standard two years later when considering, and quickly dismissing, an idea submission case. In *Henried v. Four Star Television*, plaintiff Paul Henried alleged that the defendant breached a contract to pay him for using his work, which consisted of a seven-page synopsis for a television...
1. In Buchwald v. Paramount Pictures Corporation, the motion picture Beverly Hills Cop, starring Eddie Murphy, was the subject of a breach of contract idea submission claim.
   - True.
   - False.

2. In 2008, the California Court of Appeal upheld the dismissal, on summary judgment, of a breach of implied contract claim involving the motion picture Wedding Crashers.
   - True.
   - False.

3. The California Court of Appeal overruled a demurrer in an idea submission case in:
   A. Weitzenkorn v. Lesser.
   B. Fink v. Goodson-Todman Enterprises, Ltd.
   C. Sutton v. Walt Disney Productions.
   D. A and B.

4. The substantial similarity test employed in breach of contract idea submission cases is identical to the substantial similarity test used in copyright infringement actions.
   - True.
   - False.

5. Which of the following cases concerned Branded, a television series?
   A. Desny v. Wilder.
   B. Weitzenkorn v. Lesser.
   C. Fink v. Goodson-Todman Enterprises, Ltd.
   D. None of the above.

6. At trial, the person who conceived of an idea may not testify regarding the value of the disclosure of that idea.
   - True.
   - False.

7. The Shakespearean play The Taming of the Shrew was the subject of an idea submission claim in Sutton v. Walt Disney Productions.
   - True.
   - False.

8. A plaintiff must show that his or her idea is novel in order to state a claim for breach of contract in an idea submission case.
   - True.
   - False.

9. Courts expressly refused to apply a “substantial similarity” standard in:
   A. Sutton v. Walt Disney Productions.
   B. Henried v. Four Star Television.
   D. None of the above.

10. In Desny v. Wilder, the court expressly acknowledged the possibility that the idea transmitted from the plaintiff to the defendant may lack value and thus not be the proper subject of a contract.
    - True.
    - False.

11. The plaintiff’s idea was not embodied in a written disclosure in:
    A. Desny v. Wilder.
    B. Donahue v. Ziv Television Programs, Inc.
    C. Minniear v. Tors.
    D. None of the above.

12. The fact that two works contained heroes who traveled in chauffeur-driven Rolls-Royces was found to be sufficient to establish a cause of action in an idea submission case.
    - True.
    - False.

13. Proof of access alone may sometimes establish actual copying.
    - True.
    - False.

14. A defendant’s independent creation of the work may be relevant in copyright infringement cases, but it is not relevant in state law idea submission cases.
    - True.
    - False.

15. In Fink v. Goodson-Todman Enterprises, Ltd., the court held that demurrers are inappropriate in breach of contract cases involving idea submission claims.
    - True.
    - False.

16. The court affirmed summary judgment for the defendant in:
    A. Desny v. Wilder.
    C. Donahue v. Ziv Television Programs, Inc.
    D. Minniear v. Tors.

17. In Sutton v. Walt Disney Productions, the California Court of Appeal explained that to state a cause of action for breach of contract on an idea submission theory, the plaintiff must demonstrate a substantial similarity between his or her ideas as embodied in his or her work and the defendant’s work.
    - True.
    - False.

18. In Minniear v. Tors, the court permitted the plaintiff’s case to survive a motion for nonsuit.
    - True.
    - False.

19. Questions of substantial similarity may be decided at the demurrer stage in idea submission cases.
    - True.
    - False.

20. The California Court of Appeal recently explained that a high degree of similarity is required to meet the substantial similarity test in idea submission cases.
    - True.
    - False.
In determining whether the plaintiff had a viable cause of action for breach of contract, the court compared the two works in order to determine whether there was “a substantial or material similarity between plaintiff’s material and defendant’s series.” After examining the plots, characters, motivations, subject matter, and milieu of the two works, the court found a lack of substantial similarity.\(^\text{14}\) As a result, the court upheld dismissal of the case on demurrer. The court noted that while both works contained heroes who traveled in a chauffeur-driven Rolls-Royce, this fact seemed “grossly inadequate to sustain a claim of substantial or material similarity.”\(^\text{15}\)

Four days after the \textit{Henried} decision, the court of appeal decided \textit{Minniear v. Tors}. Despite the prior cases finding that a high threshold for similarity is required for idea submission cases, plaintiffs frequently cite them, along with \textit{Minniear}, for the proposition that a low threshold of similarity will suffice.\(^\text{16}\) Indeed, plaintiffs sometimes claim that, according to \textit{Minniear}, as long as their work is the “inspiration for” the defendant’s work, they have sufficiently stated a cause of action for breach of contract to pay for use of their work. However, this assertion misinterprets case law. In fact, \textit{Minniear} did not articulate a low standard at all.

The court of appeal held that plaintiff Harold Minniear had presented sufficient evidence at trial regarding the similarity of his underwater adventure television series to the defendant’s series to overcome a motion for nonsuit. Although the court used the words “inspiration for” in its opinion, it once again focused on the high level of similarity between the two works in deciding to permit the plaintiff’s case to survive. Indeed, the court dissected the two works and found that there were “enough similarities in the basic plot, ideas, themes, sequences and dramatic ‘gimmicks’” for the jury to infer that the plaintiff’s work was in fact used by the defendants.\(^\text{17}\) The court noted that both works were “based on an underwater adventure format involving an ex-Navy frogman named Mike, using scuba and special underwater equipment. In each work, the heroes operated their own boat on a commission for dangerous underwater work. Attractive young girls were featured in both works.” Moreover, both works featured a character named Mike Gilbert and contained similar jet pilot incidents.

The court of appeal applied the substantial similarity test in the 1970 case of \textit{Fink v. Goodson-Todman Enterprises, Ltd.}\(^\text{18}\) Plaintiff Harry Fink created a presentation for a proposed television series titled \textit{The Coward}, which he alleged the defendants used without compensation to Fink in developing the television series \textit{Branded}. The court compared the two works, found a high degree of similarity between them, and held that Fink had stated causes of action for breach of express contract and breach of implied contract, among others.

Explaining that it was looking for the most feasible way “to look for substantial similarity” between two works, the \textit{Fink} court considered the plot, themes, and storytelling techniques of the works.\(^\text{19}\) The plots and basic themes of the two works were “strikingly similar,” if not entirely “the same.” In both stories:

\begin{enumerate}
  \item The hero is a young military officer who takes command upon the infirmity of his superior.
  \item Men in the hero’s military unit are killed after he assumes command, which leads to a court martial and internal turmoil for the hero.
  \item The main character is on a mission and carries a physical reminder of that mission.
  \item The main character has a Scottish name.
\end{enumerate}

In addition to these similarities in plot and theme, the techniques of portrayal and other storytelling devices, such as dream sequences, were alike as well. The numerous similarities of the two works were deemed sufficient to withstand demurrer.

In 1982, the court of appeal reiterated the high standard for similarity in \textit{Mamm v. Columbia Pictures, Inc.}\(^\text{20}\) an implied contract case. The court stated, without discussion, that an instruction directing the jury to consider whether “the defendants based [their work] substantially upon [the] plaintiff’s ideas” was correct.\(^\text{21}\)

In the famous \textit{Buchwald v. Paramount Pictures Corporation} case, the plaintiffs succeeded in proving to the superior court that the defendants had breached a contract with the plaintiffs in making the motion picture \textit{Coming to America}.\(^\text{22}\) Although the court considered whether the defendants’ motion picture “was inspired by” the plaintiffs’ work, it expressly stated that it based its determination on the quantitative and qualitative points of similarity—as identified in \textit{Fink}—between the works.\(^\text{23}\)

The court found “compelling evidence of similarity between [the works],” in the abstract and in the details. Both were modern-day comedies in which the protagonist is a young black member of royalty from a fictional African kingdom. Both protagonists are extremely wealthy and well educated and, in both stories, the protagonist comes to a large city on the American East Coast. Both stories contained “fish out of water” and “love triumphs over all” themes. Moreover, both main characters find themselves without their royal trappings, experience the realities of “ghetto life,” and are enriched by these experiences. Each protagonist falls in love with a young American woman whom he marries and makes his queen in the mythical African kingdom. Also, each main character is employed by a fast food restaurant. In both works the protagonist foils a robbery attempt by using a mop. Each work was to star Eddie Murphy, who eventually took the lead in the defendants’ motion picture, and each work was to be directed by John Landis, who ultimately directed the defendants’ work.

This year, in an unpublished opinion, the California Court of Appeal, in upholding the dismissal of an idea submission claim in \textit{Reginald v. New Line Cinema Corporation}, affirmed the high level of proof required by the substantial similarity test.\(^\text{24}\) The plaintiff, Rex Reginald, claimed that the 2005 blockbuster motion picture \textit{Wedding Crashers} was based on his submission of material titled “Party Crashers Handbook” to New Line Cinema prior to the development of the motion picture. The trial court dismissed Reginald’s claims on summary judgment on the ground that his submission was not substantially similar to the motion picture. On appeal, Reginald argued that California courts have not applied a consistent standard to the idea submission analysis. The court of appeal rejected this argument.

The appellate court affirmed the trial court’s dismissal of the case as a matter of law. The court of appeal independently compared the works and held that summary judgment was properly granted because there was no substantial similarity between the plaintiff’s concept and \textit{Wedding Crashers}. It did so by employing a standard for idea submission cases involving a claim of a breach of implied contract:

Where...there is no direct evidence showing that a defendant used a plaintiff’s idea, the plaintiff must show that the defendant’s work is substantially similar to plaintiff’s idea in order to raise an inference that the defendant used plaintiff’s idea....While there may be no precise formula established by law,...the degree of similarity required to meet the substantial similarity test is high in the idea submission context....[The points of comparison used in determining similarities are material features of the works, not merely words and phrases or the same basic idea.\(^\text{25}\)

Ultimately, the court of appeal rejected Reginald’s identification of 14 alleged similarities between the works as a matter of law. In doing so, the court stated that the alleged similarities did “not play a material role in the specific elements of the works at issue, such as characters, character motivation, settings, basic dramatic core and themes, storylines,
plot ideas, the dramatic sequence, and dramatic gimmicks.”

So case law dating back 50 years confirms that plaintiffs must establish a substantial similarity between their work and the defendant’s work to be successful in an express or implied contract idea submission claim. Clearly the courts look to several factors in determining whether the requisite level of similarity has been met:

1) A similar combination or sequence of elements.
2) Similar characters, settings, dramatic cores, and plots.
3) Similar formats.
4) Similarities in theme or subject matter.
5) Similar gimmicks.
6) Similar storytelling techniques.
7) Similar portrayal elements (such as identical casting).

Ultimately, the considerations in idea submission cases are largely identical to the elements considered in the extrinsic test for copyright infringement—namely plot, theme, dialogue, mood, setting, pace, characters, and sequence of events.

**Alterning the Required Degree of Similarity**

Although substantial similarity is the benchmark in idea submission cases, the necessary degree of similarity may be heightened or lessened depending on the factual circumstances of the case. These circumstances may include the language used by the parties in making their agreement, which may alter the level of similarity required to show a later breach in contract.

In *Weitzenkorn*, for example, the California Supreme Court explained repeatedly that the language of the parties’ agreement may require a different standard of similarity to be applied. Underlying the court’s opinion was its reasoning that producers and writers are free to make any contract they desire—and set any standard they want—regarding the buying of ideas. Indeed, the *Weitzenkorn* court stated that however “improbable” it may be, the plaintiff might be able to show that the defendants agreed to pay her “no matter how slight or commonplace the portion which they used.”

Courts of appeal and the Los Angeles Superior Court have followed *Weitzenkorn* by stating that the terms of the contract—that is, what the parties actually agreed to—will be controlling.

Accordingly, contracting parties can modify the level of similarity required to trigger an obligation to pay for use of the work. As in *Weitzenkorn*, a person presenting an original work may seek an agreement requiring compensation for the use of even the slightest element of his or her work. On the other hand, production companies may negotiate arrangements in which they only need to compensate parties when they use unchanged significant portions of the work, including the exact plot, theme, characters, and settings. Theoretically, the contracting parties could agree that only a “striking similarity” (a standard with a higher level of proof than substantial similarity) will suffice to trigger a producer’s obligation to compensate the plaintiff. Producers can also protect themselves by making it clear during negotiations that absent an express written agreement to the contrary, the producer does not agree to pay for the use of general ideas or nonoriginal elements of the work.

Although access to the original work is often at issue in copyright infringement cases, it is questionable whether the degree of access is influential in an idea submission case. Under the “inverse ratio rule,” less similarity may be required when a defendant has been granted unfettered access to the work. As the California Supreme Court stated in *Golding v. R.K.O. Pictures, Inc.*, “Where there is strong evidence of access, less proof of similarity may suffice. Conversely, if the evidence of access is uncertain, strong proof of similarity should be shown before the infer-
ence of copying may be indulged.” 30 Citing Golding, lower courts have stated that less similarity is required when the defendant had “unlimited access” to the plaintiff's work or the evidence of access is “overwhelming.” 31 However, the Golding court also explained that “[p]roof of access, however, establishes no more than the opportunity to copy and not actual copying....Any liability for damages must rest upon substantial evidence of similarity between” the two works. 32

Since access to the original work is often undisputed, idea submission cases typically hinge on whether the new work is sufficiently similar to what was submitted. Indeed, according to Nimmer on Copyright, “even massive evidence of access cannot by itself avoid the necessity of also proving the full measure of substantial similarity.” 33 However, in Funky Films, Inc. v. Time Warner Entertainment Company, L.P., the Ninth Circuit implied that the inverse ratio rule has stronger applicability in cases in which the defendant expressly has conceded access to the plaintiff's work. 34

To the extent the rule applies and can alter the requisite degree of similarity, courts have provided virtually no guidance regarding how much the rule can affect the required level of similarity in a given case. The question of how much or how little the inverse ratio rule can affect the applicable standard remains unanswered.

Development of the Initial Idea

Another factor that plays a role in idea submissions claims is the degree to which the initial idea was developed. For example, if a person simply suggests that a producer “make a comedy this year,” must that person be compensated if the producer later produces a comedic work within the year? 35 The answer is most likely no. But how much more detailed must the idea be? It is unclear whether suggestions that a reality show be developed around the concept of a singing competition or remaking a film provide sufficient basis for a claim. Unfortunately, there is little guidance on this topic.

Notably, the Desny court left open the possibility that an idea transmitted by a plaintiff to a defendant may be valueless—and thus not the proper subject of a contract. The court explained that only “some ideas are of value to a producer” and that other ideas “may be considered totally devoid of...any practical value.” 36 The court's opinion emphasizes that those who convey valuable ideas may seek to recover on breach of contract grounds. 37

Moreover, the court of appeal in Chandler v. Roach has held that an idea must have “sufficient concreteness so as not to be too vague to be consideration for a contract.” 38

To the extent that the plaintiff has mislead the producer about the value of his or her idea, gross inadequacy of consideration may be relevant to a claim of fraud. 39

The line to be drawn between what is vague and what is valuable is difficult to discern. Some very general ideas can, in fact, support a claim. In Fink, for example, the court noted that a “mere basic theme” may be an idea that can support a contract-based claim. 40 Moreover, the Chandler court noted that there is no requirement of either novelty or concreteness for an idea to be the subject of a contract—a statement directly at odds with its opinion that an idea needs to have “sufficient concreteness” to constitute consideration. In addition, the timing of the disclosure of the idea may make the idea valuable. In particular, an idea “may be valuable to the person to whom it is disclosed simply because the disclosure takes place at the right time.” 41 Finally, the person who conceives an idea may elucidate the value of its disclosure through testimony at trial. 42

Several basic contract principles also suggest that very general ideas may be the subject of a contract-based claim. The terms of a contract will be controlling, 43 so if the defendant actually agreed to pay for a general idea, it is unlikely that the courts will interfere to protect the defendant from its own decision. Indeed, an underlying principle of contract law is that “one who promises to pay a fee in exchange for services will be held to his promise, regardless of the value of the services, and even though they may be valueless in fact.” 44 Moreover, as many plaintiffs have argued, courts ordinarily do not question the adequacy of consideration in contract cases. 45

However, these principles belie the fact that no court has ever held that a general, minimal idea may support a contract claim. For example, in Desny, the plaintiff's idea was a well-developed storyline set forth in a four-page synopsis. 46 In Fink, the plaintiff's idea was presented in a detailed plot summary for a television series, along with a pilot script. 47 In Donahue, the plaintiff's idea was delineated in 12 story outlines, one screenplay, and a proposed budget. 48 In Minniear, the plaintiff's idea took the form of a script and a booklet that outlined prospective episodes. 49 In Buchwald, the plaintiff's idea consisted of at least a three-page treatment. 50 In Wettzenkorn, the plaintiff's idea comprised a composition with an extensive storyline. 51

The case most routinely cited for the proposition that a general idea may support a contract claim is Blaustein v. Burton. 52 However, the plaintiff's concept for the transformation of a Shakespearean play into a motion picture was in fact well detailed. Indeed, among other things, the plaintiff pro-

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posed to create a motion picture out of the play *The Taming of the Shrew* starring Elizabeth Taylor and Richard Burton and directed by Franco Zeffirelli. The plaintiff proposed to remove the “play within a play” device found in the original play and to include the enactment of two scenes that occur off-stage in the play. The plaintiff also proposed to film the movie in Italy. Considering these proposals and the fact that the resulting movie included each of these elements, the *Blaustein* court concluded that the plaintiff’s idea was one that might be protected by contract.54

California case law elucidates that a substantial similarity standard is applied in breach of contract claims arising in idea submission cases. A high degree of similarity between the plaintiff’s and the defendant’s works is required in order to support a breach of contract claim. In determining whether the standard has been satisfied, courts will analyze the works and look for similarities regarding plot, theme, dialogue, mood, setting, pace, characters, sequence of events, gimmicks, storytelling devices, portrayal techniques, and combinations of these factors.

Courts will also look to the language of the parties’ contract to decide whether the parties have agreed to apply a higher or lower standard of similarity in a given case. Less clear, however, is the effect, if any, of the inverse ratio rule. The law remains unsettled regarding when the inverse ratio rule applies and, if it does, whether it alters the level of similarity that is required to trigger a defendant’s obligation to pay in an idea submission case.

Also uncertain is the extent to which an idea must be developed before it can be the subject of a contract claim. Lawyers on both sides of the table could give more definitive advice to their clients if clearer guidelines existed. However, because no case has yet to affirm the existence of a contract based on a general, ill-defined idea, it is best to conclude that an idea requires more certainty if it is to form the basis of a contract.

1 Klekas v. EMI Films, Inc., 150 Cal. App. 3d 1102, 1114-15 (1984) (upholding the dismissal of the plaintiff’s implied contract claim when there was no evidence that the defendants had access to the plaintiff’s work, notwithstanding the existence of numerous similarities between the plaintiff’s and the defendants’ works); *Hollywood Screen Test of Am., Inc. v. NBC Universal, Inc.*, 151 Cal. App. 4th 631, 647-49 (2007) (affirming dismissal of the plaintiff’s entire idea submission case on summary judgment when the undisputed evidence showed that the defendant’s work was the product of independent creation).

2 The substantial similarity test is comparable but not identical with the test of the same name in copyright cases. For example, protectability and novelty are required in almost all copyright infringement cases, but they are not so required in contract cases. See text, supra.
Weitzenkorn v. Lesser, 40 Cal. 2d 778 (1953).

Id. at 780, 787.

Id. at 791.

Id. at 791-92.


Id. at 603. The court held that such a general similarity was not enough to survive demurrer, even though it expressly noted that the protectability of the plaintiff’s work is not at issue in express and implied contract cases. Id.

Desny v. Wilder, 46 Cal. 2d 715 (1956).

Id. at 727, 743.


Id. at 600, 601 & n.4, 602. After the second trial, the court of appeal upheld the jury verdict for the plaintiffs based upon a finding of a high degree of similarity between the two works. Indeed, there was abundant evidence that the defendants had made “a substantial use” of the plaintiffs’ work in an “important and material respect.” Donahue v. United Artists Corp., 2 Cal. App. 3d 794, 807-08 (1969) (citations omitted).


Id. at 436-37.

Id. at 437.


Id. at 503.


Id. at 1010. Notably, the Fink court explained that the same points of similarity are analyzed for contract and noncontract claims. Fink, 9 Cal. App. 3d at 1008-10. In copyright infringement claims, for example, the points of similarity that courts analyze include plot, theme, dialogue, mood, setting, pace, characters, and sequence of events. Kouf v. Walt Disney Pictures & Television, 16 F. 3d 1042, 1045 (9th Cir. 1994).

There is one significant difference in the analysis of contract versus noncontract idea submission claims. While the novelty of the idea is not required in contract-based idea submission claims, it is a requirement for noncontract actions, such as copyright infringement claims. Fink, 9 Cal. App. 3d at 1008-10. However, law professor Lionel L. Sobel argues persuasively that novelty should be a requirement in implied contract cases, as opposed to cases involving an express agreement. Lionel L. Sobel, The Law of Ideas, Revisited, 1 UCLA ENT. L. REV. 9, 61-63 (1994) (citing Apfel v. Prudential-Bache Sec., Inc., 81 N.Y. 2d 470, 478 (1993) (“There is no equity in enforcing a seemingly valid contract when, in fact, it turns out upon disclosure that the buyer already possessed the idea. In such instances, the disclosure...is manifestly without value.”)).

A California case supports Sobel’s argument. Ware v. Columbia Broad. Sys., Inc., 253 Cal. App. 2d 489 (1967). In rejecting an implied contract claim on summary judgment, the Ware court explained that it would have been “futious” for a plaintiff to claim that a defendant impliedly agreed “to pay him if they ever in the future made a picture embodying any stock situation which” the plaintiff had also used in creating the plaintiff’s work. Id. at 493.


Id. at 477 n.6.


Id. at *10.


Id. at *4-6.
the evidence of access is overwhelming, less similarity is required.

33 To the extent that recovery can be premised upon a plaintiff to recover are extremely low. Moreover, the defendant could argue that the circumstances were such that no agreement should be implied in the first instance and, even if one could be implied, that the potential damages for a plaintiff to recover are extremely low. Moreover, the defendant can argue that the plaintiff's idea is so vague and general as to be worthless and therefore cannot constitute consideration for the defendant's alleged promise to pay.


37 Id. at 15. See also id. at 738 (stating that the conveyance of "ideas which are valuable and which [producers] can put to profitable use" may form the basis of an agreement).


40 See Chandler, 156 Cal. App. 2d at 444; see also RESTATEMENT (SECOND) OF CONTRACTS §79 cmt. (2007) (Courts do not ordinarily inquire into the adequacy of consideration, especially when one or both of the values exchanged are uncertain or difficult to measure;); Harris v. Time, Inc., 191 Cal. App. 3d 449, 456 (1987) ("Courts [generally] will not...question the adequacy of the consideration.").

41 3 WILLISTON ON CONTRACTS §7.21 (4th ed. 2007).

42 Cost of Section membership is $35. LACBA Membership is required to join the Section. For more information about joining the Section and its subcommittees, please contact the member services department at (213) 896-6560.

43 Id. at 792.

44 Id. at 972.


46 Id. at 734; see also id. at 738 (stating that the conveyance of "ideas which are valuable and which [producers] can put to profitable use" may form the basis of an agreement).


48 Id. at 792.

49 Id. at 972.


52 Weitzenkorn v. Lesser, 40 Cal. 2d 778, 781 (1953).


54 Id. at 184.
Video games have revolutionized entertainment. The relatively simple and inexpensive pleasure of, for example, a board game has been transformed into an economically sizeable, globally interactive, and sometimes controversial form of entertainment. The video game world is at least a $27.5 billion global industry, with nearly 100 million people playing video games in the United States alone.

Despite these successes, the video game industry is not without difficulties. Many people continue to believe that video games are bad for children. Some parents, watchdog groups, and churches decry video games as morally and psychologically unhealthy because they convey messages of violence, sex, and profanity. Some psychologists argue that the exposure to video game violence increases the risk that children will behave aggressively in real life, and lawmakers continue to try to push through legislation to regulate the video gaming industry.

Opponents of regulation often challenge the legislation’s constitutionality under the First Amendment. They also counter that no substantial evidence exists that violent video games are in and of themselves harmful to children. Rather, it is the parent’s duty to safeguard children from games that are inappropriate for their age. There is already a body within the industry, the Entertainment Safety Ratings Board (ESRB), that informs consumers of the age appropriateness of games. Opponents believe the calls for more regulation unfairly focus on video games among other media, such as movies and television, that portray similar content.

In truth, both sides have valid concerns. But while the media focuses on the blame game and the legislation aimed at cleaning up the content, what counts most are the courts’

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The Fight for Regulation

Video games have been around since the late 1950s, but it was not until the release of Mortal Kombat as an arcade game in 1993 that many alarms were sounded about violence in video games. It was the first fighting game that used digitized characters and blood, rather than the traditional cartoonlike hand-animated graphics. U.S. Senators Joe Lieberman and Herbert Kohl did not think this game or others that depicted violence should be available to children. They were the catalysts behind the December 1993 joint congressional hearings on video game violence that led them to introduce a bill to impose a rating system if the industry itself did not develop one of its own.4 At the hearing, expert witnesses testified to their views on the violent and unhealthy aspects of video games: “[E]lectronic games…actually encourage violence as the resolution of first resort by rewarding participants for killing one’s opponents in the most grisly ways imaginable.”5 That era’s video game giants, Sega and Nintendo, agreed to support a self-regulating body, the ESRB, which was formed in 1994. This voluntary nonprofit is independent of the gaming industry and provides consumers with a rating system for games. The ESRB was formed by the Interactive Digital Software Association, which is now the Electronic Software Association.

The process for rating games is fairly straightforward. A game company submits answers to an ESRB questionnaire detailing its game’s storyline, content, and gameplay.6 Along with the paperwork the game company must submit a video containing the potentially most offensive content within the game, including but not limited to violence, sex, substance abuse, and gambling.7 A committee made up of at least three trained game raters evaluates the submission, provides feedback, and issues a preliminary ESRB rating.8 The ESRB staff then reviews everything again and makes the final rating decision.

There are seven ratings: E (Early Childhood), E (Everyone), E10+ (Everyone 10 and older), T (Teen), M (Mature), AO (Adults Only), and RP (Rating Pending), which are displayed on the packaging.9 The back of the video game package also contains content descriptors, which detail elements in the game that triggered a rating. Examples include blood, nudity, and language.10 The M and AO ratings are the most extreme. An M-rated game may be sold at retailers, but an AO-rated game may not. Contrary to popular belief, it is not the ESRB that bans the AO games; rather, it is generally the console manufacturers and retailers. Nintendo, Sony, and Microsoft have policies prohibiting third-party AO-rated titles from appearing on their consoles.11 In order to distribute and profit from an AO-rated game, the publisher has to edit out whatever triggered the AO rating and resubmit it to the ESRB. Should a video game publisher fail to disclose objectionable content in the games, the ESRB may fine the company up to $1 million or refuse to rate its games, which effectively blocks retail sales.

The ESRB educates families through public service announcements on television and with retailers (such as Best Buy, Blockbuster Video, and GameStop) who belong to the ESRB Retail Council,12 ESRB retail members are subject to mystery shopper audits to determine if employees of these retail stores are selling M or AO games to those under 17.13 Despite the ESRB’s efforts at self-regulation, watchdog groups are far from pleased with the content of video games available to minors. As more studies continue to publish data suggesting that violent video games increase aggression in children,14 video game opponents and legislators are growing more active. These groups object to the content of the video games, regardless of ratings meant to preclude minors from purchasing or gaining access to these games at the outset. For instance, Rockstar Games’s Grand Theft Auto (GTA)15 series is a well-known game that allows players to act out crimes for rewards.16 The ESRB has rated all eight titles of the series as M, citing to blood, violence, and strong language.17 Some groups still oppose its distribution, even with the rating.18 This issue is also regularly raised by politicians on a national stage. In March 2005, Senator Hillary Rodham Clinton spoke to the Kaiser Family Foundation on the subject of media sex and violence, pointing out that GTA is particularly harmful to youth because “[they’re] playing a game that encourages them to have sex with prostitutes and then murder them.”19

Legislation

The states’ attempts at regulation have generated controversy and public discourse. Courts have consistently held that video games are protected speech, and efforts by legislators to ban or limit the access to or the sale of games have been held unconstitutional under the First Amendment. State regulators often look to the U.S. Supreme Court’s holding in Ginsberg v. New York for how to enact constitutional laws to protect minors from obscenity.20 In Ginsberg, the Court held that communications directed at minors under the age of 17 did not enjoy the same kind of protection under the First Amendment’s freedom of speech principles.21 Thus, lawmakers could make laws intended to prevent obscene materials from getting into the hands of minors. Courts interpreting Ginsberg, however, have not applied its holding beyond the context of sexual obscenity. Consequently, laws aimed at curbing video game violence continue to be routinely struck down.

The first of these cases was American Amusement Machine Association v. Kendrick, arising from the July 2000 Indianapolis Arcade Ordinance requiring businesses to label their coin-operated games that featured graphic violence or strong sexual content.22 It also prohibited children under 17 to play those games without parental consent. The Seventh Circuit reviewed the constitutionality of this ordinance and, in an opinion written by Judge Richard A. Posner, unanimously concluded that it would be dangerous for the government to control children’s access to information. Judge Posner cited the blind fanaticism of the young German soldiers under the Hitler regime during World War II,23 “[T]o shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”24

Moreover, Judge Posner rejected the city’s argument that the ordinance was based on obscenity grounds by narrowly interpreting Ginsberg to apply only to matters involving sex, not violence. As Posner indirectly pointed out, this case does not involve obscenity but rather violence, and the two cannot be used interchangeably. And even if the violence was sufficiently obscene to qualify as offensive to a large sector of society, Posner still did not believe that graphical violence qualifies as offensive under obscenity laws.

Fighting words that incite people to violence may be regulated,25 but Judge Posner was not convinced that violence in video games incites minors to act violently. The court rejected the psychological evidence on which the city relied,26 as the studies did not reveal that video games have caused anyone to commit a violent act (as opposed to merely feeling aggressive) or have caused the average level of violence to increase. As a result, Posner ruled the ordinance unconstitutional.

The Eighth Circuit faced a similar constitutional challenge in the case of IDSA v. St. Louis County in 2003.27 The St. Louis violent video game law required minors under 17 to obtain parental consent before buying games with violent or sexually explicit content, or playing in arcades with such games. The court reiterated the basic First Amendment principle that content-based restrictions on speech are presumptively invalid and will be struck down absent a compelling state interest to restrict such
Explicit Video Game Law. Although the implementation of the Illinois Sexually explicit material, taken as a whole, lacks any serious literary, artistic, political, or scientific value. As such, the Sexually Explicit Video Game Law was held unconstitutional.

Similarly, in Michigan, Louisiana, and Oklahoma the courts held that the First Amendment protects the content in video games. “[S]uch depictions [of violence] have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation.” Again, the court did not find the social science research on violence and aggression compelling enough to regulate the graphical depiction of violence against police officers: “[T]here has been no showing that exposure to video games that ‘trivialize violence against law enforcement officers’ is likely to lead to actual violence against such officers.”

In 2006, the Seventh Circuit affirmed the district court’s holding in ESA v. Blagojevich granting a permanent injunction to prevent the implementation of the Illinois Sexually Explicit Video Game Law. Although there was a counterpart Violent Video Games Law, the state did not appeal the loss. Instead, the state sought to implement the Sexually Explicit Video Game Law. However, the court rejected the state’s argument on the grounds that it did not meet the Supreme Court’s three-prong test under Miller v. California, under which obscene speech may be regulated if 1) an average person would find the work to appeal to the prurient interest, 2) the work is patently offensive, and 3) the work lacks serious literary, artistic, political, or scientific value. The court held that “[the state] created a statute that is constitutionally overbroad” because it failed to include language that the sexually explicit material, taken as a whole, lacks any serious literary, artistic, political, or scientific value. As such, the Sexually Explicit Video Game Law was held unconstitutional.

California has also had difficulty in passing video game content laws that withstand constitutional challenge. For example, California Assembly member Leland Yee penned Chapter 638, which would have placed restrictions on selling or renting violent computer and video games to anyone under 18 if the violence was offensive to the community or if the violence was done in an “especially heinous, cruel, or depraved” manner. The law would also have required game manufacturers and distributors to label the game packages with stickers displaying the number 18. Chapter 638 was enacted on October 7, 2005—and 10 days later, the Video Software Dealers Association (now the Entertainment Merchants Association) and the Entertainment Software Association filed suit, challenging the law’s constitutionality. In August 2007, Judge Ronald M. Whyte of the U.S. District Court of the Northern District of California granted the plaintiffs a permanent injunction barring enforcement of Chapter 638, holding that “the evidence does not establish that video games, because of their interactive nature or otherwise, are any more harmful than violent television, movies, internet sites or other speech-related exposures.” The evidence did not provide for the required nexus between the protection of minors and the regulation of speech. The state of California appealed the decision to the Ninth Circuit.

Another recent video game case has received a similar ruling. In March 2008, the Eighth Circuit upheld an injunction against a Minnesota violent video games law that sought to impose a $25 fine on those under 17 who rented or purchased a game rated AO or M. The appellate court affirmed the district court’s holding that the state did not prove that violent video games hurt children and that the law was thus unconstitutional. Judge Roger I. Wollman wrote: “Whatever our intuitive (dare we say commonsense) feelings regarding the effect of violent video games, precedent requires undeniable proof that such violence causes ‘psychological dysfunction. The requirement of such a high level of proof may reflect a refined estrangement from reality, but apply it we must.”

These judicial actions have been costly political exercises. If the ESA is successful in obtaining $324,840 in fees from California, then it will have been awarded nearly $1.9 million in fees and expenses for defending its rights in California. As Michael D. Gallagher, president of the ESA, points out: “California citizens should be outraged at their elected leaders. Hard-earned tax dollars were spent on defending this law that California’s state leaders knew was unconstitutional.”

State legislators are not alone in this battle. Since the Grand Theft Auto: San Andreas scandal of July 2005, in which it was discovered that third-party software programs could unlock a private sex-themed minigame within the game known as Hot Coffee, the federal government has introduced three major bills to regulate the video game industry. In September 2005, Senator Clinton introduced the U.S. Family Entertainment Protection Act (FEPA), calling for federal enforcement of the ESRB’s rating system. First, FEPA would impose initial fines of $1,000 or 100 hours of community service to game vendors who sold games rated M or AO to minors; subsequent violations would trigger a $5,000 fine or 500 hours of community service. Second, FEPA called for a Federal
Trade Commission (FTC) investigation of the ESRB’s rating methodology. It would authorize the FTC to conduct random audits of retailers.48 The bill was referred to the Senate Committee on Commerce, Science and Transportation, where it expired at the end of the 109th session of Congress.49

Failure to pass the 2005 bill did not prevent Cliff Stearns, a member of the U.S. Congress, from proposing legislation in 2006 to grant the FTC the power to create rules governing video game ratings. The Truth in Video Game Rating Act (TVGRA)50 would allow the FTC to commandeer the ESRB’s game rating system and independently assign its own ratings. Moreover, it would implement rules prohibiting video game publishers from failing to disclose questionable content to the ratings board. The Entertainment Technology advisor, a blogging arm of Acacia Research Group,51 noted that the bill “seems somehow redundant, duplicating established industry efforts and necessitating additional taxpayer expenditure for re-enforcement of already-enforced strictures.”52 The first version of this bill died in Congress. However, Senator Sam Brownback reintroduced the bill in 2007.

Yet another bill was the Video Game Decency Act, proposed by Representative Fred Upton in September 2006.53 Rather than punish the ESRB, Upton’s bill sought to punish developers and publishers that, to obtain a better rating, fail to disclose objectionable content to the ESRB. Upton’s bill, like the Truth in Video Game Rating Act, did not pass into law and was resurrected in 2007.54

The constitutional barrier to enforcement of these bills remains clear, however, so some state and federal legislators are beginning to channel their efforts in other directions. Idaho State Attorney General Lawrence Wasden has teamed with the ESRB to educate parents about ratings by personally broadcasting public service announcements: “[W]ith 1,000 new games released every year, how are parents to make, and help their kids make, good choices? The video game rating system is a good place to start. It includes age-appropriate ratings, along with information about what’s actually in the game.”55 Similarly in Delaware, Lieutenant Governor John Carney and State Representative Helene Keeley, who had initially proposed a bill to make it illegal to sell M-rated games to minors, have opted to join forces with the ESRB to educate and encourage parents to pay attention to ratings and make safe choices for their children.56 They plan to advertise on billboards, print, and radio broadcasts to spread this message.

Additionally, a recent FTC report to Congress has recognized the video game industry’s “significant progress” in limiting its retail sales of mature games to minors, noting that neither movie nor music retailers have reached this goal.57 The FTC has also highlighted that the ESRB is a “useful and important tool that parents increasingly use to help them make informed decisions about games for their children.”58

Nevertheless, the video game industry will still face challenges. Most recently, New Mexico Representative Gail Chasey has introduced the Leave No Child Inside Act that would force New Mexico state consumers to pay a 1 percent excise tax on purchases of games, consoles, and televisions.59 Although the purpose of the tax is to fund outdoor education programs for schoolchildren, the ESA, the Entertainment Merchants Association, and other organizations have mounted opposition, claiming this bill is singling out the video game industry indirectly as a means of regulating it. As EMA Vice President Sean Bersell expressed in his opposition, “Video games, like other forms of entertainment, are expressive products protected by the First Amendment.... A special tax on physical video game sales would place an unfair burden on store-based video game retailers in New Mexico as they compete against other video game delivery systems that are not subject to the same level of taxation.”60

### Videos and Movies

The video game industry has been closely scrutinized—arguably more so than the film industry. Both industries have self-regulating bodies that oversee content and provide ratings for the public. The Motion Picture Association of America is a nonprofit business trade association that rates movies on a voluntary basis—a similar model to the ESRB.61 The MPAA’s ratings are not legally required, but they are the industry standard.62 Major studios have agreed to submit their movies for ratings before release into theaters or stores.63 Some stores, such as Wal-Mart, will not sell R-rated movies to minors.64 Yet, politicians seem less critical of the MPAA than the ESRB. ESRB president Patricia Vance distinguishes the two organizations based on two factors: first, the MPAA is more established due to its age, about 30 years ahead of the ESRB; and second, people have the misperception that video games are predominantly intended for kids, when in fact, the average gamer is 33 years old.65 One might also hypothesize that the movie industry’s government relations function is larger, better coordinated, better funded, and more experienced.

Though the video game industry will face persistent challenges, one thing is clear: the ESRB has helpfully encouraged compromise. Supporters are increasingly abiding by the ESRB’s standards to disclose content, retail the games properly, and promote awareness.

Critics are increasingly relying on the ESRB to regulate its own industry. The recent results have been positive. In a 2006 survey conducted by The Harrison Group, 84 percent of parents said they were familiar with the ESRB’s rating system, and 68 percent believed the rating system was an effective means of determining whether a game was suitable for their children.66 Perhaps, with more time, the ESRB will garner the same respect and confidence that the MPAA commands.

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7 Id.
8 Id.
10 Id.
13 Id.
14 See Ben Carrozza, Obvious: Psychology Study Finds Video Games May Cause Aggression, DOREA, Nov. 29, 2007, available at http://www.dose.ca/games/story.html?docid=6d670c8-72ac-4c7-ebed-7286b1c53c36 (citing to University of Michigan psychology researcher and professor L. Rowell Huesmann’s results of a study: “Exposure to violent electronic media has a larger effect than all but one other well-known threat to public health. The only effect slightly larger than the effect of media violence on aggression is that of cigarette smoking on lung cancer.”).
17 See Grand Theft Auto Legacy, available at

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Even more controversial is Manhunt 2, another title from Rockstar Games. Though originally scheduled to be released in North America in July 2007, Manhunt 2 was pushed back until the end of October because it had received an AO rating and was initially banned in the United Kingdom and Ireland.


Id. at 635.

American Amusement Machine Ass’n v. Kendrick, 244 F. 3d 572 (7th Cir. 2001).

Id. at 573.

Id. at 577.


See Craig A. Anderson & Karen E. Dill, Personality Processes and Individual Differences—Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life, 78 J. PERSONALITY & SOC. PSYCH. 772 (2000). Results from studies reveal that “exposure to violent video games will increase aggressive behavior in both the short term (e.g., laboratory aggression) and the long term (e.g., delinquency).”

IDSA v. St. Louis County, 329 F. 3d 954 (8th Cir. 2003).

Id. at 959.

Id. at 957 (quoting Hurley v. Irish-American Gay, Lesbian & Biseexual Group, 515 U.S. 557, 569 (1995)).


Id. at 1185.

Id. at 1188.

ESA v. Blagojevich, 469 F. 3d 641 (7th Cir. 2006). According to the Entertainment Software Association Web site, the ESA “is...dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet.” See http://www.theesa.com/about.


Blagojevich, 469 F. 3d at 648.

ESA v. Granholm, 404 F. Supp. 2d 978, 981 (E.D. Mich. 2005) imposing preliminary injunction against statute that included language “[c]onsidered as a whole, lacks serious literary, artistic, political, education, or scientific value for minors” in its definition of implicated content because statute was unlikely to survive strict scrutiny).

ESA v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006) (A statute that criminalized distribution of video and computer games that appealed to minors’ morbid interests was nothing more than impermissible thought control.).

Entertainment Merch. Ass’n v. Henry, No. 06-675 (W.D. Okla. filed Sept. 17, 2007) (holding that there is no support or “substantial evidence” that video...
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games are harmful to minors and that “there is a complete dearth of legislative findings, scientific studies or other rationale to support passage of the act”).

Yee, A.B. 1179, ch. 638 tt. 1.2A §1746(B) (2005).


Id.


Id.


Id.

Id.


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TAP Deposition Skills Workshop

ON SATURDAY, MAY 3, Trial Advocacy and the Litigation Section will present the TAP deposition skills workshop, which provides introductory and intermediate instruction on how to take and defend depositions in California state court actions. The first part of the program features a lecture, with questions and answers, covering the rules relating to oral depositions, how to pin down the deponent, how to defend a deposition, the use of deposition testimony in trial, and developing a deposition strategy. The second part is a workshop in which participants practice taking and defending the deposition of a plaintiff in a civil action for negligence and receive constructive feedback on their performance. Participants will receive an outline that organizes the deposition process into a user-friendly format. This program fills quickly. Registrations with a check cannot be guaranteed admittance due to processing time. Cancellations cannot be accepted after April 28, 2008. The program will take place at the LACBA/Executive Presentations Mock Courtroom, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal begin at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The registration code number is 009858. The prices below include the meal.

$250—LACBA members
$350—all others
3.75 CLE hours

Practical Persuasion

On Tuesday, May 13, the Association will host an interactive, hands-on 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 Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal begin at 5:30 P.M., with the program continuing from 6 to 9:15. The prices below include the meal. The registration code number is 009756.

$110—CLE+Plus members
$185—LACBA members
$230—all others
3.25 CLE hours

Retirement and Redirection

On Tuesday, May 20, the Senior Lawyers Section will host a program featuring speaker Hindi Greenberg on considering retirement or redirection. This seminar will cover such topics as: properly and ethically closing a law practice, affording retirement, legal or other work available to those seeking to keep their skills sharp and earn income, the State Bar’s emeritus program, identity and purpose in life after restructuring or retirement, and deciding what will best meet the needs of retiring or redirected lawyers while not causing problems to their firms or clients. Those who are beginning to think about whether to retire or change their work focus or otherwise utilize their legal skills in a productive manner will benefit from this seminar, which will offer a list of resources on practice management, redirection, and retirement. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal begin at noon, with the program continuing from 12:30 to 1:30 p.m. The registration code number is 009982. The prices below include the meal.

$50—Senior Lawyers Section members
$75—LACBA and Barristers Section members
$150—all others
.75 CLE hours
Reflections on the Writers’ Strike

FOR 10 YEARS I had the honor of serving as a coordinating editor of this magazine’s annual Entertainment Law issue and writing the From the Chair column. This issue is the first since 1994 that I have had absolutely nothing to do with, but, out of force of habit I suppose, I was still asked to write a column for it. The difference this year is that I get to be in the back of the magazine, and, I must say, I like the view—if only because, for the first time, I get the last word.

My excuse for not participating in this issue is that I was busy leading my fellow members of the Writers Guilds of America in our 100-day strike for the Internet. Some have called our strike the most successful labor action in the entertainment industry in 30 years and the most important in the American labor movement in this young century. Barely a month has passed since we ratified the contract, so I do not have an objective perspective on events (give me another few days), but there are some lessons learned and insights attained that I can confidently share. Even under the spotlight of “the last word.”

Entertainment industry writers came into this struggle wanting to right some historic wrongs. For more than a generation, whenever a new technology came along (such as cable or home video) the studios and networks would refuse to pay the going wage rates, benefits, and residuals because, they alleged, the new media was an unproven business model. Unfortunately, when the model eventually proved successful (such as cable and home video), they still would not pay. Though it had been nearly 20 years since the last WGA strike and fewer than a third of current guild members were part of it, the overwhelming sense of the membership was that, as far as new media on the Internet was concerned, we wouldn’t get fooled again. Furthermore, there was a general sense that studios and networks were in the habit of making agreements that they would apply to the letter when it benefitted them but refuse to honor without a lengthy fight if it cost them. This included big ticket items like profit participation and fair market valuations of television and film sales, as well as more mundane considerations like overtime and other benefits for reality television series workers and timely payment for services rendered.

Despite the righteous resolve of writers (or perhaps because of it), the enormous, diversified, multinational corporations that control media in America fought back hard. Who knew? For a generation these vicious competitors (whose parent companies include General Electric, News Corp, Time Warner, Sony, Walt Disney, and Viacom) had employed full-time labor executives joined under the banner of the Alliance of Motion Picture and Television Producers to respond to every union and guild demand that came their way with a simple but determined no. This process had served them well for decades and so they continued to use it, even several weeks into a devastating strike that significantly affected their companies’ business. Meanwhile, these same media giants used direct control over (or tremendous sway with) traditional news outlets and hired high-priced political consultants to launch a public relations offensive, while maintaining a stoic, oligopolistic unity as defense.

But in this battle for the Internet, the Internet proved to be the secret weapon. We writers always knew that we could write. We soon discovered that we could also e-mail. And blog. And podcast. Writers quickly developed Web sites, created YouTube videos, and produced unprecedented new media content. In an era of user-generated content on the Internet, there was a sudden and palpable sense of user-generated resolve as well. There were polls showing big media with a favorable rating lower than the margin of error. The Star Trek fan base alone had a noticeable impact, exhausting the overstock of XXXL strike T-shirts.

There was also a clarion call from organized labor outside show business. Teamsters, nurses, laborers, flight attendants, janitors, plumbers, steel workers, dock workers, carpenters, pilots, walked the picket lines side by side with actors, musicians, directors, below-the-line talent of all varieties, and (even in freezing temperatures back East) with never fewer than 1,000 writers. Unions around the globe sent representatives and messages of support. Even rival factions within the American labor movement declared that this was a fight that writers had to win and that organized labor had to help them win.

Writers have historically been the thin edge of the wedge for the Hollywood labor movement, but the question remains whether this wedge represents an era of more aggressive union demands and tactics or a period of studio and network flexibility and collaboration—a vital question with the SAG/AFTRA contract still very much unsettled as of this writing. While labor peace is desired by all, writers are only now building the third leg of the stool upon which that peace must rest. Those legs are organizing (membership outreach and recruitment), negotiating, and enforcement.

It is the enforcement of this new contract—hand in hand with the willingness of the conglomerates to share information, access to decision making, and, ultimately, revenue—that will drive labor peace in Hollywood in the coming years. Giving creative talent its fair share through collective bargaining is one thing, but making multinational conglomerates live up to their promises is another. Whether it be through legislation, litigation, or lamentation (we are not above loud and vociferous complaining) enforcement will be the last word.

Patric M. Verrone, a member of the Los Angeles Lawyer Editorial Board, is president of the Writers Guild of America, West.
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