PIERCE LAW GROUP LLP

Who the Independents depend on

Film • TV • New Media

Entertainment Law Circular

August 2015 Issue 4

PierceLawGroupLLP.com (310) 274-9191

Stay Connected

Avvo Rating 10.0 Superb

Million Dollar Advocates Forum

Super Lawyers David Albert Pierce SELECTED IN 2015 THOMSON REUTERS

In Production

PLG-LLP client EuropaCorp is currently in production on the family comedy "Nine Lives." The film is directed by Barry Sonnenfeld and stars Kevin Spacey, Jennifer Garner & Christopher Walken. Spacey plays an uptight businessman who magically becomes trapped inside the body of the family's pet cat. The film is set for release in Spring 2016.

Ho'omaika'i 'Ana (Congratulations) to PLG-LLP Client Zane Kekoa Schweitzer

Congratulations to Pierce Law Group LLP's client Zane Kekoa Schweitzer for winning the 2015 Italia Surf Expo! Zane is currently ranked 2nd in the overall pro standings. Earlier in the year, Zane won the Masters of the Ocean Championship in the Dominican Republic (achieving the overall highest combined scores in Surfing, Stand-Up Paddleboarding, Windsurfing, and Kitesurfing events). Zane also won this year's US Stand-Up Paddleboard Tour in both Waves and Racing and he has been nominated as 1 of 4 athletes to represent StandUp Paddle in the Olympics in Japan in year 2020!

In addition to being a professional surfer, paddleboarder, and windsurfer, Zane provides television color commentary at such events and is actively pursuing other career opportunities in film and television as well as the world of commercial endorsements. Cowabunga!

THINK BEFORE YOU LINK: A HYPOTHETICAL CASE STUDY OF DIRECTOR JOSH TRANK'S TWEET DISPARAGING HIS OWN "FANTASTIC FOUR" FILM

By David Albert Pierce, Esq.

Josh Trank, Director of *Fantastic Four* did little to help his film or his reputation as a director when he opted to Tweet on the evening before his film's wide-screen release: "*A year ago I had a fantastic version of this. And it would've received great reviews. You'll probably never see it. That's reality though. [Thurs 8/6/15, 6:43 PM]*"

The Tweet was quickly brought down, but just like that nude selfie that you sent just to that special someone, nothing is truly ever fully deleted from the Internet. TheWrap.com, writes: "*The young auteur's post implying that Studio compromised his vision could have shaved $5 Million to $10 Million off dismal box office opening.*"

In February 2012, I served as a Program Chair for a panel entitled "Truth and Dare: Celebrities & Social Media" presented by the Beverly Hills Bar Association's Entertainment Law Section. I along with my partner Anthony J. Hanna also co-authored an article for that seminar entitled "*Blogs, Facebook & Twitter: How Instant Communication Can Help or Hurt Celebrities*" which discussed some famous Twitter gaffs and 5 basic rules to avoid making such gaffs yourself. The caveats and guidelines set forth in that article remain of value. To read about the Pierce Law Group 5 Basic Rules To Follow For Social Media Posting as set forth in our 2012 article.[Click Here - piercelawgroupllp social media article]

Filmmaker Josh Trank is the latest Hollywood personality who could have benefitted from a a Pierce Law Group advocated "Think Before You Link" policy.

In light of the multi-million dollar loss to his own film's box office, the question was theoretically posed: Could Trank be held legally responsible for the loss? Assuming the Studio could establish with specifity the amount of monetary damages that the imprudent tweet caused as opposed to the damage from the much panned film itself, Trank could be liable.

Most contracts contain the standard term that reads: "*Neither [Artist, Crew Member, Director, Producer] nor any of his/her representatives will issue or authorize the issuance of any information, advertising, or publicity, including but not limited to traditional media such as magazines and newspapers, as well as any "on-line" or "new media" outlets, such as blogs, social networking (e.g., Facebook, Twitter, or Instagram) or chat rooms, relating to the engagement hereunder, the Picture, Company, Company's personnel or operations without first obtaining Company's prior written consent (with the exception of incidental, non-derogatory, non-confidential reference in biographical material).*"

In addition, most film directors are required to provide publicity services as part of their contractual obligations related to the Picture. And, all employees are obligated to perform all services (including Publicity services) in a professional good faith manner and in keeping with their duty of loyalty to the employer which is implied in all employment contracts. The law defines employees as agents of the employer and under traditional rules of agency, owe a duty of loyalty and all employees are obligated to refrain from engaging in actions that harm the interests of the employer. Furthermore, while all employees owe this duty under common law, some courts have set forth that the more responsibility and trust accorded to a particular position, the greater the duty of loyalty that is owed by the person holding that position. In California Labor Code sections 2850 - 2866 codifies basic obligations that employees owes employers.

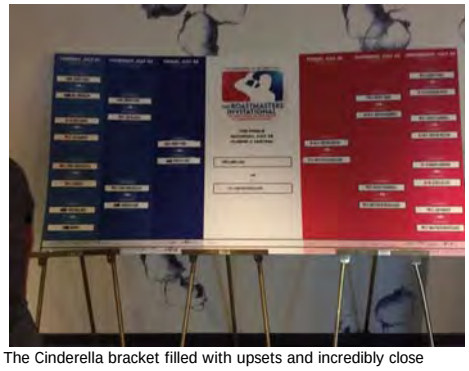
Limited Exceptions to these type of standard clauses regarding what an employee can say do exist, such as: (1) in circumstance of an employee blowing the whistle on illegal activities of the company; (2) in certain situations where the statement is made in furtherance of matters concerning concerted activity undertaken on behalf of a group of employees concerned about workplace terms and conditions as provided for under the National Labor Relations Act; or (3) when the employee may be furthering some other political or statutorily protected agenda. However, those limited exceptions do not seem to apply in the case of Trank dissing his own film particularly when weighed against the significant responsibility and trust bestowed on a director in regard to his contractual obligation to help sell the film.

Thus, strong arguments exist to support the position that Trank breached his agreement presuming that his director's contract contained the standard contract terms requiring him to perform services in a professional manner, including publicity services, as well as the provision requiring any statements about publicity to be cleared by the Studio, and for Trank to further refrain from rendering any derogatory remarks.

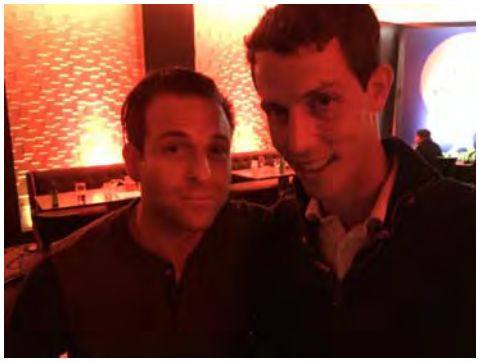
Zane Keoka Schweitzer

PLG-LLP Clients Invade Montreal's Just For Laughs Comedy Festival

From July 22 - July 26, DAP travelled with several PLG-LLP comedy clients to the Just For Laughs comedy festival & industry convention in Montreal, Canada. The highlight of the Festival was The Roast Tournament for which several of our clients played instrumental roles on stage and behind the scenes, including loveable Emcee Brian Moses who also creator the concept of comedians battling one another in a head-to-head battle of wits. Montreal's Roast Tournament consisted of an international line-up of comics representing, Australia, UK, Canada, and the United States and was filled with as many unexpected upsets and Cinderella stories as any NCAA tourney.



The Cinderella bracket filled with upsets and incredibly close hillarious funny bouts.



Perennial Roast Battle favorite PLG-LLP client Tony Hinchcliffe and his super agent Ari Levin from CAA are all smiles at the Festival Headquarters bar.

If Trank really desired to distance himself from the Film, his remedy was to use the procedures and protocols afforded to him by the DGA. While Trank may not have had "final cut," the Creative Rights provisions of the DGA Basic Agreement afforded him many protections concerning ensuring his say and concerns were privately heard and chronicled throughout the editing and delivery process.

Moreover, if he remained truly unhappy with the Studio's cut, he should have sought private remedy via section 8-211 of the DGA Basic Agreement which sets forth the DGA procedures for petitioning removal of a director's name from the film. {For the full text of Section 8-211 governing Director's desire to use a pseudonym in substitution of the Director's name on the screen, advertising, publicity and any other material, see page 105 of the Basic Agreement, click here.

It is uncertain whether Trank sought to invoke Section 8-211 of the DGA Basic Agreement (one would presume that news of such efforts would have leaked out if he had, and that likely would have caused far more than just $10 Million in lost Box Office revenue). However, even the mere threat of such action, could have likely led to the Studio and Trank meeting to work together to achieve a final version that everyone could be happy with to avoid the death nail of a phony director's name going on the final cut of such a highly publicized film and given that both Studio and filmmaker presumably shared the common goal of delivering to the public the most commercially successful cut possible.

By instead setting forth on social media that he doesn't like the film prior to its actual opening, Trank appears to have blazed his own imprudent path that neither his contract nor his union arguably permits. If Trask undertook such efforts in the hopes of saving his own future job opportunities with other studios, it's highly unlikely that goal will be met. Thus, even if the Studio opts not to rake Trank through the coals via a lawsuit against him, the imprudent no doubt spur of the moment tweet, will cause ramifications lasting for longer than the brief time period in which Trank posted and then deleted his tweet. Most notably, Trank may suffer a backlash from other studios unwilling to work with a non-team player.

All of this could have been avoided had Trank chosen to "Think before he linked." While Twitter and other social media provide celebrities with an immediate connection with fans of a type that never existed previously, just because you can Tweet without consulting your manager, publicist or attorney, doesn't mean you always should so tweet. And once it's on the Internet (be it a nude selfie or a message you really wished you hadn't posted), it's likely out there forever.

For more information about DGA and other entertainment union rules; Controlling speech in the workplace; or Legal implications of Social Media, contact:

Anthony J. Hanna, Esq. at tony@piercelawgroupllp.com or
David Albert Pierce, Esq. at david@piercelawgroupllp.com

Courts Slam Door On Individuals Attempting To Claim Their Contributions Provides A Copyright Interest When No Such Relationship Was Contemplated By The Production Company That Hired Them

By Jason Brooks, Esq.

Contributors to film projects (such as directors or actors) that have a falling out with producers often attempt to prevent distribution of films by claiming a copyright interest in the film when fully executed contracts with those collaborators have not been obtained. Recently the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals have ruled in favor of production companies when such collaborators on films have attempted to assert their on separate copyright in a film in an attempt to prevent distribution or exact greater payments for their services.

Usually, when a film is being produced, everyone involved signs a release agreement clearly establishing that all of the intellectual property rights to the film are owned by film's owner. For example, an actor may sign a release permitting the use of his image and likeness as well as the results and proceeds of his services captured on film in performance of the role in which he was cast. That portrayal is then owned by the film, and not the individual.

In a recent Second Circuit case of New York, all of the contributors of a film signed similar IP release agreements, save for the film's director who refused to sign until an agreement regarding his compensation for services could be fully negotiated. The director held out until after completion of filming, and when the parties failed to reach an agreement, the director refused to turn over the film for distribution. He then proceeded to copyright his own work as a director on the film, and would not allow the producer to distribute it. When the film's producer began distributing the property to film festivals anyway, both sides ended up in court.

Similarly, in a Ninth Circuit Court of Appeals case last month, the California court reversed a decision granting an actress an individual copyright in her five-second role in a small but highly controversial film. The actress had relied upon her copyright to force Google to remove the film's video file from both Google's YouTube platform, and any search engine results.

In reversing the decision, the Ninth Circuit explained that filmmaking is a collaborative process, and granting the ability for such copyrights would allow anyone with a minor stake in a film, be it a costume designer or an extra, to hold up the release and/or distribution of that film. Thus, in an effort to avoid this result, the court held, that no individual could copyright his/her performance or contribution in a work if such performance or contribution is indistinguishable from the work as a whole.

Drawing from the analysis of California's Ninth Circuit case, New York's Second Circuit held that even when an individual's contributions are substantial, such as those made by a director, that individual nevertheless cannot maintain a copyright interest in his or her contributions alone if those

PLG-LLP client Brian Moses referees the Joe DeRosa v. Sarah Tiana battle- an out-of-competition exhibition bout between former lovers providing amazing displays of crushing jokes being flung by both combatants. A fight which actually lived up to (and surpassed) the pre-battle hype.

Championship bout saw veteran Englishman Jimmy Carr snag victory away from a tenacious Mathew Broussard, a Cinderella kid on whose shoulders all of America had pinned its dreams. In this photo Referee Brian Moses engages the competitors.

When It Comes To Trademark Infringement, If You See Something, Say Something
By Vera Golosker, Esq.

This past Spring, in a case entitled, B&B Hardware v. Hargis Industries, the U.S. Supreme Court reaffirms the importance of raising challenges to potential confusingly similar trademarks early and vigorously.

B&B Hardware ("B&B") registered the mark "**sealtight**" for metal fasteners, and other hardware. THree years later, Defendant Hargis Industries Inc. ("Hargis") sought to

contributions are inseparable from the work as a whole.

Thus, as a result of these decisions, film companies and producers can breathe a bit easier when their films' directors, actors, and/or others involved turn rogue and try to thwart the release of the film based on unsigned contracts coupled with claims of individual intellectual property rights in a collaborative work that they do not own. The unfortunate reality is failure to obtain signatures on cast and crew contracts occur more often than lawyers and Errors & Insurance carriers would prefer, and while these newly decided cases help to further reveal the futility of dishonest employees trying to better their agreed contract terms by claiming their Results & Proceeds belong to them and not the Production Company, the best advice for producers is to obtain signatures BEFORE CAMERAS EVER ROLL. This is the best way to safeguard from such claims. It should also be noted that different facts can result in different outcomes. Thus, all producers should strive to have each and everyone involved in a film sign their respective contracts prior to them rendering services. Failure to obtain even one signed release from your film's cast, crew or other participants can jeopardize distribution or at very least jack up your Errors & Insurance premiums.

If you have any questions about Production Counsel issues, the experienced attorneys at Pierce Law Group LLP are here to help. Please feel free to contact us for a consult anytime.

Seminars, Conferences & Events

On July 15, 2015, PLG-LLP attorneys Azita Mirazian and Vera Golosker delivered a seminar on Copyright Basics for the California Lawyers for the Arts.

On August 5, 2015, David Albert Pierce attended the Executive Board Retreat for the Greater Los Angeles Chapter of the Leukemia Lymphoma Society. The Retreats kicks off, David's sixth year as a Trustee on the Executive Board of this philanthropic endeavor that is dear to his heart.

On August 5, 2015, Anthony J. Hanna attended the Hollywood Chamber of Commerce Team Hollywood Quarterly Meeting in regard to strategic planning for furthering preservation of film & television production in greater Los Angeles and cultivating emerging new media in the area.

On August 6, 2015, DAP, Azita Mirazian and Vera Golosker attended the California Society of Entertainment Lawyers' Summer organization meeting to help set the agenda for that organization's events for the coming year.

On August 14, 2015, the Beverly Hills Bar Association's Intellectual Property, Internet & New Media Section for which Azita Mirazian serves as Chairman, is presenting a seminar entiled, "From Printed Page To The Big Screen; Ethical ISsues In Negotiating IP Deals Involving Creative Properties" the Seminar runs from Noon - 1:30 pm and will be held at the BHBA conference room at 9420 Wilshire Boulevard, 2 FL, Beverly Hills, California 90210. The speakers will be Prof. Marc Greenberg of Golden Gate University School of Law and attorney Michael Lovitz. For more information: www.bhba.org

On August 22, 2015, David Albert Pierce will be speaking on a panel "Bookers & New Media" from 1 pm - 3pm at the Burbank Comedy Festival at Flappers Comedy Club in Burbank. This speaking event is open to the public and tickets may be purchased at www.burbankcomedyfestival.com

ENROLLMENT IS NOW OPEN FOR David Albert Pierce's UCLA-Extension course entitled "Organizing, Financing and Operating A Start-Up Entertainment Production Company." This is a 12 session course that meets Monday nights from 7 pm - 10 pm commencing on September 21st and ending on December 7th. Early Enrollment Tuition is $635 before August 21st, the Tuition price after August 21st is $695. 34 hours of MCLE credit is awarded to attorneys that take the class. The program also provides 4 credit units for UCLA-Extension Certificates for both its Producing Program and Busness & Management of Entertainment Program. David has taught this course since 1998. For more information click here: Enroll in Course

register "**sealtite**" for self-drilling metal screws. B&B opposed Hargis' registration due to the confusing nature of the marks which both apply to similar hardware products.

The Trademark Trial Appeal Board ("TTAB") determined that Hargis' mark (the second in time mark) could not be registered due to likelihood of confusion, and Hargis did not appeal that decision. Even though it could not register its trademark, Hargis still continued to sell its product using the name "sealtite." B&B then filed a civil action against Hargis for trademark infringement, unfair competition, and false designation of origin. B&B filed a motion for summary judgment citing the past finding of likelihood of confusion rendered by the TTAB. However the district court denied B&B's summary judgment motion, refusing to give the TTAB decision preclusive effect. The 8th Circuit affirmed the denial of summary judgment.

However, the Supreme Court reversed, stating that the same likelihood of confusion standard applies to an analysis in both registration of a mark at the administrative level and infringement of a mark brought in a court action, and that there is no reason Congress would not want the TTAB decisions to have preclusive effect.
The full opinion can be
found here.

Thus, as long as the ordinary elements of issue preclusion are met (e.g. Issues raised at TTAB are the same material issues being raised anew in court with both sides having already been provided an opportunity to be heard and present their case at the TTAB), the TTAB decision will have preclusive binding effect.

Due to this decision, trademark challenges at a TTAB registration proceedings level must be taken most seriously and such actions will likely be more contentious as the Supreme Court has now instructed all lower courts to honor the prior holdings of the TTAB.

If you learn of a proposed mark that is pending before the Trademark Office which may infringe on your own mark, it is recommended that you challenge the mark as soon as you learn of the possibility of confusion with your own mark and to present a compelling case at the administrative agency level.

Pierce Law Group LLP can help clients with filing Trademark registrations. We can also help clients in protecting their marks and withstanding challenges from earlier registered marks of others.

For more information contact: Vera Golosker, Esq. at Vera@piercelawgroupllp.com

Pierce Law Group LLP & Its Attorneys Actively Support the Following Charities:

LEUKEMIA & LYMPHOMA SOCIETY®
fighting blood cancers

CHRISTOPHER & DANA REEVE FOUNDATION

Azita Mirzaian & Vera Golosker deliver speech on Copyright Basics for Cal. Lawyers For The Arts.

Burbank Comedy Festival runs from Aug. 16 - Aug. 22. For information, show schedules & tickets [click here].

UCLA Extension
Entertainment & Music Industry Programs
Certificates relevant to Entertainment and Music Studies

Organizing, Financing, and Operating a Start-Up Entertainment Production Company

Average rating: Rating: 4.5/5
MGMNT X 402.32
4.00 units

Reg. #	Status	Location	Start Date	Qtr/Yr	Through 8/21	After 8/21	
259670W	Open	Dodd Hall 121	9/21/2015	FA 15	$635	$695	Enroll Here [Add to Cart]

34 hours of MCLE credit available. 36 hours of CP credit available.

A practical primer on starting a business, staying in business, and thriving, whether in motion pictures, television, music, or other entertainment industry venture. This course addresses essential issues regarding the legal and business affairs basics, planning, implementation, and management. Guest speakers include industry experts in entertainment financing, intellectual property, union issues, distribution, film and television production, and other matters relating to the management and operation of an independent production company. *Internet access required to retrieve course materials.* Instructors: David Albert Pierce and Patrick Gorman.

Enrollment deadline: Oct 5

UCLA: 1222 School of Public Affairs Bldg.
Monday, 7-10pm,
September 21

UCLA: 121 Dodd Hall
Monday, 7-10pm,
September 28 - December 7

12 meetings total

About Pierce Law Group LLP

Pierce Law Group LLP is a full service entertainment law firm with nine attorneys. It practices in the areas of entertainment law, intellectual property (copyright, trademarks, right of publicity), film finance, securities law, production counsel, and labor & employment issues affecting the entertainment industry with an emphasis on film, television and new media.

The firm also represents various artists including producers, actors, writers, directors, numerous accomplished comedians, and other creative entrepreneurs.

Our client list includes both Academy Award and Emmy Award winners. The Firm's academic and analytic approach to contract negotiations and litigation seek to obtain creative solutions for achieving our client's desires.

Practice Areas

Entertainment Law

Intellectual Property

Film Finance

Employment Advice for Creative Enterprenuers

Disclaimer

The information you obtain in this newsletter is not, nor is it intended to be, legal advice. You should consult an attorney for advice regarding your individual situation. We invite you to contact us and welcome your calls, letters, and electronic mail. Contacting us does not create an attorney-client relationship. Please do not send any confidential information to us until such time as an attorney-client relationship has been established.

PIERCE
LAW GROUP LLP

SUITE 225 EAST TOWER
9100 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90212
T 310 274 9191 F 310 274 9151
WWW.PIERCELAWGROUPLLP.COM