

# PIERCE

## LAW GROUP LLP

Who the Independents depend on  
*Film • TV • New Media*

### Entertainment Law Circular

January 2016

[PierceLawGroupLLP.com](http://PierceLawGroupLLP.com)

(310) 274-9191

#### Now Playing



Congratulations to our rising star comedy client Tony Hinchcliffe. His comedy special "Tony Hinchcliffe: One Shot" premieres on Netflix Jan. 15th.

#### Park City, Utah Events

Attorneys David Albert Pierce, Azita Mirzaian, and Vera Golosker along with client director Lindsey Henderson will be traveling to Park City for this year's Sundance Film Festival and Slamdance Film Festival Jan. 21- 29.

Pierce Law Group has been a proud sponsor of Slamdance Film Festival since 1998 and serves as general counsel for this

#### When Considering Tax Incentives For Film Funding - Consider These Tips

By David Albert Pierce, Esq.

**1. Understand the difference between a credit and a rebate.** Credits are like coupons. If you have a coupon for three dollars off at Big Kahuna Burger, but you never eat at Big Kahuna Burger, the coupon is worthless to you. But, you might be able to find someone who loves Big Kahuna Burgers and is willing to pay you two dollars for that coupon. The burger lover saves a dollar on his next tasty burger, while you just put two dollars in your pocket. Tax Credits work the same way. If you film in Louisiana, but don't live and pay tax in Louisiana, a \$300,000 coupon toward your next tax payment in Louisiana is meaningless to you unless you sell it to a fat cat in Louisiana who purchases your Tax Credit for \$200,000. He saves \$100K on his state taxes, and your film pockets \$200K. By contrast, a tax rebate is pure cash paid directly to you by the state. So, a \$300K rebate will be of greater value to you than a \$300K credit, unless you live and pay a lot of taxes in the state issuing the credit.

**2. Understand the application process and the rules for pre-qualifying for the incentive.** If you don't follow all of the rules and bureaucratic red tape required to properly apply for a rebate or credit, you will not receive the money. Many states allow you to pre-qualify or you can obtain an opinion letter from experts that discuss whether you are likely to meet all of the requirements and have all of the proper paperwork in order to obtain the rebate or

once upstart, but now well-established Festival which cater to indies with an attitude.

**On January 21st** Sundance Film Festival premieres "**Operation Avalanche**," written, directed and starring our client Matt Johnson. Operation Avalanche is feature length comedy about a CIA film crews involvement in the 1967 moon landing.

**On January 22nd - 26th**, the Pierce Law Group team will be conducting daily **Legal Workshops for Filmmakers** at the Slamdance Film Festival Headquarters at 255 Main St., Park City, Utah. This is free and open to all. For more info: [\[click here\]](#)

**On January 24th** Sundance Film Festival premieres Jason Reitman's short documentary "**Roast Battle**" chronicling our client Brian Moses' unique comedy show by the same name.

**On January 25th**, David and the other attorneys travelling to Park City will present our annual "**Fireside Chat**" on specific legal issues of critical importance to Filmmakers. The seminar will be held at **11 a.m. in the Gallery Screening Room at Slamdance Headquarters** at Treasure Mountain Inn 255 Main St., Park City. This is a free event with hot cocoa & snacks for those in attendance.

credit.

**3. Verify the information you have regarding the incentive is still viable and applicable.** States can (and do) change their minds about tax credits and rebates with each new fiscal year and each new election, changing everything from the amount of the incentive, the procedures for obtaining them, and even whether they continue to exist. Read all the fine print early and often to ensure you have the most up-to-date information about the program.

**4. Determine your cash flow needs in relation to when the incentive money will be received and plan for how to cover that gap.** The number one mistake novice producers make concerning tax incentives is they fail to realize how long it takes to actually receive the tax incentive money. Usually, the incentive will not be received until well after post-production is complete. So, you will need to take a short term loan or figure out another way to cash-flow the completion of your film while awaiting receipt of the tax incentive money.

**5. Be sure to contractually obligate the talent and other key players with loan-out companies to register their businesses to do business in the state providing tax incentives to maximize the pay-out.** High profile cast and crew are often paid via "loan-out companies." Many states require these loan-out companies to be "registered to do business" in their state in order for the production company to include the fees paid to the loan-outs as "Qualified Spend" (i.e., money which is included in the ultimate tax incentive amount paid to the production company). Some agents and managers don't like having their clients register to do business in another state because the cast or crew member is then "on that state's radar" and must (in most instances) pay state tax at the end of the year for all earnings made while filming on location. This can be a material deal point so it's best to raise it with the agent at the time the offer is made. If they give you a hassle, remind them that paying tax in the state in which money is earned is an obligation, not an option. ***Be kind to the taxman and hopefully he'll be kind to you.***

***The above article originally was published in MovieMaker Magazine Winter 2016 Edition (now on newsstands).***

For further info on utilizing film tax incentives to fund your next entertainment project or other film financing strategies, contact the PLG-LLP finance legal team led by David Albert Pierce & Trea Tran Lachowicz.

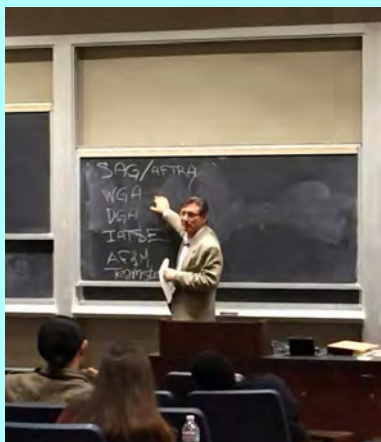
**David: [david@piercelawgroupllp.com](mailto:david@piercelawgroupllp.com)**



**IF YOU ARE GOING TO PARK CITY AND WOULD LIKE TO MEET UP WITH DAP, AZITA MIRZAIAN OR VERA GOLOSKER, PLEASE CONTACT OUR CLIENT DIRECTOR LINDSEY TO COORDINATE MEETING UP:**  
[lindsey@piercelawgroupllp.com](mailto:lindsey@piercelawgroupllp.com)

## Past Events From December 2015

Anthony J. Hanna gave a class lecture at UCLA on the "Issues Concerning Labor Unions in the Entertainment Industry."



Azita Mirzaian presented "How to Avoid Common Pitfalls in Entertainment Employment Contracts" at a California Lawyers for the Arts seminar.

Trea: [trea@piercelawgroupllp.com](mailto:trea@piercelawgroupllp.com)

## NFL Players Take on Fantasy Football Site Over Right Of Publicity Claim

By Jason M. Brooks, Esq.

Fantasy sports are not only a favorite pastime of many sports enthusiasts, but now these popular games have grown into a multi-billion dollar industry, with hundreds of millions of dollars being wagered on these games every week. Online fantasy sports platforms allow fans of popular sports leagues to draft real-life players onto imaginary teams. The various platforms then convert the players' actual game performance statistics into points for their respective fantasy team owners, which these fans then use to compete against one another for cash or other prizes.

Fantasy football sites receive over \$11 billion in entry fees alone which, before even factoring in advertising dollars, is enough to set the derivative sports market's annual revenue at an amount greater than that of the NFL (i.e. the actual sport itself). Not surprisingly, such successful profit margins have brought much delight to venture capitalists as well, who have invested over \$300 million in top fantasy companies like DraftKings and FanDuel.

However, the meteoric rise in success of the fantasy sports industry has not been without its share of conflict. While state Attorney General's seek to shut down these sites based on their gambling nature despite loopholes provided to them by federal law, other approaches to put them out of business or otherwise share the wealth have been pursued by pro athletes themselves as not every real-life player is enthusiastic about having their name and reputation tied to these gambling sites.

Recently, Pierre Garçon, a player on the NFL's Washington Redskins, filed a class action lawsuit against the fantasy football site FanDuel. In his complaint, Garçon challenged the site's use of his name, image, and likeness as an infringement on his publicity rights, and further alleged that the site engages in false endorsement in connection with a commercial activity.

### Legal Issues In Fantasy Football

Because fantasy football teams are based on the performances of real players, a fantasy football site's use of a player's name, picture, and game



Pierce Law Group LLP hosted The Christopher & Dana Reeve Foundation's Cocktail Reception & Night of Comedy at The Comedy Store, with Jeff Garlin ("The Goldbergs") & Ray Romano ("Everybody Loves Ray") headlining the show. The event raised \$130,000 for spinal cord research!



David Albert Pierce serves on the West Coast Advisory Board of the charity which pursues research for spinal cord injuries. The charity was created by our favorite Superman, Christopher Reeve and his wife Dana, and the charity continues in their memory.

PLG sponsored the inaugural Arclight Cinemas' Women in Entertainment summit at the Arclight Hollywood.



statistics is essential to the site's operations. Previous lawsuits involving fantasy baseball concerning the same issue have found that no "right publicity violation" as occurred as the statistical information is public record. And it has long been held that baseball cards with photos of players and statistics fall well within the "newsworthy" protections of the 1st Amendment.

However these holdings do not mean that NFL players (and other athletes) lose their right to control how their own images are utilized commercially. And individual players, the NFL Players Association and the NFL itself all strictly attempt to regulate and license the use of its players name and likeness in commercial settings.

However, big bucks are at stake here and the argument goes that the game statistics are news worthy and available for use by all, therefore the fantasy leagues can report on those statistics and reference the celebrity players that create those statistics. Yet, how can this be when other companies, pay millions of dollars to license athletes' names and images to endorse their products and services?

Interestingly, FanDuels competitor, DraftKings has an express licensing agreement with the NFL and certain players. As such, DraftKings has player cooperation in its marketing.

The legal question is thus what is the extent to which FanDuel can display a player's name, image, and statistics? Where does "nominal use" end and venture into rendering an uncompensated player a spokesperson for the company against his will.

### The FanDuel Complaint

Garçon is effectively attempting to prevent FanDuel, and ultimately other similar companies, from profiting off of the unauthorized commercial use of players' names and likenesses. While Garçon did not state a specific amount of damages he seeks in relief, one of his requests is that FanDuel disgorge its profits earned from promoting daily fantasy sports contests using NFL players' names and likenesses.

In his lawsuit, Garçon also alleges that because he is a popular and well-known player, FanDuel's use of his name and likeness in its advertising





Pictured above: Briana C. Hill and Kaja Martin (client and producer/host of the popular YouTube series "Equals 3").

## Congratulations!



PLG client and talented actress, Christina DeRosa, on the set of the Emmy-Nominated TV show "Blackish."

could lead consumers to believe that he endorses the site or is in some way associated with the company. As a result, Garçon argues that FanDuel has unjustly profited from his name and likeness.

To support his claims, Garçon points to a 28-minute infomercial that FanDuel ran nationally beginning in September of 2015. In the infomercial, which featured screenshots of the website and a scrolling ticker displaying the names of players and their positions, Garçon's name is seen at least 53 times.

In addition, FanDuel has aired two other commercials which also feature Garçon's name, team, and position. Garçon also points to FanDuel's "recommended picks" feature of the site which highlights the successes a fantasy team owner could realize if he or she signed up for the site and drafted a player, such as Garçon, on their roster.

### Could the Claims Succeed?

Garçon has the burden of needing to distinguish this case from existing case law from 2007. In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, a case involving Major League Baseball and the use of its players' names and likenesses in connection with fantasy baseball products. In that case, the 8th Circuit Court of Appeals held that consumers are unlikely to believe that the mere inclusion by a fantasy baseball site of a particular player's name in its advertising is an endorsement by that player of the site or its products. Rather, the court held that because the fantasy games depend on the inclusion of every player, regardless of star power, the use of any particular name(s) offered no commercial advantage, and thus there was no risk of consumer confusion that any one player was endorsing the product, and subsequently no false endorsement claim. While celebrities do have a right to control the authorized use of their image and name for commercial purposes, Garçon's action has its challenges. His success hinges on his ability to show that FanDuel used his specific name in the advertisements is for a "commercial advantage," verses certain First Amendment arguments that inclusion of his name is merely tied to the actual statistics and factual information by which the fantasy game is played and thus able to be referenced by the FanDuels.

It remains to be seen if other NFL players will join Garçon's lawsuit, and if so, whether or not the Maryland judge will likely follow the reasoning of



We celebrate the success of Anthony Hanna's daughter, Caroline Hanna, who is a member of the Mira Costa high school girls golf team, which captured its first CIF state title in 2015!

### Stay Connected & Like Us On Social Media



 Forward to a Friend

 Join our Mailing List

### Accorded the Highest Recognition by Industry & Peers



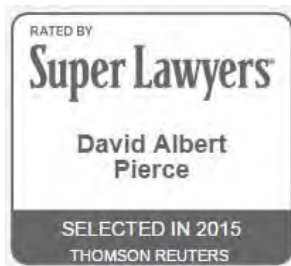
the 8th Circuit case.

With billions at stake, it is possible this case may provide further definition as to where the limits of a "fair use" defense end and damages for Right of Publicity claims begin.

While Pierce Law Group is not involved in this lawsuit, our firm regularly litigates right of publicity claims. Our entertainment attorneys can advise you on the best practices in regard to right of publicity issues.



Client Lisa Torres, founder of workout studio Barre Physique, and her business partner Paresh Shah model PLG baseball caps during their recent office visit with a message reminding all to get our bodies and minds in good shape in 2016! DAP promises he will... and he never breaks a promise to a client.



*Membership limited  
to attorneys who've  
won million dollar  
verdicts & settlements*

## **About Us**

Pierce Law Group LLP practices in all area of litigation and transactional matters affecting film, TV, new media and the business of creative entrepreneurs across many industries.

### **ENTERTAINMENT LAW**

Motion Picture/TV Production Counsel ♦ Production, Talent, Licensing, and Distribution Agreements ♦ Clearances and Use Licenses ♦ Talent Agency and Management Agreements ♦ All aspects of New Media

### **INTELLECTUAL PROPERTY**

License and Use Agreements ♦ Copyright Law ♦ Trademark and Unfair Competition Law ♦ Rights of Publicity and Privacy ♦ Internet and E-Commerce

### **EMPLOYMENT LAW**

Guild Signatory Agreements ♦ Compliance Counseling ♦ Employment Agreements ♦ Employee Manuals and Policy Handbooks ♦ Wage Hour ♦ OSHA Safety ♦ NLRA matters ♦ Management Training Seminars ♦ Workplace Investigations

### **CORPORATE FINANCE**

Entity Formation and Maintenance ♦ Finance and Securities Law ♦ Motion Picture Production Incentives and Tax Credits ♦ Rapid Crisis Management of Workplace Problems ♦ Private Placement Offerings ♦ Loan Documents

**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](http://WWW.PIERCELAWGROUPLLP.COM)

#### **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.

