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# PIERCE

## LAW GROUP LLP

Who the Independents depend on  
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### Entertainment Law Circular

May 2019

PierceLLP.com

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#### Events & Speaking Engagements



On Wednesday, May 22nd the Beverly Hills Bar Association Entertainment Law Section will present An Analysis of Twentieth Century Fox Film Corporation v. Wark Entertainment, Inc. f/s/o Barry Josephson, et al.

This program is chaired by Pierce Law Group's John Baldivia and will give an inside look into the recent arbitration decision concerning the award of \$128,000,000 in regard to actual and punitive damages related to unpaid profit participation from the TV series *Bones*.

Panelists will include Neville L. Johnson, as well as the winning lawyers that tried the case: John

#### *But, I Swear That's Not Really Me!* New California Bill Aims to End Deepfake Porn

By Michael Peters

#### California SB 564

### Bans Nonconsensual Digital Sex Scenes



SAG-AFTRA is sponsoring a new California bill for which Pierce Law Group LLP is also actively lending its support.

Technology is capable of creating very convincing but fake nude or sexually explicit scenes. While this technology has legitimate application in Hollywood, it can also open the door for filmmakers to take liberties that may undermine a performer's rights and dignity. This technology is also being used to

V. Berlinski, Chad Fitzgerald, and Aaron Liskin.

David Albert Pierce is the chair for the BHBA Entertainment Law Section.

For more information on how to attend this and other BHBA events, [click here](#).

Thursday, June 6th the BHBA Entertainment Law Section presents **Stairway to Hell: How Recent Cases Have Blurred Lines in Copyright Clearance and Liability for Entertainment Content.**

The panel will include attorneys **Kenneth D. Freundlich, Neville L. Johnson, Judith Finell, and Paul E. Burns.**

David Albert Pierce will be introducing the panel and offering introductory remarks

For more information on how to attend this and other BHBA events, [click here](#).

## CONGRATS MARISSA ROMAN-GRIFFIN!

### 2019 BHBA Entertainment Lawyer of the Year Dinner



DAP with Entertainment Lawyer of the Year Marissa Roman-Griffin

create fake tapes of celebrities using an aggregate of celebrity images found online. This is known as deepfake pornography.

As a response, lawmakers are taking steps to protect the dignity of citizens by making this practice unequivocally actionable. While there likely already exist causes of action that would arise from such conduct, this bill will make prosecution much easier and much more practicable.

**California Senate Bill 564** defines the types of creations subject to liability as *"realistic digitized performance in which the individual did not actually perform....'Digitized' includes depicting the nude body parts of another human being as being those of the individual or imposing digitally created nude body parts onto the individual."*

On the topic of consent, the bill requires that it be in writing and the bill allows for the depicted individual three days to rescind such consent unless they were given 72 hours to consider and the depicted individual's representative approved the consent as well. Liability arises under this act when either 1) someone creates or discloses a fake sexually explicit creation and knew or reasonably should have known that the depicted individual does not consent, or 2) someone discloses but does not created a fake sexually explicit creation and *knows* that the depicted individual does not consent.

This bill allows for the recovery of economic, non-economic, punitive damages, attorney's fees, and allows the Plaintiff to choose between either of 1) all monetary gain the Defendant received from creating, developing, or disclosing the fake sexually explicit creation, or 2) statutory damages ranging from \$5,000 to \$500,000.

SB 564 has most recently been placed in the suspense file, meaning it will undergo an evaluation of its fiscal impact by the house. For more information regarding how you can support his bill, visit [SAG-AFTRA's Action Alert](#).

The bill itself can be found [here](#).

For more information about this bill and it affects contact *Pierce Law Group LLP*.

David Albert Pierce attended the 2019 Beverly Hills Bar Association's Entertainment Lawyer of the Year on Thursday May 2nd at the Four Seasons Hotel. This year the event honored Marissa Roman-Griffin of Akin Gump and her award was bestowed on her by last year's winner Clifford Gilbert-Lurie of Ziffren Brittenham LLP.

David Albert Pierce kicked off the evening with introductory remarks which were both humorous and informative. The humor continued through the evening as David turned over the Master of Ceremonies duties to Comedian Dana Goldberg.



DAP warms up the audience at Entertainment Lawyer of the Year awards.

### David Albert Pierce and Joshua A. Edwards Speak at Slamdance Workshop: DIY Filmmaking in 2019



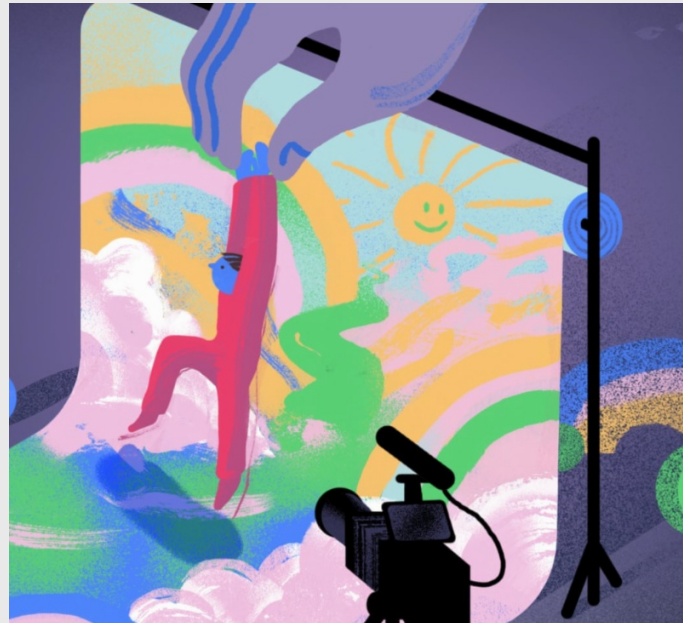
David Albert Pierce and Joshua Edwards spoke on various panels at Slamdance's DIY Filmmaking Workshop on Saturday, May 11.

### Pierce opines on "Kidfluencers"-- Follow The \$\$

David Albert Pierce provided extensive background and was quoted several times in news reporter Julia Carrie Wong's recent article in **The Guardian** on child social media stars (known as "Kidfluencers") and the tricky legality on who owns their fortunes.

Read about this heretofore unexamined area of entertainment law and congrats to [Julia Carrie Wong](#) for her outstanding journalism!

[Click here to read article!](#)



### 'It's not play if you're making money': how Instagram and YouTube disrupted child labor laws

'Kidfluencers' are earning millions on social media, but who owns that money?  
by Julia Carrie Wong

[Click here to read article!](#)

Dr. Seuss Enterprises filed suit over a "Oh, The Places You'll Go!"-meets- "Star Trek" crossover work titled "Oh, the Places You'll Boldly Go!" (comparison pictured below) for copyright and trademark infringement.

David provided a 1 hour seminar on "Legal Issues Concerning Film Financing," where he spoke on important issues every Independent filmmaker should know when searching for money.

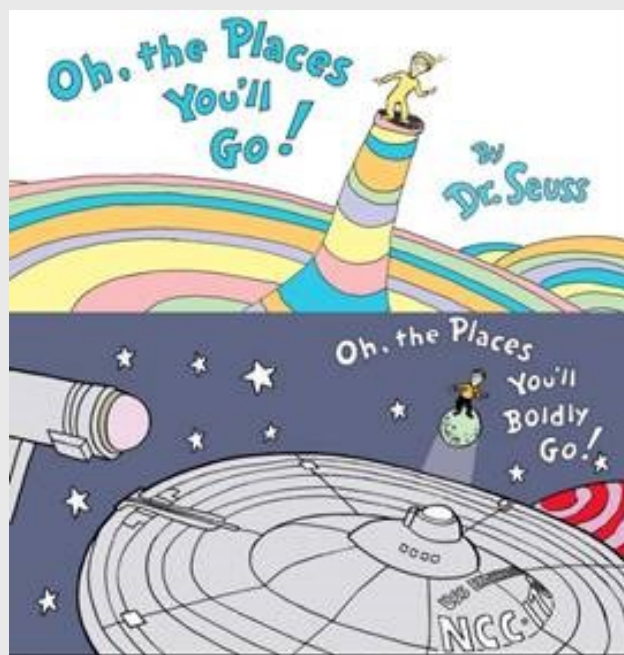
Josh sat on the panel "Find Your Audience: Shorts and Features," where the discussion revolved around how filmmakers can best navigate the tricky new developments in media sharing and streaming and how to best get their content to the masses. Also on this panel was Mercedes Cooper (ARRAY), Allison Amon (Bullitt), John Charles Meyer (Producer, *Dave Made a Maze*), and Peter Baxter (Slamdance President).

Read "15 Takeaways from the Sigma + Slamdance DIY Filmmaking Bootcamp in LA" by [clicking here](#).



*Pierce Law Group LLP is a proud sponsor of Slamdance Film Festival. For more information on Slamdance and upcoming events, [click here](#).*

**David Albert Pierce Honored by the Leukemia & Lymphoma Society for 9 Years of Executive Board Service!**



Defendants claimed fair use and parody, and the court granted summary judgement in favor of the Defendants for both copyright and trademark infringement.

The court found that the Defendants' did not infringe under the fair use doctrine because the work took no more of the elements from the original work than necessary to incorporate the story of Star Trek into the Dr. Seuss style, the use was highly transformative, and had little impact on the market for the Plaintiff's work despite being a commercial product itself.

Regarding trademark infringement, the Court found that typeface and illustration styles were not protected by trademark.

*For more information about this decision and how it affects you, contact [John Baldivia, Esq.](#) or [David Albert Pierce, Esq.](#)*

## ***9th Circuit Expands on Fair Use Within Internet Distribution and Search Engines***

VHT, Inc. v. Zillow Group, Inc.

By Michael Peters

**VHT** creates professional real estate photographs for listing services and provides its customers a license to use the photos for the purpose of selling their property. **Zillow** is one of the predominant real estate listing websites



On Tuesday, April 30th, David Albert Pierce attended the Greater Los Angeles Chapter of the Leukemia Lymphoma Society's Reception honoring outstanding volunteers.

DAP was under the belief his presence at the event was merely as an Executive Trustee showing support for volunteers. However, he was pleasantly surprised to be presented with an award thanking him for his own 9 years of leadership on the LLS Executive Board of Trustees and raising over \$100,000 during that term.

While this is David's final year on the board, he is grateful for his time with LLS and looks forward to many more volunteer opportunities in the future!

*For more information on the Leukemia & Lymphoma Society and how you can find your local chapter and get involved, [click here](#).*

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that has displayed many of VHT's copyrighted photos. VHT claimed that Zillow's use of VHT's photos exceeded the scope of the license granted to its customers both on the publicly searchable Zillow listings, and Zillow "Digs," which is a sister website to the listing service that features home remodeling and improvement photos. *The jury awarded VHT \$8.27 million, which the district court reversed in part to about \$4 million.*

The district court granted, and the 9<sup>th</sup> Circuit affirmed, summary judgment to Zillow regarding the claim of direct infringement against the real estate listing platform, holding that Zillow's allowing users to display VHT-owned images was not volitional conduct that is required for a finding of direct liability.

In support of this reasoning, the court referenced that Zillow programmed their website to give priority to photos with "evergreen" licenses (licensed without time restriction) over "deciduous" ones (licenses temporally tied to the sale of the property) after a listing had been closed but the images remained on the website. This effort by Zillow was seen by the court as contrary to VHT's claim that Zillow facilitated or enabled infringement.

The jury had found that the home improvement website, Zillow Digs, directly infringed 28,125 images. The district court reversed this verdict in part regarding to 22,109 images that were not displayed, and 2,093 images that were displayed but not searchable, leaving a direct infringement verdict for 3,921 images that were tagged by Zillow employees to be displayed and searchable on Zillow Digs.

Both parties appealed.

VHT claims that the jury verdict should not have been overturned because the images that were not displayed were nonetheless made available for display.

Zillow claims that fair use insulates their use of the 3,921 images that were found to be direct infringement.

Regarding the 22,109 images that were not displayed, the 9<sup>th</sup> Circuit held that the Copyright Act's display right does not encompass an



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### CALL FOR ACTION:

Congress is considering an important bill this week that would stop the spread of dangerous junk insurance plans which discriminate against patients with pre-existing conditions. This is just one of seven bills that have been packaged together to protect and expand meaningful health care access and promote affordability to patients.

Pierce Law Group is asking all our friends to stand with LLS, and cancer patients everywhere and call your representatives today at **1-855-980-5634** and tell them to vote YES on H.R. 987. This phone number is the general switchboard for the House of Representatives, simply give them your reps name or just your zip code and they will instantly connect you with the right Congressman.

More information on this bill can be [found here](#).

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exclusive right to make a work available for display as VHT claims it does. A photograph is digitally displayed "by using a computer to fill a computer screen." *Perfect 10 v. Amazon*, 508 F.3d 1146, 1160 (9<sup>th</sup> Cir. 2007).

Therefore, VHT's arguments that their works were made available for display by Zillow does not constitute infringement because there was no resulting display in violation of VHT's exclusive right. However, the court also points out that VHT's "made available" argument was not brought until appeal, and a verdict cannot be sustained on a theory that was never presented to the jury. Therefore, the court was bound to disregard VHT's "made available" argument for infringement of its right of display.

Regarding the 2,093 images that were not searchable, the court also found that these did not constitute direct infringement because these were only displayed on personal pages through which users uploaded their own choice of images. These photos were displayed as a result of users' actions, not the conduct of Zillow or its employees.

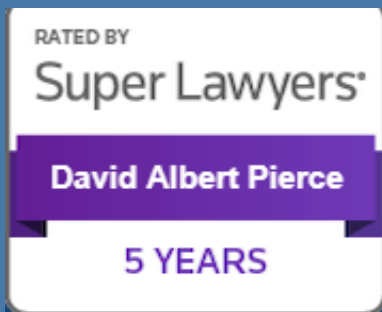
Regarding Zillow's claim of fair use, the 9<sup>th</sup> Circuit gave an in-depth analysis that found against fair use for works searchable in the Zillow Digs search engine.

Important fair use decisions in the past found that many elements of open-universe search engines that displayed lower resolution images and connected the users to the creators' websites weighed in favor of fair use. In contrast, Zillow's closed-universe search engine that featured high quality images of only interior design and home improvement, cut against a finding of fair use on every factor.

First, including VHT's works in a closed-universe website that focuses on the same industry as VHT does not change the original purpose of the work as an open-universe search engine does by facilitating discovery and connecting consumers to creators.

Second, the nature of VHT's work is for public viewing, which cuts against a finding of fair use.

Third, Zillow used the entire photographs at full-



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quality with no justification for a need to do so.

Finally, VHT was actively exploring the market for licensing its photos, therefore Zillow's use directly impacted VHT's potential market.

*For more information about this decision and how it affects you, contact [Michael Peters, Esq.](#) or [David Albert Pierce, Esq.](#)*

## ***NCAA Limitations on Student Athlete Compensation Struck Down***

National Collegiate Athletic Association

By Michael Peters

Student athletes sued the NCAA regarding rules that limit the compensation student athletes can receive from their schools. They received a major victory in the form of a permanent injunction that prevents schools from fixing or limiting the education-related compensation that can be offered to student athletes, finding such limitations to be anti-competitive. Schools can now offer student athletes computers, science equipment, musical instruments, post-eligibility scholarships, tutoring, study abroad expenses, and post-eligibility internships.

*For more information about this decision and how it affects you, contact [Joshua Edwards, Esq.](#) or [David Albert Pierce, Esq.](#)*

## **About Pierce Law Group LLP**

Pierce Law Group LLP is a full service, boutique entertainment law firm that provides both transactional and litigation legal services.

Our practice areas include 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.

We represent production companies and other creative businesses as well as artists including producers, actors, writers, directors, comedians, and other entrepreneurs.

Our client list includes both Academy Award and Emmy Award winners. We utilize an academic and analytic legal approach to accomplish creative solutions to our clients' goals.

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