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Entertainment & Sports Law Section
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Music City Tax-Ache: Avoiding the Heartache of Section 409A's 80 Percent Tax Rate

By James M. McCarten



As if the business of music weren't hard enough, tax rules targeted at abusive planning by corporate executives and not at the entertainment industry are making it even harder for our artists, writers and other creative clients (sometimes collectively referred to as "talent") to achieve economic security. By now, most of us who work regularly or even occasionally with talent have had at least one run-in with Internal Revenue Code Section 409A, and it has always left us and our clients deeply frustrated.

More and more we hear about artists and their representatives being told by studio or recording label executives that the studio "would love to discuss an advance," but only if held harmless from the tax consequences to the talent when the studio "checks the box" on the tax form designating the payment as subject to Section 409A. While advances to talent have historically been a regular part of the music and entertainment business, the studios and recording companies are now using the thinly veiled threat of "checking the Section 409A box" to avoid requests for advances by successful artists.

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Stars, Icons, Heroes & Fond Farewells

By Stacey Schlitz

Why is it that deaths seem to happen in threes? In reality, deaths happen every day, but thankfully, they don't happen every day to people I know. I suppose this mystical phenomenon happens in one's own self-absorbed universe: deaths that affect ME happen in threes.

In the last few months, there were three celebrity deaths of people I don't know but that caused me to stop and take a breath and consider my job as Entertainment Lawyer. In the realm of mega-superstardom, I learned of the untimely death of Michael Jackson, whose coy but insatiable need for public attention carried over into his spectacle of a funeral at the Staples Center in Los Angeles. Jackson left unresolved custody issues for his children and an estate estimated at \$400 million in debt.

In the realm of feathered hair icons, I was saddened by the death of my favorite '70s blonde, Farrah Fawcett. What girl who grew up in the '70s didn't play Charlie's Angels, in which the winner gets to be Jill Munroe and the loser has to play Sabrina Duncan (Kate Jackson's smart Angel)? Fawcett, who died of what must have been an excruciating terminal illness, had a turbulent life with her partner and presumably an equally turbulent relationship with her son, who was in jail at the time of her death.

Our Nashville Fourth of July celebration was

dimmed by the news of the death of local hero and football star Steve McNair. We learned on that day that McNair had a complicated life and will leave complicated issues for his family, having left no will for the distribution of his estate.

This triumvirate tragedy got me thinking about the psychology of being an attorney to entertainers. Very often, an entertainment client is an extremely talented person who comes into a lot of money. Very often the client is surrounded by family and friends who have never seen this type of wealth and notoriety before. These family and friends might have a hard time dealing with the client's success. Sometimes, they might take advantage of the client.

As attorneys, we may not be charged with the duty of being our clients' therapist. But we should be aware that the clients may be going down a new road of success all by themselves. And we have to remember that we may be the only

person in the clients' life who can warn them of the pitfalls of their newly found success. They might not know that they need a will, that they need to provide for minor children in the event of their death, that they need to plan their finances for the day when they are not writing Number Ones anymore, or that their personal physician needs to be licensed to practice. We should always strive to serve our clients by asking the right questions and by never assuming that just because your clients are stars, icons, or heroes that they don't need assistance in these matters.

As my 2008-2009 term as editor of the *E&S Newsletter* comes to a close, I would like to extend my gratitude to the hardworking folks that made this newsletter possible: Sarah Hayman and Landry Butler at the TBA, Ken Sanney, Tim Stehli, Kendra Tidwell, Susan McDonald, Heather Hubbard, Cassie Madden, all of the contributors, and most of all, to Amy Everhart, the 2008-2009 chair of the E&S Section and helper in All Things Editorial. It has been a fun year, and I wish the best of luck to next year's editor, Ken Sanney. **E&S**

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E&S Editorial Board

Stacey Schlitz
Ken Sanney
Kendra Tidwell
Tim Stehli

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STACEY SCHLITZ of Drescher & Sharp PC, represents clients in the music and film industries in a variety of matters, including contract negotiation, business formation, intellectual property, and litigation. In addition, Stacey advises clients in estate planning, and federal and state taxation.

Call to Action: E&S Forms Legislative Subcommittee

By Amy J. Everhart

The songwriter pulls his guitar from the case. “This is a little something I wrote last week,” he introduces in that ultra-chill voice God gave all performing songwriters, then launches into a rocking number, while the audience smiles and sways and taps its collective feet.

A typical scene in Nashville ... could happen at the Bluebird Café or The Basement. But the audience in this case is Davidson County Probate Judge Randy Kennedy, his clerk, his courtroom deputy, two tables of lawyers, the proud parents of the songwriter and a courtroom full of Davidson County citizens waiting for their turn on the probate docket.

It’s become tradition for our minor entertainer clients in Davidson County to bring their guitars and perform a number for the court after the hearing on a petition to approve the minor’s entertainment agreement under the Tennessee Protection of Minor Performers Act. I’m always a little embarrassed, knowing the others in the courtroom are probably relatives of a recently departed loved one there on sad business. Once the matter before ours was a little girl who’d petitioned to change her name. She was wearing too-short tattered pants, and she wanted to change her name to that of her foster parents, she explained to the judge, because her real parents had never acted like parents. I wanted to crawl out of the room when my Next-Taylor-Swift client was called before the court next.

Nonetheless, I always enjoy appearing at a hearing under the Tennessee Protection of Minor Performers Act, short and too-sweet as it usually is, because I was fortunate to help draft the Act. As a “baby lawyer,” I was a member of the drafting committee with Dorothy Campbell, Bob Sullivan, Phillip Lyon and then-law student Nora Miles. We engaged in every step of the legislative process from researching how other states handle minor entertainment contracts to drafting the language of the bill to attending the committee hearing on the bill to posing with Governor Bredesen when he signed the bill into law. This experience was rewarding for the obvious reason — the opportunity to participate in the governmental process — but also for the opportunity to have a say in the law governing my own law practice and my clients. (This doesn’t always work to my benefit: Judges don’t always see things my way even when I insist I have personal knowledge why the Act reads the way it does. And one judge told me we need to amend the Act on a particularly confusing section *pronto*.)

The E&S Section has formed a legislative subcommittee for the coming year to study legislative needs, draft new legislation on entertainment and sports-related legal issues and keep you informed of entertainment and sports-related legislation pending in the state and federal legislatures.

One of our tasks will be to study the Tennessee Protection of Minor Performers Act and determine whether amendments are warranted. Often a statute’s ambiguities don’t become apparent until a statute is employed. Some of the points on my personal list for review are:

- Clarification of the requirement to set aside a portion of the minor’s proceeds in trust;
- Potential amendment of the service requirements on interested parties (more than one judge has interpreted the Tenn. R. Civ. P. service requirement to mean 30 days must pass before hearing on the petition to give the respondent an opportunity to respond, when the proceeding was intended to be *ex parte* and an accelerated process);
- Clarification of the procedure for seeking reversal or modification of an order of approval, including whether a more specific and/or harsh standard is warranted, whether the procedure must be accelerated and how it fits within the Tenn. R. Civ. P. requirements; and
- How the statute accommodates similar laws in other states.

If you’ve proceeded under this statute you likely have suggestions for changes to it as well. If so, I’d love to hear from you. I also welcome your suggestions on legislation you might like to see proposed by the E&S section. Please contact me at aeverhart@aeverhart.com with your thoughts.

Finally, I encourage you to get involved in legislative efforts, whether by joining our subcommittee or contacting your legislative representatives with your viewpoint. Even though you might find yourself arguing a bit more with the judge, you’re sure to find the process rewarding. **E&S**

AMY J. EVERHART is the chair of the new E&S Legislative Subcommittee. She recently launched her own law firm focusing on entertainment, trademark and copyright law and is the author of the intellectual-property law blog *Lightbulb Moments* (www.aeverhart.com/lightbulbmoments).

Member Update

By Tim Stehli

TBA E&S member **Anjlee Khurana** was recently spotted enjoying the performances of some of Nashville's best songwriters at "Rockin' At Regions," the first of Regions Bank's new series of open houses spotlighting Music City's finest talent. Held at the Music Row Roundabout, the inaugural event featured performances by Frank Myers, Roxie Dean, Tommy Karlas and Matt Caldwell, along with some excellent food, wine and lots of music industry movers and shakers. What more could you ask for?

And while "Rockin' At Regions" showcased some of Music Row's great songwriters, Evans, Jones and Reynolds' **Chris Hujan** is doing his part to help refute any myths that the only music in Music City is country. Chris has recently joined the advisory board of the Nashville Jazz Workshop, a non-profit organization dedicated to providing the Nashville community with quality jazz education and performances. Founded in 1998, the Nashville Jazz Workshop has been growing ever since, providing great support to the local arts community. Who knows, if the Workshop's influence continues to grow, maybe the next number-one single on the country charts will be in five-four time in the key of E-flat!

Several Tennessee law firms have been included among the country's best entertainment firms in the *Chambers USA* legal guide, including Adams & Reese,

Zumwalt, Almon & Hayes, Loeb & Loeb, and Harris, Martin, Jones, Shrum, Bradford & Wommack, among others. What do these firms have in common? They all have attorneys who are ESLS members. Now, I'm not saying that's the only reason for their inclusion in the *Chambers* guide, but you never know.

Finally, a number of local attorneys have recently become members of an extremely prestigious legal organization — the E&S Section Executive Council. "I am excited to work with this year's Executive Council in an effort to continue the significant work accomplished last year through the various committees," says incoming E&S Chair **Chris Vlahos**. The other incoming Executive Council members include **Ken Sanney, Stacey Schlitz, Kevin O'Keefe** and **Michael McSunas** on the Newsletter Committee; **John Bell, Howell O'Rear** and **Cheryl Slay** on the Networking Committee; **Austen Adams, Cheryl Slay, Frank Berger-Gilligan** and **Kelly Randall** on the CLE Committee; and **Amy Everhart, Jeff Colvin, Rush Hicks** and **Dorothy Campbell** on the Legislative Committee. Good luck to all the incoming Executive Council members on another successful year! **E&S**

TIM STEHLI is director of licensing and business affairs at HoriPro Entertainment Group Inc.

Legislation Update

By Heather Hubbard

Several bills related to the entertainment industry have been introduced this session, but only one has been passed so far. On June 30, President Obama signed into law the Webcaster Settlement Act of 2009, amending Section 114 of the Copyright Act, which extended the deadline for negotiations between SoundExchange and webcasters to agree on certain statutory rates. An agreement with "pureplay" webcasters was announced shortly afterward on July 7.

The Performance Rights Act(s) have reappeared this year in both the House and Senate, and unless you've been hiding under a rock, you know the contents (it requires terrestrial radio to pay for performances of sound recordings — Internet and satellite radio already pay for performances of sound recordings). In anticipation of the acts being proposed again this year, the terrestrial radio lobbyists went to work very early. Twenty-four senators and 246 congressmen (including Phil Roe, John Duncan and Lincoln Davis from Tennessee) joined in resolutions supporting the Local Radio Freedom Act, which declares "no new taxes" on "local" radio. In response to this support,

there have been changes and the House version has been marked up in an attempt to protect small broadcasters. The bill was voted out of the House Judiciary Committee with bi-partisan support by a vote of 21-9. The House version is expected to come up for a vote later this fall. Similarly, the Senate Judiciary Committee is expected to hold a markup of its version this fall.

The lesser known Artist-Museum Partnership Act is not nearly as contentious but has yet to make its way out of the Senate Committee on Finance or the House Committee on Ways and Means, where it has been stuck since February. This act would amend the Internal Revenue Code to allow authors of literary, musical, artistic, and scholarly works to receive a tax deduction for the fair market value of the physical work and/or copyright if contributed to certain tax-exempt organizations. As always, certain exclusions apply. **E&S**

HEATHER HUBBARD is an associate at Waller Lansden Dortch & Davis PLLC in Nashville. She practices in the area of trial and appellate litigation and intellectual property law.

Litigation Update

By Cassie Madden

COPYRIGHT

***Specific Software Solutions LLC v. Inst. of Workcomp Advisors LLC*, 615 F. Supp. 2d (M.D. Tenn. 2009).** The court held that the Copyright Office must review the materials submitted and pass judgment on their copyrightability before the materials are considered “registered” for the purposes of the jurisdictional requirements of Section 411 of the Copyright Act. Submission of the fee, deposit and application to the Copyright Office is not sufficient to confer jurisdiction.

***Brainard v. Vassar*, 2009 U.S. Dist. LEXIS 36104 (M.D. Tenn. April 29, 2009).** Finding that the defendants’ song “Good Ole Days” and the plaintiffs’ song “Good Ol’ Days to Come” are not substantially similar after the unoriginal, unprotectible elements of the plaintiffs’ work are filtered out, the court granted summary judgment to the defendants and dismissed the plaintiffs’ claims of copyright infringement.

***Arista Records LLC v. USENET.com*, 2009 U.S. Dist. LEXIS 55237 (S.D.N.Y. June 30, 2009).** The defendants, operators of a network where users can, and did, post and share infringing musical works, was found liable for direct infringement for actively participating in the infringement process and for inducement to infringement, contributory infringement and vicarious infringement due to the defendants’ knowledge of infringement by its users, promotion of its network as an alternative to Napster and Grokster and failure to use their controls to limit copyright infringement on their servers.

***The Football Ass’n Premier League Ltd. v. YouTube Inc.*, 2009 U.S. Dist. LEXIS 57438 (S.D.N.Y. July 3, 2009).** The court dismissed the plaintiffs’ copyright claims for statutory damages with respect to all foreign works not registered in the United States (with the exception of live broadcast works), finding that Section 412 of the Copyright Act requires registration to obtain statutory damages for

both domestic and foreign works and neither the Berne Convention nor the Uruguay Round Agreements, even if they conflict with Section 412, exempt foreign works from the requirement.

***Salinger v. Colting*, 2009 U.S. Dist. LEXIS 56012 (S.D.N.Y. July 1, 2009).** Plaintiff J.D. Salinger, author of *The Catcher in the Rye*, was granted a preliminary injunction preventing the defendants from publishing, advertising or distributing the novel *60 Years Later: Coming Through the Rye* in the United States during the pendency of the suit. The court found that the defendants were unlikely to prove fair use because the book is not a parody and any non-parodic transformative content could not overcome the weight of the other fair-use factors.

SPORTS

***Dallas Cowboys Football Club, Ltd. v. America’s Team Props.*, 616 F. Supp. 2d 622 (N.D. Tex. 2009).** The Cowboys were granted summary judgment on their claims for infringement of their trademark rights in the mark “America’s Team” because of the Cowboys’ long association with “America’s Team” prior to the defendant’s first use and a likelihood of confusion as the mark had acquired secondary meaning among consumers.

***CBS Interactive Inc. v. NFL Players Ass’n Inc.*, 2009 U.S. Dist. LEXIS 36800 (D. Minn. April 28, 2009).** Plaintiff, a provider of fantasy football games, is entitled to use NFL football players’ names and statistics for fantasy football without a license because such use does not violate any right of publicity held by the players and, even if it did, the plaintiff has a First Amendment right to use the information that prevails over any publicity right. **ESG**

CASSIE MADDEN is an associate at Riley Warnock & Jacobson PLC in Nashville. She focuses her practice on commercial litigation.

The Battle for IP Rights in Games & Toys: It's Not Kids' Play!

By Cheryl L. Slay

The mission of the entertainment industries is to produce that which delights, uplifts and engages the human spirit. Nowhere is this mission more imperative than in the sector of the entertainment market that produces games and toys for consumers. Yet an irony of the workings of this sector is the fiercely competitive environment by which these products reach the marketplace. As is the case for many legal issues surfacing within the entertainment context, the core of these battles involves the use of intellectual property.

HIGH STAKES

The world of toys and games is both exciting and profitable. Think Elmo, Cabbage Patch Kids, Beanie Babies (re-popularized by two new dolls named for each of President Obama's daughters), Atari, Hot Wheels and Monopoly. Each of these products represents visionary manufacturers' ability to stimulate and shape popular interests, and thereby create cultural phenomena as well as entertainment. Accordingly, the financial payoffs have been significant. For example, the Cabbage Patch Kids, originating in 1979 and ultimately manufactured by three different companies, generated more than \$2 billion in retail sales in 1984 alone.¹ Beanie Babies made \$250 million during its first three years, from approximately 1996 to 1999.² And Atari, an early leader in the video game industry, owning 80 percent of the video game market in the early '80s, accounted for 70 percent of Warner Communications' profits at the time.³

Today's most prominent toy and game manufacturers are no less successful than their counterparts of yesteryear. Sony, maker of the immensely popular PlayStation games, reported in 2008:

... a profit of \$277 million for its fourth fiscal quarter ... a reversal from a year ago as losses dwindled for its struggling PlayStation 3 video game business ...⁴

PlayStation's struggles may have been due in part to the fierce competition in the electronic game market, namely from Xbox and Wii, the virtual reality game franchise. For 2008, Microsoft, maker of PlayStation, reported:

"Xbox platform and PC game revenue increased \$418 million or 85 percent primarily as a result of

increased Xbox 360 console sales, Xbox 360 video game sales, and Xbox Live revenue."⁵

Likewise, Nintendo — manufacturer of Super Mario and Pokemon as well as Wii — reported a profit of \$996 million from April through June 2008, a significant increase for the same period in 2007. The big factor behind the stellar performance was the Wii and its game software.⁶

These entertainment sector profits are often augmented by clothing and other merchandise made appealing by specific toys; or via the reverse occurrence, whereby games are conversely launched by popular television shows and movies. The Disney Corporation has long recognized the profitability of this sector of entertainment, mastering the combination of films and television programs with merchandise that includes games and toys. *Billboard Magazine*, a publication generally dedicated to reporting on music business, highlighted the significance of Disney's merchandising efforts in its August 2009 issue:

Even in these penny-pinching economic times, the lure of Disney merch is resilient. Disney Consumer

Products is a bright spot for the Walt Disney Co. in a down market. For the quarter that ended March 28, [2009,] the consumer products division — a unit that controls products that generate \$30 billion in global retail sales annually and oversees everything from manufacturing, designing, licensing and promoting Disney's intellectual property — saw revenue of \$496 million, up from \$457 million for the same quarter in 2008; a 9 percent increase ...⁷

Conveying the intertwining nature of entertainment ventures, *Billboard* also reports that of that \$30 billion in annual sales, nearly 10 percent is related to music-related enterprises like *Hannah Montana*, a television show for "tweens" (children between the ages of 8 to 13) and *High School Musical*. Additionally, Disney's consumer products include conventional Disney merchandise — the ubiquitous Mickey Mouse games and toys, merchandise based on animated feature films, and other Magic Kingdom paraphernalia.



THE LEGAL ISSUES

The profit potential of the games and toys market serves as a backdrop for the legal battles it faces. As with other high-stakes commercial enterprises, this sector of the entertainment industry is riddled with its share of legal challenges. This article highlights three recent disputes, all of which revolve primarily around ownership and control of intellectual property: Copyright law is at the heart of the *Bryant v. Mattel* cases, a/k/a the “*Barbie v. Bratz*” doll cases; *SLB Toys v. WHAM-O* involves trademark rights for slip-and-slide water games; and rights of publicity (and other state-law claims) determined the outcome of *Romantics v. Activision*, a case involving the use of music in the well-known video game *Guitar Hero*.

BARBIE v. BRATZ

Carter Bryant v. Mattel Inc., currently pending in U.S. District Court in California,⁸ provides a framework for analyzing whether the doctrine of work for hire fulfills its constitutionally derived purpose of stimulating innovation and creativity. This case involves the well-known toymaker Mattel Inc., manufacturer of the Barbie doll franchise, and MGA Entertainment (MGA), maker of the rival Bratz fashion dolls.

The dispute is whether the work produced by Carter Bryant for MGA, i.e., specific doll prototypes (as well as resultant products developed from the prototypes), are products actually owned by Mattel through the work-for-hire agreements Bryant signed as an employee of Mattel. The dispute also alleges that Bryant copied the prototypes in question from an abandoned Mattel project known as Toon Teens, which Bryant allegedly learned of during his employment with Mattel.

The procedural history begins in 2004, when Mattel filed suit against Bryant in California Superior Court for breach of contract, breach of fiduciary duty, and other claims alleging that he breached agreements with Mattel assigning all rights for inventions, concepts, and other intellectual property to Mattel while in its employ. A series of attempts by Bryant at removing the case to federal court ensued. Additionally, MGA intervened and was made a party to the case in 2004, whereby Mattel sued MGA for copyright infringement (and certain torts) and ownership of the Bratz dolls. MGA also filed its own copyright infringement suit alleging that Mattel had infringed the Bratz dolls by incorporating Bratz features in Mattel’s “My Scene” dolls. Ultimately, the case was removed to federal district court in California, and in 2006, Judge Larson ordered the consolidation of *Bryant v. Mattel Inc.*, CV 04-09049; *Mattel Inc. v. Bryant*, CV-04-09059, and *MGA Entertainment Inc. v. Mattel Inc.*, CV 05-02727, now consolidated as *Carter Bryant v. Mattel Inc.*, CV 04-09049.

Bryant settled his case with Mattel for an undisclosed amount, leaving MGA and Issac Larian, MGA’s chief executive officer, as co-defendants in a copyright case that centers on the application of the work-for-hire doctrine. Though no longer a party to the lawsuit, Bryant’s actions during his tenure as a Mattel employee

largely form the basis for the infringement allegations against MGA.

Bryant was employed by Mattel as a product designer from Sept. 1995 through April 1998 and from Jan. 1999 through Oct. 2000. As a condition of employment, he signed an Employee Confidential Information and Inventions Agreement that prohibited him from “engaging in any employment or business other than for [Mattel], or invest[ing] or assist[ing] (in any manner) any business competitive with the business or future business plans of [Mattel].”⁹ In late 2003, according to Mattel’s Complaint, Mattel learned that Bryant had entered into an agreement with a competitor, while employed with Mattel, to design products and receive royalties for the design of the competitor’s products. The complaint further alleged that the nature of Bryant’s agreement with the competitor was that all such products Bryant created would be considered works for hire for the competitor, i.e., MGA.¹⁰

Jury trial commenced in May 2008, and a verdict was returned in August 2008 awarding Mattel \$100 million in damages, of which only \$10 million was awarded for copyright infringement.¹¹ The total award is far less than the \$2 billion Mattel sought but is a large infringement award nonetheless. Additionally, the real victory for Mattel was handed down by the court on Dec. 3, 2008, in an order granting Mattel’s motion for a permanent injunction against MGA — to enjoin further sale and use of the Bratz product line, and a declaratory judgment setting forth a declaration “of [Mattel’s] rights (and the MGA parties’ lack of rights) regarding the Bratz-related works, including certain drawings, sculpts, and ideas.”¹²

In granting the permanent injunction the court applied the standard two-pronged test for proving copyright infringement — (a) access to the infringed works, plus (b) substantial similarity between the copied and original works — and found that:

... [T]he dolls ... and products ... are ... substantially similar to Mattel’s registered copyrighted drawings and are embodiments of the sculpts depicted in Exhibits 1 and 2. In doing so, the court has first examined the specific expressive elements of the works at issue ... Although the court recognizes that there are differences between the works, the court ultimately finds that those dolls and products set forth in the above-referenced exhibits are substantially similar to Mattel’s registered copyright drawings ...¹³

The injunction:

- Ordered the impoundment and destruction of Bratz dolls, specialized plates, molds and matrices used to make them;
- Ordered the recall of infringing Bratz products from retailers;
- Denied royalties from MGA to Mattel in lieu of injunction (the court mentioned the lack of settlement between the parties as the basis for this aspect of the order); and

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- Appointed a special master to ensure that the order is carried out.

SLB TOYS USA INC. v. WHAM-O INC.¹⁴

In another recent dispute between toymaker rivals, the battleground is not copyrights, but trademarks. Trademarks identify a brand of goods or services to the consuming public, often forming the basis for the consumer's purchasing decision, based on recognition of the brand. Consequently, maintaining brand identity is important to both sides in the dispute. Wham-O Inc., maker of the Hula Hoop®, the Super Ball®, the Frisbee®, and the Slip-and-Slide®, was initially sued by SLB Toys for infringing on SLB Toys' line of waterslides known as Banzai Falls. Wham-O countersued, maintaining that the Slip-and-Slide is distinctive for its yellow color, which Wham-O has registered as a federal trademark. Wham-O alleged that SLB Toys committed trademark and trade dress infringement when it sold orange-colored slides in packaging showing yellow-colored slides.

In October 2007, a jury rendered a verdict for Wham-O, awarding the company \$6 million in damages for SLB Toys' willful trademark infringement and dilution and willful false advertising in connection with SLB Toys' use of the yellow color in marketing its products. The court entered a permanent injunction enjoining SLB Toys "from using the color yellow on the sliding surface of water slide toys, or packaging or advertising depicting the same, or any mark similar thereto or likely to cause confusion therewith, in the sale ... of water slide toys at any locality in the United States."¹⁵

Yet the battle between these rivals continues, as the *ABA Journal* reported in its May 2009 issue:

Last year [SLB Toys] took the highly unusual step of filing four separate petitions to the U.S. Patent & Trademark Office to cancel three of Wham-O's most famous trademark registrations: Slip 'n Slide, Frisbee, and Hula Hoop. It also filed a notice of opposition to a pending Wham-O application for a Super Ball trademark, says New York City lawyer Parker Bagley, who represents ... Wham-O. What's behind the rivalry? Perhaps an attempt on the part of Manley to add Wham-O's inventory to its own product line.¹⁶

Whether this speculative view of underlying motives is accurate, the nature of the aggressive rivalry resembles that between the Barbie and Bratz franchises, in which the stakes in the legal dispute severely threaten the continued viability of the competitor.

ROMANTICS A/K/A MASTER BEAT INC. ET AL. v. ACTIVISION PUBLISHING INC.¹⁷

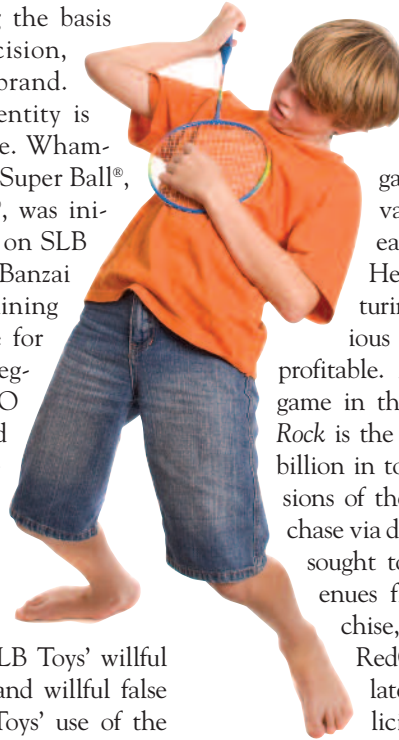
Unlike the other cases highlighted here, this dispute does not involve a battle between rival toy companies. Rather, the band known as The Romantics objected to the use of their song "What I Like About You" in the

Guitar Hero video game, distributed by Activision Publishing Inc. Activision's web site states that the company is a videogame development company specializing in music-based games.

Indeed, Guitar Hero is a music-based game in which players pretend to play various guitars (lead, bass, rhythm) and earn points for playing well. Guitar Hero is actually a series of games featuring cover versions of songs from various eras. The result has been highly profitable. According to Activision, the third game in the series, *Guitar Hero III: Legends of Rock* is the first single video game to exceed \$1 billion in total sales.¹⁸ Additionally, in later versions of the games, songs are available for purchase via download. Accordingly, the Romantics sought to determine their rights to any revenues flowing from such a profitable franchise, filing suit against Activision and RedOctane Inc., the game's publisher, in late 2007 for violation of right of publicity, false endorsement, unfair competition and unjust enrichment.

Copyright infringement was not alleged in the complaint, as the version used in the games was a sound-alike version that did not feature the Romantics' original recording. Rather, the defendants had obtained licenses to re-record the song using a cover band, leaving the Romantics to rely upon these state-law causes of action, which were ultimately unsuccessful. On the right-of-publicity claim, the plaintiffs argued that the Romantics have a right to a distinctive sound and the use of that sound "for commercial purposes in all forms of communications, including video games," which the defendants violated by using the plaintiffs' identity and distinctive sound for the defendants' commercial purposes without the plaintiffs' permission.

The federal district court in the Eastern District of Michigan applied the state's right-of-publicity law and held that Michigan has never recognized right of publicity in the sound of a voice, even if distinctive. The court also found that copyright law preempted the state-law right-of-publicity claim because the claim arises from vocal performances reflected in a copyrighted sound recording as opposed to performances existing separate and apart from a copyrighted work. The court also cited sections 106 and 114(b) of the Copyright Act, which permit musical-composition copyright owners to license sound-alike recordings, and in this case the defendants obtained licenses from the composers. Consequently, the



plaintiffs did not prevail on any of their claims.

SUMMARY

The entertainment industries can potentially control an important public interest, which is borne out by their profitability, and is affected by litigated outcomes that not only determine the control of creative property rights, but ultimately affect the availability of these consumer goods and raise questions about the appropriate scope of intellectual-property protections.

For instance, last Christmas — a critical time for retail sales — a number of media covering the Bratz/Barbie controversy reported on consumer concerns among parents of the Bratz demographic as to whether Bratz dolls would remain available for purchase during the Christmas season, in light of the court's December order enjoining the defendant from continuing to sell Bratz dolls and ordering the destruction of dolls and infringing molds, plates, etc. Public interest is a factor to be considered in court analyses of whether to grant or deny injunctive relief; the order has been stayed pending post-trial motions.

Similarly, the *Wham-O* court denied the plaintiff's request to order destruction of the infringing articles as unnecessarily harsh, and burdensome for the court to oversee, particularly because the jury did not find the design of the product itself to be infringing.

These actions by the courts seem appropriate in when weighed against the potential to deprive consumers of entertainment products based on technical applications of intellectual-property law. Yet relevant questions are raised in terms of balancing competing interests:

- The *Bryant* case outcome is unsettling because Mattel stands to profit substantially from MGA's investment. The Bratz franchise now includes merchandise, television programming and the like. Mattel is not prohibited from continuing to sell the Bratz dolls and collecting profits from them (rather than destroying the molds and recalling them), and reaping the benefits of a brand wholly built by a successful competitor. Is the work-for-hire doctrine intended to fuel such rivalries and permit one company to capitalize on the investment of another?
- Is the *Bryant* outcome the kind the Constitution's framers envisioned in promoting creativity through securing rights to innovators? Whose innovation is valued, protected, intended to be protected?
- Despite the varied sources of available intellectual-property protections (in both state and federal law), is the kind of performance innovation the Romantics created compensable?
- Does trademark law protect consumer interests as well as those of trademark owners?
- Are consumer interests served when a popular game or toy is removed from the marketplace (or never reaches it) because of varying applications of law?

The ability of the entertainment industry to accomplish its mission, including within the games and toys sectors, may depend on the answers to questions like these, and may have weighty implications that are not so entertaining. **EBS**

CHERYL L. SLAY is an entertainment and intellectual property law attorney and assistant professor of music business in the College of Entertainment & Music Business at Belmont University.

NOTES

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11. In addition to copyright infringement, the complaint asserted the following claims against MGA: intentional interference with contractual relations; aiding and abetting breach of fiduciary duty; aiding and abetting breach of the duty of loyalty; conversion; and fraudulent concealment.
12. Order, Dec. 3, 2008, *Bryant v. Mattel*. The order is overwhelmingly favorable for Mattel in granting additional (and significant) motions for relief.
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Practitioner's Tips

By Susan McDonald

Here's an issue that seems simple but can create huge problems if lawyers ignore it: Who is your client? The existence of an attorney-client relationship is a question of fact based on the particular circumstances of each case. A person can be considered a "client" without a written agreement and without paying legal fees. For example, in *Winstead v. Berry*, 556 So.2d 321 (Miss. 1981), the plaintiff in a legal malpractice action presented proof that the defendant-attorney represented both her and her former husband in divorce proceedings and never advised her to retain independent counsel. Her proof was sufficient to avoid summary judgment. In *Sotelo v. Stewart*, 281 S.W. 3d 76 (Tex. Ct. App. 2008), the defendant-attorney represented Sotelo's former husband in a breach-of-contract action. When the attorney moved to withdraw from the case, he accidentally added Sotelo's name as a defendant to the style of the case. Sotelo sued the attorney when her property was sold in execution of judgment in the contract action. The court held that, regardless of communication between Sotelo and the attorney, the addition of Sotelo's name to the pleadings in the contract action raised a fact issue as to the existence of an implied attorney-client relationship.

HOW DOES THIS APPLY TO THE ENTERTAINMENT AND SPORTS PRACTITIONER?

Well, both entertainment and sports activities are often carried out in groups. What happens if an entire band comes to you for representation? The issues that face the lead singer/songwriter for the band might be in conflict with those of the bass player. Likewise, if a sports team comes to you for representation, do you represent the coach? The management? The owner of the team?

Regardless of the way you encounter potential

clients, the time to address the issue of representation is your first meeting. If you wait until someone claims to be your client, it is probably too late. However you decide to address the issue, it should be in writing and should consider these points:

1. Know who is your client.
2. Know who is not your client.
3. Make certain that others know who is your client and who is not your client.

In addition, the answer to each of these questions depends on the nature of the case or matter and the facts of the case or matter. Identifying the potential conflicts will help to determine who is (and isn't) your client.

The popularity of social networks through Facebook, MySpace, Twitter and the like raise interesting issues on this point. Can an attorney-client relationship be created accidentally or unintentionally simply by "following" someone on Twitter or responding to a question about the law from a "friend" on Facebook? Carolyn Elafant, who writes the blog "My Shingle," recently posted about the pay-for-answer system at LawGuru (<http://www.myshingle.com/2009/07/articles/ethics-malpractice-issues/fee-for-advice-sites-poses-traps-for-the-unwary/>). She notes that "just because LawGuru says that the attorney-client relationship ends when the answer is delivered, doesn't make it so." While social networks have provided a forum for specialty areas like entertainment, copyright and trademark law, they also increase the risk that the reader will assume an attorney-client relationship that the writer never intended, simply because the reader "followed" the writer, or considered themselves a "friend." **ESG**

SUSAN MCDONALD maintains a solo law practice in Nashville and frequently teaches CLE classes in legal research and writing.

So why is the suggestion that the payor will “check the box” if the artist continues to insist on receiving an advance so effective? The answer is relatively simple. If Section 409A applies, the effective Federal tax rate on the funds being paid immediately jumps to 60 percent, and, if there is a California connection (or a connection with another state that has adopted its own version of Section 409A), an additional 20 percent tax may also apply. Thus, the effective tax rate on the amount received can be as high as 80 percent. Even worse, all amounts due after the advance may also be at risk for an 80 percent tax. With most of my clients, as soon as they understand that they may lose an additional 40 percent or more of their funds off the top to taxes by insisting on payment today, and compare that against doing nothing and eventually receiving their full gross amount within the next 12, perhaps 24 months, they generally instruct me to stop arguing. And, that is before we even begin discussing the potential for regular tax penalties and interest. As Congress clearly intended, the effective marginal tax rate on income to which Section 409A applies is economically devastating.

So, what exactly is Code Section 409A? In somewhat abbreviated form, Section 409A applies to any “service provider” who receives compensation earlier than it was otherwise due under a written payment schedule. The language imposing these confiscatory tax rates actually states that the statute applies whenever a “service provider” receives a “legally binding right to compensation” in one year but does not actually or constructively receive the compensation until a subsequent year. (Such amounts are defined as “deferred compensation.”) Congress’ intent in enacting Section 409A was to prevent high-level executives from artificially manipulating when they might receive income under a deferred compensation arrangement. These rules were specifically designed to prevent the types of abuses found in the Enron and other corporate scandals where the executives received payouts that Congress and the public believed should have been available for creditors and/or shareholders. A simple example of the type of abuse Congress intended to curtail with Section 409A is the executive who qualifies for a bonus for services performed in year one, but voluntarily defers payment of the bonus until year five, all the while retaining the ability to access those funds in certain circumstances, most of which are effectively under his control, without a meaningful economic cost to the premature termination of the arrangement. Now, unless the executive makes sure he complies with all the requirements set forth in Section 409A and its regulations, that bonus will be subject to Section 409A’s “extra” tax.

So, given that corporate America is the primary target of these new rules, why the concern about their application in the music and entertainment industries? Well, let’s look at the design of a traditional recording

contract. The artist is expected to provide his/her services in one year to produce a master (with a minimal contractual advance designed to cover the artist’s out-of-pocket costs in preparing the master). All royalties from sales and downloads of the music will then be paid at the end of each of the following calendar quarters for so long as sales occur; in other words, the artist is to receive payment for services performed this year in the years that follow. Thus, at least on its face, this arrangement appears to squarely meet Section 409A’s definition of deferred compensation. Further, as discussed below, any advance would facially appear to be an acceleration of the payments, an action clearly prohibited under Section 409A.

HOW WILL THE IRS KNOW?

When I’m working with talent, the first question out of my clients’ mouths after the potential application of Section 409A has been raised has always been: “How will the IRS know?” Unfortunately, the answer is that it will be “easy.” The 2004 tax act that added Section 409A also imposed additional reporting obligations upon payors of such compensation. Whether the recipient is treated as an employee or as an independent contractor, the payor must specify whether amounts paid or accrued are Section 409A deferred compensation in its year-end Forms W-2 or Forms 1099-Misc, or itself be subject to penalty. In other words, the tax laws place payors of compensation in the position of deciding whether to report an amount as subject to Section 409A, a burden cynical representatives of talent believe is being used as a pretext to change historic industry practice. It is much easier for the payor to “strong-arm” talent into abandoning (or never making) a request for an advance by arguing that, if an advance is made, the payor will have to “check the box” indicating that Section 409A and its extra tax burden applies.

SECTION 409A IN GENERAL

Part of the American Jobs Creation Act of 2004, Section 409A is not a completely new set of rules. Rather, Section 409A imposes and layers additional rules and requirements on those that already applied to deferred compensation arrangements. Thus, dealing with nonqualified deferred compensation issues is now nearly as complex as designing qualified plans.

If an arrangement involves deferred compensation (defined as above), unless all of the requirements imposed by Section 409A (summarized below) have been met, the income the taxpayer believed deferred becomes fully taxable in the year in which the service provider first receives a legally binding right to that compensation, even if not paid at that time.

The Initial Deferral Election — to the extent it is the service provider who is making an election to defer (a circumstance not often found in the entertainment

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and music industries), the election must be made before the year in which the services are performed. If the relationship between the service provider and the payor is a new relationship (e.g., for a new project or where an artist has changed labels), Section 409A and its regulations provide a few exceptions that allow certain deferrals agreed to during the first year of the relationship.

Subsequent Elections To Defer — if a service provider has been deemed to elect to defer payments, those payments cannot be “re-deferred” (except in very limited circumstances).

The “In Writing” Requirement — under Section 409A, any arrangement involving “deferred compensation,” whether a voluntary or imposed deferral, must be in writing.

Distribution Events — the written agreement between the service provider and the service recipient must provide that the amounts deferred will only be paid upon one or more of the following events, and *only* such types of events:

- a separation from service;
- a fixed period of time determined as of the date of deferral;
- a “change in control” of the company (practitioners must be careful here, as the statute expressly grants the IRS broad discretion to define the term “change in control,” and, while the IRS definition generally follows the definition used in Code Section 280G and its regulations, significant differences exist);
- an unforeseen emergency resulting in a severe financial hardship to the service provider (limited in a manner very similar to the 401(k) hardship provisions);
- the death of the service provider; or
- the service provider’s disability.

When Must Distributions Be Made? — the regulations provide very specific rules relating to the types of schedules and/or events that can be used to trigger payment under Section 409A, and such events must be beyond the influence or control of the service provider; in fact, the regulations expressly state that distribution events must be clear, unambiguous and completely beyond the service provider’s control at the time of deferral.

Changes In Form Of Payment — for those who might negotiate payment in stock rather than cash, the form of payment must be expressly set forth in writing at the time of the initial deferral.

Funding — the arrangement cannot allow payment

to be triggered based on the financial health of the payor, nor may the arrangement provide that the funds will be held in an offshore trust.

No Acceleration — last, but certainly not least, payment of the deferred compensation may not, under any circumstances, be accelerated (except for a couple of extremely narrow exceptions allowed under the regulations).

And, as noted earlier, it is this last requirement that is one of the major concerns when analyzing whether Section 409A applies to arrangements in the entertainment and/or music businesses.

THE DEFINITIONAL CONUNDRUM

As described above, Section 409A only applies if a legally binding right to compensation is created in one year, but the compensation itself is not to be paid until a later year. The Section 409A regulations make abundantly clear that the IRS believes it is possible for a service provider to receive a legally binding right to compensation, even though the ultimate amount to be paid may currently be uncertain because of the manner in which it is calculated. The regula-

tions, however, also clearly state that a legally binding right will not exist if the payment is subject to a “substantial risk of forfeiture.” So, if there is a substantial risk that the compensation will not be paid, the arrangement does not yet involve “deferred compensation.”

In its final regulations, the IRS provided some very general guidance on what qualifies as a substantial risk of forfeiture for purposes of Section 409A. One such condition is where the service provider is obligated to perform substantial future services to receive the payments. The second is where the payment is contingent on the occurrence of a condition related to a purpose for which the compensation is to be paid, so long as the possibility of forfeiture is “substantial.” Note here that the Service’s regulations make clear that the condition related to the purpose for which the compensation is to be paid must relate to the service recipient’s business or its organizational goals; the focus must be on the business of the company making the payments and not the business of the service provider.

For non-tax practitioners, this is not the first time Congress has incorporated the term “substantial risk of forfeiture” into our tax law. That phrase is also found in Code Section 83 and again in Code Section 3121, both of which set forth rules on when certain payments will be income taxable or be taxable for FICA purposes. Interestingly, when the IRS issued its

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Section 409A regulations, it specifically refused to adopt the interpretative rules that already existed under Section 83 and/or Section 3121, reasoning that the purposes behind the enactment of Code Section 409A were sufficiently different to justify a different set of rules for determining whether a “substantial risk of forfeiture” existed. Thus far, however, the IRS has declined to provide guidance beyond that set forth above, leaving taxpayers, both service recipients (the payors) and service providers (the payees), with statutory language identical to at least two other tax provisions, a significant body of law and authority developed around that language from those earlier statutes, followed by a general disclaimer that those interpretative rules should not apply for purposes of Section 409A.

So, as that little old lady in the famous Wendy’s commercial might say: “Where’s the beef?” What interpretative rules and definitions should taxpayers and the courts use to determine whether a substantial risk of forfeiture is present in cases involving Section 409A? In the absence of express guidance from the IRS, taxpayers must still interpret this language, and the only guidance available is guidance the IRS says generally ought not apply. As other commentators have already wondered, what will a court do when faced with this situation? Many tax professionals believe a court would likely ignore the Service’s caveat in its Section 409A regulations and look to the cases and rulings issued under these other Code Sections.

In determining whether amounts to be paid in the future are subject to a “substantial risk of forfeiture,” the IRS has consistently ruled that, where compensation is not due an employee or contractor unless a product is actually sold and/or payment is actually received by the payor, such compensation is subject to a substantial risk of forfeiture. For example, in December 2007, the IRS ruled that payments to be made to a retired insurance agent based on actual policy renewals were, in fact, subject to a substantial risk of forfeiture because the commissions were not due unless or until the insurance company actually received payment for the next year’s policy coverage. See, e.g., PLR 200813013 (Dec. 17, 2007). If payments to an insurance agent based on actual receipt of policy renewals are subject to a substantial risk of forfeiture, it is hard to imagine that royalties or other payments due an artist based on sales, actual airplay or any other success-based goal should be treated any differently; a position further, albeit inferentially, supported by Section 409A’s regulations stating that conditioning payment on a corporation attaining a

certain level of earnings is also a substantial risk of forfeiture (at least until the goal is reached). Nevertheless, many studios and recording companies are taking the position that the language in the preamble to Section 409A’s regulations caveating concepts adopted elsewhere in the Code is sufficient to create concern and thus have decided that the record label and/or studio will err on the side of safety and report accelerated royalty payments as if Section 409A applies.

Outside of the entertainment industry, the exception most often used by tax professionals to avoid Section 409A is the exception for short-term deferrals.

ANOTHER DEFENSE: INDEPENDENT-CONTRACTOR STATUS

Pursuant to the final regulations, independent contractors are exempt from Section 409A as long as the contractor provides significant services in the same trade or business to two or more parties unrelated to each other or to the independent contractor. The regulations also set out a safe harbor for determining whether the independent-contractor exemption applies. The safe harbor exists where the contractor provides services to two or more independent service recipients (unrelated to each other or the contractor) and neither service recipient accounts for more than 70 percent of the contractor’s total revenue for the tax year.

While this exception might initially appear to protect a large number of artists and writers, ultimately it is likely to be of little practical assistance because it is so fact-specific. For example, if an individual is both a writer and a performer, but much more successful at one than the other, is that individual engaged in two separate trades or businesses? What is the result if a writer pens a single song that is wildly successful? For many, such a success will often account for much more than 70 percent of the writer’s overall revenues, and those revenues are likely to be paid by a single performing rights organization or, in the case of a performance or successful film project, by a single label or studio.

Further complicating the inquiry, at least in the minds of our clients, is the existence of loan-out corporations. Many artists who use such corporations believe the rules affecting those corporations ought to be different. Unfortunately, working through the regulations and the application of these rules to loan-out corporations, while the analysis is a little more complex, the result is usually the same as if the loan-out corporation did not exist.

Finally, once an artist has become so successful that a label or studio offers the artist a 360 deal, all payments to the artist will thereafter be made by a single corporation with the result that the independent-

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contractor safe harbor will clearly not apply. In moving to a 360 arrangement, however, some planning opportunities may exist. At that time, the artist might look at insisting on carve-outs for new projects and/or greater upfront payments for each project (which must be in the contract) or for executing the new deal (which then resembles a “signing bonus” paid to a professional athlete), all of which should then be outside of the restrictions of Section 409A.

ANOTHER POTENTIAL EXCEPTION — SHORT-TERM DEFERRALS

Outside of the entertainment industry, the exception most often used by tax professionals to avoid Section 409A is the exception for short-term deferrals. Under the statute and its regulations, as long as the compensation is received no later than two and a half months following the close of the first tax year in which the amount is no longer subject to a substantial risk of forfeiture, Section 409A does not apply. Those rules, however, also prohibit the contract from containing any provision allowing the payment to be made at a later date. For those encountering these rules in other contexts, the final regulations are relatively generous in their approach and allow the short-term exception to be extended in certain, but very limited, circumstances.

OTHER POTENTIAL WAYS TO GET CASH TO A CLIENT

While a very fact-specific analysis, the existing contract may already provide some opportunities to accelerate limited amounts to the artist. These exceptions, however, require a careful reading of the contract, followed by a detailed analysis of the application of Section 409A’s rules to the facts. For example, for administrative convenience and to reserve flexibility for the payor, some contracts allow the studio to make payments up to 30 days before the date such amounts are otherwise actually due. If a standard contract term, there is some room to argue that such limited acceleration does not violate Section 409A.

Finally, as alluded to above, when a client signs a new contract, whether for additional projects or with a new label entirely, any “signing bonus” the artist receives is unlikely to be a payment subject to the pro-

visions of Section 409A. The practical difficulty with this approach, however, is whether the label or studio is willing to allow the new project to stand on its own; in other words, do not allow the payments for the new project to be adjustable for any shortfall or additional amounts due under an existing contingent compensation arrangement for current projects.

Many of our artists have already encountered recording labels and studios using Section 409A to push back against the historic business practice of providing successful talent with advances. Should the IRS ever issue guidance supporting that interpretation, it will inevitably change industry negotiating dynamics. For example, if advances are indeed prohibited, what established artist will sign a long-term contract without requiring significant guaranteed advances? Perhaps the negotiation is over whether advances will be based on the performance of the last project or a rolling average of prior projects, but guaranteed advances will become a standard issue. Artists may also end up taking more economic risk that their subsequent projects will be even more successful and only agree to single project contracts.

CONCLUSION

In the end, practitioners in the entertainment industry must recognize that Section 409A’s rules are extremely complex, and the strategies advisors might employ to assure an artist has timely access to cash once a project has been completed (the recording and/or the film) will likely be different from client to client, depending on the facts and circumstances surrounding each artist’s circumstances and negotiating leverage. In the meantime, it will also be important for practitioners to watch for new IRS rules governing this overly complex tax statute. **ES**

JIM MCCARTEN is a member of the Nashville firm White & Reasor PLC. A past chair of the TBA Tax Section and a member of the Trustees of the Tennessee Federal Tax Conference, McCarten has spoken and written extensively on Section 409A.

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The Digital Music Promoter

By Amy J. Everhart

As an entertainment lawyer, surely you've gotten that desperate inquiry from the aspiring artist: "What can I do to be heard?" As a former artist herself, digital music promoter Leslie Wallace remembers how tough it is to be heard among the chorus of voices trying to make it in the music industry. She launched Digital Music Promotion to help artists, especially of the independent variety, gain visibility using the new tools and technology available to them in this new millennium.

Wallace tapped into a service in high demand in this new era of the music industry, where the independent path to success has become mainstream. But she started the old-fashioned way, way back in 2002, before the advent of iTunes, working her way up through the digital media departments of the major labels. Back then, digital music promotion meant working with the likes of MTV for artist placement on MTV's website.

Once she knew the tools of the trade and gained valuable contacts with the people inside the digital-music industry, Wallace recalls, "I started toying with this idea — use the contacts I've developed throughout the years and, instead of working at the label, I'll work with independent artists and labels. They don't have someone like me — pitching for in-store promotion, placement on iTunes. Why wouldn't they want an advocate that's working for them and not for some machine?"

Digital Music Promotion was born in January 2007 and, with Wallace's prowess for gaining visibility, has done just that. The company has worked with clients ranging from the aforementioned independent artists to major labels and artists, accomplishing such coveted digital placements for her clients as "Single of the Week" on the iTunes home page.

The crux of Wallace's business is digital distribution and especially public relations, such as online positioning and in-store promotion. "That's what sets us apart," Wallace says. "The fact that we can go to iTunes — that we have a direct relationship with them — to pitch a product and make that product visible to the public — that's a big deal for artists and labels, especially independent artists and labels. They don't have the ability to do that if they don't have an advocate in that world."

That's where Wallace's company comes in. "We like to help the little guys. That's what our business is all about — giving the artists that may not have the

big record deal — and there's a lot more of those these days — a leg up and a platform to stand on."

But clients shouldn't expect Wallace's company to carry the entire promotions load. "It's important for artists and labels to understand that we alone can't carry an entire campaign for them. They need to have other things going on. Touring, an active online presence (a website, MySpace), an active relationship with their fans, an email list, a good product, a good image. It doesn't stop with making music."

That said, Wallace's contacts and expertise in the digital world give artists that extra push they often can't accomplish themselves — visibility. "If we get a home-page promotion on iTunes, millions of people are looking at that product. You can reach so many more people online than you can any other way. Thousands upon thousands of eyeballs on their product where they wouldn't get that otherwise."

The key to Wallace's success is twofold: 1) stay on top of the trends in a profession in which cutting edge is essential, and 2) maintain contacts inside the industry. As for the latter, she practices what she preaches, using social networking sites like Facebook and LinkedIn. "LinkedIn is a great tool because it's a great business social network. There's not a lot of fluff on that site. It's just people trying to keep in touch with people from a business perspective." The most important ingredient to Wallace's maintenance of contacts, though, is decidedly low-tech: "I have never done any advertising for my company. It's all talking to people. I let other people promote it for me."

Speaking of trends, what trends does Wallace see on the digital-promotion horizon? "Man, Twitter's so cool. Finally there's a tool artists can use when they're on the road. I think eventually everything's going to be integrated for the phone — mobile's going to be very important. Right now those two worlds are still quite disconnected — with the exception of the iPhone." Another tip: the free service Say Now (www.saynow.com), a mobile shout-out company. Artists' fans can sign up online for artists' updates in the form of text or voice-mail.

"The internet is such a great tool," Wallace concludes. "Why not use it to your advantage?" **EBS**

AMY J. EVERHART recently launched her own law firm focusing on entertainment, trademark and copyright law and is the author of the intellectual-property law blog *Lightbulb Moments* (www.aeverhart.com/lightbulbmoments).



Entertainment and Sports Law Section

Tennessee Bar Association
221 Fourth Avenue North, Suite 400
Nashville, TN 37219