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FALL 2012



DAVID WHITE
ON HIS BIGGEST
CHALLENGES
AS NATIONAL
EXECUTIVE
DIRECTOR OF
SAG-AFTRA

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pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING
& THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE

2

CONTENT

- 03 **LETTER FROM THE GUEST EDITOR**
Jimmy Nguyen

- 06 **DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA**
Julia Harris

- 12 **REAL WORLD RISK IN VIRTUAL WORLD GAMING:**
VIRTUAL CURRENCIES, MONEY LAUNDERING, & THE HIDDEN RISKS TO GAME COMPANIES

- 19 **WAGER-BASED ONLINE GAMING & THE U.S. MARKET**
AN INTERVIEW WITH MELISSA M. RIAHEI

- 23 **PLAYING FOR KEEPS:**
THE BRANDING GAME
Paula Jill Krasny

- 27 **IN-HOUSE GAMING:**
PAST, PRESENT, AND FUTURE
Adapted from an Interview with Kerry Hopkins

- 29 **THE INTERSECTION BETWEEN CONTRACT & COPYRIGHT LAW**
EXAMINING MDY INDUSTRIES, LLC V. BLIZZARD ENTERTAINMENT, INC. AND ITS IMPACT ON SOFTWARE LICENSES
Insights Staff

- 34 **PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE**
Cassandra S. Franklin

LETTER FROM THE GUEST EDITOR

Jimmy Nguyen

AMEC's *M/E Insights* publication is back and better than ever. In this issue, we bring you articles and interviews on a range of topics sparking change in the media and entertainment industries. It is often said that the only constant is change. I have always been fascinated to watch how the media and entertainment world copes with change.

One of the most significant developments to hit Hollywood in recent years is the merger of SAG and AFTRA. David White is now the sole National Executive Director for the merged union. In a candid interview with *M&E Insights* managing editor Julia Harris, David provides insight into the challenges he faces as he acts on behalf of the combined union's members.

Of course, advancements in digital technology have transformed the media landscape. Technological leaps create powerful new forms to distribute content and reach consumers, but also trigger increasing liability claims against media companies. Cassandra Franklin reviews how companies can protect themselves with good media liability insurance.

The remainder of this issue focuses on the lucrative and changing sector of digital games. Global branding and IP lawyer Paula Jill Krasny discusses how branding and trademark strategy are important for video and digital game properties. Copyright issues are also important to game owners, who typically use Terms of Use and license agreements to help protect their software. The Insights

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

**THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW**

pg. 6 to 11

**DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA**

pg. 19 to 22

**WAGER-BASED ONLINE GAMING
& THE U.S. MARKET**

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

**PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE**

Staff writes about how such contractual provisions intersect with copyright law when examining the 9th Circuit's decision in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, and the case's impact on game software licenses.

Of course, game providers need to generate revenue. In the world of online games, many do so by selling virtual goods and virtual currency. But the revenue opportunity does not come without risk. Mikhail Reider-Gordon, a Director in Navigant's Disputes & Investigations practice, evaluates money laundering and other risks that game companies face when using virtual currency.

Working as a lawyer for game companies can put you at the forefront of change. I interviewed Kerry Hopkins, Senior Director, Intellectual Property at Electronic

Arts, Inc. to get a peek into her daily life as in-house counsel for a major video game company. Read about her career path and work in a piece adapted from that interview.

Finally, we delve into the exploding world of Internet gambling. Once the domain of just foreign operators, Internet gaming is coming more openly to the U.S. market. Melissa Riahei is the General Counsel of U.S. Digital Gaming, Inc. — which will provide a technology platform for legally-compliant online gaming in the U.S. In her prior job as General Counsel to the Illinois Lottery, Melissa helped lead efforts that resulted in the U.S. Department of Justice reinterpreting the federal Wire Act in a manner that would permit online lotteries and other forms of online gaming. Some states, such as Nevada, are beginning to legalize and license some forms of Internet gambling. Expect

media and entertainment companies to become key business partners and participants in this emerging U.S. marketplace. In an interview with me, Melissa gives us a summary of key legal issues in the online gaming area and what changes to expect in the future.

As legal counsel and other professionals in media and entertainment, we always have to be ready for change. Although change is not always comfortable, it opens up our minds to new ways of thinking. It presents new opportunities. It fosters flexibility. Don't be afraid of it. Embrace change as a new opportunity for you, your clients and your companies to shine.

Enjoy.



pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

JIMMY NGUYEN



Jimmy Nguyen is a partner in the Los Angeles office of Davis Wright Tremaine LLP. He is a “360 degree” lawyer who handles complex litigation, transactions, and counseling work involving intellectual property, entertainment, new media, sports, advertising, privacy, and technology. He is a prominent thought leader for issues involving the Internet, social media, mobile devices, and other evolving media technologies. Jimmy has represented many companies in the entertainment, media, technology, consumer products, game and online gaming sectors.

In 2008, Lawdragon named Jimmy (at only age 36) to its list of “500 Leading Lawyers in America” and called him a “dynamo talent.” A leader in IP and technology circles, Jimmy is former chair of the State

Bar of California’s IP Law Section and was named in 2011 by the Century City Bar Association as its “IP Lawyer of the Year.” He has also been named to “Best Lawyers Under 40” lists by the Daily Journal, the National Asian Pacific American Bar Association, and the National LGBT Bar Association. Jimmy is a member of AMEC’s Law Firm Advisory Board. A strong diversity advocate, he also serves on the board, and is former co-chair, of the California Minority Counsel Program.

Outside of law, Jimmy keeps engaged with many media and advocacy activities. Jimmy blogs at his own website (www.JimmyWin.com) and via online outlets such as Advocate.com for the LGBT community, FWD Nation for the millennial generation, and HelloGiggles.com for young women. He has also provided media commentary for *Good Morning America*, *In Session* on TruTV, National Public Radio, and numerous publications. Active in the LGBT community, Jimmy formerly served on the board of Equality California – the state’s leading LGBT political organization. In 2010, he was named by the Advocate magazine to its “Forty under40” list of top LGBT persons. For many years, he was a volunteer coach for the Mt. San Antonio College speech and debate team – which

he helped lead to numerous national titles. With colleagues from the speech world, Jimmy co-founded the American Readers Theater association and has served as director of its national tournament since 2001. In one of his most fun gigs ever, Jimmy served as a preliminary judge at the 2011 Miss Universe pageant in Brazil. In all that he does, Jimmy encourages everyone to SHINE. SPEAK. WIN in life.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA



By Julia Harris

This interview was conducted on July 25, 2012

Less than five months ago, SAG-AFTRA's co-national executive director (NED), Kim Roberts Hedgpeth, stepped down, leaving her counterpart, David White, the sole NED of the newly merged union. White proved to be a strong leader, and also one capable of compromise, having handily navigated some of SAG-AFTRA's biggest contemporary challenges while simultaneously preparing for the great trials still ahead.

White helped both SAG and AFTRA achieve tremendous success during the course of the recent merger, oversaw the negotiation of a new agreement for music video performers, currently works on negotiations for a new commercials contract, and is actively working towards merging the currently-separate SAG and AFTRA health and pension plans. He spoke openly with Insights about his biggest hurdles so far, and the even greater tests on the horizon.

Q WHAT HAS BEEN YOUR MOST SIGNIFICANT CHALLENGE SINCE BECOMING NED OF SAG?

A The merger process, no question. When I arrived, it was during a fairly tumultuous period for the former Screen Actors Guild, and there was certainly a lot of work to do to get us back on track with our television theatrical negotiations and a series of other contract negotiations. We had to restructure certain aspects of our operations and rethink how we did our daily work. That was a tremendous challenge, and our staff team and our board accomplished a lot during that period. Without question, this third merger attempt was the greatest challenge since I've been back as NED.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

Q WHAT DO YOU SEE AS YOUR GREATEST CHALLENGE STILL AHEAD OF YOU?

A Our greatest challenge on the horizon continues to be the successful integration of two great, proud organizations that serve 165,000 members world-wide, and the advancement of our members' interests in a variety of [upcoming] negotiations.

[Many see the task of unifying the nationwide population of members as one of the biggest hurdles that White will face. Focusing a massive group of workers into a single force at the bargaining table may be White's ultimate test.]

Q WITH OVER 165,000 MEMBERS, AND 33 OFFICES ACROSS THE COUNTRY, SAG-AFTRA IS NOW THE LARGEST ENTERTAINMENT UNION. WHAT STEPS WILL YOU TAKE, OR ARE ALREADY UNDERWAY, TO UNIFY SAG-AFTRA'S MEMBERS?

A There are a couple of things. One, we're working with the board to lay the foundation for an energetic, positive governing process at the elected level. Having good governance with our elected officials is absolutely key to the future of the organization, and we are doing a very good job right now of cultivating a culture within our board and our staff leadership team to support that. Members around the world take their first cues from their elected leadership, so that has to go well, and we're focused on that.

The second part is ensuring that the basic operations of the combined union work to support the evolving needs of its membership around the world. To accomplish that, we have to ensure that we're allocating staff resources appropriately around the country and integrating technology in a smart, efficient manner. We want all of our staff to be focused on the aspects of their job where their professional talents are really needed—not on the unproductive parts of the job, and that requires smart technology. Both former SAG and former AFTRA, and, frankly, many of the for-profit companies in this industry, are largely paper-based, manual-task type organizations. Surprisingly for this industry, our most celebrated institutions don't regularly do a good job of integrating technology into their operations. We have many antiquated systems throughout this industry, and one absolute priority for me at SAG-AFTRA is that we function in every way as a 21st century organization. I think that will help to separate us from a lot of other companies and organizations in the industry, and give us an important advantage.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

I'm familiar with how studios operate. They have this incredible 3D-type technology and they have wonderful new things happening in new media, and they often still have mail folks that push around mail carts out in the hallways. There is so much that we as an industry do not do to invest in the future infrastructure of our basic operations. Now, if you go to Silicon Valley, you can't say that. They do a better job of taking that type of investment seriously. I think we are only on the front side in the entertainment industry, and that we have a ways to go, but for us at SAG-AFTRA we are laser-focused on it.

Q DO YOU PLAN TO USE SILICON VALLEY AS AN EXAMPLE FOR HOW YOU WANT TO MOVE FORWARD AS A BUSINESS STRUCTURE?

A Despite what I just said, you have to be careful with broadly overselling the positive attributes of one industry or another at a surface level. The grass can always look greener on the other side, and when searching for specific examples to follow, we have to be fairly targeted in our observation of which companies and organizations are doing this well and which aren't.

Q WHICH COMPANIES WILL SAG-AFTRA LOOK TOWARDS AS AN EXAMPLE?

A For example, there are some companies that have established internal universities. They've established curricula to help improve employees' basic understanding of their work. We are actively looking at these companies because we are going to establish a nationwide curricula for all of our contracts to make sure that our employees, from administrative clerks to the NED, have basic training in the contracts under which our members work.

Recently, the SAG-AFTRA board called on its trustees to implement "a reciprocity agreement between the two existing Health Plans" and to "undertake expeditious and appropriate action to create a unified Health Plan." The Board also urged the trustees of the two plans to review "the feasibility and advisability of creating a unified" pension plan and reciprocity agreement between the existing pension plans. The merger of these plans was a priority for many members who voted in favor of the merger of SAG and AFTRA.

Q WHAT STEPS, IF ANY, TOWARD THOSE GOALS HAVE BEEN TAKEN BY THE UNION OR THE TRUSTEES OF THE TWO PLANS?

A The national board put forth a resolution urging the trustees of both plans to establish, immediately, a reciprocity arrangement for the health plan and to move forward with the review and ultimate implementation of merger between the two pension plans. The national board also directed the union side trustees to treat that as a

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

priority on a going forward basis because the union SAG-AFTRA, which is separate from the pension and health plans, has a great and active interest in seeing these processes done as soon as possible. I am a trustee of one of the plans, the SAG pension and health plans, and at the trustee level, we are actively looking at this to see what steps should be taken, and whether and when to merge the plans.

SAG-AFTRA and the advertising industry agreed to postpone their scheduled “early negotiations” of the union’s commercials agreement. The existing agreement remains in place through March 2013. The parties’ request for more time to address “data challenges” justified the postponement.

Q WHAT SORT OF “DATA CHALLENGES” DO THE PARTIES NEED TO ADDRESS?

A The exercise that we are engaged in regarding the commercials contract, on the advertising and advertising agency side, and the union side, is to take a comprehensive view of the changing nature of the whole advertising business. A big piece of that is looking at the way that compensation works in the industry. We agreed to study a gross ratings point system, to see whether or not that type of system would translate into a fair and equitable payment system for our members that reflects the aggregate compensation levels that currently exist. Theoretically, it could be more accurate in its tracking of particular commercials in a wide variety of media. It’s a big effort, and “data challenges” refers to the fact that we’re working very hard to aggregate and assess the data that is coming our way about this new, possible system. This is something that we all want to get right before considering it in our negotiations. The early bargaining that had been prescheduled was focused on this analysis, and both sides agreed that we can—and should—take some additional time with that. It will not affect our normal bargaining schedule, but for that piece of it, both sides agree that we should continue reviewing the numbers before we come back to the table.

Q WHAT ARE THE BIGGEST ISSUES THAT WILL NEED TO BE ADDRESSED IN THE NEGOTIATIONS, AND HOW DOES SAG-AFTRA PLAN TO ADDRESS THESE ISSUES?

A The big issues for the negotiations are yet to be fixed. Those come out of our member-based “W and W” (“wages and working conditions”) process. That’s where we gather members who actually work under these contracts from around the country and hear from them, so that we understand what their experience has been over the past 3 years living with the terms of the agreement. Then, the negotiating team takes that information and comes up with our bargaining proposals. The priorities that we will have at the negotiating table flow from the real life experiences of our members who have worked the contract, and we will only learn about them through the “W and W” process.

“ We have many antiquated systems throughout this industry, and one absolute priority for me at SAG-AFTRA is that we function in every way as a 21st century organization. ”

The board has unanimously approved the first industry-wide music video agreement. That agreement delivers terms for dancers and other performers who work in music videos and sets the first industry-wide standard for wages and working conditions in music video production.

Q WHAT WERE SAG-AFTRA'S GOALS WITH REGARD TO THE MUSIC VIDEO AGREEMENT, AND HOW DID IT GO ABOUT ACHIEVING THEM?

A The music video agreement and the board's unanimous approval of that agreement represent a tremendous success for our members. It's hard to express how excited I am about that agreement and that process. It is the result of years of work by our members and staff under former AFTRA. In particular, the organizing staff and the contract staff for the sound recordings agreement worked directly with dancers to get them engaged with the union, and to empower them as talent and employees of a particular business. That learning and organizing process then translated into an empowered leadership within the dancing community that was very thoughtful about the wages and working conditions that they would need to protect themselves and their fellow dancers. There was also a lot of work with the record labels. Most of that happened prior to the merger.

Then, having a newly merged organization backing that process had a positive effect on those negotiations as well. The industry, to their credit, came to the table with a genuine desire to reach a deal so that both sides could avoid unnecessary warfare. It was exactly what you want in this process: an empowered membership, an informed staff supporting that membership, an industry that approached the negotiations with common-sense proposals and an understanding that dancers are integral to the success of their business. Both sides were willing to make basic compromises to get the deal done.

Q ASIDE FROM WHAT WE'VE ALREADY DISCUSSED, ARE THERE ANY MEMBER TARGETS THAT YOU HAVE RECOGNIZED AND THAT YOU ARE MAKING A GOAL OF REALIZING?

A Yes, I think that the combination of the assets that former SAG and former AFTRA brought to this marriage is quite powerful. Now, we have this great vehicle that has the opportunity to not only spread information to members so that they are more aware of their work environments across the country, but also to empower groups of people and provide basic protections for them in a world that really is turning into a scary place for the professionals behind microphones and in front of cameras. Think about all of the forces that diminish the chance that someone can have a professional

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

life in this industry: digital theft, production companies beholden to multinational corporations with little to no actual connection to the industry (and much more focused than ever before on quarterly earnings and cost control—especially labor costs)...

There are agents who are doing the packaging, producers who are doing the producing, networks or studios or record labels who are handling the distribution, financiers who are organizing the money, and banks who are lending money—none of those guys necessarily talk to one another on a regular basis, but every individual decision has an impact on each little member. Think about all of those forces versus a person who just grew up wanting to find a way to make a living off their creativity, or on their ability to broadcast their voice, or utilize their mind to inform people about the world around us. Our members are shot out there with almost no protection, except for those provided by this union. My goal for SAG-AFTRA is to inform, empower, and protect our members, who work in a variety of industries, so they can make a living off their creativity—which serves all of us.

None of us have a very good life if there are no songs to listen to, and no movies to see, and no newscasters to tell us what’s going on in our communities. All of our lives would be diminished by that, and the people who are the most vulnerable in these industries are the professionals who are the “creative” in front of the camera or behind the microphone. We want to protect them because we think that’s important to our national culture and to worldwide culture.

Q DO YOU THINK THE MARRIAGE OF SAG AND AFTRA HAS GIVEN THEIR MEMBERS MORE CONFIDENCE IN THEIR OWN BARGAINING POWER?

A Yes, I think the merger has triggered some of the highest aspirations that members have for this union. Our challenge is living up to those aspirations.

Q DO YOU HAVE ANY FINAL WORDS OF ADVICE FOR LABOR ATTORNEYS ENTERING NEGOTIATIONS?

A Yes. In any negotiation you have some core bottom lines. It’s really important to understand where those lay, and to maintain flexibility in the ability to reach those objectives. You should always treat the other side with respect, and keep the ultimate goal in mind.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

By Mikhail Reider-Gordon

A couple of years ago, when I used to tell audiences of financial compliance officers and regulators that the total volume of sales in virtual goods would top \$1 billion in the U.S. alone, I was usually greeted with head-shaking, disbelief, and even mild derision. As anyone who reads the financial papers knows, companies associated with virtual goods and virtual currencies are some of the hottest for acquisition, growth, and investment. Due to this growth (and a number of recently-publicized incidents of money laundering), the companies that provide virtual worlds—and the virtual currencies that are used in them—are also now being carefully scrutinized by regulators both in the U.S. and in other countries. Where money is being made, currencies are being transferred; with few rules, bad things are bound to occur.

Recently, new rules were promulgated by FinCEN relating to Prepaid Access and Money Service Businesses (MSBs), which expanded the qualification of an MSB to include amended definitions that replace “stored value” with “prepaid access” while also broadening their reach in recognition of online virtual currencies’ growth; as a result, many gaming companies may now find that they face new anti-money laundering (AML) compliance issues under the Bank Secrecy Act (BSA) and have business decisions to make about the management of their virtual currencies and growth plans.

One of the key determinants of these new rules hinges on whether a virtual currency is circulated outside of the United States. The Prepaid Access Final Rule went into effect on September 27, 2011, and the new MSB registration requirements for Providers of Prepaid Access became effective January 29, 2012, so game companies had very little time to truly prepare. Additionally, many state laws demand some form of licensure, even unique registration, for entities engaging in any currency transfers to or from third parties.

Moreover, with the increasing number of games that operate across borders or are acquiring (or being acquired by) other foreign-domiciled companies, awareness of the laws—and the enactment of regulations and licensure requirements on virtual currencies in other countries—is more important and urgent than ever before.

Virtual currencies, along with characters and items, were first traded for real money (RMT) as far back as the 1980s, but this practice gained substantial traction in the late 1990s with the introduction of games EverQuest and UltimaOnline. Because RMT became central to the success of these virtual worlds and games, currency exchange sites were created and grew. IGE was the largest and most successful at one time, acting as the official currency exchange house for 19

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

**REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES**

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING
& THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE

different virtual world currencies. During the past few years, due to increasing legal pressure from game operators in the U.S., IGE transferred their operations to the Philippines, but that move has not deterred savvy users from converting their virtual currencies into RMT. Some of the exchange houses (all online) offer gift certificates in addition to the standard virtual currencies. At one time, Guy4Game.com, IGE and IGXE even offered the option of wire transfers. Most offered credit card transactions, and some accepted eChecks. In 2008, Newsweek reported that there were over 200 companies in South Korea alone working in the RMT virtual currency exchange. The transaction costs of these payments are driven down by sheer volume, but this volume is also what allows the laundering of larger sums of money to occur, hidden in micro-payments.

When E-Gold executives were indicted early this year, FBI Cyber Division Assistant Director James Finch stated, *“The advent of new electronic currency systems increases the risk that criminals, and possibly terrorists, will exploit these systems to launder money and transfer funds globally to avoid law enforcement scrutiny and circumvent banking regulations and reporting.”* Finch was not referring just to the gold-backed online currency traders; he was also referring to virtual currencies from virtual worlds and social networking sites.

As far back as 2007, the DOJ issued an unclassified report on Mexican drug cartels that specifically referenced how virtual worlds were being utilized by narco-traffickers to launder proceeds: *“Online role-playing games... afford traffickers a number of unique money laundering opportunities. Drug traffickers can legitimize their income through accounts established with online game companies through the following methods: Selling virtual game items to other players for a credit to their account; the game company periodically settles the account by issuing a legitimate check to the account owner/ launderer for the virtual items sold in the game; Accepting virtual money in exchange for illicit drugs, thereafter receiving a legitimate check from the game company; Maintaining multiple game accounts through which they can buy items*

from and sell items to themselves, in a cyber version of a trade-based money laundering scheme; and selling virtual currency in exchange for real money to other players.”

Until very recently, most legal scholars and legal bloggers have opined that virtual items and currencies are goods or property, and a handful of courts in the U.S. and Europe have agreed. When currency can be converted and used it is no longer a virtual item, however, it is increasingly being viewed as a monetary unit, and the companies that allow for the creation, swapping and conversion of these units are being viewed by regulators and governments as subject to the laws and regulations that govern MSBs.

Sony Online Entertainment discovered a few years ago that one of their users was moving large amounts of money through one of its MMORPGs, and they assumed that he was trying to buy some rare and elusive virtual item. They located the gamer in Europe, who promptly admitted that he was laundering money through the online game (via buying & selling virtual goods). He would move funds from a US account to one in Russia. He told the Sony executives that transferring money through the game was cheaper than using a bank!

While many game developers, such as Blizzard (creator of World of Warcraft), prohibit the practice, it is common that goods and services within virtual economies are sold via online auction sites and traded for real currencies. The practice of gold farming is now being replaced by automated bot farms, and increasingly gold farming companies are facing competition from criminal hacker groups that break into players' and gold farmers' game accounts to steal virtual product for real money value. Virtual goods are some of the most sought-after commodities in the greater hacking community.

In October 2008, Seoul Metropolitan Police Agency arrested a group responsible for laundering money generated by Chinese gold farming from Korea back to the mainland. In a little over 18 months, the group wired \$38 million from Korea to a Hong

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

Kong paper company as payments for purchases. In return, the group took a commission of 3-5% for purchasing the virtual currency in China, reportedly produced by traditional farming as well as viruses, and then cashing out in the Korean market¹.

The South Korean police arrested a hacker in 2003 for using an exploit to trick the game into paying him nearly \$1 million dollars, and in 2007, a Chinese court sentenced a former executive at Chinese online gaming company Shanda Interactive Entertainment Ltd. to five years in prison for virtual embezzlement. Along with two accomplices, the programmer who was in charge of creating assets for the game Legend of Mir II created his own virtual assets without permission, and then sold them for \$260,000.

At one time, Social Gold used this example in their marketing material: *“Large online communities such as Gaia Online, who frequently receive cash-filled envelopes from their community members in exchange for virtual goods, can greatly benefit from a more streamlined online approach to cash-based transactions.”*

So pervasive is virtual crime, the South Koreans now have a unit in their police force to investigate in-game crimes. In 2008, the Korean Cyber Crime Investigation Team fielded over 40,000 complaints—22,000 of which involved activity that occurred in virtual worlds.

Entropia Universe and others have models that allow users to obtain cash benefits from the virtual items they create, acquire and purchase. Live Gamer positions itself as marketplace where users from multiple virtual world platforms can “cash out” their game world items for RMT. Eye On MOGS was the first site to tackle comparison of virtual currency sellers: they offer the opportunity to convert real-life earnings into virtual gold, platinum, ISK or Credits, depending on one’s inhabited virtual world. The Australian gaming company

MMGN recently announced that it intends to launch an online marketplace where gamers can sell virtual goods across multiple video games. The site already attracts 500,000 unique users a month, and that number rises closer to a million during peak times.

However, the danger of facilitating laundering looms large for those companies that offer such services without stringent controls in place to monitor and combat prohibited activities.

Bugs and glitches in game codes can allow for exploits as well. In South Korea, a 22-year old student and an accomplice manipulated a virtual world server before making off with 1.5 billion Won (approximately \$1.2million USD)

“WHILE MANY GAME DEVELOPERS... PROHIBIT THE PRACTICE, IT IS COMMON THAT GOODS AND SERVICES WITHIN VIRTUAL ECONOMIES ARE SOLD VIA ONLINE AUCTION SITES AND TRADED FOR REAL CURRENCIES.”

It is not just U.S. regulators who have begun to take notice and promulgate rules aimed at reining in virtual currencies. In 2009, China said that it would prohibit companies that operate platforms for online virtual-currency transactions from providing services to minors in an effort to prevent abuses. Much like the new FinCen rules [31 CFR Parts 1010 and

¹ <http://www.virtualworldsnews.com/2008/10/group-laundered-38m-in-virtual-currencies-in-18-months.html>

1022], online game operators that issue virtual currencies for use exclusively within closed systems are not intended to be affected by the ban, which affected numerous large platform providers. The Chinese central bank has begun supervising virtual currencies of those perceived as having the ability to affect the value of the Yuan. According to the authorities, “Virtual currency may only be used to buy online game items.” Game operators are required to provide the Ministry of Culture (“MOC”) with information about their virtual currencies; the Chinese government classifies any online currency used to recharge, prepay or purchase points for online game accounts as subject to the regulations. The MOC also vowed to increase supervision on money laundering via virtual credits and other online trading within the gaming world.

In Japan, a new payment services law regulates virtual currency transactions using the benchmark that where “points” have value, they fall under the law.

A recent decision by the South Korean Supreme Court ruled that exchanging virtual currency for real money is legal (albeit subject to taxation) in the country, effectively legitimizing RMT in these games/virtual worlds.

Korea, China and Japan have also lead U.S. courts in applying traditional property law to address theft and abuse matters within these virtual economies. The Chaoyang District People’s Court in Beijing ruled in 2003 that the game company Arctic Ice Technology Development had to restore a gamer’s virtual holdings that had been stolen from him when the game was hacked. The items were valued at RMB 1,140 (US\$138). Additionally, the court ordered Arctic Ice to pay the plaintiff’s court costs. Most interesting of all, the Chinese court cited a Korean law that holds, “*online virtual property holds value independent of the game’s parent company/creator.*” The Chinese and Korean courts determined that there was not a discernible difference between virtual

items held in a virtual world/game from that of funds held in a bank. “*When users associate these objects with values in real world markets, the developer might be liable for loss due to circumstances within its control.*”²

A recent criminal prosecution in the UK of a hacker who helped himself to Zynga’s virtual poker chips would appear to indicate that the UK courts recognize the Zynga virtual currency as legitimate currency, having treated the crime from the perspective that what was done with the virtual chips still constituted real theft and fraud.

Frequently, I encounter verbiage in End User License Agreements (EULAs) that prohibit selling virtual goods that come from the associated game, yet grey market RMT sites like GosuMail abound. Companies can file suit for violations of their Terms of Service or for infringement, but it is an unwinnable game—another version of the ‘whack-a-mole’ game that is played by IP owners for other types of digital content. Many MMORPGS such as RuneScape, World of Warcraft, Guild Wars, Warhammer Online, Lord of the Rings Online and Final Fantasy XI strictly prohibit use of real-world cash to buy gold, items, or any other product linked with the game. Final Fantasy XI and Warhammer Online claim to have task forces dedicated to the removal of real money trading from the game.

When concerns are raised over potential laundering that could occur within Farmville, Zynga points out that players conduct their financial transactions via PayPal. Is this a problem? For PayPal, it is. In 2009, PayPal ran afoul of the Australian Transaction Reports & Analysis Centre (AUSTRAC) for failing to have adequate risk assessment protocols to address money laundering prior to the \$1,000 threshold (in other words, for those transacting under \$1000).

The more virtual currencies are used to purchase real goods and services or are exchanged on sanctioned or recognized virtual currency exchange houses, the more the “play” currency

² http://www.chinadaily.com.cn/en/doc/2003/11/20/content_283094.htm

begins to resemble real world money. The virtual currencies are no longer IP owned by a game company; they become more of a parallel currency, subject to the same rules and risks of real world currency systems. Facebook claims that they aim to make their Credits (their virtual currency) an “international virtual currency³ [analogous to] Europe’s euro.” If this is comes to pass, the only thing that could make it truly global and truly successful would be users’ ability to cash it out or take it outside of the Facebook platform. Facebook also claims to monitor the Internet to ensure that a secondary market for Facebook Credits does not materialize.

What should game counsel be considering when evaluating these new FinCEN rules, identifying emerging laws in countries outside of the U.S. where the game is used, and contemplating the potential results of future company growth?

Examine the landscape in which you are currently operating (and where the company hopes to develop). Will you be offering virtual currencies that cross platforms or will they be bought, sold, or traded across borders? What anti-money laundering (AML) provisions and controls do you currently have in place to comply with the BSA?

Some companies will say that their currencies are converted to RMT by third-party payment processors, and that they have nothing to worry about. Do not rely entirely on your third party payment system to monitor your game’s users and environment. It is not PayPal or any third-party’s top priority to identify your company’s risks. Payment processors like the major credit card companies boast robust AML monitoring systems. Partnering with them and assigning designated people from your side who can work directly with those processors to help identify questionable activities is key. However, if you are also dealing with foreign payment processors such as those located in China, Brazil and other locales abroad, higher risk ratings must be attached to those transactions, because many

countries, whilst paying lip service to stringent AML laws and controls, do not have or utilize strong AML monitoring.

SOME OTHER BEST PRACTICES TO CONSIDER ARE:

- › Sales of digital goods are often for small amounts of money, typically only one or two dollars. Although many game companies may utilize some sort of fraud detection service or outside monitoring firm, the charges for the service is often on a per-transaction basis. Companies tend to set their transaction values too high and skip scans for low-cost purchases, whilst others wait 24 or 48 hours so that they can process several transactions at once (either missing critical data that would help them identify laundering activities, or failing to see connections due to the delayed processing). Revisit your thresholds and parameters to determine if the sieve mesh is too wide.
- › In acquiring foreign-based game companies, are you importing greater risks into your U.S. entity due to fewer strictures that governed the company pre-acquisition?
- › Do you possess the capability to perform complex data analytics on financial transactions with your game’s currency? If you are using a virtual currency application programming interface (API), work with specialists who can help you better utilize it to conduct complex analytics and laundering and fraud detection.
 - » Most game companies will argue that it is too expensive and too time-consuming to enable such data analytics, but it was not long ago that banks, casinos and MSBs made the same arguments. Detection is extremely difficult when there are hundreds of thousands of transactions are being conducted, primarily in under-\$20 increments.

³ Deborah Liu, product marketer on the Facebook Developer Network team, at the Virtual Goods Summit, San Francisco, XX 2011.

Sophisticated detection/data analytics software is required; the alternative laundering charges can be even more costly.

- › Do you have clear and strict controls, monitoring and enforcement that do not allow your game's currency to be traded in the RMT market?
- › Are you able to monitor for off-shore gold-farming or other exploitation of your game's currency?
 - » Consider hiring third-party AML compliance specialists to assist you in reviewing your current policies and procedures as well as in helping to construct monitoring systems that are unique to the gaming business and game users/subscribers.
- › Do you regularly perform due diligence on your partners, including coding, distribution, game/online network partners, foreign entities?
- › Have you held frank discussions with your chief growth strategists, boards, investment advisors and business development teams—are there plans to roll out across borders; deals in development that envision acquiring foreign game operations; are you acquiring or expanding your game's digital currency across platforms to make it easier for users to spend their virtual currencies with outside vendors or out-of-system hosts?
- › Have you ensured that your company has sufficiently sophisticated mechanisms to log activities and reconstruct events that have occurred to both (a) demonstrate that the company was taking proactive steps to combat misuse of its currency and virtual environment and that (b) the user, having identified a hitherto unknown exploit or backdoor, violated the EULA and (possibly) hacked the game code or servers, thereby positioning your company as a victim?

- › Have you formed a committee of internal stakeholders who meet to discuss and examine potential issues—corporate security (the company face to law enforcement), programming, marketing, business development, vendor relations?
 - » Are you already working with your financial institutions and payment providers? They need to understand your business model. Be prepared for some institutions to consider your business to be of higher risk because you allow for virtual currency activities. In 2008, the U.K.-based Halifax Bank began to block all payments to Blizzard Entertainment as stolen credit cards were becoming the standard means of paying for users' subscriptions to the game. You do not want to discover that your bank has closed accounts because you have not maintained an open dialogue with them.

It has been anathema for many companies, founded or run by those steeped in the open-source culture, to try to maintain substantive control over these typically organically-grown virtual communities, citizens of which write many of their own rules and develop their own in-game "laws of the land." Most game companies resist the tendency toward omniscience over their virtual worlds. Quite the contrary, most have been keen to stay at some remove, as the perception of freedom is one of the lures for participants in virtual worlds. However, exploitations, the growth of gold-farming, and cross-platform trading of game currencies and RMT have led to the legitimization of these virtual currencies as forms of legal tender, and thus greater risks for game-host companies who may be held responsible for the transactions that occur with the currencies of their games outside of the virtual world for which they were originally intended. When flaws in the underlying code allow for unintended exploits and the result is the potential for the exploit to be converted via sales of

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

virtual goods into RMT, under certain circumstances game companies may be held responsible for facilitating laundering. Such scenarios have already occurred in a number of instances where users have identified exploits and proceeded to turn them into substantial profit, in some instances clearing thousands of dollars in sales.

Virtual world and game host companies must be more proactive. With many companies currently being acquired by larger ones, and others floating IPOs, compliance programs need to grow ahead of the company—not behind it.

The line between the real and virtual world is becoming increasingly blurred as hand-held devices which can now effectively facilitate relatively complex financial transactions, virtual banking, mobile banking and mobile payments become commonplace. With the growth of virtual currencies and the platforms on which to convert them to RMT and the outlets that accept virtual currencies as payment for real-world goods expands, game companies must become significantly more sophisticated in terms of their compliance, their controls, and their behavior. Game companies are on the precipice of becoming MSBs, and with that development will come a host of regulations that should significantly alter how these businesses conduct themselves.

AUTHOR PROFILE

MIKHAIL REIDER-GORDON

As a Director in Navigant's Disputes & Investigations practice, **Mikhail Reider-Gordon's** practice focuses on the Foreign Corrupt Practices Act (FCPA) and the anti-corruption regime, municipal public corruption, anti-money laundering, regulatory and corporate ethics compliance, and white-collar crime matters, including the theft of trade secrets.

With 25 years of experience, she is accustomed to assisting entities and individuals on extremely sensitive, and high profile matters, directing investigation teams both nationally and globally. Ms. Gordon currently serves as Co-Chair of the American Bar Association (ABA) International Law Section's Anti-Money Laundering Committee; Vice-Chair of the section's Anti-Corruption Committee; and as the Criminal Justice liaison for the International Law Section. She is a frequent lecturer on anti-corruption, money-laundering and white-collar crime topics.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

WAGER-BASED ONLINE GAMING AND THE U.S. MARKET



Melissa Riahei

AN INTERVIEW WITH MELISSA M. RIAHEI

EXECUTIVE VICE PRESIDENT AND GENERAL
COUNSEL OF U.S. DIGITAL GAMING, INC.

Melissa Riahei joined Beverly Hills-based US Digital Gaming in 2011, after serving as General Counsel to the Illinois Lottery. Melissa's legal efforts on behalf of that Lottery are widely recognized as the key driver behind the US Department of Justice's recent reinterpretation of the Wire Act—a monumental reversal that unlocked the gate to legalization of wager-based online gaming in the United States.

Jimmy Nguyen, a partner at Davis Wright Tremaine LLP, represents clients involved in the online gaming industry. He spoke to Melissa about this emerging multi-billion dollar industry for the U.S., where the American regulatory landscape is heading, and what future business opportunities this presents for media and entertainment businesses.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING
& THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE

WHAT EXACTLY IS “WAGER-BASED ONLINE GAMING”?

Playing an online game that contains the elements of consideration (generally in the form of money), chance, and prize is considered wager-based online gaming, or online gambling. Online gambling exploded into a multi-billion dollar industry worldwide, and provides a core form of entertainment for millions of people who use their computers and web-based mobile devices to play digital versions of traditional casino games such as peer-to-peer poker, black jack, roulette, slots, etc., as well as online lottery games.

HOW DID YOU GET INVOLVED IN “ONLINE GAMING”?

I was introduced to the gaming industry in 2007, when I left my position as a litigator at a large Chicago law firm to accept an invitation to join the Governor’s Office in Illinois. Land-based gaming is a significant industry in Illinois and provides a sizable portion of the state’s revenue. One of the most important gaming assets to the state is its Lottery, which operates as an arm of state government, and generates in excess of \$2.2 billion annually. As Deputy Chief Counsel to the Governor, one of my responsibilities was overseeing the operations of the Illinois Lottery.

In 2009, Illinois found itself in an unprecedented fiscal crisis, and there was an

urgent need to stimulate the economy and create jobs. The Governor and the legislature worked on a “capital projects” bill aimed at creating over 400,000 jobs, and needed a revenue source to fund the bill. They turned to the Lottery as a primary funding mechanism.

The challenge we faced was that Lottery revenues, while significant, remained stagnant over the years. This was primarily because the existing distribution channels for lottery products were limited to land-based retailers, mainly convenience stores, which catered to an aging and lower socio-economic demographic. To increase revenues, we needed to broaden and diversify our player base. We believed that the key to doing that was to offer lottery games on the Internet. Utilizing the Internet and web-based mobile devices as a distribution channel would allow us to capture a larger and more affluent segment of the population who made their everyday purchases on the Internet. Also, utilizing the Internet as a new gaming medium with exciting audio, visual, and interactive capabilities would render the games more appealing to a younger demographic of adult players.

The Lottery was one of the few industries in the United States that had not yet entered the digital age, and our projections indicated that the state could raise hundreds of millions of dollars by simply allowing the Lottery to provide its games online. There was just one minor problem — the U.S. Department of Justice’s longstanding ban on Internet gambling in the United States.

WHAT EXACTLY WAS THE DEPARTMENT OF JUSTICE’S POSITION ON THE ISSUE?

Despite the fact that online gambling is a legal, regulated and taxed form of entertainment in over 85 nations worldwide — including Italy, France, the United Kingdom, and Canada — the U.S. Department of Justice had for years taken the position that any form of wagering on the Internet was illegal under federal law. In fact, in a letter sent to Illinois in 2005, the DOJ made clear that even if the state specifically authorized online gambling, and limited it to individuals located within state boundaries, that the DOJ would consider that a violation of federal law. Since the use of the Internet inevitably involved the routing of data across state lines, the activity invoked federal jurisdiction.

The DOJ’s prohibition of online wagering was based on its interpretation of the Wire Act (18 U.S.C. § 1081, et. seq.), a federal bill enacted in 1961, at a time when no one contemplated the use of the Internet or wireless communication devices for wagering purposes. The Wire Act was actually enacted to assist the states with the enforcement of their own laws relating to bookmaking and organized crime. On its face, it prohibited the use of wire communications to transmit in interstate or in foreign commerce wagering information “on any sporting event or contest...” Nevertheless, the U.S. Department of Justice interpreted it to apply to *intrastate* wagering, and on any game or contest — not just sports betting.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

While online gambling was considered illegal in the U.S., millions of Americans were still gambling billions of dollars on illegal off shore sites each year, playing online poker, casino games, and lottery games. A report published by Morgan Stanley estimated the illegal online gambling market in the US was \$5.4 billion in 2009. Due to a lack of regulation, however, billions of dollars were unnecessarily leaking from the U.S. economy to illegal offshore gambling operators who served U.S. players, and states were handcuffed from capturing that revenue because of the prohibition on online gambling.

HOW DID YOU DEAL WITH THE DEPARTMENT OF JUSTICE'S BAN ON INTERNET GAMING?

We determined that it was time to urge the Department of Justice to reconsider its interpretation of the Wire Act. At the time, there were 43 states across the nation experiencing budget shortfalls, and there were billions of dollars that could be captured by state governments to fund essential government services simply by legalizing and regulating an activity that was already occurring, so we challenged the DOJ's interpretation by enacting state legislation authorizing the sale of lottery tickets online – the first legislation of its kind in the nation.

Simultaneously, we devised a strategic plan to inform the DOJ of our Internet gaming program, and to persuade the DOJ to reconsider its interpretation of the Wire Act. I was the individual tasked with leading that effort on behalf of the State of Illinois. To that end, I quickly became an expert on all aspects of online gaming, from technological issues pertaining to geo-location and age-verification, to the relevant legal landscape nationally and internationally, as well as the public policy implications of legalization of online gambling in the US. The process was long and arduous, entailing the preparation of a comprehensive White Paper, and numerous meetings over the course of a year, with top officials from the U.S. Department of Justice.

WHAT WAS THE RESULT OF THAT PROCESS?

After careful maneuvering through a complicated legal and political maze, I'm pleased to say that we were ultimately successful in convincing the Department of Justice to reconsider its interpretation of the Wire Act. On December 23, 2011, in unprecedented reversal that forever changed the gaming landscape in the United States, the DOJ held that contrary to its previous interpretation, **the Wire Act does not apply to any form of online gambling other than sports betting**. As a result, the federal barrier that, for decades, paralyzed states from moving forward with enacting online gambling legislation was removed.

WHAT HAS BEEN THE IMPACT OF DOJ'S ASTONISHING REVERSAL?

Since the Department of Justice's reversal, we have seen significant movement towards the legalization of online gambling on a state-by-state basis. First and foremost, Illinois became the first state in the nation to offer its lottery products for sale on the Internet. Nevada moved on regulations pertaining to online poker, and is now in the process of licensing online gaming operators. Just weeks ago, Delaware, the second smallest state in the nation, became the first to legalize full-scale online lottery and casino gaming. By 2013, Delaware residents will be able

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ALLOWING THE
LOTTERY TO
PROVIDE ITS
GAMES ONLINE.”

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING
& THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE

to enjoy all forms of online casino gaming, including poker, black jack, roulette and lottery games from their computers and mobile devices. In addition, several other states including California, Iowa, and New Jersey, introduced different variations of online gaming legislation. And surprisingly, a state with no form of land-based gaming whatsoever, Hawaii, introduced a bill to create an “Internet only” state Lottery, authorized to offer online poker, casino and lottery games. There have also been efforts to pass federal legislation authorizing online gambling on a national level.

I believe that over the next few years, we will see a domino effect, with state after state legalizing, regulating and deriving revenue from various forms of online gambling – creating a legal, vibrant, multi-billion dollar online entertainment industry.

ing the weather, checking stock prices, checking the news, a poker player’s eyeballs are focused on the gaming web-site for several hours at a time. Individuals who gamble online are generally younger, educated, and affluent. This provides the perfect opportunity to utilize the gaming platform for branding, advertising, distribution, and e-commerce. Through the proper use of social media, a community can be created around gaming that can be monetized in various ways.

Until now, the Internet gambling market has been conducted by illegal enterprises, and as such, there has been no opportunity for legitimate U.S. companies to be involved. In a legal, regulated market, media and entertainment business will be able to take full advantage of this emerging industry.

As various states legalize, we will focus on leveraging our advanced technology platform, creative content, and strategic partnerships to deliver a customizable, cross-platform gaming solution that integrates a full suite of consumer facing games and the “back of house” transactional infrastructure to operate legal online gaming sites across the country. This is a very exciting time in the birth of a significant industry, and we’re very happy to be helping shape the landscape.

WHAT FUTURE BUSINESS OPPORTUNITIES WILL LEGALIZATION OF ONLINE GAMING PROVIDE FOR MEDIA AND ENTERTAINMENT BUSINESSES?

The legalization of online gaming gives rise to a whole new advertising and distribution platform for media and entertainment companies, and the opportunities it presents are boundless. As of April 2011, there were approximately 10 million Americans spending hours a day playing Internet poker. While a general Internet user spends only minutes on each web-site check-

WHAT ROLE WILL YOUR COMPANY U.S. DIGITAL GAMING PLAY IN THIS SPACE?

US Digital Gaming is currently working with legislators and gaming stakeholders in each state to shape the regulatory landscape for this emerging market. Our company is comprised of veteran leaders and pioneers in the gaming, technology and entertainment industries. Our industry expertise, coupled with our legal and political knowledge, makes us uniquely suited to assist decision makers as they chart a course for the legalization of online gaming in the United States.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

PLAYING FOR KEEPS: THE BRANDING GAME

By Paula Jill Krasny

Who would have thought that over three decades ago, when the Pac-Man video game was first released, gaming would become an international social phenomenon that dramatically changed our behavior? Who would have thought that Wii or PlayStation gaming equipment would replace fishing poles and golf clubs as father-son bonding tools? Or that today's youth would prefer to watch international gaming competitions around the clock instead of attending an afternoon baseball game at Wrigley Field or Fenway Park? Or that a mother would actually encourage her children to play video games to acquire the manual dexterity necessary to become a top surgeon, or that the US military would use video games to train pilots? Video games are here to stay; they are not a passing fad or trend.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

Given the intense competition, continued growth and ever-increasing profits associated with the gaming industry, branding is of exponential importance. Brands such as Nintendo, Atari, Pokémon and Mario have become household names throughout the world. Accordingly, these names and characters carry considerable goodwill, value, or brand equity for their respective owners.

WHY ARE BRANDS IMPORTANT?

Brands are like labels; they help consumers identify and distinguish one product from another. Companies spend millions of dollars so that consumers think of their brand name and buy their products, as opposed to their competitors’.

Brands also carry messages – sometimes intended, and sometimes not – about the quality of the products and services sold under their name. For example, positive associations with brands, such as outstanding corporate social responsibility, can cause like-minded people to buy Starbucks coffee and TOMS shoes. By contrast, Ford Motor Company retired the Pinto brand name when the cars’ reputation plummeted amidst the negative press and lawsuits associated with the safety of the cars’ gas tanks. Similarly, in the gaming world, the name “Call of Duty” connotes a military- or war-based game, while “Wii” has a reputation as a console for non-violent games.

Frequently, a brand is a company’s most valuable asset. When extended to various product lines, often through licensing, a brand can represent a huge revenue generator. In order to maintain and even increase the value of a brand, the brand owner must protect it. If a product has a poor reputation in the marketplace, is low-quality, or is frequently knocked-off, then the value of brand associated with it decreases.

Brands are protected by “trademarks,” which is a legal name for a “brand.” Trademarks, like labels, indicate the source of a product and distinguish one product from another. Names, logos, certain designs and sounds all can function as trademarks. A myriad of brands in the gaming industry (a/k/a “eSports”) are entitled to protection, ranging from the names of companies (e.g., Sega), consoles (e.g., Playstation3), games (e.g., Call of Duty: Modern Warfare), characters (e.g., Mario), arcades (e.g., Dave & Busters), stations (e.g., G4TV), gaming retailers (e.g., GameStop), eSports competitions (e.g., Dreamhack) and even gaming aliases (e.g., Fatal1ty). In addition to logos, images of characters often can be protected as trademarks. In some cases, sounds emitted from games and certain trade dress formats, i.e., the overall look of a product, also are protected under the trademark laws.

HOW TO PROTECT BRANDS AS TRADEMARKS

Trademarks are territorial. This means that they are protected on a country-by-country basis. US trademark rights do not extend to Mexico, China, Europe or any other country or region. Therefore, to the extent the market for a product is international, the brand must be protected not only in the US, but also abroad.

Trademark rights can arise in two ways – through use, and through registration. In “common law” countries, such as the United States and Canada, where law is made through legal precedent, trademark rights accrue through actual use of the mark in commerce. In countries whose legal systems are more code than case-law oriented, i.e., “civil law” countries, trademark rights emanate from the trademark registration itself. The first set of countries are called “first-to-use jurisdictions,” and the second are “first-to-file jurisdictions,” meaning that if there is no trademark filing, then no trademark rights have been established.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

Even though trademark rights arise from use in common law countries, it is still important to obtain a trademark registration. In the US, a trademark registration gives the trademark owner nationwide rights to the mark, the important legal presumptions of the validity of the mark and registration, and the exclusive right to use the registered mark on or in connection with the goods or services specified in the certificate (subject to any limitations set forth in the certificate). A US trademark filing can also be a basis for securing an earlier filing date in other countries, and it can function as the basis for an application filing under an international trademark registration regime named the Madrid Protocol.

Because trademark rights are territorial, the brand owner must first make sure that it can actually use its mark in each country where it seeks protection without infringing any third party trademark or other intellectual property rights. The mark should also be culturally acceptable in the countries where it will be registered and used. Accordingly, before adopting a mark, the owner should make sure that the mark has been fully vetted and cleared.

Trademark clearance consists of a trademark professional, typically a lawyer, rendering an opinion on the strength and availability of the mark, based on a trademark search report. It is not enough to simply conduct an Internet search and see whether anyone is already using your proposed mark. Allocating and investing resources early in the process to properly clear a trademark is much more cost-effective than selecting a new mark while also potentially needing to recall, alter and/or destroy product, change packaging and marketing collateral, and pay damages.

To obtain a trademark registration, an application is filed with the relevant trademark office(s). The examination process varies from country to country. If the mark passes examination, and no one opposes

registration of the mark, then a registration certificate issues. If the mark is not used (typically for a period of 3 or 5 years after registration), in both first-to-file and first-to-use jurisdictions, the registration becomes vulnerable to cancellation. In addition, a few countries, including the US, require the trademark owner to prove to the trademark office that the mark is in use after a certain number of years, or else that registration will be cancelled. In most countries, the registration is valid for ten years, and must be renewed every ten years.

“ A FEW YEARS AGO, NO ONE HAD HEARD OF THE NAME MINECRAFT, A GAME WHICH, AS OF AUGUST 28, 2012, BOASTS NEARLY 39 MILLION REGISTERED USERS – A “COUNTRY” OF PLAYERS WITH A POPULATION LARGER THAN CANADA. ”

SETTING PRIORITIES

When devising a trademark registration and protection program, priorities must be set. Not every creator in the gaming industry possesses the resources necessary to establish a global trademark filing program. For example, many games are initially created by inde-

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

pendent developers, but are later bought by larger companies; to the extent that the developer has a brand that is “good” from a marketing standpoint and is protected or protectable, the value (and, presumably, acceptable purchase price) of the game increases. In today’s economic climate, even some larger companies may not want to invest significant sums of money into protecting a brand without some reassurance that the game in question, and hopefully its ancillary products, will be profitable.

Brands in gaming can take off like wildfire, given that most games and competitions occur in real-time online. A few years ago, no one had heard of the name Minecraft, a game which, as of August 28, 2012, boasts nearly 39 million registered users – a “country” of players with a population larger than Canada. Today, not everyone is aware of the Binding of Isaac game (released approximately a year ago), but in a year or two, it could grow into a well-known global gaming brand on par with the Legend of Zelda.

Therefore, regardless of the size of the brand owner, its filing strategy must be well-planned, as seemingly minor decisions may affect the overall value of the brand. Even though an enterprise may not initially have the resources necessary to engage a global trademark filing program, it can start by filing applications in its key market(s). As the enterprise secures more funding, it can expand its filing program, and there are various filing strategies that can be used to help contain costs as the program grows. Since various complexities and strategies exist when selecting and protecting trademarks, one should confer with trademark counsel to devise and implement a workable strategy to protect the brands associated with video games.

AUTHOR PROFILE

PAULA KRASNY



An internationally renowned branding lawyer, **Paula** has been practicing intellectual property law for 25 years. Her clients’ brands are household names. Paula works with clients to realize maximum value from their brands through licensing arrangements, acquisitions, dispositions and restructurings. She also manages clients’ intellectual property portfolios through the selection and clearance of marks, the strategic registration of marks internationally and the global enforcement of brands.

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pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE



IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

Adapted from an Interview with Kerry Hopkins

Kerry Hopkins, Senior Director, Intellectual Property at Electronic Arts, Inc., worked as an IP manager in the video game industry at Sony Computer Entertainment America before and during law school. In 2006, when Electronic Arts' then-Director of IP enforcement planned to retire, she called Kerry to see if she was interested in joining EA. At the time, Kerry worked in Reed Smith's IP litigation group, and while she enjoyed her life in a law firm, she could not pass up the opportunity to return to the gaming industry.

On a day-to-day basis, Kerry performs a variety of IP-related and public policy work, which ensures that her day remains

interesting. A substantial part of her job involves supporting her team on IP enforcement and protection matters. Most of EA's enforcement efforts relate to online infringement, and range from an app that used EA's logos and game content without authorization, to a website phishing the company's customers' account information, to more traditional infringement of the business' brands. On any given day, she could advise EA's business units that are considering new technology or partnerships, provide IP diligence support to the company's mergers and acquisitions team, or review a marketing concept or game content for IP clearance. Although the gaming industry does not traditionally focus on patents, that paradigm is swiftly changing, and EA is in the process of growing their patent mining program. Kerry serves as the lead for the legal group on public policy matters, and thus represents EA on very diverse issues ranging from accessibility to energy.

However, her life is not all work, and no play – how could it be for a gaming attorney? Kerry says that she has about 50 online games going at any time. Her job requires that she keep up on video games (both EA's and the competitors'),

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

the business, and the technology. She notes that it would be impossible to give good business advice on issues like trademark clearance and brand building, or even analyze potential copyright infringement, without a good sense of the products in the market. With the game industry, and EA specifically, swiftly expanding from traditional gaming platforms to social, casual, mobile and other online and digital channels, more new content exists than in any prior era, and it must all be monitored now more than ever. In other words, Kerry gets paid to play games and keep herself as up-to-date as possible on social and mobile game trends.

Kerry's work life does require some more traditional lawyering, such as keeping up on the most recent developments in case law that affect her field. She notes that one case she has been following is last year's Ninth Circuit decision in *MDY v. Blizzard* [see the article at page 29 for more detail] which she notes provided a new level of clarity relating to the scope of U.S. copyright law and the DMCA. However, Kerry is concerned that the decision also, "left some questions on third party liability for interfering with terms of use." Other issues she identifies as front-and-center for the business are user-generated content, including liability for users uploading infringing content on game services; scope of copyright to protect against game "clones" and "fast follows"; protection of trademarks in the new gTLD world; and legislative and voluntary solutions to tackle online piracy of games. The scope of the right of publicity in games is a hot topic for EA, particularly now that the U.S. Supreme Court has ruled that games are expressive works deserving of full protection under the First Amendment.

While the gaming industry is still predominantly male, Kerry attributes her success to the incredible opportunities she has been offered, often by male management. She started her career in the game industry during the mid-90s as an administrative contractor for Sony's legal department. Fifteen years later, she manages the Intellectual Property legal department for one of the world's most successful game companies. She attributes her ability to take steps that would lead her to a leadership role in the industry to the encouragement provided by her male colleagues. Says Kerry, "My experience isn't unusual for men or women in the game industry, which says a lot for how the industry values its employees of either gender." She also notes that the level of passion that people in the gaming industry have for their product is what makes the industry so great. She notes, "No other product combines software, technology, content

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The level of passion that people in the gaming industry have for their product is what makes the industry so great.
”

and branding the way games do, which makes it an exciting place for an Intellectual Property lawyer!”

Her advice to outside counsel? "Give me practical advice." In house attorneys want help finding solutions that make sense. She notes, "don't just explain the law; explain how it impacts EA." Kerry also observed that too often, outside counsel switch to autopilot and fail to consider the specific needs of or impact of their advice on the client. She says that understanding your in-house counterpart's tolerance for risk, costs, and effort is key to keeping them happy and getting the job done.

What about her advice to young lawyers who want to break into the gaming industry? "Young lawyers should take a few years to develop strong skills at a firm before seeking to move to an in-house role," Kerry says. Her advice is to build relationships with partners in your firm. Many of EA's new hires are recommended by trusted outside counsel or other law firm contacts. She commented that bigger game companies typically hire lawyers to work with specific business units or in specialized functions. Start-up game companies hire counsel to be a "jack-of-all-trades." There are advantages and disadvantages to both, so any interested applicant should know which they prefer.

Kerry says that in the next five years, she sees herself staying with EA. As she looks back on how much her role at EA grew and changed over the past five years, she can see all the times she was able to provide her own team the same types of chances she was offered to develop skills and take on new responsibilities. She hopes that the next five will continue to allow her to do the same for others and reinvent her own role at EA as the industry itself continues its transition into the next generation.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

THE INTERSECTION BETWEEN CONTRACT & COPYRIGHT LAW: EXAMINING MDY INDUSTRIES, LLC V. BLIZZARD ENTERTAINMENT, INC. AND ITS IMPACT ON SOFTWARE LICENSES

Insights Staff

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

**REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES**

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

**THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW**

pg. 6 to 11

**DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA**

pg. 19 to 22

**WAGER-BASED ONLINE GAMING
& THE U.S. MARKET**

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

**PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE**



As a general matter, a licensee under a software license infringes the copyright to the licensed software if said licensee exceeds the scope of the license. Scope is defined by conditions to the application of the licensed rights. When a licensee exceeds the scope of the license, copyright infringement remedies become available. Conversely, independent contractual covenants are not limitations on the scope of the license, and thus violation of such covenants gives rise only to breach of contract remedies.

For example, if the license agreement states, “*Subject to and **conditioned on** Licensee’s compliance with the royalty payment obligations of this agreement, Licensee is granted a license to use, copy, distribute, [etc.]*,” then violation of the payment obligation qualifies as a failure of satisfaction of the condition of the license, and thus amounts to copyright infringement. However, if the license agreement omits the italicized portion quoted above, so that payment of royalties is not an express condition of the license, then the licensee’s failure to pay would entitle the licensor to a claim breach of contract but would not give rise to a claim of copyright infringement.

Copyright law allows for recovery of lost profits or a reasonable royalty, as well as statutory damages (even where concrete proof of harm may be lacking) and attorneys’ fees in exceptional cases. Injunctive relief is commonly awarded in copyright infringement cases and is expedited by the irreparable harm presumption that applies if the plaintiff is likely to succeed on the merits of the copyright infringement claim. Conversely, remedies for breach of contract do not include injunctive relief, and are available only against parties to the contract—if a party is lacking privity, he is not subject

to contract claims. Furthermore, breach of contract remedies are generally limited to direct economic loss.

In December 2010, the Court of Appeals for the Ninth Circuit issued a ruling in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, in which the court interpreted a new rule that a contract obligation will be considered a license condition only if the obligation contains a “nexus” to the exclusive rights accorded to the copyright owner via the U.S. Copyright Act. The Ninth Circuit’s reasoning renders licenses mere contract covenants and not conditions that are limiting the license scope, foreclosing the possibility of copyright remedies, if they are not mere restatements of a copyright owners exclusive rights. By requiring license conditions to be restatements of the copyright holder’s exclusive rights under copyright in order for breach of such conditions to trigger copyright remedies, the Ninth Circuit essentially rendered conditions meaningless and eliminated an important tool copyright owners long enjoyed to control the use and distribution of their works.

The *MDY Industries* case concerns Blizzard Entertainment’s popular multiplayer online role-playing game World of Warcraft [WOW] and a “bot” [software cheat program] created by MDY Industries. The bot allows players to automatically gain virtual currency and increase points so that the need to play through all of the levels of the game in order to amass advanced powers, armor, and weapons is eliminated. Blizzard claimed that MDY’s bot program constituted a violation of the game service’s terms of use which all players must agree to prior to installing the client- side software needed to connect to the Blizzard game servers. Blizzard alleged that by inducing players to violate the terms of use, MDY was encouraging players to infringe the copyright to the client-side program by exceeding the scope of the license contained in the terms of use.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

Blizzard’s terms of use contained the following restrictions (“Limitations on Your Use of the Service”):

You agree that you will not... (ii) create or use cheats, bots, “mods,” and/or hacks, or any other third-party software designed to modify the World of Warcraft experience; or (iii) use any third-party software that intercepts, “mines,” or otherwise collects information from or through the Program or Service.

The court analyzed whether use of the MDY bot exceeded the scope of the license Blizzard granted in the terms of use, which would constitute copyright infringement.

As a pure drafting matter, the authors of the Blizzard terms of use (as they existed at the time) failed to draft the anti-bot restrictions as conditions to the license to use the software. The Ninth Circuit stated that nowhere in the terms of use was there any statement conditioning use or access of the software on compliance with any anti-bot requirement on the part of the user. Given state law’s preference against conditions, the Ninth Circuit could have based its decision on the deficient drafting of the Blizzard terms of use and ended its analysis there.

However, the court did not rest its decision solely on its construction of the terms of use. Instead, the court handed down a new requirement that contractual terms must have a “nexus” to copyright’s exclusive rights of reproduction, distribution, or the creation of derivative works in order for such terms to be considered license conditions. To recover for copyright infringement based on breach of a license agreement:

- 1) the copying must exceed the scope of the defendant’s license and
- 2) the copyright owner’s complaint must be grounded in an exclusive right of copyright (for example, unlawful reproduction).

The court noted that some of the Blizzard terms of use were “grounded” in Blizzard’s exclusive rights of copyright, and others (the anti-bot obligation) were not.

For example, Terms of Use § 4(D) forbids creation of derivative works based on WOW without Blizzard’s consent. A player who violates this prohibition would exceed the scope of her license and violate one of Blizzard’s exclusive rights under the Copyright Act. In contrast, Term of Use § 4(C) (ii) prohibits a player’s disruption of another player’s game experience. A player might violate this prohibition while playing the game by harassing another player with unsolicited instant messages. Although this conduct may violate the contractual covenants with Blizzard, it would not violate any of Blizzard’s exclusive rights of copyright.

The anti-bot provisions at issue in this case, are similarly covenants rather than conditions. A bot user violates the covenants with Blizzard, but does not commit copyright infringement because the bot does not infringe any of Blizzard’s exclusive rights. By way of illustration, the use does not alter or copy WOW software.

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FOR A LICENSEE’S VIOLATION
OF A CONTRACT TO CONSTITUTE
COPYRIGHT INFRINGEMENT,
THERE MUST BE A “NEXUS” BE-
TWEEN THE CONDITION AND THE
LICENSOR’S EXCLUSIVE RIGHTS
OF COPYRIGHT.

”

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING
& THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE

The court justified its reasoning by saying that were they to hold otherwise, any software copyright holder could label any disfavored conduct during software use as copyright infringement, by conditioning the license on the player's refraining from the unwanted conduct. The rationale would be that because the conduct occurs while the player's computer is copying the software code in order for it to run, the violation is copyright infringement. This would allow software copyright owners greater rights than Congress conferred on copyright owners.

Consequently, the appellate court held that for a licensee's violation of a contract to constitute copyright infringement, there must be a "nexus" between the condition and the licensor's exclusive rights of copyright. It reversed the district court's \$6.5 million judgment and award of injunctive relief in favor of Blizzard, concluding that MDY may have induced breach of contract but it did not encourage copyright infringement.

SO, WHAT'S THE IMPACT?

The law in the Ninth Circuit is now such that the only contractual "conditions" whose violation is the appropriate subject of copyright remedies are those in which a violation would result in a claim for copyright infringement in the absence of a license. So, the act constituting a violation of the contractual restriction must also qualify as an independent infringement of one of the exclusive rights of copyright for that restriction to be deemed a condition limiting in scope.

Under this reasoning, breach will result in copyright recovery only for conditions that are essentially restatements of the copyright owner's exclusive rights. This is a more restrictive view of license conditions, and effectively renders them redundant.

For example, the prohibition in Blizzard's terms of use on the creation of derivative works is a proper "condition" of the license. A license stating, "I grant you the right to reproduce and perform this work, provided that you do not create derivative works," contains a license condition (prohibiting derivatives), the breach of which is compensable by copyright only because breach also amounts to direct copyright infringement, in that creating derivative works is one of the exclusive rights under the Copyright Act. In fact, conditioning reproduction and performance rights on refraining from creating derivative works is unnecessary; the right to create derivative works need only be omitted from the license grant, since it is an exclusive right granted to the copyright holder in the Copyright Act.

Conversely, if the license states, "I grant you the right to reproduce, perform, and make derivative works, provided that [you do x]," the license does not contain a condition redressable by copyright unless violation of "x" itself infringes one of the exclusive rights granted the copyright owner. If "x" is, "preserve copyright notices in any and all copies and give credit to the original developers of this code", or "license derivative works under the same terms", the Ninth Circuit would hold that "x" is a contractual covenant because violation of "x" is not an exclusive right of copyright. It is important to note here that if certain terms are not redressable via copyright remedies, regardless of how those conditions are drafted, they will not give rise to a copyright infringement claim.

What if x is "pay me royalties"? Can a copyright owner in a license agreement condition the license on payment of royalties, such that failure to pay results in copyright infringement? Right to payment is not one of the exclusive rights granted to the copyright owner. Yet, it is fairly settled law that failure to pay royalties can be considered to exceed the scope of a license, entitling the copyright owner to copyright infringement remedies.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

The Ninth Circuit summarily disposed of this rather inconvenient fact in a footnote by dismissing payment as a singular, one-off exception:

A licensee arguably may commit copyright infringement by continuing to use the licensed work while failing to make required payments, even though a failure to make payments otherwise lacks a nexus to the licensor's exclusive statutory rights. We view payment as sui generis, however, because of the distinct nexus between payment and all commercial copyright licenses, not just those concerning software.

In this footnote, the court explains why breach of payment conditions are compensable via copyright remedies but breach of all other conditions that are not restatements of rights under copyright are not. The Ninth Circuit's ruling establishes that only royalty payment obligations in licenses should be redressed through copyright remedies.

CONCLUSION

The Ninth Circuit's holding in *MDY Industries* is significant, in that drafters need to be aware of how they are drafting their client's licenses. Violation of conditions does not itself constitute an infringement of one of the exclusive rights of copyright. Under the Ninth Circuit's ruling, breach of a condition that is not an exclusive right afforded by the Copyright Act is redressable only through contract remedies against those in direct privity with the licensor, and recovery would be limited to direct compensatory damages. Drafters should be aware of this when crafting a license for a client, and when seeking redress for certain violations of a license so that he or she may advise the client appropriately. As we all know, breach of contract remedies can be far less than some copyright infringement damages, and clients must know this before deciding on a course of action.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING
& THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

By Cassandra S. Franklin

In the information age, new technologies are obsolete almost as soon as they are conceived. From sampling and file-sharing in the music industry to digitized avatars designed to look like famous sports figures in video games, technology and media continue to evolve at a speed that would have been unimaginable fifty years ago. The accessibility of intellectual property in this new media and technology landscape gives rise to a barrage of media liability claims. For example, WB Music Corp. was recently sued for copyright infringe-

ment for alleged sampling in Madonna's 1990 dance hit "Vogue." Additionally, in an ongoing lawsuit, football legend Jim Brown claimed that Electronic Arts, Inc. misappropriated his likeness in its Madden NFL football video game. New media liability claims are filed every day. Thus, it is more important than ever for those in the media and entertainment industry to procure liability insurance that protects against the risk that these claims can impair the bottom line of an otherwise successful production.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

BROAD COVERAGE IN THE ENTERTAINMENT INDUSTRY

Almost every business has some type of liability insurance coverage designed to protect against third party claims. Commercial general liability (CGL) policies provide the most common form of insurance purchased to protect against such claims. Most CGL policies provide “personal and advertising” coverage for disparagement or defamation, violation of right of privacy as well as copyright infringement or misappropriation of another’s idea in advertisements.

However, while CGL policies generally provide relatively broad coverage for defamation and right of privacy claims, coverage for intellectual property claims may be limited. Many policies include intellectual property exclusions. Although these exclusions may still allow coverage for certain infringements that occur in the insured’s advertisement, rather than in the insured’s product itself, jumping through the hoops necessary to establish coverage can be challenging. Furthermore, at least one court has gone so far as to read the exclusion to bar coverage for right of publicity claims, which many typically think of as a type of privacy claim.

In addition, many CGL policies include fields of entertainment exclusions targeted at entertainment businesses. It may reasonably be argued that these exclusions, at least as applied

broadly to an enterprise that is engaged solely in the entertainment business, improperly make coverage illusory. Nonetheless, such exclusions provide yet another hurdle to obtaining coverage for media liability claims under CGL policies.

For these reasons, while CGL policies should not be forgotten as a potential source of insurance for media liability claims, the scope of coverage for such claims may be somewhat circumscribed.

SPECIALIZED COVERAGE FOR A WIDE VARIETY OF CLAIMS

Fortunately, entertainment and media insureds can look to a specialized type of insurance providing coverage for media liability claims—media liability insurance. The first such insurance was created in the modest Midwestern town of Kansas City, Missouri in the 1920s in response to the requests for insurance to protect against claims for defamation. Initially a relatively simple line of errors and omissions insurance, media liability insurance developed over the years to cover a wide variety of media and entertainment insureds for a range of claims common in the entertainment and publication media, such as invasion of privacy, including infringement of right of publicity, as well as defamation, copyright infringement, piracy, idea misappropriation, and trademark claims.

Media liability insurance is not nearly as standardized as many other forms of insurance. The insured should therefore pay especially close attention to the policy language to be sure that it provides the coverage needed. Most policies provide some form of coverage for a specified list of claims arising out of errors, omissions, or misstatements that occur in the insured’s business productions or other creations.

Naturally, the insured will want the list of covered claims to be as inclusive as possible. Since media liability policies vary significantly, not all policies may provide coverage for even the common media liability claims listed above. The insured should thoroughly review the coverage in any given policy with an eye toward whether it protects sufficiently against claims the insured may face. Businesses with international distribution should carefully consider whether coverage is provided for intellectual property claims abroad. Those operating in European countries such as France, for example, should consider requesting that the policy specify that claims under moral rights (or “droit moral”) are covered. It may also be possible to negotiate for a “catch-all” provision affording coverage for “any error or omission.” This type of clause may be helpful in the event that a claim asserted against the insured does not fall within the policy’s enumerated list of specific covered claims.

Insurers frequently use a defined term such as “business of the in-

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

sured” to delineate the scope of the insured’s business covered under a policy. Insureds should pay particular attention to this definition when purchasing a media liability policy to ensure that it obtains coverage for all of its operations. If, for example, the insured not only produces movies and television shows, but also owns and runs theme parks, the insured will want to be sure that the policy provides coverage for all of these aspects of its business.

Most media liability policies provide coverage for both damages and defense expenses. As media liability suits are frequently settled—and not uncommonly for less than the cost of defending the suit—coverage for defense expenses is a key form of coverage. When procuring a policy, the insured should carefully assess whether there is coverage for defense expenses.

If possible, the insured should also negotiate defense expense coverage that does not impact policy limits. Such coverage will provide the insured with a defense while leaving the policy’s full limits intact to cover an eventual settlement or judgment.

In addition to coverage for damages and defense expenses, some media liability insurance policies provide coverage for certain types of injunctive relief—a coverage often not available in other forms of liability insurance. Such coverage can be particularly important in the context of intellectual property claims, where injunctive relief is often requested as a remedy.

“ THERE MAY BE A DIRECT RELATIONSHIP BETWEEN THE SUCCESS OF AN ENTERTAINMENT OR MEDIA PRODUCTION AND THE PROBABILITY THAT AT LEAST ONE MEDIA LIABILITY CLAIM WILL BE ASSERTED AGAINST THOSE MOST LIKELY TO REAP THE FINANCIAL REWARDS OF THAT SUCCESS.

HOW TO ENSURE THE BEST COVERAGE FOR YOUR CLIENT

Media liability policies may be written to provide “claims made” or “occurrence” coverage. There are key differences between these two types of coverage. Claims made coverage will turn on when the “claim” is made against the insured. By contrast, “occurrence” coverage will turn on when the error or omission that gave rise to the claim took place. Many of the media liability policies available today provide “claims made” coverage. In addition to requiring that the claim be made during the policy period, “claims made” policies often also specify that a claim must be “reported” to the insurer within the policy period (or a specified extended reporting period). Because these reporting periods are strictly construed in some jurisdictions, insureds should be vigilant about complying with reporting requirements.

Like other types of insurance policies, media liability policies typically contain a number of conditions and exclusions. For instance, although media liability policies cover a number of different intellectual property claims, they often exclude coverage for patent infringement. (Insurance coverage designed to provide coverage for patent infringement is available but generally quite costly.)

Additionally, media liability policies generally exclude claims for breach of contract from coverage. Insurers often argue that this exclusion applies especially broadly to include claims for breach of an implied contract or any claim that has any relationship to a contract. However, generally, exclusions are read narrowly so as to provide as much coverage as possible. Additionally, when there is ambiguity in an exclusion (as in any provision in a policy), the exclusion will usually be construed in favor of the insured.

Thus, a media liability insurer may argue that a copyright infringement claim is excluded because a written

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

licensing agreement is involved. However, licensing agreements are often involved in copyright infringement claims. In fact, claims for copyright infringement and breach of contract are commonly brought together. It would be improper to read the contract exclusion so broadly as to preclude coverage for a copyright infringement claim just because a claim for breach of contract is asserted in the same lawsuit or because the parties' rights are established in a licensing agreement. Similarly, although misappropriation of idea claims are sometimes framed as breach of implied contract claims, a court should not read the contract exclusion to preclude coverage for such claims. Both copyright infringement claims and idea submission claims are at the core of coverage provided by media liability insurance. It would therefore defeat the purpose of media liability insurance to read the contract exclusion to exclude coverage for such claims.

Another common exclusion purports to bar coverage for knowing or intentional violations of another's rights. However, these types of exclusions have typically been limited to circumstances where the insurer can prove that the insured specifically intended harm to the third party claimant. These types of exclusions, too, would defeat the purpose of media liability coverage if they were read to bar coverage for any intentional conduct. After all, errors and omissions coverage by its nature contemplates some level of inten-

tionality. Furthermore, innocent insureds held vicariously liable for acts of their employees or other co-insureds should not lose coverage where the innocent insured did not itself specifically intend to harm a third party claimant.

Many carriers require the insured to institute and follow certain clearance procedures when using copyrighted or otherwise potentially protected material. Once such procedures are in place, innocent mistakes can be made resulting in less than perfect compliance. When clearance procedures are mandated, the insured should attempt to negotiate the inclusion of a provision that inadvertent failure to comply with the required procedures will not bar coverage so long as the insured adopted proper clearance procedures and made a good faith effort to see that they were followed.

Finally, many policies provide a stringent contractual limit (often as short as a year) on the time within which a suit may be brought. If an insured believes that an insurer failed to comply with the provisions of its policy, or standards of conduct mandated by the law, the insured should take care to bring suit within the specified time, unless there is some basis for "tolling" or holding in abeyance the limitations period. The insured may also be able to negotiate a valid waiver agreement to toll or postpone the running of the limitations period for some years. However, some states limit the period of

time that such an agreement may validly last. Therefore, the insured should be sure to obtain appropriate counsel when entering into such agreements.

CONCLUSION

As a practical matter, media liability claims can significantly impact the bottom lines of media and entertainment companies. Indeed, there may well be a direct relationship between the success of an entertainment or media production and the probability that at least one media liability claim will be asserted against those most likely to reap the financial rewards of that success. Both the cost of defending against such claims, and the relief awarded in connection with them, may be astronomical. Carefully selected and negotiated media liability insurance can provide valuable revenue protection in the face of such claims. To obtain guidance, the insured may want to discuss options with counsel who can provide insights into the procurement of appropriate media liability insurance.

pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING:
VIRTUAL CURRENCIES, MONEY LAUNDERING, AND
THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND
COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS
NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING
& THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH
MEDIA LIABILITY INSURANCE

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pg. 3 to 5

LETTER FROM THE GUEST EDITOR

pg. 12 to 18

REAL WORLD RISK IN VIRTUAL WORLD GAMING: VIRTUAL CURRENCIES, MONEY LAUNDERING, AND THE HIDDEN RISKS TO GAME COMPANIES

pg. 23 to 26

PLAYING FOR KEEPS: THE BRANDING GAME

pg. 29 to 33

THE INTERSECTION BETWEEN CONTRACT AND COPYRIGHT LAW

pg. 6 to 11

DAVID WHITE ON HIS BIGGEST CHALLENGES AS NATIONAL EXECUTIVE DIRECTOR OF SAG-AFTRA

pg. 19 to 22

WAGER-BASED ONLINE GAMING & THE U.S. MARKET

pg. 27 to 28

IN-HOUSE GAMING: PAST, PRESENT, AND FUTURE

pg. 34 to 38

PROTECTING ENTERTAINMENT REVENUES WITH MEDIA LIABILITY INSURANCE

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