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Entertainment & Sports Law Section
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Calculating An Infringer's Profits: To Deduct Or Not To Deduct, That Is The Question

By Tim Warnock

The Copyright Act provides two measures of damage to plaintiffs alleging copyright infringement in civil actions.¹ A successful plaintiff may elect between recovering (1) the actual damages suffered plus the profits of the infringer or (2) statutory damages.²

This article primarily addresses the method of calculating the profits of an infringer. Whether to elect to pursue the infringer's profits or statutory damage, however, necessarily requires understanding both measures of damage.

The framework for statutory damages establishes three ranges. Statutory damages for copyright infringement may be awarded within a range from \$750 to \$30,000 per infringement.³ If the defendant

proves that the infringement was "innocent," the award may be reduced to \$200 per infringement.⁴ If the plaintiff establishes that the infringement was willful, the award may be increased to \$150,000 per infringement.⁵

If the plaintiff elects to pursue actual damages plus the profits of the infringer, rather than statutory damages, the plaintiff may attempt to prove two different categories of damage. First, the plaintiff may have suffered actual damage. For example, in a case involving the alleged infringement of a musical composition — the words and music that comprise a song — the plaintiff may claim as actual damage its failure to collect a license fee if the alleged infringer had obtained a license to exploit the composition from the plaintiff.⁶

The infringer's profits reflect the sum that the defendant actually earned from the infringement as opposed to the sum that the plaintiff would have earned. In order to recover an infringer's profits, the plaintiff must only prove the infringer's gross revenue.⁷ Proving gross revenue might involve proving revenue from sales of a compact disc or discs in the case of an alleged infringement of a musical composition, revenue from on-line sales, revenue from



performing rights societies, revenue from the infringer's having licensed the infringing work to others and revenue from synchronization licenses if the infringing work has been used in a television or radio commercial, television show or movie.

The defendant may then prove "his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."⁸ The defendant bears the burden of proving the expenses, and "reasonable approximations constitute satisfactory evidence."⁹ Uncertainty based on a defendant's inadequate record-keeping practices, however, will be resolved in favor of the plaintiff.¹⁰

So, exactly which expenses are deductible?

An infringer incurs certain expenses as part of creating and exploiting the infringing work. Is the defendant entitled to deduct the costs of manufacturing the infringing work? Are shipping costs deductible? May the defendant deduct the value of returned goods? Is the defendant entitled to deduct the cost of legal fees defending the infringement action?

The infringer may incur other expenses regardless of

continued on page 10

Discounts, Dates, and Investments in the Future

By Stacey Schlitz

“You wait all your life for a publishing deal, and you need me to review this by tomorrow?!” I wanted to say this while I was on the phone with my client, but I’ve got to put food on the table, so I held back my comments and mumbled them to myself after I hung up and rubbed my forehead in frustration. Tonight was supposed to be date night with my spouse. But this client is a great young writer. I saw him play at clubs here and there, and he always said he wanted to use me when he got something going. But somehow, he and the publisher got this whole thing going (behind my back!) and want to sign a retroactive deal... in 24 hours. Oh, and he said, “Don’t take more than a couple of hours to review it — ‘cuz money is tight.”

We all know this client. Sometimes we believe in them so much that we do extra work — on the fast and cheap — just because we want them to succeed. We forego family dinners, soccer games, and birthdays just to get it done by tomorrow (at a discount). But is an investment in “tomorrow” necessarily an investment in the future?

Many of them are appreciative, and many of them, well, they go to another lawyer (at a substantial markup) for their bigger, better second deal. Did we do ourselves, or our client, any good by working “on the fast and cheap”? Balancing your interest in getting paid what you are worth with making an investment in your client is an elegant dance that takes years to master.

This issue, we will address some other balancing acts — great and small — that we must make in our

daily practice. Tim Warnock’s article, “Calculating an Infringer’s Profits: To Deduct or Not to Deduct, That Is the Question,” addresses a copyright infringement plaintiff’s election to recover (1) actual damages suffered plus the profits of the infringer or (2) statutory damages. Because of the uncertainty among the federal districts, the calculation of net actual damages can be tricky.

In Part II of the E&S Newsletter’s interview with Steve Underwood of the Tennessee Titans, he discusses careers in sports law, sports-agent negotiations, and the NFL’s collective bargaining agreement with the NFL Players Association. Mr. Underwood advises working in a related field such as a brewing company, concessions business, or travel business to get your foot in the door of a professional sports franchise — another balancing act for those who aspire to a career in sports law.

As we enter into the leisurely summer months, due dates will compete with dinner dates, and an hour at the office — billable or discounted — will always be an hour away from your loved ones. This Memorial Day Weekend, let’s remember to always make decisions that will be an investment in the future — whether it be for ourselves, our clients, our families, or our friendships. **E&S**

STACEY SCHLITZ is an associate at Drescher & Sharp PC in Nashville. She represents clients in the music and film industries in a variety of matters including contract negotiation, business formation, intellectual property and litigation.

E&S IN THIS ISSUE:

- 2 Letter from the Editor
- 3 Letter from the Chair
- 4 An Interview with Steve Underwood
- 6 Member Update
- 7 The Entertainment Lawyer and the Business Manager
- 8 Spotlight: Blogging: Be A Follower. Read A Blog
- 8 Litigation Update
- 11 Practitioner’s Tips
- 13 CLE Calendar

E&S Editorial Board

Stacey Schlitz
Ken Sanney
Kendra Tidwell
Tim Stehli

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Picking the Perfect Shingle (and Other Mistakes in My First Days as a Solo)

By Amy J. Everhart

“You’re brave!” everyone says on learning I’ve left my law-firm gig of 11 years to open a solo intellectual property/entertainment practice. Translation: You’re crazy! What are you thinking going out on your own at a time like this? Law firms are collapsing around us!

Perhaps. But I march on bravely, picking out the perfect shingle to hang outside my door, meeting with the Lexis rep at my kitchen counter, shaking coins out of my piggy bank for my first professional-liability-insurance premium payment. And soaking up all the advice I can. I’ve found lots of terrific mentors in my transition, willing to share how — and why — they fly solo, whether in a bungalow on Music Row or a home office in West Meade or a rented space in Germantown.

In the event you’re brave (translation: crazy) like me and find yourself contemplating shingles of your own, I urge you to follow the tips below, the cream of the crop I gathered during many a chai latte at Starbucks on 21st (my pick for the best locale for a business date, followed closely by Bricktop’s and Frothy Monkey).

GET TO WORK.

In the early days of my solo practice (two months ago), I spent hours on such critical decisions as how to sign my letters (very truly yours? best regards?), what my firm colors should be (turquoise and olive? navy and chartreuse?), and what photo to include on my website (the one in the grey suit where I’m laughing with my nose crinkled? the one in the blue dress where I’m smiling knowingly?). “Forget all that,” a mentor said as he sipped his sensible plain black coffee at Frothy Monkey. “Just get to work. And do a good job.” I looked down at my own whimsical hazelnut white mocha. Ah, yes ... work. So while I still get distracted by the mundane details of practice management (I can’t change my hazelnut-white-mocha tendencies), my first priority is to work — and to do great work while I’m at it. After all, no one’s there to review my work before it goes out. So, lesson learned: Even if you lure all the clients in the world with a fancy website, you won’t keep them if you don’t do good work.

GET YOUR BILLS OUT.

Seems simple enough. ‘Course, I’ve never been the one in charge of the money stuff before, and, at my old firm, found annoying those demands to finish my time sheets. I mean, I was working, couldn’t they see? But by Day 42 of flying solo, I started to understand what all the billing fuss was about. I’d finally learned to heed Tip No. 1 (work — have you forgotten already?), so I’d racked up some hefty billable time. Now if I could just

... oomph ... get this darn ... SCREAM!!!! ... billing software ... &#! ... to work. Okay, so I ended up creating the first invoice manually, and I *emailed* it because my turquoise and olive letterhead hadn’t arrived, but the bill went out. And it made its point, too, because one week later I opened my new P.O. Box to find ... gasp ... a check! My first solo income! Now to find time to deposit it. Just let me remove this accounting hat and put on my runner’s hat ...

BE PATIENT.

Your first few weeks flying solo, you will have thoughts like this (at 1 a.m.), so just expect them: “So I had enough work last week. But what if no one ever calls again? What if I can’t pay my mortgage this month? And I can’t afford groceries, much less my student-loan payments, some good those did me! ... and ...” I’m not guaranteeing you won’t have to cut out HBO and eat SpaghettiOs for a spell, but I can tell you to be patient. You’ll get calls. You’re a lawyer, and you have a service to offer that — believe it! — people need. Use the slow times to spruce up your marketing, attend a networking function, write an article for publication, volunteer your time, bone up on your legal skills. In short, don’t panic. I panicked one day. But the next, and the next, and the next, I was up all hours working on a summary judgment brief. And I was able to pay my mortgage and eat pasta that hadn’t been stored in a can.

BE SELECTIVE.

In my first days as a solo, I accepted every client who called. “You need advice on how to tune your piano? And all you can pay is a free haircut at your barber shop? Glad to help!” This is especially tough in an entertainment practice, because you get those calls from aspiring entertainers who’ve been told that the way to get discovered is to send their stuff to an entertainment lawyer. A recent emailed client “inquiry” wasn’t an inquiry at all, more a proclamation that the guy was ready for the big time and I should check out his music on his MySpace page. The luxury of being your own boss is that you can be selective. You can accept clients who 1) are likely to pay, 2) are unlikely to cause trouble, and 3) have legal issues you actually know something about. Yeah, yeah, we all need to eat, so we can’t turn away every client, but we needn’t spend our days tuning pianos for free (unless we choose to do so).

BE PRACTICAL.

I’m obsessed with this cherry-wood filing cabinet on Amazon.com. But do you have any idea how much filing cabinets cost these days? While I shop around for

continued on page 5

Part II: An Interview with Steve Underwood, Senior VP and General Counsel of the Tennessee Titans

By Stacey Schlitz

In our January 2009 issue, Steve Underwood, Senior Executive Vice President/COO, General Counsel of the Tennessee Titans, talked about his role in Titans Club, the role of media in the NFL, and the economic challenges ahead for professional sports.

In part II of the *E&S Newsletter's* interview with Underwood, he discusses careers in sports law, sports-agent negotiations, and the NFL's collective bargaining agreement with the NFL Players Association.

More than ever, a law degree is an important asset to one who chooses a career in the NFL. This is due in no small part to the recent requirement imposed by the National Football League Players Association (NFLPA) that an agent must possess a law degree or graduate degree to become certified. In addition, general knowledge of labor and union law is crucial to understanding the collective bargaining agreement between the NFL and the NFLPA. Underwood provides his insight and advice on the recent developments in the professional sports industry.

ON SPORTS LAW AND PEOPLE THAT ASPIRE TO BE IN SPORTS LAW:

Sports law is a left-nostril business. When I speak publicly, one of the questions is always, "How can I get your job?" First of all, you have to understand that jobs that include being a lawyer for a major league professional sports franchise — that's a very limited number. One of the things that I suggest to them is to get a job with a minor league sports enterprise.

There are also many allied fields that professional sports depend on. One [allied field of practice] is [working for] venues. You may know Walter Overton, who is the general manager of our facility [LP Field]. Walter went to law school and has a law degree. We are also reliant on sponsorship businesses in allied fields, such as large brewing companies, the concessions business, and the travel business. If you can just get your foot in the door, somewhere, you can start out somewhere in the business where you can network and get to know people. It is very difficult to walk in and go to work for a major league sports team unless you know an owner or a high-ranking executive at a club.

ON YOUR FAMILIARITY WITH THE COLLECTIVE BARGAINING AGREEMENT (CBA) BETWEEN THE NFL AND THE NFL PLAYERS ASSOCIATION (NFLPA):

I have one on my credenza. I have been reading our collective bargaining agreements for thirty years. I am reasonably conversant with the CBA. There isn't a week that goes by that I don't either answer some question for some staff person here about the collective bargaining agreement or deal with the portions of it

that relate to the salary cap or player contracts.

ON HOW THE NFL'S CBA COMPARES TO OTHER UNION AGREEMENTS:

Our CBA — other than the salary-cap provisions and the parts that are understandably unique to our business — is very similar to other [union agreements]. We have grievance provisions [such as binding arbitration], there are provisions that relate to benefits, working conditions, there are provisions that relate to pension and 401(k) for the players, no-suit, no-lockout provisions, things that you would see in almost any well-negotiated, thorough CBA.

Now we do have provisions that relate to free agency and the salary cap. And there are other provisions that are unique to our business such as having a team physician, the qualifications for a team physician, a standard agreement that every employee has to sign as a member of the collective bargaining unit, the way terminations are to take place, the waiver agreement, that are unique to our business.

The very same provisions that appear in the 1970 CBA, the first CBA between the union and the management council, are still present in this document. They're greatly expanded, much more pervasive than what was in the original CBA, but if you were a labor lawyer and looked at this document, you would be right at home with it.

ON WHETHER THE STATE AND FEDERAL COURTS ENFORCE THE NFL'S CBA:

From time to time, for example, we have had players file lawsuits against us, which are in general prohibited by our no-sue provisions in our CBA. Those disputes are designed to be resolved in binding arbitration, and we have had some fairly significant litigation over time that relates to labor preemption, and having lawsuits that are filed in state or federal court dismissed in favor



Steve Underwood

of arbitration. [One of the leading cases is *Smith v. Houston Oilers Inc.*, 87 F.3d 717 (5th Cir. 1996), cert. denied, 519 U.S. 1008 (1996).]

ON WHETHER HAVING A LAW DEGREE WILL HELP YOU BE A BETTER SPORTS AGENT:

I think certainly in terms of looking at contract language, it always helps to have a lawyer do that. But in terms of the dollars and cents and what other players are making and what other bells and whistles might be in a player contract, I've always thought that the most important thing for the agent to do was to know the market. And the union provides them with a wealth of information about that. And I think that just communicating, doing what you have to do to know what a player's level of compensation ought to be is the most important thing.

You also need to understand your client, just like as lawyers we need to understand our clients' business, they need to understand what their players are trying to accomplish. You know, free agency, as far as I'm concerned, from a player's perspective, is more than just about money. They may want to play for a certain club because they like that club's coach, they like that club's facility, they like other players that are on that club or they think that that club has an opportunity to win a championship. And if they have to take slightly less money, that's OK. They may feel at home with the club that they've been with for many years, and they know and understand that club's system, whatever it may be, on offense or defense. While I think that money is often the controlling decision for a player, and free agency, I think if you ask the players they will tell you that having the opportunity to make the decision about where you're going to go to them is almost as important as the money. So the agent needs to know his client, and what his client is really looking for, and to at least be in a position to offer advice about what's best for him, where they have an opportunity to play more, perhaps, where two teams are competing for the same player, where do I have the best

chance to play. Because most players want to be on the field; they want to be able to participate.

And I think all of those decisions and more go into a player deciding where they want to be and an agent needs to understand all of those things, in addition to what the market is for their player. How much should my guy be making? What are the terms and conditions of employment going to be? In addition to the base salary, signing bonus, guaranteed money, roster bonus, for whatever it happens to be. So an agent needs to be well equipped, and I think part of that is being informed. They also need to have a rapport with whoever is negotiating contracts on the side of the club.

ON WHETHER THE NFLPA REQUIREMENT THAT AN NFL AGENT POSSESS A LAW DEGREE OR GRADUATE DEGREE HAS IMPROVED THE FIELD OF AGENTS OVERALL:

I am not entirely conversant with the requirements, but I think it is good that the union has basic requirements for people that are competent to represent NFL players, because in the case of many of the players, tens of millions of dollars [are being negotiated], and the career of a professional athlete doesn't last that many years. So whoever is advising him about his contract needs to know enough about our business and enough about what wages are being paid, and what benefits and rights players are supposed to have. Compared to where things were when players first started getting agents back in the 70s, I think the field of people who are representing players are much, much more competent. The agents we deal with here are highly skilled; most of them very experienced, been at it a long time, and know exactly what they're doing. And they don't leave much money on the table! **E&S**

STACEY SCHLITZ is an associate at Drescher & Sharp PC in Nashville. She represents clients in the music and film industries in a variety of matters including contract negotiation, business formation, intellectual property and litigation.

Letter from the Chair (continued from page 3)

a cheaper one, I've settled for those nifty cardboard boxes from Office Max. "Just get the must-have's for now," at least two mentors told me. So, while I'd love to have the People Search function in my Lexis package, I sacrificed it in lieu of the *Tenn. Code Ann.* But I did invest in accounting software. Professional stationery and business cards. And a website, although I searched until I found a good deal from a recent website-design grad. Vanderbilt Law Library has become a favorite (free!) resource, except when I forget the parking meter's run. So I chose my priorities, but they may not be yours. A friend relies on Fastcase (included in your TBA membership) instead of Lexis. Another friend can't type to save his life and immediately hired

an assistant, while I'm wearing that hat myself for now. Do your research (free at Vanderbilt!), and decide for yourself: What do I need now, and what can I get later?

That's all the time I can spend with you today, because it's time to actually, really get to work. But because, as you can see, I'm still very much in learning mode myself, I'll share my adventures in solo practice in a regular column debuting in this newsletter in the fall. And now, I march on ever so bravely ... **E&S**

AMY J. EVERHART recently launched her own law firm specializing in trademark, copyright, entertainment and Internet law. She is also the author of the intellectual-property law blog *Lightbulb Moments*.

Member Update

By Tim Stehli

Leadership Music has been presenting some great programs this year, with the involvement of TBA Entertainment and Sports Law Section members including **Ray Gonzalez** and **Denise McIntosh Stevens**. The guest speaker at the recent Artist Day program was none other than Kiss' **Gene Simmons**. I know Gene Simmons isn't a lawyer, and almost certainly not an ESLS member, but still ... wouldn't it be cool if he was?

Arizona-based ESLS member **Matthew Wenzlau** has been busy lately. The motion picture side of his practice in particular has had some exciting things happening, including several films that were featured in the Phoenix and Los Angeles film festivals. The Wenzlau Law Group PLLC has also recently opened an office in Nashville, so come August when the Arizona temperatures get too unbearable, the group can escape to our balmy 98-degree Tennessee weather.

And speaking of film festivals, the **Law Office of Jefferson A. Wallace PLLC** recently hosted quite the fete for the Nashville Film Festival, which, rumor has it, put *Vanity Fair's* little Oscar party to shame. Jefferson and **John Bell Jr.** organized the soiree, and even Nelson L. "Nero" Griswold, of the original Nero's Cactus Canyon, put in an appearance. A great party at a great law firm for a great film festival in a great city — the only word I can think of to describe that is ... groovy!

As if that weren't groovy enough, a handful of

Nashville lawyers, including ESLS Member and *E&S Newsletter* Editor **Stacey Schlitz**, got to see their names in lights as legal advisors to the zombie film "Make Out With Violence," which won an award at the Nashville Film Festival. Ahh, what we attorneys can teach about being zombies!

Jefferson Wallace would also like to remind all of the ESLS members that there is still a demand for experienced mentors to participate in the **ESLS Mentor Program**. I'll personally second that, and add an "Indeed!" It doesn't take much time, is rewarding, and is a great way to pass on your entertainment law knowledge to younger attorneys. Interested? You can fill out a mentor form on the ESLS web page at www.tba.org.sections/EntertainmentLaw/index.html.

Continuing with the theme of passing along one's knowledge, **Bob Sullivan** has done just that while teaching the Entertainment Law and Intellectual Property Law classes at the Nashville School of Law. Current NSL student **Adam Reed** (and future ESLS member?) says it's nice to have a seasoned vet who brings real-life experience into the classroom, and adds that he's a great teacher and an even better guy. See, there's some of that "rewarding" stuff I was just talking about!

And to make this column an education hat trick, the Volunteer Lawyers and Professionals for the Arts (formerly the Tennessee Volunteer Lawyers for the Arts) recently presented an entertainment law clinic

at the Country Music Hall of Fame and Museum in Nashville. VLPA Executive Director **Casey Gill Summar** reports that the clinic was a resounding success, with pro bono assistance given on all types of entertainment law issues. ESLS members, including **Austen Adams**, **Tara Aaron**, **Chris Vlahos**, **Tim Warnock**, **Kelly Randall**, **Ken Sanney**, **Curtis Harrington** and **Amy Everhart**, did their share in answering questions about intellectual property for local artists. See, people are just learning things all over the place these days. It's like an epidemic! **E&S**



Members of the E&S Section volunteered at a legal clinic in conjunction with Volunteer Lawyers and Professionals for the Arts at the Country Music Hall of Fame on April 18. Pictured are Kelly Randall, Chris Vlahos, Tim Warnock, VLPA's Casey Gill Summar and Austen Adams. Volunteers not pictured are Tara Mooney Aaron, Ken Sanney, Curtis Harrington and Amy Everhart.

TIM STEHLI is Director of Licensing and Business Affairs at HoriPro Entertainment Group Inc. Email Tim with your entertainment and sports news and member updates at tstehli@bellsouth.net.

The Business Manager

By Amy J. Everhart

Do you balance your checkbook every month? Do you like figuring out sudoku and crossword puzzles?

Julie Boos does. And that's one reason she enjoys her chosen profession of artist business management. She asks these questions when she interviews prospective staff at her business-management firm, Flood, Bumstead, McCready & McCarthy Inc. "If you like that kind of puzzle work, then you typically like accounting," she says. ("Boos," by the way, is pronounced "Bose," "like the speakers but without the money," she jokes.)

Boos's is the classic Nashville story, but with a twist: She set sail for Nashville from her Midwestern hometown (Hiawatha, Kansas, population just under 4,000) after college and a stint as a branch manager of a Kansas City bank. Only instead of packing a guitar ("I love to sing but no one would pay to listen to me"), she packed her passion for numbers and business (and those check-balancing skills). Luck welcomed her on her first day in Music City in the form of a happenstance introduction to an employee of Flood Bumstead. Boos checked in to Flood Bumstead and has been there ever since.

From her entry-level position, Boos learned the ropes of business management. Thirteen years and an MBA later, she holds the title of business manager and is responsible for artists including Lady Antebellum, Blake Shelton, Kellie Pickler and new-comer Mallery Hope.

Boos's job is to oversee virtually every facet of her client-artists' financial lives, from touring to buying a car. She doesn't go so far as to change light bulbs, though, recalling a phone call from a client who'd just leased an apartment in LA and asked Boos who was responsible for changing the light bulbs.

At the end of each year, Boos sits down with the artist's team and looks ahead to the next year. How many tour dates are on the books? Will the artist add another bus? What are projected record advances, royalties, released singles? Boos then focuses on the artist's personal goals: Vacations planned? Kids' college to pay for? Are you getting married? "If you are, we need to talk about a prenup," she (half) jokes. Factoring in projected income and expenses, she formulates a budget and a financial plan.

Another big part of Boos's job is to work with the artist's attorney in negotiating the financial aspect of contracts. "Attorneys are great at negotiating the spirit of the contract," she says, "but we collaborate to examine and translate the terms to dollars and cents to the artist. I turn the language of the contract into dollars and cents so everyone can understand. We want to make sure the artist is getting the best deal he can." Boos says that, particularly with the new 360 deals, she's especially wary of new and strange terms turning

up in proposed contracts.

Particularly in the new 360 deals, "labels don't always understand touring numbers and what a net touring number looks like for an artist. We do a lot of education helping labels understand what it is they're asking for in 360 deals. If the manager is getting 15 percent and the booking agent is getting 10 percent and the business manager is getting 5 percent and then the label comes along and says, 'We want 15 or 20 percent of gross,' well, you've just put the artist out of business. And it's really hard for them to understand that, so I've met with label heads and said, 'let me show you how these numbers shake out.' For a new artist or even a mid-level act, taking another 15 or 20 percent off the top shuts the doors on the place."

Boos's advice for attorneys from her perspective as a business manager: Be collaborative. Keep it simple. Don't over-lawyer. Bill fairly, considering what the artist netted from the deal. And, of course, always remember: "Time is money."

"Good entertainment lawyers are critical," Boos adds. "A good music attorney can save an artist a ton of headache and money in trying to get out of [bad] deals. Because you're gonna pay."

When asked the worst part of her job, she wastes no time replying "taxes," then laughs. "No, that's the part our clients dislike the most. And I'm all for a flat tax," she jokes. "Taxes are just such a hassle. Clients hate 'em. But it runs smoothly here; we've got it down to a science."

Indeed, much like entertainment law, business management is not the glamorous career that many job-seekers think it is, Boos says. "This is definitely a behind-the-scenes, home-office, paperwork job. It's a numbers job. It's definitely not sexy and glamorous. It's not jet-setting around the world and hanging with your clients and cocktailing every night at number-one parties. It's the nuts and bolts of the music industry."

And, to numbers fans like Boos, that's a good thing. "If you're going to work with numbers and you're going to work in business, this is a great business to work in. The payoff for us is watching someone listen to your advice, execute the plan and end up financially secure. There's not a better day than the day that they've got money in the bank. You're just so proud of them when they actually succeed, because it's not the rule, it's the exception that someone actually walks away from this business with the money they need to secure their lifestyle." **ESG**

AMY J. EVERHART recently launched her own law firm specializing in trademark, copyright, entertainment and Internet law. She is also the author of the intellectual-property law blog *Lightbulb Moments*.

Blogging: Be A Follower. Read A Blog

By Kenneth J. Sanney

Your mom always told you not to be a follower. I'm here to tell you she was wrong! Recently, I was having a discussion with some of our fellow section members about marketing our law practices. The conversation eventually turned to the blog I had just begun writing. As we talked about the commitment and effort it takes to produce a blog, I had an idea: I would use my column in E&S to highlight a few of our section members' blogs you should be following. But beware — if you check out their blogs, you may disappoint your mom.

LAW ON THE ROW

<http://musicattorney.wordpress.com/1999/09/>

SONGWriters CORNER

<http://musicattorney.wordpress.com/songwriters-corner/>

Nashville attorney Barry Neil Shrum has been posting on his blog, *Law on the Row*, since September 1999. He also authors a blog titled *Songwriters Corner*, which “is a collection of articles, many from the archives of *Law on the Row*, and web links which may be of particular interest to songwriters and music publishers.” For those of you who have not had the pleasure of meeting Barry Shrum, he is a member of the Music Row law firm of Harris, Martin, Jones, Shrum, Bradford & Wommack.

According to Shrum, “*Law on the Row* chronicles the life, issues and events of an entertainment attorney on Music Row in Nashville.” The audience of *Law on the Row* is clear: anyone who has an interest in music business and law. There is something there for the entertainment attorney, the recording artist, the songwriter, and the fan. You will find posts on everything from how songwriters can protect their ideas when submitting demo tapes to publishers to jurisdiction issues, Mozart, and Maslow's hierarchy of needs.

Not only is the blog well written, it has a “Resources” tab at the top that will take the reader to a very useful and informative list of links to websites on varying topics including legal resources, record labels, music charts and publications, mechanical rights organizations, performing rights organizations, other professional music organizations, and intellectual property links.

For those of you contemplating writing a blog of your own, take note of Shrum's consistent quality posts. One of the keys to a successful blog is to keep your audience engaged with regular posts that provide your readers something of value.

LIGHTBULB MOMENTS™

<http://www.aeverhart.com/lightbulbmoments>

Attorney Amy Everhart, the current chair of our section, has very recently launched both her own law firm

and her *Lightbulb Moments* blog. Everhart describes her blog as “[d]edicated to covering recent developments in the law protecting the execution of bright ideas and how those developments affect you.”

As attorneys, we can each learn a great deal from Everhart's elegantly written blog. She makes good use of hyperlinks in her posts, taking the reader to websites that can fill in the legal details with case law, statutes, and other background information. From a writing standpoint we would all do well to emulate her clear, concise style.

While we attorneys can learn a lot about the law, the music business, and writing from Everhart, it does not take long to see that she is not writing for us, she is writing for clients. You will not find a lot of legalese or a law review style. You will not feel like you are reading through CLE materials while perusing her blog. Her posts are warm and inviting, not intimidating. Her marketing savvy shines brightly at the bottom of the page where you are provided the ability to send her an e-mail right from the blog.

Lightbulb Moments is one of the best examples of another key to a successful blog: know your audience. Everhart knows that her main audience contains her potential clients, so she speaks to them and lets them reach out to her.

DIY MUSIC MOGUL™ <http://diymusicmogul.com/>

DIY Music Mogul™ is “a music business and law blog for entrepreneurial artists and songwriters” written by fellow section member Kevin Levine. Levine is an entertainment and intellectual property lawyer with Kay Casto & Chaney PLLC and also the Executive Creative Director of Blue 11 Music Publishing LLC, an independent music publishing company.

Levine brings his considerable experience and passion to this informative blog that “is dedicated to entrepreneurial musicians who are ready to take control of and grow their independent music businesses.”

There is plenty of sound legal information in this blog. You will also find some very sound music business advice that ranges from foundational (set aside 10 minutes a day to think about your business and how it will operate in the future) to sophisticated (“[m]any qualified lawyers will offer some services on a flat-fee basis, as opposed to billing by the hour” for federal trademark or service mark registration).

Another key to a successful blog is the ability to drive readers to your blog. There are many ways to accomplish this goal. *DIY Music Mogul*™ uses a blog roll (a list of blogs Levine is reading) and a link to his LinkedIn profile. Each is a great way to attract readers (read: potential clients). The blog roll is usually reciprocated and creates a type of blog social network.

LinkedIn is a business social networking site.

THE SANNEY COPYRIGHT AND MUSIC LAW BLOG

<http://www.musiclaw-copyright.blogspot.com/>

Let me apologize up front for what follows. This is simply a shameless self-promotion of my own blog — I'm sorry.

Several months ago I decided to create my own blog. As some of you may know, I teach as an adjunct professor in Middle Tennessee State University's Recording Industry program. After class, many of my students would come up to me with all sorts of interesting questions about their band, their songwriting, or their internship at a major label. They wanted what all of our musician friends want at some point, free legal advice. Those conversations, however, paid me in knowledge. Through such conversations I have gained an understanding of the difficulty some of our clients experience with the legal side of the music business.

My blog is my humble attempt to provide a more in-depth treatment of what we all do on a daily basis. Sometimes I delve into esoteric material and other times I simply describe the types of publishing deals a songwriter can sign.

One of the best tips I received when I first started blogging is to place a link to your blog in your e-mail signature block. I have received a lot of feedback and exposure from that one little trick.

ADLAWGUY <http://twitter.com/AdLawGuy>

Finally, on the technologically cutting edge is the *Ad Law Guy*, Chattanooga attorney Michael McSunas. McSunas is using Twitter to market his practice.

Twitter is not a blog. Twitter is a free service that lets you keep in touch with people through the exchange of quick frequent posts (known as tweets) that answer one simple question: What are you doing? These tweets are similar to the status-updates feature you would find in social networking sites like Facebook.

One of the first things you will notice is that tweets are extremely short compared to even the shortest blog posts — and therein explains the ever-growing popularity of this new means of communication. For both the tweeters and followers, this is a content-rich process. The nature of a tweet — one to two lines of text — is quick and breezy yet very informative. You can tweet in seconds and your followers don't have to commit hours a week keeping current. In fact, you can catch up with McSunas in a few seconds by reading through an entire page of tweets on your iPhone or Blackberry while waiting on your coffee to brew.

But don't let the short length of his tweets fool you. Like a blog, you still need to deliver value to your followers. McSunas does this by providing frequent tweets (often several a day) of relevant and interesting links to other sites. Following McSunas is like having a personal research assistant sending you interesting links about the music business and law. Pretty cool, huh? Check it out. You just might become a follower.

For those of you inspired by my article to start a blog or tweet, drop me a line and let me know. If you lead, I will follow. **E&S**

KENNETH J. SANNEY is an associate at Day & Blair PC in Brentwood. He specializes in copyright, trademark and entertainment law and litigation.

Litigation Update

By Cassie Madden

Golan v. Holder, 2009 U.S. Dist. LEXIS 28263 (D. Col. April 3, 2009)

The court analyzed whether Section 514 of the Uruguay Round Agreements Act, which removes works from the public domain by restoring the U.S. copyrights of foreign authors, violates the First Amendment rights of artisans and businesses that use public-domain works. The court held that Section 514 is unconstitutional because, while the Act was implemented to comply with the Berne Convention, Section 514 is substantially broader than necessary for compliance.

Bourne Co. v. Twentieth Century Fox Film Corp., 2009 U.S. Dist. LEXIS 24341 (S.D.N.Y. March 16, 2009)

The court held that the creators of the television show *The Family Guy* had a valid fair-use defense to the plaintiff's claim for infringement of the plaintiff's copyright in the song "When You Wish Upon a Star" because *Family Guy*'s song, "I Need a Jew," comments on both racist stereotypes and anti-Semitism and is, therefore, a parody that is at the heart of fair use.

Poindexter v. Warner/Chappell Music Inc., 2009 U.S. Dist. LEXIS 9199 (S.D.N.Y. Feb. 9, 2009)

Despite an agreement between the parties to toll the statute of limitations on the plaintiff's copyright claim, the plaintiff's claims were dismissed as time-barred. The court held that the parties' agreement tolled the statute of limitations going forward, but did not revive previously expired statute-of-limitations terms, and that settlement discussions do not justify equitable tolling of the statute of limitations.

Noffke v. Bakke, 760 N.W.2d 156 (Wis. 2009)

A cheerleader was sued by a fellow cheerleader for injuries resulting from a fall during a stunt. The court granted immunity to the defendant, finding that cheerleading is a contact sport that falls under a Wisconsin statute that provides immunity in negligence actions to participants in amateur contact sports. **E&S**

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

Calculating An Infringer's Profits (continued from page 1)

the infringing exploitation. Is the defendant entitled to deduct the monthly rent payment for the warehouse where the infringing goods are stored? May the defendant deduct some or all of the costs of the company's bookkeeper who creates the financial statements reflecting the income earned from sales of the infringing goods? May a corporate defendant deduct the cost of the CEO's salary? What about deducting part of the cost of the corporate jet?

The Sixth Circuit does not have clear answers to these questions. In fact, some of these questions have not been answered in any circuit in cases construing the Copyright Act. Analogous cases decided under either the Patent Act or the Trademark Act can provide helpful guidance in a copyright case. The answers to some of these questions are inconsistent, often turning on whether the infringement was willful.

INCOME TAX

The Sixth Circuit has held, in a case involving patent infringement, that a plaintiff may recover pretax profits.¹¹ In *Schnadig Corp. v. Gaines Manufacturing Co. Inc.*, the court reasoned that forbidding the deduction of income tax would ensure that the plaintiff was treated as if the plaintiff had earned the profit.¹²

The United States District Court for the Southern District of New York has held that a nonwillful infringer may deduct income tax costs, but a willful infringer may not.¹³ The United States Court of Appeals for the Ninth Circuit has held that nonwillful infringers may deduct income taxes actually paid relating to the infringing work.¹⁴

FIXED, OR INDIRECT, COSTS

The Sixth Circuit has upheld a district court's decision to allow a defendant to deduct "two-thirds of the fixed costs allocable to the infringing production."¹⁵ Permitting the deduction of all overhead expenses for the organization would be unfair to a plaintiff. On the other hand, some overhead expense is necessary to the generation of each dollar of revenue. The court in *Schnadig* recognized that the infringing goods could not have been manufactured without expenses for "utilities, administrative salaries, building space and the like."¹⁶ The "guiding principle," the court reasoned, was that the plaintiff should recover "every dollar of advantage realized by the infringer from the infringement."¹⁷

A defendant may also attempt to identify the specific overhead-expense categories that are implicated by the infringing activity and propose a fair and reasonable formula for assigning those expenses to the infringing work.¹⁸ "An infringer need not prove overhead expenses and their relationship to the infringing production in minute detail, but must explain at least in general terms how claimed overhead actually contributed to the production of the infringing work."¹⁹

If a defendant cannot establish that the overhead costs bear some relation to the infringing work, the

court may not deduct those expenses in calculating damages. For instance, replacement of framing damaged during shipping, general advertising of the defendant's business, bad-debt expense, charitable contributions, internet expenses, training expenses and subscriptions to publications are all expenses that a court refused to deduct in a case involving infringing artwork.²⁰

The cost of warehouse staff to fill orders of infringing goods may not be deductible absent testimony explaining not only the amount of the cost but also testimony addressing the amount of time spent filling orders with infringing goods as opposed to filling other orders.²¹

VARIABLE, OR DIRECT, COSTS

Costs incurred directly related to the infringement, such as the cost of printing and mailing an infringing brochure, are properly deductible from a defendant's gross revenue.²² In connection with an infringing musical performance, deductible expenses included the commission to the booking agent, musicians' salaries for the infringing shows, and commission to the business manager.²³

In a case involving the infringement of copyrighted software, the jury was instructed specifically to deduct production and marketing expenses.²⁴ Framing, printing, freight and sales commissions are properly deductible in connection with a damage calculation in a case involving infringed artwork.²⁵ A court may deduct royalties, or a portion of the profits, paid to others.²⁶

"Remaindered" costs of goods sold may be deducted.²⁷ These costs are the value of unsold or returned product less the sum received upon liquidation. Similarly, printing costs for unsold copies of the infringing goods are deductible if the unsold goods were destroyed.²⁸

The cost of retouching — or altering — photographs falls into two categories. Retouching for the purpose of concealing infringement is not deductible.²⁹ Retouching for other purposes with the incidental effect of concealing, on the other hand, is deductible.³⁰

On occasion, a direct cost is not really a direct cost. In *Burns v. Imagine Films Entertainment Inc.*, the United States District Court for the Western District of New York held that distribution costs paid directly by a defendant were not deductible because those expenses were paid to companies in which the defendant had an ownership interest.³¹

CONCLUSION

The cases addressing the calculation of the profits of the infringer seek to award the plaintiff every dollar of profit earned by the infringer from the infringement. At times, such as calculating the amount of overhead that the defendant may deduct, the calculation is imprecise. In other instances, such as disallowing income-tax payments for willful infringers, the rationale appears simply punitive. With respect to each of the categories of expense, however, a defen-

dant should be well prepared not only with proof of the expense but also a credible explanation for the relationship between the claimed expense and the infringing activity. **ESB**

TIM WARNOCK is a member of Riley Warnock & Jacobson PLC. He is certified in Tennessee as a civil trial specialist by the Tennessee Commission on Continuing Legal Education and Specialization. Warnock has represented clients in a variety of cases, including copyright, trademark, other intellectual property cases and other general commercial litigation.

NOTES

1. In addition to liability for damages, the Copyright Act also provides for impoundment, destruction of infringing goods, injunctive relief and criminal liability. 17 U.S.C. §§ 502, 503 and 506.

2. 17 U.S.C. § 504.

3. *Id.*

4. 17 U.S.C. § 504(c)(2).

5. *Id.*

6. *McRoberts Software Inc. v. Media 100 Inc.*, 329 F.3d 557, 566 (7th Cir. July 22, 2003).

7. 17 U.S.C. § 504(b).

8. *Id.*

9. *Folkens v. Wyland* (NFN), 2002 U.S. Dist. LEXIS 13519, at*3 (N.D. Ca. 2002).

10. *Caffey v. Cook*, 409 F. Supp. 2d 484, 504 (S.D.N.Y. 2006).

11. *Schnadig Corp. v. Gaines Manufacturing Co. Inc.*, 620 F.2d 1166 (6th Cir. 1980).

12. *Id.* at 1171.

13. *Caffey*, 409 F. Supp. at 506.

14. *Folkens*, 2002 U.S. Dist. LEXIS 13519, at *19.

15. *Schnadig*, 620 F.2d at 1175.

16. *Schnadig*, 620 F.2d at 1172.

17. *Schnadig*, 620 F.2d at 1175.

18. *Caffey*, 409 F. Supp. at 504.

19. *Folkens*, 2002 U.S. Dist. LEXIS 13519, *15.

20. *Id.* at *117-18.

21. *Mendler v. Winterland Concessions Co.*, 2000 U.S. Dist. LEXIS 12966, at **10-11 (N.D. Cal. Sept. 6, 2000).

22. *Pham v. Jones*, 2006 U.S. Dist. LEXIS 32932 (S.D. Tx. May 13, 2006).

23. *Caffey*, 409 F. Supp. at 504.

24. *McRoberts Software Inc.*, 329 F.3d at 568.

25. *Folkens*, 2002 U.S. Dist. LEXIS 13519, at *14.

26. *Gunthy-Renker Corp. v. Bernstein*, 39 Fed. Appx. 584 (9th Cir. 2002).

27. *Mendler*, 2000 U.S. Dist. LEXIS 12966 at **11-12.

28. *Syigma Photo News Inc. v. High Society Mag. Inc.*, 778 F.2d 89, 92 (2d Cir. 1985).

Practitioner's Tips

By Susan McDonald

When I first started practicing law, the only reference book on my desk was the *Blue Book*. If I needed to check a dictionary or thesaurus, I trekked to the library. Over the past ten years, I have focused my work on research and writing and learned about a few more reference resources. Here are some books that I think every lawyer — whether you do litigation or transactions — should consider having close at hand.

1. A usage dictionary. According to Bryan Garner, the “purpose of a usage dictionary is to help writers, editors, and speakers use the language effectively; to help them sound grammatical but relaxed, refined but natural, correct but unpedantic.” Don’t we all need that help? My preferred usage dictionaries are both by Garner: Garner’s *Modern American Usage* and, just for us lawyers, — *A Dictionary of Modern Legal Usage*. I enjoy these dictionaries so much that I gave them as Christmas gifts this year. You may be more familiar with other usage guides, such as *Oxford Fowler’s Modern English Usage Dictionary* or the *American Heritage® Book of English Usage*.

2. A grammar guide. When do I use the present subjunctive form of a verb? Is a split infinitive really fatal? And there is the always troublesome choice between “that” and “which.” Instead of just wondering or ignoring those issues, I go first to *The Chicago Manual*

of Style as my primary grammar resource. But I sometimes check my *Plain English Handbook* from seventh grade. If you are (or want to be) a grammar nerd, check out www.grammargirl.com.

3. A current edition of the *Blue Book*. The *Blue Book*, like other reference books, can become outdated. The most recent edition is the Eighteenth, so you may need to order a new one. The Eighteenth edition includes citation forms for internet and other electronic sources. You may also want a copy of the *ALWD Citation Manual*, the *Green Book*, as a supplemental resource.

4. A *Manual of Style for Contract Drafting* by Ken Adams. This book, now in its second edition, recommends the most efficient language and format for each section of a contract. (For full disclosure, I helped proofread/edit a chapter of this edition.) The book is practical and understandable and useful, even to litigators who have never drafted a contract. Ken teaches contract drafting at the University of Pennsylvania, and I wish some group in Nashville would get him to conduct a CLE program here. **ESB**

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



Entertainment and Sports Law Section

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

CLE Calendar

JUNE 15 & 29

An Introduction to Contract Basics 1.5 general hours. Provider: Lorman Education Services (Teleconference) Contact: Kari J. Campbell 715-833-3940 kcampbell@lorman.com <http://www.cletn.com/lorman.com>.

JULY 7

Advantageous Uses of LLCs 1.5 general hours. Provider: National Business Institute (Teleconference) Contact: Laura Shay 715-835-8525 Laura.Shay@nbi-sems.com <http://www.nbi-sems.com>

JULY 28

5th Annual Southeastern Intellectual Property Job Fair CLE TBD. Provider: Georgia State University Law School. (Atlanta) Contact: Crystal Amos 404-413-9078

JULY 30

Business Law: Intellectual Property. 1.5 general hours. Provider: National Business Institute. (Teleconference) Contact: Laura Shay 715-835-8525 Laura.Shay@nbi-sems.com. <http://www.nbi-sems.com>.

AUGUST 6

LLC or Inc.? Entity Selection for a Small to Medium Sized Business. 5 general hours, 1 dual hour. Provider: National Business Institute. (Nashville) Contact: Laura Shay 715-835-8525 Laura.Shay@nbi-sems.com <http://www.nbi-sems.com>

AUGUST 13

Tips on How to Deconstruct a Contract 1 general hour. Provider: Knoxville Bar Association (Knoxville) Contact: Marsha S. Wilson 865-522-6522 mwilson@knoxbar.org <http://www.knoxbar.org>