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Dispute Resolution Magazine welcomes a diversity of viewpoints. Articles, therefore, reflect the views of their authors, and do not necessarily represent the position of the American Bar Association, the ABA Section of Dispute Resolution, or the editors of the magazine.

Article Submissions

The Editorial Board welcomes the submission of article concepts as well as draft articles relevant to the field of dispute resolution. The Editorial Board reviews all submissions and makes final decisions as to the publication of articles in Dispute Resolution Magazine. Email submissions to Gina Brown, Editor, at gibrown@americanbar.org. Submission Guidelines are available on the Publications page of the Section of Dispute Resolution web site: www.americanbar.org/dispute.
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Digital data has not only gotten "big," as we now put it. Data has gotten fast, unstructured, and overwhelming. According to IBM, 90% of the data in the world has been produced in just the past 2 years. Feeds from social media, offline transactions, user video and image posts, and more all converge into massive dashboards that give marketers and now publishers increasingly real-time, unmediated, and holistic views of the consumer. The big impact of Big Data is only beginning to be felt among content providers, but many in the industry see it as both a threat to the traditional ownership media companies had over audiences and an opportunity to reinvent content as data-driven products and services and give a struggling media industry new business models.

STEVE SMITH

Maybe it's the cachet that comes with increased media attention. Often it's the quick opportunity to reward eager venture capitalists and other money seeders. Likely it's the promise of liquidity and a quick infusion of cash. But whatever the reason, the allure of going public is hard to ignore for a privately held digital content company that has its sights set on bigger, better things. As they say, however, be careful what you wish for: Dreams of an auspicious debut on the stock market can quickly be dashed, and pressures to perform up to investors' expectations and conform to SEC regulations can be immense.

ERIK I. MARTIN

As with many software providers, WhatsUpGold has an active userbase that has a lot of questions. And like those other companies, WhatsUpGold often deals with this base of users through social media, such as Twitter and user message boards. However, WhatsUpGold's user forums were not quite up to snuff, and the company found itself looking for a new solution.

THERESA CRAMER
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Archibald Cary Coolidge, Founding Editor
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THE WRATH OF THE BUZZ KING: HOW THE NINTH CIRCUIT’S DECISION IN MDY INDUSTRIES, INC. V. BLIZZARD ENTERTAINMENT MAY SLAY THE GAME GENIE

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Since its release in 2004, Blizzard Entertainment’s (“Blizzard”) World of Warcraft (“WoW”) has become the world’s most infamous and popular massively multiplayer online role-playing game. The company’s strong anti-cheating policy culminated in the Ninth Circuit’s decision in MDY Industries v. Blizzard Entertainment, where the court held that the rights holders could use the Digital Millennium Copyright Act (“DMCA”) to prevent circumvention even where there is no actual copyright infringement involved. Although cheaters are not a sympathetic group of people, the Ninth Circuit’s decision strays from similar decisions by other circuit courts and potentially grants right holders like Blizzard the ability to control far more of the end-user experience than copyright has traditionally allowed. This paper explores the impact that this decision will have on the video game industry in light of its decision almost two years earlier in Lewis Galoob Toys v. Nintendo of America. It argues that the Ninth Circuit’s decision creates a dangerous precedent that allows right holders to exert control far beyond the scope of copyright law and puts forth several proposals in light of this decision.

AMBUSH MARKETING: DISSECTING THE DISCOURSE

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This article discusses the problematic discourse in which scholars and corporate complainants such as the International Olympic Committee have condemned the issue of ambush marketing. It argues that those who purportly complain about ambush marketing have wielded the term far too literally, and thus a great deal of conclusion exists between the generally accepted definition of ambush marketing and the reality of the circumstances surrounding the numerous marketing strategies that the term is commonly used to describe. While much of the current literature on the subject concludes that the existing state of the law in the United States is not equipped to handle the alleged problems that ambush marketing poses, this article concludes that American trademark and unfair competition law adequately balances the competing interests at stake in ambush marketing cases and should serve as a model for the rest of the world to follow. This article further exposes the fundamental flaw that pervades most analyses of the alleged threat posed by ambush marketing: That while critics argue that so-called ambush marketing tactics are particularly threatening because they cause consumer confusion as to a non sponsoring company’s association with an event, few ambush cases have ever been litigated primarily because complainants have not even been able to meet the Lanham Act’s low-threshold of proving any such likelihood of consumer confusion.

COMMENTS

PRIVACY IN SOCIAL MEDIA: THE RIGHT OF PUBLICITY

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The increasing ubiquity of social media websites like Facebook and Twitter has led to a growing concern regarding the right of privacy on the Internet. The myriad of common law cases on the issue provide website operators (and their advertisers) with little or no clear direction as to what is and is not permitted. At the same time, as websites monetize using an advertising model, that monetization is colliding with privacy rights, specifically, the right of publicity. The right of publicity has been heavily litigated lately, in particular against Facebook as it attempts to monetize its massive user base. This Comment is the first of four covering each of the four privacy claims in relation to social media. It begins with a summary of the recent litigation on the right of privacy against social media websites, then explains right of publicity claims and defenses, and ends with a suggested framework for websites to obtain the “consent” of their users, so as to avoid right of publicity claims.

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THE TRANSFORMATIVE TRIBUTE: HOW MASH-UP MUSIC CONSTITUTES FAIR USE OF COPYRIGHTS
by Vera Golosker

The music industry faces copyright protection issues in light of the transformative digital sampling trend, which has carved out a new genre: mash-up. Without obtaining licensing agreements, creators of mash-up music use parts of copyrighted songs as the ingredients for a fusion of sounds that arguably amounts to more creative value than the sum of its parts. In conditioning the legality of mash-up music, courts and legislators must strike a balance between securing original artists' interests and promoting new frontiers of expression. This article presents a background of digital sampling, applies the fair use defense to mash-up music, and proposes that the doctrine include protection for artistic re-contextualization. A sophisticated level of transformation, exhibited by artists such as Girl Talk, reintroduces the original songs to modern consumers' ears. This exposure, as well as changing notions of originality and accessibility, can explain the absence of legal challenge for Girl Talk, who used 372 unlicensed samples in his last album, All Day. Indeed, mash-up music pays tribute to sampled artists, and taps into current trends of consumption. By offering a dynamic musical experience that is novel, yet nostalgic, mash-up artists can give consumers an innovative product worthy of the fair use defense.

ONLINE BUSINESS REVIEWS AND THE PUBLIC FIGURE DOCTRINE: AN ADVERTISING-BASED STANDARD
by Jenna Morton

Online reviews exert a powerful influence of consumers, who rely on the reviews to choose restaurants, bars, doctors, and many other businesses. Businesses also rely on the reviews as an important form of advertisement. False reviews thus harm both businesses and consumers. Businesses that are harmed by false online reviews can bring a defamation action against the reviewers. However, the current legal standard is unclear as applied to businesses, as it looks to whether an individual is a “public figure.” This note weighs the costs and benefits of three possible legal standards for businesses bringing defamation actions: (1) a bright line standard that requires all businesses to prove that a statement was made with actual malice—knowledge or reckless disregard for its falsity, or (2) a retroactive balancing test that weighs all factors to determine whether the business is a “public figure,” and (3) the option recommended by this note: a compromise that requires businesses to prove actual malice if they advertise online, but makes recovery easier for small businesses with no online presence.

DRAFTING A SOLUTION: IMPACT OF THE NEW SALARY SYSTEM ON THE FIRST-YEAR MAJOR LEAGUE BASEBALL AMATEUR DRAFT
by Nicholas A. Deming

Major League Baseball has evolved over the years. What was once a game played by residents of small towns across the country is now a multi-billion dollar industry with international stars and ever-expanding exposure. With this transformation, the needs of the game have changed and its place in the judicial framework is unsettled. Currently, there is a growing discrepancy between small-market and large-market Major League Baseball teams. In part, the first-year amateur draft often fails to steer the most talented players to the worst teams because of financial concerns surrounding signing bonuses. Major League Baseball had the opportunity to fix this problem with the newest Collective Bargaining Agreement. The changes to the new Collective Bargaining Agreement attempted to curb the spending on rookies, and although it made steps in the right direction, Major League Baseball should implement a hard slotted salary structure to fully transform the amateur draft and ultimately improve professional baseball. This note will first give a history of antitrust law, Major League Baseball, and Collective Bargaining Agreements in Major League Baseball. It will then analyze how antitrust and labor law set the legal framework for the first-year amateur draft, the historical problems of the draft, the changes to the current Collective Bargaining Agreement, and the potential consequences of the new rules. It will then propose the implementation of a hard slotted salary as a better solution to Major League Baseball’s current problems and offer a conclusion as to the likelihood of such a system being implemented.
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