

Camp  
#CLE  
WRAP-UP  
12 SESSIONS \* 30 EXPERTS



ETHICAL ISSUES  
IN  
Entertainment Law

SCREAMING  
ABOUT  
Streaming



Films  
WITH  
Legal  
THEMES

BOOK

—BY—  
LOWELL BROWN  
HANNAH KIDD  
LINDSAY STAFFORD MADER

SW

all

WHAT ATTORNEYS WERE DISCOVERING, ABSORBING,

and DISCUSSING AT THIS YEAR'S FESTIVAL

INTERACTIVE  
**BUZZ**  
TWIBEL  
METADATA  
ONLINE SPEECH



The  
**WORD**  
ON 2014'S  
INTERACTIVE PANELS  
from  
PATENT CONTROL  
to PROTECTING  
PERSONAL  
INFO



*Lawyers from the music, film, and interactive industries* came together during South by Southwest to discuss trends, find new talent, examine legal issues, and build on ideas. The Texas Bar Journal received press credentials to cover these events as well as a variety of CLE sessions, which were held in Austin from March 7 to March 16. Here's a look at what attorneys were talking about at SXSW 2014.



## **INTERACTIVE**

The SXSW Interactive Festival has a tradition of encouraging innovators to push the envelope. But with fresh developments come new legal questions, and technology often moves faster than the legislative process. During the festival's opening days, tech and law experts discussed some of the issues at play, with the topics eliciting lively debates and fervent opinions.

### **Clubbing the Patent Trolls: How We Can Fight Back**

Panelists explained that both big and small businesses can be targets of patent trolls, which threaten litigation against companies for allegedly infringing on protected patents, though the patents are arguably broad and common sense and not always the claimant's original creation. Patent trolls typically purchase patents from bankrupt or struggling entrepreneurs and demand fees against infringing violators. In turn, companies might pay the "trolls" to go away instead of facing expensive court costs to fight the accusations, which are reportedly usually erroneous.

While the issue of patent trolling is currently being discussed in courts across the nation, panelists said the process is moving too slow and stressed the importance of reform. They also suggested that in the meantime, pro bono attorneys could assist small businesses that have limited funds to combat litigation. But some audience members responded with concerns that stricter limitations on patent lawsuits could jeopardize honest businesses and universities that have legitimate patents on products they worked hard to develop.

### **Mobile Security and the Future of the App Economy**

U.S. lawmakers are struggling to keep up with monitoring and protecting user rights within the ever-changing mobile development sector. Panelist Jaclyn Louis, legislative director and counsel to U.S. Rep. Tom Marino of Pennsylvania, cited a study showing that 95 percent of the top 200

free apps exhibit risky behaviors, further explaining that major threats to consumers include data theft and adware. Yet many Washington leaders want to avoid stifling development, which could be an effect of stricter requirements on app producers. Louis noted that the idea of a voluntary badge (think Energy Star) could be an effective method of vetting apps for consumers without too much government oversight.

### **Twibel, Tumblr, and the First Amendment**

With the option to hide behind avatars, handles, and screen names, people can be downright mean, even libelous, while communicating online. When defamatory statements are published on the Web, who is to blame?

For websites like Tumblr and Twitter, the answer is somewhat complicated. But one thing is certain—it's not the companies. Under Section 230 of Title 47 of the United States Code, passed as part of the Communication Decency Act of 1996, site hosts have protection against legal claims arising from information written by third parties. This includes content such as hate speech and sex trafficking.

During a panel entitled "The Fragile Law that Protects Online Speech," Ari Shahdadi, general counsel to Tumblr, explained how the company applies Section 230 to cases where unhappy users ask for negative posts to be removed from the site. Examples included rants against ex-boyfriends and bad business reviews, which Shahdadi noted are protected under the First Amendment. Taking them down, he argued, might discourage positive grassroots conversations. "You're either committed to free speech or you're not," he said.

According to Ellyn Angelotti of the Poynter Institute and Catherine Cameron with Stetson University College of Law—panelists in the conversation "Twibel: Fight Bad Speech with More Speech"—Twitter is facing similar questions. But despite numerous instances of online defamation, few cases have actually gone to court. Angelotti and Cameron, along with audience members, speculated that this could be a reflection of the costs associated with suing or simply an understanding that "that's just the way things are online."

Recognizing that traditional mediation and dispute resolution approaches are not always practical in online defamation cases, Angelotti and Cameron suggested community monitoring as a system for combating libel. Still, questions regarding the rights and responsibilities of both users and hosts linger and appear likely to remain present until additional legislation is passed.

## MUSIC

### Remixing, Mashups, and Copyright Law

The take-away from the music panel titled “Remixing, Mashups, and Copyright Law” was to play it safe when creating derivative musical works. All three panelists stressed to the audience of artists, producers, and a handful of attorneys that they must obtain a license if they wish to distribute a remix of an existing song or a mashup of several songs or videos. If the license is for using just a portion—however small or large—use just that part of the original and nothing more. And don’t even think about claiming the Fair Use Doctrine to support non-licensed remixes or mashups, which Christiane Kinney, musician and partner in the LeClairRyan law firm’s Los Angeles office, called “an excuse for copyright infringement.”

Dean Serletic, head of marketing and licensing for Music Mastermind Inc., pointed out that many amateur users who post their reinterpretation of songs and videos to YouTube have no idea that there is a law regulating such actions. Some of these uploads are flagged and removed because the users are generating ad revenue from the original owners’ content. Serletic added that recreating artists and the owners of original compositions need to openly negotiate. Sean Kinney, a music and film industry consultant, added that the creators of derivative works must ensure that they too have contracts on the derivative work to include anybody and everybody that had a role in producing the end product.



## FILM

Tucked among the SXSW Film Conference and Festival’s 133 feature films were a number of law-related documentaries, including several with Texas ties. Here are six whose stories touched on legal themes.

### Evolution of a Criminal

When New York University film student Darius Clark Monroe was 16 years old, he and two friends—one of them armed with a shotgun—burst into a Houston-area bank and demanded money from terrified clerks and patrons. Monroe was certified as an adult, pleaded guilty, and served several years in prison.

“I realized I had never made amends,” said Monroe, 33,

after the world premiere of his documentary, explaining the impetus for the film. He knew if he was ever going to heal, he had to find the people inside the bank that day and apologize, no matter how painful it might be and regardless of whether they would accept it.

The film, directed by Monroe and executive produced by Spike Lee, follows Monroe through each step of that journey. It also explores the repercussions of the robbery through the stories of Monroe, his accomplices, and their victims, including some who remained wary of the filmmaker’s motives.

### The Case Against 8

Telling the story of landmark U.S. Supreme Court cases often means poring through diaries and legal filings and—if you’re not too late—jogging the memories of those who lived it. For documentary directors Ben Cotner and Ryan White, it meant turning on a camera and watching events unfold. “I felt like a fly on the wall of history,” said White.

Filmed over five years, *The Case Against 8* offers an inside look at the legal and personal stories behind the effort to overturn California’s same-sex marriage ban, known as Proposition 8. The filmmakers manage to build tension as the story moves through the courts toward its resolution, the June 2013 Supreme Court decision in *Hollingsworth v. Perry*, which had the effect of allowing same-sex unions to resume in California.

The movie follows two interweaving storylines—the maneuverings of legal odd couple Theodore Olson and David Boies, who represented the plaintiffs challenging Proposition 8 (they also worked as opposing counsel in *Bush v. Gore*), and the lives of the plaintiffs themselves. The film won the SXSW Audience Award in the Festival Favorites category. Its debut on HBO is scheduled for June 23.

### Above All Else

Driven by concerns about his family’s safety, East Texas landowner David Daniel wages an unlikely fight against TransCanada’s Keystone XL pipeline in director John Fiege’s documentary. A former high-wire performer, Daniel builds a network of platforms and shelters in the trees above his property, hoping to block progress on the massive pipeline project by staging a tree-sit with a group of environmental activists. Hazards emerge—legal and physical—as the characters are forced to decide how much they’re willing to endure for the cause.

### The Great Invisible

Director Margaret Brown’s film—which won the SXSW

Grand Jury Award for documentary features—explores the toll of the 2010 BP Deepwater Horizon rig explosion and oil spill through the stories of survivors, Gulf Coast residents, and industry executives.

### The Internet's Own Boy

Internet pioneer and activist Aaron Swartz committed suicide in 2013 at age 26 while facing computer fraud charges for downloading millions of copyrighted academic journal articles. The film, from director Brian Knappenberger, raises questions about the fairness of the federal prosecution and asks viewers to ponder whether society suffers when publicly funded research is kept from the public domain.

### Vessel

Director Diana Whitten follows Dutch doctor Rebecca Gomperts in her quest to challenge some countries' strict anti-abortion laws by offering abortion-inducing drugs to women aboard a ship offshore, in international waters. The film won both the SXSW Audience Award for documentary features and the Special Jury Recognition for Political Courage Award.



### CLE

By the end of SXSW, attorneys were referring to the festival's official legal program as "Camp CLE." The CLE room typically was full of lawyers from around the country, as well as a mix of artists, publishers, and other entertainment industry professionals. Arranged by the Midwest-based Lommen Abdo Law Firm, a total of 12 sessions were held, led by 30 law experts.

### The Sentient Economy: Law and Policy for the IoT

Session leader Gerard Stegmaier—a partner in Goodwin Procter in Washington, D.C.—explained that the Internet of Things, commonly known as IoT, consists of objects that people use in their everyday lives that have the ability to connect to the online network, such as smartphones, personal activity trackers, even refrigerators with interactive computers. These devices often ask for the user to provide a varying amount of personal information so that the user's experience can be individually customized. Stegmaier quipped that this "machine-to-machine" con-

nection is dangerous because it involves controversial consumer privacy matters. Privacy law issues, he believes, will either inhibit or prohibit the growth of the IoT. Because most consumers value being notified—or being asked for permission—any time their personal data is captured, Stegmaier recommended that tech companies consider taking such "privacy by design" approaches.

Businesses that supply objects within the IoT can get into trouble for violating deceptive-trade laws, either by being outright deceptive or by being unfair. While the IoT "makes cool things possible," he said, lawyers need to make sure consumers and companies aren't at risk.

### All About Hidden Camera and Investigative Reporting

Led by entertainment attorney Michael Donaldson of Donaldson & Callif in Beverly Hills, this discussion focused on the recommended practices for documentaries and news programs that film "unsuspecting subjects." Donaldson suggested starting by researching the relevant states' laws on recording conversation and trying to obtain releases from any unsuspecting subjects who are filmed.

When no releases are obtained—as is commonly the case for undercover and investigative reporting pieces—the most important factor that courts have considered is the filmed individual's expectation of privacy. A TV news show that secretly filmed a physician inappropriately prescribing painkillers lost in court, based on the doctor's reasonable expectation of privacy in his own office. On the other hand, a suit brought on by a circus performer who was filmed backstage beating an orangutan was unsuccessful because the court found that he had little reasonable expectation of privacy backstage.

### Screaming About Streaming

Said to be the hot topic of this year's SXSW CLE, this three-person panel focused on online streaming and the copyright and royalty issues related to the increasingly popular way of consuming music. Panelists explained that music streaming involves two separate copyright issues: one for the composition's publishing and another for the master recording. Streaming itself is divided into two categories: interactive streaming (i.g., Spotify) and non-interactive (i.g., Sirius XM and—controversially—Pandora).

In the recent court case involving Pandora and the American Society of Composers, Authors and Publishers, Pandora sought to pay the same rate that traditional radio pays (1.7 percent of revenue) for ASCAP-registered material. Pandora insisted that it is guaranteed protection to have such low rates, while publishers and ASCAP argued that it is unfair and results in an industry where millions of hits on a single song generate less than \$600

in compensation. (The judge decided Pandora should pay 1.85 percent, significantly less than the 3 percent ASCAP was seeking.)

### Panelists Say It's Time To Revise Copyright Act

The major law governing copyright in the United States will turn 38 this year. An update meant to modernize the law for the digital age took effect during the Clinton administration. Technology hasn't stopped evolving since then, of course, and many—including officials at the U.S. Copyright Office—say a comprehensive revision is due. The U.S. House Judiciary Committee is reviewing the Copyright Act of 1976 in its entirety for potential updates. Separately, the U.S. Patent and Trademark Office is conducting its own review of the law for potential changes related to the Internet. Panelist Jacqueline Charlesworth of the Copyright Office said she expected Congress to begin considering draft legislation within the next year, following a series of public hearings.

The reviews take into account a variety of issues, including music licensing, the legal framework for remixes, and royalties for music played on AM/FM radio. Unlike digital radio or music streaming services, terrestrial AM/FM radio stations are not required to pay royalties to performers when they play their recordings.



### Ethical Pitfalls in Entertainment Law

The entertainment field can be fraught with ethical dilemmas. If they're not careful, attorneys can run afoul of rules governing the attorney-client relationship, conflicts of interest, attorney compensation, and simultaneous representation, among others, speakers said during a SXSW CLE session. That's especially true if an attorney is wearing a second hat—agent, manager, even band member, said Austin entertainment and media lawyer Lawrence Waks, a partner with Jackson Walker.

Conflicts of interest often happen when an attorney is asked to represent multiple parties associated with a single band or artist. In those cases, the attorney should warn the parties of the potential conflicts, encourage them to hire their own attorneys, and have them sign a conflict waiver, said Steve McConnico, an Austin trial lawyer. However, certain conflicts can't be waived under the rules of professional conduct, like if a manager is already in a dispute with band members, he said.

In Texas, like most states, a lawyer is prohibited from jointly representing clients when their interests are or may become adverse, said former Texas Supreme Court Chief Justice Wallace Jefferson, a partner in Alexander Dubose Jefferson & Townsend. Disciplinary codes may differ from state to state, which can make joint representation a tricky area to navigate, he said.

"You'll be in a lot better shape before a judge or jury if you say, 'I followed the ethics opinion,'" said McConnico. "If you give me a case where somebody's done that, I can defend them till the earth is flat and I'll get that ethics opinion into evidence. But if they didn't do anything to try to determine what the ethics opinions of the jurisdiction say about conflict, your defense attorneys will have a real disadvantage." **TBJ**

