A tangled Legal Web

July 24 - August 6, 2007 by Matthew Heller

When Mario Lavandeira was sued in November by paparazzi agency X17, he was, as usual, working on his PerezHilton.com gossip blog at his office -- a Coffee Bean & Tea Leaf in West Hollywood. As a process server handed Lavandeira the copyright infringement suit, Splash, another photo agency that later sued the blogger, documented the incident with footage that is now on display at Jossip, a rival Web site.

In a year of blockbuster legal developments in the industry -- from Google's fight over the legality of its prized acquisition YouTube to the regulatory hurdles of the proposed XM-Sirius merger, and from a heated trial over profits from NBC's "Will & Grace" to the increasingly attorney-led stampede of private equity into the business -- Lavandeira's case might best illustrate the current state of entertainment law: a mix of celebrity, big business, the Internet and the challenge of applying old laws to new technology.

"There has never been the type of situation Perez Hilton is in," says his attorney, Bryan Freedman. "All of a sudden, a blogger creates something that is so popular. You're talking about a different world."

Indeed, the X17 lawsuit claims "hot news" misappropriation -- a rule of law largely moribund for 80 years that was designed to protect competitors in the news business whose scoops were being stolen. Does that rule apply to a gossip blog that makes copyrighted images available to millions worldwide before the photos' owners can do the same? A judge ruled in February that the case could go to trial.

X17 and Lavandeira are not alone in posing big legal questions to which the attorneys profiled on the following pages are attempting to find answers, reshaping the media landscape in the process.

The Digital Millennium Copyright Act, for example, was passed by Congress in 1998 and established specific rules to help balance technology innovation with the piracy concerns of intellectual property owners. But do the law's safe-harbor procedures apply to protect the millions of copyrighted thumbnail images in Google search results or video clips posted on YouTube?

"Courts are grappling with new technology that does not fit squarely into the construct of the DMCA," says Russell Frackman, who helped the content industry win a U.S. Supreme Court victory two years ago that shut down the original Napster and its clones. Frackman's clients now include Perfect 10, a racy photo publisher that sued Google over its images appearing in thumbnails. In May, the 9th U.S. Circuit Court of Appeals found the thumbnails were a "highly transformative" fair use of the images under the relatively ancient Copyright Act of 1976.

"People have been surprised at the extent to which (fair use) has continued to be extremely important in defending digital media copyright claims," says Fred von Lohmann, senior staff attorney at the Electronic Frontier Foundation, a San Francisco digital rights advocacy group.

While contract negotiation and litigation continue to be playing fields upon which entertainment law careers are built, and with labor talks kicking into high gear as major guild contracts come up for renewal, the opportunity to set new precedents looms in even the most mundane quarters. But the ever-expanding online universe is where the true legal pioneering is taking place, and as such continues to be an area of focus for a growing segment of the legal community.

With the communities such as MySpace and Facebook flourishing, conduct on the Internet is a hot issue. The legal picture became a bit clearer this year thanks to rulings interpreting the Communications Decency Act of 1996, which shields interactive computer services from liability for content posted by third parties. A Texas judge, for example, applied that law in dismissing a case against MySpace by a teenage girl who was sexually assaulted by an adult male she met on the social networking site. The CDA also protected Yahoo from a suit over the posting of a pornographic photograph of a minor.

"Courts have consistently viewed the CDA as a broad, robust protection of content on the Web," says Timothy Alger, a partner at Quinn Emanuel in Los Angeles.

A slim minority of the 9th Circuit, however, found a chink in the CDA armor. A Web site, the court ruled, could be sued under the Fair Housing Act for having users complete an interactive questionnaire about their roommate preferences because such information was provided "in direct response to questions and prompts from the operator of the Web site." The site, Roommates.com, which is represented by Alger, has filed a petition for rehearing.

"This decision could affect any company that facilitates searches," warns Alger.

Offline, the FCC's crusade against "fleeting expletives" on television took a hit in June when an appeals court overturned its fines against the Fox network. And Fox's film studio inspired a new legal niche when seven fraud and invasion of privacy suits were filed against the makers of the hit mockumentary "Borat" (causing star Sacha Baron Cohen to thank "every American who has not sued me" in accepting a Golden Globe award). A Los Angeles judge dismissed one of the cases on free-speech grounds without addressing the issue of whether the liability releases signed by the plaintiffs, two fraternity brothers, were enforceable. But "reality" entertainment of a different kind took a hit when a California appeals court held that ABC could not arbitrate a dispute with five siblings who appeared on "Extreme Makeover: Home Edition."

"It's rare to have an arbitration agreement thrown out unless it's one-sided," notes Aaron Moss of Greenberg Glusker.

But as increasingly complex financing arrangements continue to change the business, and deals for talent like J.J. Abrams and Charlie Sheen reached new heights, much of the legal drama over the past year seemed to involve bloggers, some of whom celebrated a big victory as a California judge ordered Apple Computer to pay $700,000 in attorney fees for suing over leaked company information. And in the trial of a syndication revenue dispute between NBC and "Will and Grace" creators David Kohan and Max Mutchnick, the jury reached a $48.5 million plaintiffs' verdict when the defense dropped a bombshell: The foreman had vented about NBC on his blog. Before the judge could declare a mistrial, the case settled.

As for PerezHilton.com, attorney Freedman argues that his client's posting of celebrity photos qualifies as fair use. Time will tell as to whether courts agree, but for many entertainment lawyers, merely taking the law in new directions is satisfying.

"We have a fantastic opportunity to do something new and creative and maybe change or create a field of law," says Carole Handler of Foley & Lardner of the new legal climate. "How often does that happen?"