



Texas Entertainment and Sports Law Journal

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Entertainment & Sports Law Section

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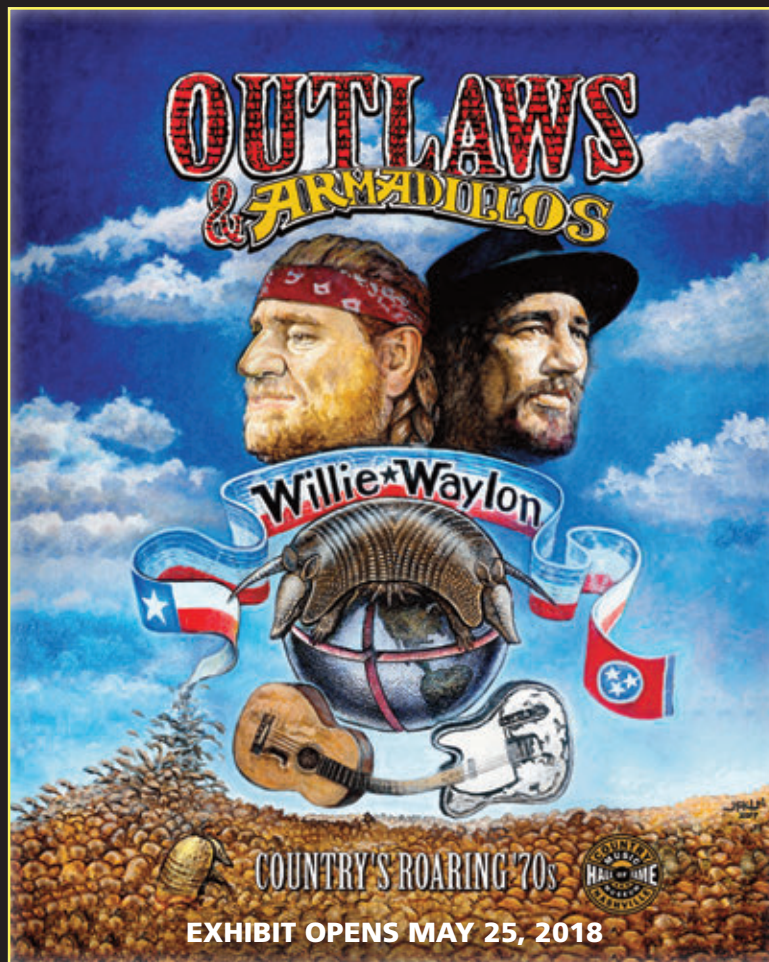
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The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, collegiate and professional sports. The TESLAW website at www.teslaw.org offers attorneys a chance to be listed with their focus area of practice in a publically searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment law. Join today to be part of a collegial organization growing the practice of entertainment law in Texas. For new bar members the first year's dues are free.

CHAIR'S REPORT

Dear Section Members,

I love this time of year. The leaves are turning, the weather is finally starting to cool down, and our busy schedules often get a much-needed break due to the Holiday season. Fall is a time for renewal, and also an opportunity to reflect and prepare for the year ahead. If you're new to the Section or a seasoned member, I invite you to take advantage of the resources our Section has to offer.

On a Quarterly basis, TESLAW releases TESLAW Tidbits, an up-to-date guide on our Industry! This e-newsletter includes: a Member Spotlight highlighting one of our local members and information on their practice; a Case Note on a timely decision affecting our Industry; and a Practice Document to utilize in your practice and add to your forms library. If you're new to the Entertainment realm, or would like to increase the visibility of your Entertainment Practice, I highly suggest making a submission to our Editor-in-Chief Erin Rodgers at erin@roddersselvera.com.

On a semi-annual basis, TESLAW releases the *Texas Entertainment and Sports Law Journal*, our online Journal. I was actually first published in our Journal back in 2010 during my last year of Law School at Texas Wesleyan Law. What a wonderful opportunity for a graduating 3L! All submissions for our Journal can be sent to Joel Timmer, Journal Editor at j.timmer@tcu.edu.

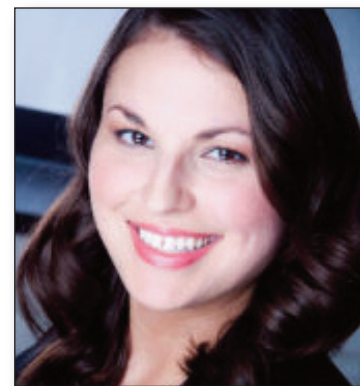
Further, our Section offers Networking and CLE Events throughout the year. First up, is our 28th Annual Entertainment Law Institute in November. This is our largest Event and kicks off with an Entertainment Law 101 Bootcamp on Wednesday, November 7th at the AT&T Hotel and Conference Center in Austin, Texas. We recently added this offering and it's been a big hit! This Bootcamp provides a high-level overview of introductory legal issues for clients in music, film, and other creative industries. The Entertainment Law Institute runs from Thursday, November 8th to Friday, November 9th and provides you with 12.5 hours of CLE Credit, including 1.25 hrs Ethics credit! Register here: teslaw.org/eli/. Our twins are actually due the same week of ELI so I will not be in attendance, but please say hello to Council Members and our Vice Chair, Dena Weaver.

In March 2019 is our SXSW Mixer at the Iron Cactus in Austin, Texas. Stay tuned for more details on this fun Networking Event.

Please feel free to reach out to me any time via email at attorney.vhelling@gmail.com. I am grateful to serve as your Chair for the 2018-2019 fiscal year! And I look forward to meeting each of you in the near future!

Sincerely,

*Victoria Helling
Chair 2018-2019
Entertainment & Sports Law Section
State Bar of Texas*



Victoria Helling
Chair 2018-2019

EDITOR'S LETTER



Joel Timmer
Editor

**Texas Entertainment and
Sports Law Journal**

Welcome to the Fall 2018 issue of the *Texas Entertainment and Sports Law Journal*. We are pleased to have a variety of content tied to the 28th Entertainment Law Institute. The ELI takes place **November 8-9, 2018** at the **AT&T Hotel and Conference Center at the University of Texas at Austin**.

In case you're not familiar with it, the ELI is an annual continuing legal education course produced by TexasBarCLE and co-sponsored by the State Bar of Texas Entertainment and Sports Law Section. Attendees can earn 12.5 hours MCLE Credit, including 1.25 hours ethics credit.

The ELI consistently provides an outstanding faculty of highly-regarded practitioners and industry insiders to keep entertainment lawyers up to date on the latest emerging trends, issues and breaking developments in music, film, and digital media.

In this issue, you'll find an article on the newly enacted Music Modernization Act by ELI panelist Christian Castle. You can also find additional details about the panels and speakers for this year's ELI.

Offered in conjunction with the ELI will be "Entertainment Law 101", a crash course on starter topics taking place the day before the start of the ELI on **November 7**. Participants can earn 3 hours of MCLE credit. Course Director Amy Mitchell provides more detail on the session later in this issue.

For more information, or to register for the Entertainment Law Institute, click here: <http://www.texasbarcle.com/CLE/AABuy0.asp?IID=16734&sProductType=EV>

For more information, or to register for Entertainment Law 101, click here: <http://www.texasbarcle.com/CLE/AABuy0.asp?IID=16735&sProductType=EV>

We hope to see you at one or both of these events!

This issue also contains a story not related to the ELI: a history of the Texas Film Commission, which is nearly 50 years old!

Happy reading!

Joel Timmer
Editor

Submissions

The Texas Entertainment and Sports Law Journal publishes articles written by practitioners, law students, and others on a variety of entertainment and sports law topics. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. Articles of varying lengths are considered, from one-to-two-page case summaries and other brief articles, to lengthier articles engaged in in-depth analysis of entertainment and sports law issues. Endnotes must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form. Please submit articles for consideration in Word or similar format, or direct any questions about potential article topics, to Journal Editor Joel Timmer at j.timmer@tcu.edu.

Once an article is submitted, the Journal does not request any additional authorization from the author to publish the article. Due to the number of submissions and the number of potential publications in the marketplace, it is nearly impossible to monitor publication of submissions in other publications. It is up to the author to assure that we are notified should there be any restrictions on our use of the article. This policy has been implemented to assure that our Journal does not violate any other publication's limitation on republication. The Journal does not restrict republication, and in fact encourages submission of an author's article to other publications prior to or after our election to publish. Obviously, the Journal will make the appropriate attribution where an article is published with the permission of another publication, and request such attribution to the Journal, if we are the first to publish an article.

== Highlights of Managing Change Under the Music Modernization Act's Mechanical Licensing Collective¹

By *Chris Castle*²



Founder of Christian L. Castle, Attorneys in Austin (christiancastle.com), **Chris Castle** is admitted in Texas and California. Chris divides his time between advising creators in the music industry, representing innovative music tech startups on music rights issues, and addressing public policy matters relating to copyright and artist rights.

The four-part “Orrin G. Hatch—Bob Goodlatte Music Modernization Act” (“MMA”) has now passed both the U.S. House of Representatives and the Senate.³ As of September 25, 2018, the Senate version of the bill passed the House of Representatives as the amended HR 1551 resolving differences and has been sent to the President for signature. Accordingly, attorneys must prepare to advise clients about the many changes in their businesses and creative relationships that will be affected by the MMA.

This article is limited to managing change for clients affected by the MMA’s government-mandated mechanical licensing collective in the MMA’s Title I. As I think you will see, far from putting songwriters on a trajectory away from the government regulation that has oppressed them for generations, the collective imposes an entirely new bureaucracy with potentially significant costs that are not readily apparent.

The Structure of the MMA and the Coming Regulations

Two of the four parts of the MMA apply to sound recordings and two parts to songs. The sound recording parts are well-known ground. Title III essentially codifies current practices by SoundExchange regarding a producer’s share of statutory performance royalties. Title II affords certain rights to digital public performance royalties for pre-1972 recordings that were the subject of The Turtles groundbreaking lawsuits against SiriusXM and Pandora Media.⁴ While not accorded its own title, Sections 104 and 105 of Title I contain process reforms to the ASCAP and BMI consent decrees similar to the Songwriter Equity Act of 2015.⁵ These three parts are largely self-executing following enactment.

The rest of Title I, however, mandates a limited blanket mechanical license to be administered by a newly created mechanical licensing collective (required by statute to be a private non-profit business organization) often referred to as “the MLC” or in the statute as “the collective.” Title I is extremely complex and comprises approximately 149 of the 186 pages of HR 1551, five times longer than the entire 1909 Copyright Act.

And then there are regulations yet to come. The MMA mandates a host of Copyright Office regulations. That does not include the regulations that the Copyright Royalty Judges (CRJs) may adopt to address administrative assessments.⁶ (This rather flies in the face of the current Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs applicable to Executive Branch agencies.⁷)

The Promise of Higher Songwriter Income

The somewhat circular talking points for the MMA revolve around claims that “songwriters will make more money” and “the services pay for everything” through an “administrative assessment” paid by blanket licensees to cover the costs of the collective. The former is claimed to be implied by the latter, even though the blanket licensees clearly do not pay for “everything” and no one knows today how much of the collective’s costs will be borne by the licensees together or individually. Songwriters have been promised rising income due to the process reforms of the ASCAP and BMI consent decrees, the shift to the “willing buyer/willing seller” rate standard, and cost shifting. We shall see.

The administrative assessment may result in a saving of some administrative costs on mechanical royalties—however, hidden costs arise from compliance due to formalities. Failing to claim⁸ each song with the collective may cause unmatched revenues to go into the “black box” (which has a contentious history). Anyone who has transferred ownership of a song catalog will understand—and the collective applies to the entire global catalog of songs past and future from all languages and cultures.

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Highlights of Managing Change Under the Music Modernization Act's Mechanical Licensing Collective

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The MMA's consent decree reforms (such as changing the rate court from a single judge to the wheel system of random assignment) may, with luck, result in higher performance royalties since the ASCAP and BMI rate courts have not gone well for songwriters in the Internet era. However, the cases are still to be heard in the same courthouse, and the wheel turns 360 degrees—so it's possible that ASCAP and BMI could still be assigned the very judges they used an act of Congress to avoid. We shall see.

Any one of these talking points could be the subject of a lengthy article, so we will mostly leave them behind now and just focus on the more practical aspects of the new mechanical licensing collective mandated by Title I. For full disclosure, I have been critical of the MLC over the last year. While a few of my concerns were addressed in the legislation, I fear there are still loose ends that may bedevil practitioners. Like any other major change in the law, compliance may be expensive and those compliance costs will not be covered by anyone but the songwriter or publisher.

The Role of the Mechanical Licensing Collective

As part of the Title I mandate, the “authorities and functions” of the collective are many⁹ but include these practical elements, any one of which is easy to write but not to execute:

- administering the blanket compulsory license for “covered activities,” including claiming for unmatched royalties (the “black box”);
- creating and prospectively updating a global rights database¹⁰;
- receiving royalty payments from all blanket licensees and administering royalty payments to copyright owners or their administrators;
- distributing “black box” or unmatched mechanical royalties on a market share basis (which is very similar to current practices); and
- conducting royalty compliance examinations of all blanket licensees once a year for the billions and soon to be trillions of streams in the prior three years (again, a very similar provision to the historical practice for physical goods).

Crucially, the collective and blanket license apply to all songs ever written or that ever will be written that are exploited in the United States—not only US works. Unlike many collecting societies around the world, *there is no “opt out,”* except through voluntary licenses if one is offered by a blanket licensee outside of the statutory license.

We will review a selection of issues arising from Title I of interest to practitioners based on reactions to my discussions and lectures.

Publishing Administrators

Let's follow the money. It is likely that sums paid by the collective will be subject to an administration fee when received by a publisher or administrator unless carved out. Carve outs will be unlikely given the new compliance work that the publisher or administrator must undertake. Accounting systems are likely already programmed to deduct an admin fee from whatever revenue is received, so changing that rule set may be like a mini-Y2K.

Reachback Safe Harbor

Title I's reachback safe harbor is earthshattering—and of questionable constitutional provenance. It eliminates the ability of copyright owners—especially small copyright owners—to sue infringers like Spotify for statutory damages, attorneys' fees, or injunctions, for infringements arising *before* enactment of the MMA if the “digital music provider” takes the blanket license *after* enactment of the MMA. Money damages are limited to payable royalties only. Given that Bluewater Music recently prevailed over Spotify's motion to dismiss in an individual statutory damages case,¹¹ the infringement cases Spotify is already fighting will likely result in settlements in excess of several hundred million.

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A History of the Texas Film Commission

By Joel Timmer



Joel Timmer is an Associate Professor in the Department of Film, Television and Digital Media at Texas Christian University in Fort Worth. He is also Editor of the TESLAW Journal.

The Texas Film Commission promotes itself as “first stop for resources that serve the film, television, commercial, animation, visual effects and video game industries of Texas.”¹ The commission seeks to attract media productions to the state by facilitating and assisting producers with their production needs, from scouting and securing locations, assisting with necessary permitting, and providing information on production resources within the state. The benefits to the state are increased business in the state, as productions could spend millions of dollars in the state on the resources needed for production, as well as employment opportunities for residents, whether for crew, cast, or in other roles supporting a production.

Texas has had a state film commission since 1971. From its earliest days, the Texas Film Commission had success in attracting film, television, and commercial production to the state, so much so that Texas referred to itself as the “Third Coast of filmmaking,” after the West and East Coasts. In the 1990s and 2000s, attracting productions to the state became more difficult

as neighboring states began offering producers cash incentives to lure them to come shoot in their states, something Texas would not do until 2007. When Texas did finally begin offering incentives, it was thanks in part to a strong desire to keep the NBC TV series *Friday Night Lights* shooting in the state.

The commission and its incentive program, however, have seen controversy over the past several years due to a provision that allows film incentives to be denied to projects that have “inappropriate content”

or that portray “Texas or Texans in a negative way.”² Three films have been denied incentives due to this provision, leading to two court cases that upheld the commission’s authority to deny incentives on that basis. At the same time, the commission has struggled to fund the incentive program, as Texas legislators have, in recent years, regularly sought to eliminate or slash funding to the program. This Article traces these and other events in the history of the Texas Film Commission.

The Commission Is Founded

Films were made in Texas long before the Texas Film Commission came into existence: the recipient of the very first Academy Award for Best Picture, *Wings* (1927), “was shot at Fort Sam Houston and around Bexar County;”³ John Wayne’s *The Alamo* (1954) was filmed in Bracketville, where filmmakers built a replica of the iconic fort (which has since been used in other films);⁴ the epic Western *Giant* (1956), starring Elizabeth Taylor, Rock Hudson, and James Dean (in his final film role), was shot in Marfa;⁵ and *Hud* (1963), starring Paul Newman, was shot in the Panhandle town of Claude,⁶ to name a few.

Texas Governor Preston Smith, himself a former Lubbock theater owner,⁷ created the Texas Film Commission in 1971.⁸ Smith is said to have been inspired, partly at least, by New Mexico’s success in luring big-budget pictures to the state following the creation of its film office.⁹ Also instrumental was Smith staffer Warren Skaaren, who “wrote a proposal to start the Texas Film Commission . . . [and] spearheaded the lobbying effort to put the bill through the state Legislature.”¹⁰ Smith signed the Executive Order creating the Texas Film Commission on May 24, 1971.¹¹ The commission, whose original purpose was to “encourage the development of the film-communication industry” in Texas, became part of the Office of the Governor.¹² Skaaren was appointed its first Executive Director.¹³

The commission started out as “a learn-as-you-go operation; Skaaren’s first purchase with the \$100,000 operating budget bestowed by a skeptical Texas Legislature was a 35mm camera with which he could document the Texas terrain for curious producers and location scouts.” Skaaren also traveled to Hollywood frequently to spread the word there about the benefits of filming in Texas. The first film to be shot in Texas following the commission’s creation was director S.F. Brownrigg’s 1971 film *Don’t Look in the Basement*, which was shot in Tehuacana. This was followed by other, more prominent films, such as Peter Bogdanovich’s *The Last Picture Show*, Sam Peckinpah’s *The Getaway*, and a young Stephen Spielberg’s *The Sugarland Express*.¹⁴

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A History of the Texas Film Commission

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Skaaren left the commission in 1974, his four-year term having seen a “total of 39 major motion pictures and an unknown number of commercial and television productions” shot in Texas.¹⁵ Prior to the commission’s founding, “the state averaged little more than one production a year.”¹⁶ Skaaren stayed active in the film industry for the remainder of his career. He is credited with “suggesting a title change for a little horror film called *Leatherface* to the more shock-tastic *The Texas Chainsaw Massacre...*”¹⁷ Skaaren also became a go-to script doctor: he rewrote the scripts for *Top Gun*, *Beverly Hills Cop 2*, *Beetlejuice* and *Batman*, films which collectively grossed more than a billion dollars.¹⁸

Taking over for Skaaren as Executive Director was one of his original hires to the film commission, Diane Booker, who served in that role from 1974 to 1977. Booker was succeeded by Pat Wolfe, who served as Executive Director from 1977 to 1982. In its first decade in existence, the commission assisted with the production of 114 theatrical and television movies in the state, including films such as *The Great Waldo Pepper* and *The Texas Chain Saw Massacre*.¹⁹

Joel Smith led the commission from 1982 to 1986,²⁰ during which time “122 major movies and television productions . . . with combined budgets of more than \$366 million” were made in the state. These included Academy Award winners *Terms of Endearment*, *Places in the Heart*, *Tender Mercies*, and *The Trip to Bountiful*.²¹ Texas’ claim to be the Third Coast of filmmaking was given credibility at the 1984 Academy Awards, when two Texas-made films, *Terms of Endearment* and *Tender Mercies*, captured seven of the top eight awards.²²

Up until the mid-1980s, “the majority of incoming productions were scattered across the state’s 267,000 square miles more or less in accordance with the sort of terrain an incoming film might require.”²³ If there was a center of Texas filmmaking during this period, it was the Dallas-Fort Worth area, with its international airport, “an established crew of film professionals who had hammered out a solid reputation over the years,” and “the largest motion picture production facility between the coasts” at the time, the Studios at Las Colinas in Irving, home to 1983’s *Silkwood* and TV series *Walker, Texas Ranger*.²⁴ However, in the mid-80s, filmmaker focus began to shift to Austin, which had mainly hosted smaller, independent films in the 1970s.²⁵ Austin would see a boom in moviemaking in the coming years.

Dana Shelton served as Executive Director from 1986 to 1989.²⁶ During her tenure, in 1987, the Texas Film Commission was made part of the Texas Economic Development Commission,²⁷ itself part of the Texas Department of Commerce.²⁸ Then in 1989, the commission was “split into two separate units: the Texas Film Commission and the Texas Music Office.”²⁹ Shelton left the commission in 1989,³⁰ and was succeeded by Joe Dial.³¹ Dial was instrumental in securing “the application of the manufacturer’s sales tax exemption to film productions. Previously, films shooting in Texas were taxed like anything else; Dial’s plan resulted in another financial incentive to bring filmmakers to the state.”³²

The year 1989 was the best ever up to that time for film and television production in the state: 32 projects were filmed in the state with production budgets totaling \$116.4 million, beating “1983, the previous record holder, which claimed 30 major productions and budgets totaling \$114.1 million.” Big sequels were given a great deal of credit for the record year: *Texasville*, director Peter Bogdanovich’s sequel to *The Last Picture Show*, a film which itself “helped put Texas on the map as a location,” “accounted for about \$55 million” of the total. Another sequel, *Robocop II*, was filmed in Houston that year.³³

Dial stepped down in 1990 and was replaced by Tom Copeland as interim director. Copeland “had by that time been with the commission as long as anyone and was roundly regarded as the backbone of the operation...” Copeland only served for two years before “incoming Governor Ann Richards, arriving with a Rolodex full of contacts and friends in Hollywood,” came in and shook things up.³⁴

Governor Ann Richards Goes to Hollywood

Governor Ann Richards took a strong interest in the film commission and its mission. In 1991, she brought the commission back into the fold of the Governor’s Office, along with the Texas Music Office forming the Office of Music, Film, Television and Multimedia.³⁵ The commission “remains in the governor’s office to this day.”³⁶ Richards also appointed California media consultant Marlene S. Saritzky to lead the commission.³⁷ A former director of the Hollywood Women’s Political Committee with the ability to tap into “the many contacts she had developed during her time in Los Angeles,” Saritzky was more aggressive

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2018 Entertainment Law Institute Panel Descriptions and Speakers

Thursday, November 8

8:45am: Data Privacy and Information Security: What are the Obligations of the Law Firm?

Speaker: *Claude E. Ducloux, Law Offices of Claude Ducloux, Austin*

A significant part of Claude’s practice involves writing, teaching, lecturing and representation of clients, including lawyers in the area of Legal Ethics and Professionalism. Claude also served as Chair of the Board of Trustees for the Texas Center of Legal Ethics and Professionalism for two years.

Fun Fact: Claude has participated in the all lawyer singing group the “Bar & Grill Singers” since 1992, performing throughout the country and benefiting pro bono causes.



9:45am: Representing Arts and Entertainment Industry Non-Profit Organizations: Is a 501(c)(3) the Right Choice?

Speakers: *Alissa McCain, Texas Accountants and Lawyers for the Arts, Austin*

Alissa is an attorney and Executive Director for Texas Accountants and Lawyers for the Art, which offers pro bono legal and accounting services to artists from all creative disciplines, including visual artists, musicians, actors, dancers, filmmakers and writers. Over 600 attorneys and accountants volunteer their time each year.

Erin Rodgers, Rodgers Selvera, Houston

Erin has been practicing entertainment and nonprofit law in the Houston area since 2007. She has spoken at many entertainment industry events and teaches copyright and business courses at the Art Institute of Houston.

Fun Fact: Erin is a classically trained clarinetist. She has also performed as a vocalist with Dave Brubeck and the Louisiana Philharmonic Orchestra, and currently performs with Houston indie rock bands The Wheel Workers and Glass the Sky, among others.



11:00am: Annual Roundup of Notable Entertainment Industry Court Rulings

Speaker: *Stan Soocher, Editor-in-Chief, “Entertainment Law & Finance” and Associate Professor, Music & Entertainment Industry Studies, University of Colorado Denver, Denver*

Stan is a Professor of Music & Entertainment Industry Studies at the University of Colorado’s Denver Campus. He is also an entertainment attorney and the long-time Editor-in-Chief of the monthly Entertainment Law & Finance.

Fun Fact: Stan authored the recently released book, *Baby You’re a Rich Man: Suing the Beatles for Fun & Profit*. He is also a drummer.



1:15pm: Drafting Terms of Service and Privacy Policies in the New Internet Era

This panel will explore common issues faced by companies seeking to operate online and engaging with consumers for the delivery of rich media or by providing social media platform services. From Terms of Service and Privacy Policies to DMCA Safe Harbor Protections, this panel discussion will provide an overview of the issues to consider and identify when advising clients, particularly startups for whom speed to market is paramount and the resources for outside legal spend is modest.

Speaker: *Gary R. Greenstein, Wilson Sonsini Goodrich & Rosati, Washington, DC*

Gary is a partner in the Washington, D.C., office of Wilson Sonsini Goodrich & Rosati, where his practice focuses on intellectual property, licensing, and commercial transactions, with specialized expertise in the digital exploitation of intellectual property.

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2018 Entertainment Law Institute Panel Descriptions and Speakers

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11:00am: Music Publishing After the MMA: Valuations, Payments, and Collections

An attorney and music publisher discuss the impact and consequences of the MMA for music publishers and startups.

Speakers: *Christian Castle, Christian L. Castle, Attorneys, Austin*

Chris' practice includes advising creators in the music industry, representing innovative music tech startups on music rights issues, and addressing public policy matters relating to copyright and artist rights.

Fun Fact: Chris was recently involved in negotiating music rights for episodic virtual reality programming. He also wrote an article on the Music Modernization Act that appears in this issue of the TESLAW Journal.

Richard Perna, Song Research & Recovery Services, Austin

Richard has spent four decades in the world of music, serving in a variety of roles, from administrator, to song-plugger, to licensing agent, to auditor, to aggregator to CEO.

Fun Fact: During his career as a music publisher, Richard negotiated, signed or acquired, the ownership, or administration rights, to copyrights written and/or recorded by numerous artists, including The Oak Ridge Boys, The Statler Brothers, Leon Russell, The Bellamy Brothers, ZZ Top, Roy Orbison, Warren Zevon, The Ramones, and Taylor Swift.



1:15pm: Every Lawyer's Crazy 'Bout a Sharp Dressed Legal Issue: An Introduction and Update to Fashion Law

The basics of fashion law will be presented, including the application of US and international intellectual property law, as well as unique transactional, litigation, and client considerations.

Speaker: *Lawrence A. Waks, Wilson Elser Moskowitz Edelman Dicker, Dallas*

Larry's IP-based practice model relies on a balance of litigation and transactional work directed toward media and entertainment, food & beverage, consumer products, technology, fashion, and publishing.

Fun Fact: Larry led a six-attorney team that represented the owners of Casamigos (actor George Clooney, entertainment industry giant Rande Gerber and real-estate tycoon Mike Meldman) in the sale of their famous tequila brand.



2:15pm: Streaming Services & Showrunners: Selling Scripted and Non-Scripted Content to Netflix, Amazon, and Hulu

The Streaming content services such as Netflix, Amazon, Hulu, iTunes and others have expanded their reach into financing original content. John Sloss, attorney and Executive Producer will discuss the current opportunities and nature of the deals.

Speaker: *John Sloss, Managing Partner, Sloss Eckhouse LawCo; President, Cinetic Media, New York*

John is a partner in Sloss Eckhouse LawCo. and a principal at media advisory firm Cinetic. Through Cinetic, he produces motion pictures and television, provides various content sales and corporate advisory services, and presides over a rapidly growing talent management division.

Fun Fact: Among the films John has produced are Richard Linklater's *Boyhood*, *Last Flag Flying*, and the "Before" Series, Todd Haynes's *Wonderstruck* and *I'm Not There*, Errol Morris's *The Fog of War*, and Kimberly Peirce's *Boys Don't Cry*.

“Entertainment Law 101” CLE program

by Amy E. Mitchell



Amy E. Mitchell

Thanks to the strong attendance at the inaugural ELI 101 (aka “Entertainment Law Bootcamp”), I am thrilled to return as course director for a second year. This year, we are taking a deeper dive into music law issues.

We are excited to welcome new ELI 101 speakers **Gretchen McCord** and **Buck McKinney**, who will be providing an overview of intellectual property strategies for creative clients and a practical overview of legal issues in music licensing, respectively. Back by popular demand is **Adam Mandell**, who will be providing common terms and strategies for negotiating music publishing agreements.

Attorneys who are looking to launch or grow an entertainment practice are encouraged to attend this “bonus” half-day CLE program. ELI 101 also aims to help newer entertainment attorneys learn some basics in order to get more out of the main ELI program.

More on this year’s run of show...



Copyright, Trademark, or Both? Maximizing IP Protection for Creative Clients

Scripts and manuscripts, titles, band names, music, films, company names, logos... Entertainment lawyers must be prepared to help their clients protect a wide range of intellectual property. Learn how to maximize your client’s protection through strategic use of copyright and trademark law. Discussion will include the types of protection appropriate for different situations, how to get started, and common pitfalls to avoid.

Speaker: *Gretchen McCord:* Gretchen left big law in 2010 to launch her own law practice and currently works with small, often family-owned, businesses, solo entrepreneurs, individual creators, educational institutions, and non-profits. Her practice focuses on copyright, trademark, and general contract law, risk assessment, licensing, establishing compliance policies and procedures, employment, independent contractor and consulting services agreements, “Master” services agreements, publishing agreements, endorsement agreements, right of publicity licenses, and website terms of use/services.



Sign That Tune: Common Terms & Strategies for Negotiating Music Publishing Agreements

Beginning entertainment attorneys will be introduced to typical provisions in a music publishing agreement, with common-sense explanations, as well as tips and strategies for improving a client’s position in a deal. A basic understanding of music copyrights would be helpful to getting the most out of this presentation.

Speaker: *Adam Mandell:* Adam is an attorney at Miller White Zelano & Branigan. Adam excels at guiding clients in protecting new technologies that don’t fit into traditional forms of intellectual property. This includes successful protection of computer programs, websites, graphical user interfaces, product designs, and packaging. In addition, he advises clients on global protection of brands online; assists clients in trademark clearance, prosecution, maintenance, enforcement and licensing; has significant experience with internet infringement matters on search engines, e-commerce, and social media; litigates commercial actions including copyright and trademark infringement; and conducts music-business deals.



Creating the Soundtrack of Our Lives: A Practical Overview of Music Licensing

Music is often called the “soundtrack of our lives,” and for good reason: we encounter it at almost every turn – from the music we intentionally consume (packaged music, radio, streaming), to the music enhancing other products we consume (film, TV), to the music we share with our friends (Facebook and YouTube), to the music we can’t seem to escape (commercials, elevators and on-hold music). For the purveyors of these products and services, consent is almost always required. Understanding the

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types of licenses involved, and the administrators from whom they must be acquired, can be a challenging task, even for an experienced music attorney. This session will address common music licensing scenarios, with practical tips for locating rights owners and administrators, and securing the necessary permissions for your clients.

Speaker: *Buck McKinney:* As an entertainment lawyer, professor, concert promoter and professional musician, Buck McKinney has over twenty-five years' experience in the music business. McKinney's current law practice focuses on entertainment matters and litigation with an emphasis on the music industry. His clients include recording artists, independent labels, publishers, concert promoters, film producers and authors. McKinney previously served as co-owner and operator of Houston live music venue and concert production company Rockefellers, where McKinney and his business partners produced over 340 concerts by artists including Dave Matthews, Dixie Chicks, Pat Metheny, Buddy Guy and Joe Sartriani.

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Highlights of Managing Change Under the Music Modernization Act's Mechanical Licensing Collective

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To reiterate—the reachback safe harbor bars claims for infringement lawsuits *filed* after January 1, 2018 *even if the claim arose before that date and is still within the statute of limitations*. An example would be Spotify class action participants who had claims outside of the class settlement. Again, the reachback safe harbor *precedes the enactment of the MMA*.

Realize that the MMA was initially introduced on December 21, 2017—eleven days before the proposed reachback period commenced. A public copy of the bill was not available until after the reachback nominally started.

None of the messaging about the bill addresses the reachback—but it is why¹² Wixen Music Publishing sued Spotify¹³ on December 29, 2017. As Robert Levine noted in *Billboard*, “A bill that restricts lawsuits after January 1, 2018 should not have been introduced just before Christmas....”¹⁴

After enactment, new infringement lawsuits like the Spotify class actions will be much harder to bring. However, there are certain predicates in the MMA that condition the availability of the safe harbor, and are deserving of greater attention beyond the scope of this article.

Vendors to the MLC

If your client is a vendor to the MLC, realize that in the unlikely event the entity once designated as the MLC by the Register is found to be wanting in a future review, the Register may appoint a new MLC. In that case, the Register may “transfer...licenses, funds, records, data, and administrative responsibilities from the existing mechanical licensing collective to the new entity.” Any intellectual property of the vendor should be clearly delineated to avoid the government deciding that it should be unexpectedly taken and transferred to a new entity, or mandate the assignment of the vendor’s contract to that new entity, apparently without compensation to the vendor.

Will the Mechanical Licensing Collective Become Duplicative?

ASCAP and BMI already license the song performance right for the same songs, to the same anticipated blanket licensees, for the same performances under antitrust supervision of the government. The collective will license the corresponding “streaming mechanical” for the same work, but gets an antitrust exemption.

Why aren’t the performing rights organizations (PROs) offering a one-stop license for all rights as in other jurisdictions? The government prohibits at least ASCAP doing so under the 77-year-old consent decree. So the MLC gets an antitrust exemption on streaming mechanicals, but government supervision controls the performance side of the identical transmission.

This is even more Kafka-esque because the new head of the government antitrust division is reviewing¹⁵ the ASCAP and BMI consent decrees to possibly end them. This did not sit well with broadcasters or Senator Richard Blumenthal, and the MMA now requires that the Antitrust Division brief Congress on any proposed changes—not on all of the 1300 consent decrees the DOJ is reviewing, just the ones applicable to songwriters. But clearly, if songwriters are freed from the consent decrees, a single license for covered activities is much more practical.

Selected Elements of Title I

Following is analysis of a few important elements of Title I:

Designation of MLC: The Register designates the MLC—but—may only select a nonprofit created by copyright owners that “is endorsed by and enjoys substantial support from musical works copyright owners *that together represent the greatest percentage of the licensor market for uses of such works in covered activities*, as measured over the preceding 3 full calendar years,” that can demonstrate to the Register that it has the ability to do the work.¹⁶

MLC Business Plan and Budget: No one has provided a business plan or a budget for the collective. When asked directly by Chairman Grassley in the Senate Judiciary Committee, the head of the Digital Media Association could not provide a cost and instead relied on estimates from the Congressional Budget Office of between \$20 million and \$30 million annually.

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He did not answer the Chairman's question with estimates from the DMA companies (Apple, Amazon, Google, Spotify) but said, "it's difficult to know what the cost of operating the collective will be."

If a client asks how much the collective will cost or how it is to be run, the answer appears to be no one knows for the moment.

Initial Administrative Assessment: Realize that the MLC must render statements under the MMA following "the license availability date," which is the January 1 following the date that is two years from enactment. Obviously, the MLC will need to have the systems to meet the accounting deadline. That implies that the MLC's costs are substantially front-loaded, and it needs to start building or contracting for those systems immediately in order to timely render statements in the future.

We are told that the blanket licensees pay for the MLC's costs, and indeed they may eventually do so. But the initial administrative assessment¹⁷ is to be "effective as of the license availability date."

Accordingly, the blanket licensees will not pay the initial assessment to the MLC for two years after enactment under the Congressional Budget Office's interpretation.

Given the timing of the MMA's passage and that the CRJ's are not required to even notice the assessment process until nine months after enactment, it appears certain that the assessment would not be paid during the crucial startup period of the MLC's operations. And of course, the administrative assessment can be appealed to the Court of Appeals for District of Columbia Circuit.¹⁸ Any appeal could further delay payment of any assessment.

If clients ask how the MLC will pay its startup costs (or pay vendors), the answer is unknown.

Black Box: Unclaimed and unmatched royalties are held for three years and then allocated to copyright owners based on market share.¹⁹ This has been a major point of contention for independent songwriters. It is also relevant for the payment of assessments, and especially the initial administrative assessment, because of this clause:

INTERIM APPLICATION OF ACCRUED ROYALTIES.—

In the event that the administrative assessment, together with any funding from voluntary contributions...is inadequate to cover current *collective total costs*, the collective, with approval of its board of directors, *may apply unclaimed accrued royalties on an interim basis to defray such costs*, subject to future reimbursement of such royalties from future collections of the assessment.²⁰

The MMA does not require the initial administrative assessment to be paid in time to cover the MLC's startup costs. It seems quite likely that to cover these pre-assessment costs, the collective may invade any black box money it collects. Amounts deducted may be replenished in future assessments, if permitted by the CRJs.

Digital Licensee Coordinator: The Digital Licensee Coordinator ("DLC")²¹ is appointed to represent the blanket licensees by the Register, relying on mirror language for appointment of the MLC, except that the companies involved are Amazon, Apple, Google and Spotify, some of the largest in commercial history, unlike the music publishers. This raises competition concerns and conflicts of interest because *the DLC also allocates the assessment among the blanket licensees* and can charge membership fees. Little discussed is the effect on startups of the DLC assessment structure and control. What if startups cannot afford their assessment? Are they denied the blanket? If startup clients ask these questions, there is no answer at present.²²

Rate Standard: A new government-mandated rate standard is intended to result in higher royalties for songwriters (called "willing buyer/willing seller"). However, blanket licensees may be able to request that the CRJs give a *reduction* in royalty rates under this new standard based on the CRJs' assessment of the operating costs for the MLC. We'll see.

Governance: The MLC's board²³ is to comprise 14 voting members made up of 10 publishers and 4 "professional songwriters." Other inferior boards, e.g., for dispute resolution, have more songwriters. The European Songwriter & Composers Alliance has criticized the structure as out of step with industry practice of at least equal representation of songwriters.²⁴

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Nonvoting Board Members: The DLC appears to have a nonvoting board membership.²⁵ Note that this means that the DLC will likely have a right to information and to attend board meetings. This may have an affect on attorney-client information, litigation, or royalty setting strategy.

Claiming/Registration: It is unclear how song metadata gets into the new global rights database as a practical matter, but that process formality appears to be the collective's responsibility. Even if the MLC doesn't charge for registration, there will still be a compliance transaction cost on copyright owners to register metadata and splits with the collective and then confirm it was properly ingested.

It is important to note that both publishers and labels are required to deliver song and sound recording ownership data to the collective in considerable detail. Compliance costs borne by *record companies* large and small should be reimbursed as a cost of the collective included in an assessment, but currently is not. It may be possible to correct this oversight in regulations.

Voluntary Licenses: Services and copyright owners may enter voluntary licenses²⁶ outside of the MLC (voluntary license payments likely won't get black boxed). These voluntary licenses presumably include catalog licenses as well as modified compulsory licenses (such as the typical HFA license) whenever made. Voluntary licenses suggest that the MLC will only administer songs that are subject to the blanket. However, since there is no opt out, digital music providers could refuse to renew a catalog license and then take that catalog under the blanket without paying a minimum guarantee.

Accountings: Payment obligations of digital music providers are clearly spelled out²⁷ more or less consistent with current practice, but payment obligations of the MLC to copyright owners are not specified,²⁸ other than black box.²⁹

Audits: Only the MLC may audit the blanket licensees.³⁰ Only copyright owners may audit the MLC.³¹ However, audits must be conducted by certified public accountants and those auditors are obligated to look for overpayments—which probably violates a CPA's duty of loyalty. As Warner Music Group's Ron Wilcox testified to the CRJs, "Because royalty audits require extensive technical and industry-specific expertise, in WMG's experience a CPA certification is not generally a requirement for conducting such audits. To my knowledge, some of the most experienced and knowledgeable royalty auditors in the music industry are not CPAs."³²

It is also important to note that the collective may only audit once a year for the prior three years. Given that there will be billions of transactions subject to audit (and eventually trillions in a three year period), it is unlikely that CPAs will be conducting census level audits. Projections and lump sum payments are likely, and lump sum payments tend to be distributed in the old-school method of market share distributions.

Conclusion

Not to be cynical, but if you are struggling to find what is "modern" about the "Music Modernization Act," you are not alone.

ENDNOTES

¹ Copyright 2018 Christian L. Castle. All rights reserved. Portions of this article first appeared as "A Skeptical Look At The Music Modernization Act" in the June 2018 issue of *The Works*, the Magazine of the British Academy of Songwriters, Composers and Authors at p. 18.

² www.christiancastle.com.

³ Orrin G. Hatch—Bob Goodlatte Music Modernization Act, HR 1551, 115th Congress 2nd Session (2018), available at <https://www.congress.gov/bill/115th-congress/house-bill/1551/text?q=%7B%22search%22%3A%5B%22music+modernization+act%22%5D%7D&cr=3>.

⁴ See generally Eriq Gardner, *After SiriusXM Success, The Turtles Take on Pandora in \$25 Million Lawsuit*, *Hollywood Reporter*, Oct. 2, 2014, available at <https://www.hollywoodreporter.com/thr-esq/siriusxm-success-turtles-take-pandora-737673>.

⁵ Available at <https://www.congress.gov/search?searchResultViewType=expanded&q=%7B%22congress%22%3A%5B%22114%22%5D%2C%22source%22%3A%22legislation%22%2C%22search%22%3A%22songwriter+equity+act%22%7D>.

⁶ MMA § 102(d)(7)(viii).

⁷ Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (February 3, 2017).

⁸ MMA § 102(d)(3)(I).

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⁹ MMA § 102(d)(3)(C).

¹⁰ MMA § 102(d)(3)(E).

¹¹ Order Denying Motion To Dismiss For Lack Of Standing And Failure To State A Claim, Sept. 29, 2018, *Bluewater Music Services Corporation, Inc. v. Spotify USA Inc.*, Case No. 3:17-cv-01051 (D.C. W.D. Tenn.) (2017).

¹² Eriq Gardner, *Spotify Hit With \$1.6 Billion Lawsuit over Tom Petty, Weezer, Neil Young Songs*, Hollywood Reporter, Jan. 2, 2018, available at <https://www.hollywoodreporter.com/thr-esq/spotify-hit-16-billion-copyright-lawsuit-tom-petty-weezer-neil-young-songs-1070960>.

¹³ *Wixen Music Publishing, Inc. v. Spotify USA Inc.*, Case No. 2:17-cv-09288 (C.D. Calif. December 29, 2017).

¹⁴ Robert Levine, *Congress Should Tweak—and Pass—The Music Modernization Act*, Billboard, April 20, 2018, available at <https://www.billboard.com/articles/business/8358164/congress-music-modernization-act-fixes-changes-column>.

¹⁵ Chris Castle, *Will DOJ Consent Decree Review Obviate Any Rationale for the Music Modernization Act*, MusicTechPolicy, April 2, 2018, available at <https://musictechpolicy.com/2018/04/02/will-doj-consent-decree-review-obviate-any-rationale-for-the-music-modernization-act-music-tech-solutions/>.

¹⁶ MMA § 102(d)(3)(B).

¹⁷ MMA § 102(d)(7)(D)(iii).

¹⁸ MMA § 102(d)(7)(D)(vii).

¹⁹ MMA § 102(d)(3)(H)-(J).

²⁰ MMA § 102(d)(7)(C) (emphasis added).

²¹ MMA § 102(d)(5).

²² See generally Chris Castle, *Congress Should Support Startups in the Music Modernization Act*, Newsmax, Aug. 20, 2018, available at <http://www.christiancastle.com/articles/2018/9/4/congress-should-support-startups-in-the-music-modernization-act>.

²³ MMA § 102(d)(7)(D)(i).

²⁴ See Letter from European Songwriter & Composers Alliance to Rep. Doug Collins, Jan. 30, 2018, available at <https://artistrightswatch.com/2018/02/01/eu-composer-songwriters-alliance-questions-serious-problems-with-music-modernization-act/>.

²⁵ MMA § 102(d)(3)(D)(i)(III)-(IV).

²⁶ MMA § 102(c)(2)(A).

²⁷ MMA § 102(d)(4)(A).

²⁸ MMA § 102(d)(3)(G)(i)(I)(cc).

²⁹ MMA § 102(d)(3)(J).

³⁰ MMA § 102(d)(4)(D).

³¹ MMA § 102(d)(3)(L).

³² Copyright Royalty Judges, Docket No. 14-CRB-0001-WR (Web IV), Testimony of Ron Wilcox, available at https://www.crb.gov/rate/14-CRB-0001-WR/statements/SX/2B_SX_WDT_Ron_Wilcox_PUBLIC.pdf.

A History of the Texas Film Commission

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than previous directors had been in selling producers on the benefits of filming in Texas. Her “tenure did indeed see a host of big-budget, profitable films arrive in state, among them *Rush*, *Flesh and Bone*, *What’s Eating Gilbert Grape*, and *Apollo 13*.”³⁸

Richards herself was more active than previous governors in supporting the commission’s mission. She made a number of trips to Hollywood, where she met “with film studio executives and industry officials, encouraging them to do more work in Texas.”³⁹ In September 1991, Richards held an outdoor reception for more than 300 filmmakers at the Academy of Television Arts and Sciences: “As movie spotlights crisscrossed the Hollywood sky, Richards evoked the legendary Mae West: ‘We want you to come up and see us sometime.’”⁴⁰ As part of her pitch, Richards highlighted “the Texas film industry’s abilities: enough trained crews to shoot nine features simultaneously and a variety of locales.”⁴¹

Richards was accused of using “the commission for political ends, as a convenient excuse to make a half-dozen fund-raising trips out to Los Angeles.”⁴² Regardless, filmmaking boomed in the state during Richards’ term, with Texas enjoying “one record year of film production after another” from 1992 to 1994.⁴³ Production in the state grew “from \$118 million in 1991 to \$189 million in 1994.”⁴⁴ Recognizing that anything that would save producers money could help attract them to the state, Richards in 1994 helped secure a new sales tax exemption, which allowed “many items used during production to be listed as tax exempt.”⁴⁵

With the end of Richards’ reign as Governor came the end of Saritzky’s as the commission’s Executive Director; she was fired when George W. Bush took over as Governor. Tom Copeland was again appointed as interim director,⁴⁶ and then Executive Director of the commission in 1995.⁴⁷

***Friday Night Lights* and the Creation of an Incentive Program**

Governor Smith’s creation of the commission had paid off. By 1998, a Texas Department of Economic Development study found that Texas was “the nation’s third-largest film producer,” employing some 6,500 people.⁴⁸ In the ten-year period from 1988 to 1998, “the gross budgets of all major film projects shot at least partially in Texas totaled more than \$1.9 billion.” With about half of a film’s gross budget normally staying in the state, this resulted in “a total impact on the Texas economy for that 10-year period of almost \$1 billion.”⁴⁹ As a result, Texas lagged “behind only California and New York in the number of films produced each year.”⁵⁰ Texas had another reason to dub itself the Third Coast of filmmaking.⁵¹

By the late 1990s, however, Texas was facing increased competition from other states and Canada, which had recognized the benefits of attracting film production and begun trying to lure producers to their locales “with tax breaks and cash subsidies.”⁵² As a result, production within the state began to fall off, going from a high of “67 projects worth \$331 million” in 1995,⁵³ to only about 33 projects worth \$194.5 million in 1999.⁵⁴

The year 2000 saw a rebound, with Austin hosting productions such as Sandra Bullock’s *Miss Congeniality*, and Robert Rodriguez’s *Spy Kids*, and Amarillo serving “as the location for scenes from both Billy Bob Thornton’s *Waking Up in Reno* and Tom Hanks’ . . . *Cast Away*.”⁵⁵ 2003 was a strong year as well, with projects shot in the state having combined budgets of \$229 million. The biggest part of that was due to *The Alamo*, with “its record budget for a Texas film” of about \$90 million.⁵⁶

But by 2004, Texas was seeing increasing competition from Louisiana and New Mexico, with inquiries to the Texas Film Commission falling off by 25% during this period.⁵⁷ Both of those states had the advantage of being able to offer filmmakers financial incentives. “New Mexico offer[ed] loans and actually invest[ed] state funds in films, while Louisiana [gave] state income tax credits.”⁵⁸ Texas was able to offer sales tax exemptions to producers, but otherwise did not have an incentive program.⁵⁹ In 2005, the Texas legislature “passed a motion picture incentive bill . . . but it wasn’t funded because the state budget was already approved.”⁶⁰ Thus, Texas continued to be at a disadvantage compared to New Mexico and Louisiana.

In 2007, the commission estimated that this disadvantage had resulted in “more than \$704 million in production budgets and 4,500 jobs” going to other states since 2003. Texas production spending had risen “from \$154 million in 2002 to \$291 million in 2004 before dropping to \$221 million in 2005. . . .” In New Mexico, production spending was \$8 million in 2002 before the state offered incentives, growing to \$428 million in 2006 with the incentives. Louisiana had attracted \$20 million in production spending in 2002 before offering incentives, growing to \$620 million in 2006 with incentives.⁶¹

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Governor Rick Perry responded in 2007 by proposing “a \$20 million incentive plan . . . designed to lure production companies to Texas with cash grants.”⁶² The legislature would approve and fund an incentive program this time around, thanks, at least in part, to the TV series *Friday Night Lights*.

By 2007, “*Friday Night Lights*, NBC’s highly acclaimed drama series created by filmmaker Peter Berg and based on H.G. ‘Buzz’ Bissinger’s book about high school football in Odessa, ha[d] been shooting in Central Texas for more than a year.” It was estimated that “*Friday Night Lights* infuse[d] the local economy with about \$1.5 million per episode,” with that money spent on “local salaries, housing rentals, set construction, catering and myriad goods and services the production requires.” Over the course of a season, that meant a total economic impact of about \$33 million. However, other states, wanting those benefits for themselves, began “aggressively courting the production, hoping to steal the series and the \$1.5 million per episode it brings to Austin.” The show’s producers observed that they could save about \$100,000 per episode by moving the show to a state that offered financial incentives, such as Louisiana or New Mexico, both of which were courting the show.⁶³

This helped motivate legislative leaders in 2007 to expedite the approval of financial incentives for filmmakers. Texas’ newly created Moving Image Incentive Program offered grants for the production of films, television programs, commercials, and video games “equal to 5 percent of in-state spending. Projects made in under-used areas of Texas are eligible for grants equal to 6.25 percent of local spending.”⁶⁴

Texas was successful in keeping *Friday Night Lights* in the state. By 2010, it was estimated that the series had “spent \$75 million in Texas alone and provided an average of 175 crew jobs a year, not counting extras. More than 90 percent of those jobs went to local crew members, and 96 percent of the show’s talent hires [were] local.”⁶⁵ Nevertheless, many in the Texas film industry warned that the state’s incentive program “falls alarmingly short compared with the programs [offered by other states].”⁶⁶ That fact, and a unique content restriction contained in the Texas incentive program, would cause issues for the commission in the years to come.

Lawmakers Direct the Commission to Consider Film Content

In considering the approval of the Texas incentive program, the Texas Senate Finance Committee had concerns about the content of films supported by the program, particularly projects that depicted Texas in a negative light.⁶⁷ This concern can be traced to the Texas-filmed *Glory Road*, a 2006 sports drama telling “the inspirational tale of the [1966] Texas Western Miners, the first all-black college basketball team to win a national championship.”⁶⁸

Glory Road was based on actual events, but took some license in portraying those events. The scene that caused the most concern involved “a racially charged incident” during a college basketball game. In the film, the game was depicted as being between the University of Texas at El Paso (UTEP) (formerly Texas Western University) and Texas A&M Commerce (formerly East Texas State University), when in actuality Texas Western had played a school from Kentucky, not Texas A&M. The scene depicts that white A&M team “throwing epithets disparaging the black players”⁶⁹ on the UTEP team, and A&M fans are depicted as being “racist.”⁷⁰ Having not been involved in the incident, Texas A&M objected to its being “disparaged” in this manner.⁷¹ As a result of this controversy, State Senate Finance Committee Chairman Steve Ogden, in whose district Texas A&M Commerce was located,⁷² added a provision to the incentive program that allows incentives to be denied to films that are inappropriate or depict Texas or Texans in a negative light.⁷³

Another provision was added to the incentive program as a result of issues raised by the 1999 film *Varsity Blues*. That provision requires the commission to review projects and their content both prior to production and in the finished product.⁷⁴ According to Film Commission Executive Director Bob Hudgins, when obtaining permission to use Georgetown school facilities to shoot the film, the filmmakers told the school district that the *Varsity Blues* would be “a nice little PG-13 family movie.” The film was actually released with an R rating, and as Hudgins described it, the film was all “drugs, sex, rock n’ roll, and football.” Some Texas senators were displeased that the final film was “very different” from what filmmakers had represented it would be. This led to the requirement of a double review of projects before providing incentives to producers.⁷⁵

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The Content Provision in Action: *Waco*, *Machete*, and *Machete Kills*

It wasn't long before the content provision was used by the commission to deny incentives to a film. In 2008, Hudgins received an application for a film titled *Waco*, which "was going to portray actual events,"⁷⁶ specifically "the federal raid on the Branch Davidian compound near the city on Feb. 23, 1993."⁷⁷ In 2009, Hudgins notified the *Waco* filmmakers that the "movie was denied incentives because of factual inaccuracies in the script."⁷⁸ *Waco* filmmakers disputed Hudgins' assertion that the script was inaccurate,⁷⁹ although Hudgins' declined to specify what the inaccuracies were. Despite the denial, Hudgins said filmmakers were still welcome to film in the state, albeit without state-provided incentives. Producers instead moved the \$30 million project out of the state.⁸⁰

Film industry trade publications reported on the denial.⁸¹ Vans Stevenson, senior vice president for state government affairs at the Motion Picture Association of America in Washington, D.C., predicted that the decision would discourage filmmakers from coming to Texas, "because there are many other places in the country where they can get incentives without having to face script approval."⁸²

Another potential controversy was brewing in 2010 over Robert Rodriguez's film *Machete*. However, amidst investigations into allegations of sexual harassment, Hudgins resigned from the commission before making any decision on that film.⁸³ Evan Fitzmaurice took over as interim director of the commission following Hudgins' departure.⁸⁴

Robert Rodriguez is "one of the biggest filmmakers in Texas history," having shot many of his movies in the state, with his films grossing more than \$620 million.⁸⁵ In fact, when Governor Rick "Perry signed legislation to beef up filmmaking incentives and bolster the state's industry in April 2009, he did so at Rodriguez's studios, with the director/producer at his side."⁸⁶

In 2009, Rodriguez's production company, Machete's Chop Shop, applied for a grant for the film *Machete* from the Texas Film Commission, receiving preliminary approval of its application from the commission.⁸⁷ In the film, which is fictional, Danny Trejo plays the Mexican Federale "Machete," so named "for his deadly skill" with the device.⁸⁸ Having made powerful enemies in Mexico, Machete heads to Texas, where he becomes a day laborer and vigilante. There, Machete is double-crossed by corrupt Texas lawmen and politicians,⁸⁹ who frame Machete for an attempted assassination attempt against an anti-immigration candidate for state Senate, all in an attempt to stir "anti-immigrant sympathies among Texas voters."⁹⁰ Seeking revenge, Machete "initiates an out-and-out killing spree, recruiting an angry army of illegal immigrants along the way."⁹¹

Prior to the film's release, and in response to a controversial anti-immigration law enacted in Arizona,⁹² Rodriguez recut a *Machete* trailer to take aim at Arizona and the law. The Machete character introduced the trailer, saying, "This is Machete with a special Cinco de Mayo message ... to Arizona." Scenes of violence, "including shots of angry illegal immigrants rising up in rebellion, followed."⁹³ In response to the recut trailer, conservative radio talk show host and "conspiracy theorist" Alex Jones began a campaign against the film, asserting that the film was likely "to trigger racial riots and racial killings in the United States,"⁹⁴ going so far as to label the film the "equivalent of a Hispanic Birth of a Nation" for inciting "racial jihad."⁹⁵ When it came to light that the Texas Film Commission had given its preliminary approval to a grant application for the film,⁹⁶ Jones began a campaign to eliminate state funding of the film. This resulted in "a wave of letters to the Governor's Office and the Texas Film Commission, savaging [the film] as a call to race war."⁹⁷

Following the political controversy, the commission denied the grant application for the film, citing "'inappropriate content or content that portrays Texas or Texans in a negative fashion' as provided by [commission regulations]."⁹⁸ However, the script had not undergone any significant changes from the time of the commission's preliminary approval of the script to the completion of the film.⁹⁹

Rodriguez's production company, Chop Shop, filed suit to challenge the denial,¹⁰⁰ arguing that once the commission approved its initial application, it could not then later deny Chop Shop an Incentive Program grant "unless, during the production process, 'substantial changes' to the content had occurred, i.e., the final script deviated from the initial script provided with the application." Without any such changes, Chop Shop argued, the commission was bound by its initial determination that Chop Shop qualified for the Incentive Program grant.¹⁰¹

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To the Third Court of Appeals of Texas, the case was one of statutory construction, with the question being “whether the statute authorized the Commission to deny a Program grant on final review of *Machete*’s content regardless of whether the project’s final script differed from the script [the Commission] initially reviewed and which [it] verified did not include content that made it ineligible for the Program.”¹⁰² The court ended up interpreting the statute “to provide the Commission with discretion throughout the entire grant process....”¹⁰³ Thus, to the court, the commission was free to deny Chop Shop’s application at any point in the application process, even if it had previously determined that the application qualified for a grant.¹⁰⁴

Around the same time of *Machete*’s grant denial, the state was facing a \$24 billion budget shortfall.¹⁰⁵ In 2009, the legislature had provided \$60 million for the incentive program,¹⁰⁶ which had helped lead to an increase in film and television production in the state.¹⁰⁷ But with the budget shortfall, incentive program funding was cut to \$32 million in 2011,¹⁰⁸ well below the \$66.5 million the commission requested.¹⁰⁹

Evan Fitzmaurice stepped down as interim director of the commission in 2012.¹¹⁰ Heather Page, who had worked as a cameraperson on projects such as *The Green Mile* and *Friday Night Lights*, and as the commission’s workforce training administrator, was tapped by Governor Perry to lead the commission later that year.

Around this time, Robert Rodriguez’s production company Machete Productions began production on a sequel to *Machete*, *Machete Kills*, also to be filmed in Texas. Despite the denial of its application for *Machete*, Machete Productions sought an incentive program grant for the sequel. Even before doing so, however, Machete Productions was informed by the commission “that the film would never receive an Incentive Program grant due to the perceived political nature and content of the film.” Undeterred, Machete Productions filed an application, which was denied due to “inappropriate content.”¹¹¹ Machete filed suit to challenge the denial, arguing the commission had “discriminated against it on the basis of viewpoint, thus violating its First Amendment rights.”¹¹²

Addressing *Machete*’s claim of unconstitutional viewpoint discrimination, the U.S. Court of Appeals for the Fifth Circuit observed that when handing out subsidies, the “[g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest,” and not fund those that it views as inconsistent with the subsidy program’s purpose.¹¹³ As the court saw it, “In so doing, the [g]overnment has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.”¹¹⁴ So long as the government funding provision does “not silence speakers by expressly threaten[ing] censorship of ideas,” or “introduce considerations that, in practice, would effectively preclude or punish the expression of particular views,” the government may favor or disfavor some viewpoints over others.¹¹⁵ In other words, as long as a filmmaker remained free to make his or her film despite the denial of government funding, the filmmaker’s First Amendment rights were not violated. The court found that to be the case here: “Despite the denial of an Incentive Program grant, *Machete Kills* was still filmed in Texas, produced, and released.”¹¹⁶

Recent Developments

In 2013, the Texas legislature allocated \$95 million for the film incentive program for the 2014–2015 biennium. A more than \$60 million increase from the previous budget, this represents the largest amount ever appropriated for the incentive program.¹¹⁷ However, in 2015, the legislature slashed that amount to approximately \$32 million for the 2015–2016 biennium.¹¹⁸ That amount was cut again in 2017, when the legislature provided just \$22 million for the program in 2018 and 2019, far short of the \$72 million originally proposed by Governor Greg Abbott. However, the actual amount to be provided as incentives could be higher than that, as the governor has additional funds to allocate at his discretion. Thus, the final amount of money to be provided by the incentive program is yet to be determined, “but it’s expected to be more than \$22 million.”¹¹⁹

In 2017, Heather Page stepped down as film commission director.¹²⁰ In 2018, Stephanie Whallon, who has been with the commission since 2011, took over as director.¹²¹ One thing Whallon can likely look forward to is fighting for film incentive program funding when the legislature again takes up the issue in 2019. Also on the horizon is the commission’s 50th birthday, which occurs in 2021. Whatever the future holds, the commission will have reason to celebrate as it looks back at all it has achieved in promoting production in Texas in its first fifty years.

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