



INTELLECTUAL PROPERTY COMMITTEE NEWSLETTER

Fall 2016

[Homepage](#) | [Committee Roster](#) | [Join the Intellectual Property Committee](#)

In This Issue

[Message from the Chair](#)

[Emerging Issues](#)

[On the Docket](#)

[A Note from the Editor](#)

Important Dates

[Business Law Section Spring Meeting](#)

April 6-8, 2017
New Orleans, LA

Editorial Board

[Meredith Mays Espino](#)

Message from the Chair

Dear Business Section IP Committee Members,

What an exciting ride it has been for me as Editor of the IP Committee Newsletter. Since I took over in August 2015, we have relaunched the publication and published three issues, and now, our fourth with the Fall 2016 edition. I have had the honor of working with great authors to bring you engaging and timely articles. I hope you've found them as interesting as I did. Working with such enthusiastic and knowledgeable authors has been a treat.

Alas, it is time for me to depart. While this Newsletter has been a passion for over a year now, I must move on to focus on my career as a new lawyer. I will miss providing a forum for authors and a conduit of information to our members. I hope you have enjoyed reading the Newsletter as much as I enjoyed editing it.

I would like to thank all of our authors for their article contributions over the past year. I would like to thank Graham Hunt and Stephanie Rodriguez at the ABA for doing all the heavy lifting to get these Newsletters out to our members. And, lastly, I want to thank you for giving us the opportunity to share this with you.

Thank you,

Meredith Mays Espino
Editor, Intellectual Property Committee Newsletter

Emerging Issues

Infringing on Criticism: Abusing Copyright Protection to Silence Game Journalists

By Michael Reed

Video game reviewer, James Stanton, better known by his alias, Jim Sterling, has a distinctively brash, but artful style of utterly ripping apart games via his channel on YouTube. Sterling's foul-mouthed and brutal criticism of video games did not go unnoticed by one target in particular: independent game studio, Digital Homicide. In Digital Homicide's attempts to remove Sterling's less than stellar reviews from YouTube, an array of absurd drama has since unfolded. Amid predictable claims of slander and libel, Digital Homicide has also thrown claims of copyright violations into the mix, which may unintentionally result in rulings that could help out their critics.

[Read more...](#)

On the Docket

Don't forget to sign up for the Business Law Section 2017 Spring Meeting in New Orleans, LA on April 6-8, 2017. Our committee's CLE offerings include:

- "What's the Big Deal? Corporate Valuation and Protection of IP," Co-

sponsored with Business Financing and Corporate Social Responsibility Law Committees

- "IP and Tax Transfer Pricing," Co-sponsored with Taxation and International Business Law Committees
- "Legal Snarls in the World Wide Web," Co-sponsored with Business and Corporate Litigation, Cyberspace Law, Intellectual Property, and Middle Market and Small Business Committees

And, of course, plan to attend the Intellectual Property Committee Meeting!

Did you know we have a listserv? In order to send a message to the listserv, send a message to the email address below. The listserv is for members only. The email address is BL-IP@mail.americanbar.org

A Note from the Editor

Our quarterly newsletter will be powered by content from you! To that end, please send me your latest news on subcommittee work and member news (including new jobs, published works, and speaking events). We also look for articles on topics of interest to our members. Articles should be 300 - 1000 words and not already published elsewhere. To submit member news, subcommittee information, meeting information, articles, or to ask questions, please contact [Meredith Mays Espino](#).

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Infringing on Criticism: Abusing Copyright Protection to Silence Game Journalists

By Michael Reed

Video game reviewer, James Stanton, better known by his alias, Jim Sterling, has a distinctively brash, but artful style of utterly ripping apart games via his channel on YouTube. Sterling's foul-mouthed and brutal criticism of video games did not go unnoticed by one target in particular: independent game studio, Digital Homicide. In Digital Homicide's attempts to remove Sterling's less than stellar reviews from YouTube, an array of absurd drama has since unfolded. Amid predictable claims of slander and libel, Digital Homicide has also thrown claims of copyright violations into the mix, which may unintentionally result in rulings that could help out their critics.

Sterling first ran afoul of Digital Homicide when he negatively reviewed the studio's release, *Slaughtering Grounds*. Within his vicious take-down of the game, which mocked it for poor design and derivative game play, Sterling used the game's artwork without obtaining proper permission from the developer. As this is usually not a concern for critics, Sterling's review was uploaded to YouTube, where he delivered audio of his criticism over footage of himself playing the game.

Anything but the innocent victim, Digital Homicide has retaliated against Sterling by putting out its own videos mocking Sterling and his reviews. Employees of Digital Homicide have also made use of YouTube's reporting features which have led to Sterling's videos being temporarily disabled for copyright infringement. Digital Homicide even went as far as to invite Sterling to a publicly viewable interview on Skype, only to turn the tables by personally insulting him and threatening to sue him.

Digital Homicide believes that Sterling's focus on their games has made it more difficult for them to convey their ideas and made it impossible convince others to take them seriously. It is the game developer's belief that such scrutiny is tantamount to censorship. These days, the word "censorship" is tossed around a lot on the internet. Oftentimes, those who find themselves under a critical microscope earnestly believe that their critics wish to censor their ideas. In the minds of the so-called "censored," the logical way to save themselves from this perceived threat is to rely on the law to actually prevent critics from speaking any ill of them.

Copyright law provides that an author has the exclusive right to control the reproduction, derivation, distribution, performance, or display of their original works under 17 USC 106. Another person who uses an original work in this way without the permission of its author, infringes on the exclusive rights of the works creator. Infringers may have to forfeit any profits or be subject to statutory damages up to \$30,000 per infringement under 17 USC 504, and an injunction is ordered against the infringer to prevent further misuse of the protected work. The Digital Millennium Copyright Act (17 USC 512) provides safe harbors for websites. Safe harbors may host infringing materials as long as the party responsible for monitoring the website removes the infringing materials upon notice from the copyright holder.

As such, Digital Homicide was able to force YouTube to remove videos which were critical of their games since Sterling's reviews included video of game play while providing commentary. Since this can be viewed technically as an unauthorized display and performance of their game, YouTube has to remove it from their site.

The process for reinstating a video which has been removed due to the delivery of a take-down notice is a lengthy and irritating administrative process which can result in a video being down for weeks while it is examined by YouTube administrators. While the video is down, it does not generate advertising revenue for its creator and users miss out on the valuable criticism and commentary which the video provided. A party claiming ownership of the video's content can flag it and require that YouTube take it down for examination with little to no effort or follow through on their part. It is an excellent tool for harassing and silencing critics by praying on YouTube's good faith attempts to comply with existing copyright law, whether or not there is an actionable infringement.

The era of take-down notices as swift means of dealing with dissenters may be at an end though. Recently, the Ninth Circuit has determined that YouTube must consider whether a video qualifies for the exception of fair use laid out in 17 USC 107, before removing content from its site in *Lienz v. Universal Music Corp*, 801 F.3d 1126 (2015)(the dancing baby case). Fair use provides that the use of a copyrighted work is not infringing, provided it is used for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. In particular, YouTube will consider the nature of the work, whether the use is transformative, how much of the original material was used, and potential effects on the original work.

Sterling's videos clearly fall within the category of criticism contemplated under this act. A strong argument can be made that his video review is transformative as it displays game play footage for the purpose of analyzing its merits compared to other games, it is a factual assessment of the game play footage, borrows no more than it needs to conduct the analysis, and does not serve as a replacement or substitute to the original, even though it may affect the market for it. YouTube has made clear who it believes to be in the right, reinstating Sterling's video and even partnering with him as it implements its new fair use standards.

While Sterling is no longer plagued by take-down notices, Digital Homicide still has a pending lawsuit through which it hopes to not only bankrupt Sterling but force him to issue video apologies on his YouTube channel. The amount of effort on the studio's part to prevent the criticism of one journalist is astounding, especially considering the fact that they still have a multi-million dollar defamation case in their back pocket.

Professional criticism of someone's artistic output tends not to be a firm ground for a successful defamation claim. In the context of journalism, their nine counts of "libel per se" are not likely to meet the standards set out by Arizona law. This law requires that the published statements be false and "on their face and without the aid of any extrinsic matter" tend to "bring any person into disrepute, contempt or ridicule" or "impeach the honesty, integrity, virtue or reputation." *Ilitzky v. Goodman*, 57 Ariz. 216, 220-21 (Ariz. 1941). A statement of opinion on the quality of someone's small, independent art project is not likely to rise to the standard contemplated by this holding.

Even if the case is quickly dismissed, it is worth noting the extent which the law can be called to aid those whose capricious goal is to silence their detractors. Whenever a work of art is created and sold in a marketplace with similar works, it cannot help but draw comparisons to these other works. If the comparison is not favorable to the work and deters potential consumers, there should be no remedy at law which will allow the creator to rectify this situation.

Authors must acknowledge that there are inherent risks in sharing their work in a public marketplace, including opening up their ideas to a variety of criticism. The creator should not be able to force others to share the weight of any of his failures or silence those who point out the shortcomings of his work. When copyright law is used as a weapon against critics because of the content of their speech, this is an attempt to enlist the government's aid in effecting a private form of censorship. Criticism itself is a creative endeavor and it is against the stated purpose of the copyright act to prevent the proliferation of original creative works.