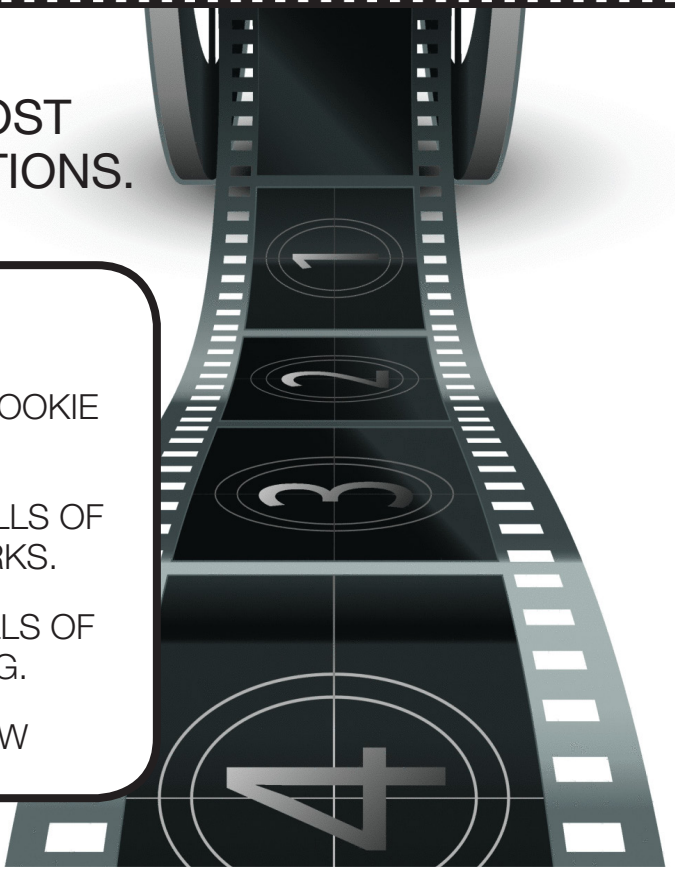
Hiscox media and entertainment news

CUTTING THE COST OF UK LIBEL ACTIONS.



INSIDE

Issue 1

HISCOX

Introduction

Welcome to the first edition of Hiscox Media and Entertainment News.

When we decided to start publishing a regular newsletter, we wanted to attract some of the best writers to address the key topics affecting the industry as well as articles of general interest that would be of most relevance to media and entertainment companies. Bi-annually, Hiscox Media and Entertainment News will bring together authors from across the globe to advance market-leading thoughts on current media industry topics.

Tweets. Retweets. Blogs. Posts. Do you know the risks? Social networking is common place in most people's personal lives but also increasingly in the work place. Do you know what your employees are tweeting, or indeed how a seemingly harmless comment you post can affect you financially? Courtney Love, Spike Lee and Kim Kardashian could certainly help answer that question for you. Katherine Larsen at Levine Sullivan Koch & Schulz, LLP adapted this article written by Amali da Silva at specialist media law firm Wiggin for US audiences, offering insight into the challenging matter of social networking.

Cameras with huge film reels are fast becoming a thing of the past. With high quality new camera equipment readily available now, more and more production companies are filming in digital and HD. Does this eradicate all the risks? Robert Campbell, a claims adjuster at the specialist claims company Hyperion, gives us an insight in to the perils and pitfalls of digital and HD filming, which he faces day-to-day.

We are delighted to have received the support from our network of media lawyers and associates, who have written about the broader issues as well as the impact of those issues in their local laws.

Our thanks go to authors for their kind assistance and intellectual input.

We hope you will enjoy reading it.

Joanne Richardson
Managing Director
US Media and Entertainment, E&O

Marcia Rutledge
Head of US Entertainment Production

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01: Which way has the cookie crumbled?

In recent years, companies interfacing with consumers via the Internet have increasingly relied on cookie technology for advertising and metrics purposes. More than sixty billion advertisements per month are carefully selected and sent to users by a single internet advertising firm. To measure and to increase the effectiveness of their advertisements, advertising networks and sometimes advertisers themselves deposit small text files or 'cookies' on users' computers, and use these to collect and maintain detailed consumer profiles reflecting consumers' online behavior, preferences and sometimes demographic information. Based on those detailed consumer profiles, these companies can place advertising targeted to specific interests of consumers.

Two types of uses of cookies have triggered a wave of regulator complaints and consumer class actions in the U.S. The first is undisclosed or inadequately disclosed online behavioral tracking of individuals. The second is use of 'flash cookies' (also known as LSOs) and similar technologies that override consumer choices (expressed through browser settings) to reject tracking cookies.

Self-regulatory guidelines

In April 2009, the FTC issued self-regulatory principles for online behavioral advertising that include, among other elements, transparency, consumer choice, data security, and limited

retention periods. The FTC's call to empower consumers to control tracking for behavioral advertising was reinforced by a high profile 'what they know' series which appeared on the front page of *The Wall Street Journal*. The series focused attention on the widespread nature of online tracking practices. Companies mentioned in these stories in turn occasionally received public letters from members of Congress asking detailed questions about their uses of cookies and faced class action lawsuits.

Last year, the Digital Advertising Alliance, a coalition of advertising and marketing trade associations, responded to the FTC's call for self-regulation by issuing self-regulatory principles for behavioral targeting which tracks users across multiple websites for advertising purposes. These principles include a 'why did I see this ad' icon in member company advertisements leading users to a page where they receive notice of the ad network's data practices and can opt out of behavioral tracking. If the network advertiser does not display the icon, the website on which the ad appears should provide a prominent link to the this centralized opt-out page.

The DAA behavioral advertising guidelines were supplemented late in 2011 by a second set of principles that prevent re-use of information gathered for behavioral advertising to screen users for eligibility for employment, credit, health treatment or insurance. Both sets of principles can be found on: www.aboutads.info/principles

The FTC has praised these self-regulatory guidelines, but is pressing the DAA to

implement a solution to allow users' browser setting tracking preferences to be recognized universally by websites.

Cookie risk factors

Consumer surprise over undisclosed or inadequately disclosed information collection through cookies can create risk. The FTC has stated repeatedly that behavioral tracking across websites of third parties may require clear notice and consumer choice. It has also stressed that practices that circumvent consumer expressions of choice not to be tracked (for example, through browser settings or an opt-out process that a company offers) may constitute

deceptive trade practices in violation of the FTC Act. Plaintiffs' bar class action lawsuits typically attack the same sorts of activities, but attempt to tie these uses of cookies to federal or state computer crime statutes, electronic communications privacy theories, or state trespass theories, or, where available under state law, private rights of action under a state deceptive practices law.

It is very important to realize that well-intentioned companies can unwittingly expose themselves to cookie risks. Many web advertising arrangements enable third-party ad networks to deposit cookies through a company's website. Click-through and other form contracts provided by some network advertisers routinely give the network advertiser the authority to do this with few constraints. The network advertiser or technology provider places cookies for the benefit of its advertisers and other customers, often without the knowledge of the website operator. The website operator is thus unable to disclose the activity in the website privacy policy. The DAA self-regulatory framework provides transparency regarding many cookie practices. However, companies that do not follow the DAA guidelines may fail to provide notice of behavioral tracking, or use of flash cookies and similar technologies that continue to track user activity despite a user setting his or her browser to remove cookies.

Cookie class action risk

Plaintiffs' class action lawyers have filed a wave of lawsuits targeting undisclosed behavioral tracking and use of flash cookies. These lawsuits are brought not only against the technology provider or ad network, but also against the websites through which these entities placed cookies.

Although the majority of these cases are resolved through settlement, either on a classwide or individual basis, settlements are often substantial. Historically, classwide settlements in these cases have ranged in the amount of $1m to $4m for the putative class, with between $600k and $1.5m in fees and costs payable to the plaintiff's attorney. The amount of consideration provided to the class depends on the size of the class and scope of the practice. And the fees and costs paid to the plaintiff's counsel depend on the stage of the litigation and fees and costs expended at the time of the settlement.

The consideration provided in individual settlements is generally substantially less. However, the defendants in those settlements do not obtain a classwide release of claims in exchange for that consideration.

These 'cookie' class actions are typically prosecuted by a segment of the plaintiff's bar that has become adept through experience in litigating these types of cases and in positioning the matters for class certification and/or a substantial settlement. These attorneys typically target well-funded and/or well-insured businesses. But this is not to mean that small, start-up companies are safe. An increasingly large segment of the plaintiff's bar now targets smaller companies based

on the assumption that they will settle rather than incur the substantial expenses necessary for a vigorous defense.

What should businesses do?

Businesses should assess not only their own cookie use, but also third-parties' cookie activity occurring through the business' website. Businesses should then square that activity with the business' stated privacy policy to ensure that it is accurate, making any necessary revisions. Businesses should also consider implementing the DAA self-regulatory principles to provide clear notice of cookies activity, and limiting uses of flash cookies to those necessary to deliver content requested by the consumer, as both are good ways to protect against cookie risk. Finally, it is important to review ad network contracts and contracts with technology providers who have authority to place cookies or other tracking technologies through a business' website, and to implement contracting and vendor procedures to protect the business from future risk.

Step 1 – cookie audit

Businesses should begin identifying the cookies (and similar technology) which are used on their websites. If businesses have not already undertaken a 'cookie audit', then they should do so promptly, protecting the review with attorney-client privilege. This audit should include a review of the types of cookies used on the website, who placed those cookies, the lifespan of the cookies, and how intrusive the cookie technology is.

Step 2 – cleaning up network advertising and related technology vendor relationships

Because an innocent business can be held liable for third-party cookies placed through the business' website, it is important that business exercise control over those relationships. This includes:

- **Performing due diligence of network advertisers' practices and those of its vendors**, examining in particular potential elements of consumer surprise. Review screen shots carefully to ensure that consumers are receiving clear notice.
- **Ensuring that contracts with network advertisers and related technology vendors protect your business**, including with clauses

binding the other part to:

- comply with applicable laws and the DAA principles;
- provide clear and conspicuous notice of third-party behavioral tracking;
- affording consumers choice to reject behavioral tracking;
- flow-through contract terms to vendors; and
- provide a right to audit the technology provider's relevant practices.

- **Ensuring that these contracts receive legal review** before approval and that the IT Department never signs a click-wrap agreement with a vendor of these services.
- **Checking all agreements,** including test agreements, against legal requirements and your privacy policy. For any materially different behavioral tracking activity that is not disclosed in the privacy policy, you may need to provide clear notice and afford consumers the opportunity to opt-in or opt-out.
- **Conducting some post-contract verification** that the vendor is acting consistent with the business' brand and is fulfilling its relevant contractual commitments.

Step 3 – Implementation

It is important to follow through on policies and compliance practices in this area. The litigation risk can be significant and inaccurate statements of company practices, however well-intentioned, can increase risk.

Article reproduced with kind permission of Jim Halpert and Carter Ott at DLA Piper www.dlapiper.com. DLA Piper's EU Information Law team have developed a robust methodology to assist organisations through the complex rules relating to compliance with cookies and can assist organisations by undertaking a cookie audit, suggest compliance options and assist in the implementation of the most effective option.

02: The power and pitfalls of social media networks.

Everyone's at it. Journalists can tweet from court. President Obama tweets from the Oval Office. Police and protesters tweet messages to each other. Almost every event of any significance seems to be live-tweeted by someone. With over 900 million active Facebook users and over 140 million Twitter users generating over 340 million tweets per day, it's no wonder businesses want to harness the power of social networking for their own ends.

Twitter is like the world's largest water cooler, where we all can gather for gossip, updates, and idle chatter. As with other social media networks, the messages posted on Twitter are typically casual, spontaneous, and reactionary. More important, they are unlikely to be subjected to any type of review. Once posted, they can be read – and retweeted – by anyone around the world.

The law is still playing a game of technological catch-up in this digital age, and courts continue to explore whether the law applies to comments on social networks in exactly the same way it does to statements made through any other medium of communication. Generally speaking, the same basic rules are in effect – and this has led to some costly lessons on the risks of freely expressing oneself through social media platforms.

Defamation in 140 characters or less?

Given the unique context of social media and the logistical constraints of social media platforms, should social media posts be understood the same as statements in newspaper articles, television broadcasts, and books? Some commenters have argued in favor of a 'Twitter defense,' asserting that tweets are too steeped in opinion, too brief, and too loosely written to ever constitute actionable statements of fact.

Were there such a defense, former Hole frontwoman Courtney Love would have twice benefitted. Unfortunately for her, the courts of California – in two separate defamation lawsuits filed against the singer – have declined to adopt this approach. Love shut down her Twitter account last year after two unsuccessful attempts to defend her tweets as constitutionally-protected opinion. In early 2011, Love settled

with a fashion designer after a payment dispute provoked Love – in a rant that spanned Twitter, MySpace and Etsy.com – to describe the designer as a "nasty, lying, hosebag thief" and a "drug-addled prostitute," among a number of other choice phrases. The singer's opinion defense was rejected by the court, and Love paid $430,000 to avoid what would have been the first-high profile trial on the question of what constitutes defamation on a social media site. Just a few months later, Love was sued again after tweeting that her former attorney had been "bought off." The judge in that action also found that Love's comment could be interpreted as a statement of fact and is allowing the case to move forward toward trial.

Other courts have been more protective of the "freewheeling, anything-goes writing style" of speech found on social networks. A New York appellate court recently explained that, because the average reader understands online statements as more emotional and less factual than offline statements, libel allegations must be viewed within the "unique context of the Internet." In this rough and tumble environment, the court concluded that criticism of a Caribbean resort's employment practices constituted expression of the author's personal views, not an actionable statement of fact that the resort was making racist hiring decisions.

'Cookie Diet' creator Dr. Sanford Siegal dismissed his lawsuit against Kim Kardashian in February 2011 before a Florida court had the opportunity to examine whether it was defamatory for her to tweet to her over 14 million (yes, million) followers that she "would never do this unhealthy diet." Is calling a particular diet 'unhealthy' a protected opinion or potentially libelous statement of fact? Although a court would likely conclude the former, this determination is not guaranteed under the law.

Interestingly, one of the most powerful aspects of Twitter – its brevity – can make a tweet more vulnerable in a defamation lawsuit. What if Kardashian had wanted to support her description of the diet by citing to research concluding that it really was damaging to one's health? Under the law, opinions based on disclosed, true facts are accorded greater protection because those facts allow the

reader to decide for herself whether the opinion necessarily follows. Twitter's 140 character limit would have prevented Kardashian from doing that – at least in the same tweet. No court has yet had the opportunity to formally consider whether the technical restrictions of the platform itself should be considered in an analysis of a tweet, a series of tweets on the same subject, or hyperlinks contained in a tweet.

Google before you Tweet is the new 'think before you speak.'

Another pitfall of Twitter is the inability to truly 'untweet' or correct a statement once made, even if the tweet contained an unintended error in fact. In March 2012, film director Spike Lee retweeted a post that misidentified an elderly Florida couple as the parents of George Zimmerman, the man who killed Trayvon Martin. The couple stated they were forced to flee their home after Lee shared their address with his almost 300,000 followers. Lee settled with the couple (on undisclosed terms) and publicly apologized for his error, tweeting: "I Deeply Apologize To The McClain Family For Retweeting Their Address. It Was A Mistake. Please Leave The McClain's In Peace."

Such errors have also been costly on the other side of the Atlantic. In England, county councilor Colin Elsbury was sued for libel over a tweet which wrongly claimed that another election candidate, Eddie Talbot, had been removed from a polling station. Although Elsbury said that it was "a genuine case of mistaken identity," he still found himself paying Talbot's legal costs plus £3,000 (almost $5,000) in damages, in addition to publishing an apology via Twitter, all to settle the claim.

Employee tweets, employer defends?

Whether tweeting, blogging, or posting, what an employee does on the job typically is the employer's responsibility. This is generally known. However, what is less commonly understood is that what an employee does while off duty may also be the employer's responsibility.

In 2011, The Associated Press settled with an NBA referee after one of its sports reporters allegedly implied that the referee was engaged in fixing the game. The tweet read: "Ref Bill Spooner told [Timberwolves coach] Rambis he'd 'get it back' after a bad call. Then he made an even worse call on Rockets. That's NBA officiating folks." The parties issued a joint statement explaining that the referee and the coach denied the statement was made, that the reporter acknowledged the possibility he misunderstood the statement, and that an NBA investigation concluded that the referee had acted

properly. The AP agreed to pay $20,000 for the referee's litigation costs, and the reporter agreed to delete the tweet.

The multinational networking equipment company, Cisco Systems, was required to defend a defamation lawsuit based on statements made in the highly popular 'Patent Troll Tracker' blog, which was anonymously authored by its Director of Intellectual Property. Two individuals disparaged in a blog post were able to keep Cisco in the lawsuit by arguing that Cisco was aware of and consented to the blog, which covered topics in which Cisco had a strong business interest. The case settled midtrial – after the court ruled that the plaintiffs would have to prove that the blogger and Cisco acted with "actual malice," an almost insurmountable challenge – and, soon after, Cisco made substantial changes to its employee social media policies. Cisco added three key provisions: employees (1) must identify their position at Cisco when commenting on any aspect of the company's business interests in which they are involved, (2) must identify the position of any other Cisco employee when forwarding or referencing posts written by them, and (3) must include a disclaimer with all social media posts, indicating that the opinions reflected therein are personal, not those of Cisco.

Employers should be careful to ensure that their employment policies cover their employees' extracurricular activities on Twitter and other social media platforms. Although the nature of the company's business will shape the content of these policies, at minimum, such a policy typically will require that employees

confirm that they are not authorized to speak on behalf of the company.

Who owns a Twitter follower list?

While writer Noah Kravitz worked for the popular mobile phone blog, Phonedog.com, he built up over 17,000 followers to his @Phonedog_Noah account. After four years with the company, he left, changed his handle to @NoahKravitz, and walked away with his follower list. Phone Dog sued, stating that the list was a company trade secret and

seeking damages of $340,000 – $2.50 per follower per month for eight months. While the case remains pending, and its outcome unclear, employers are cautioned to amend standard employment contracts to state who will retain ownership over accounts, follower lists, and related information in the event of a messy digital divorce.

Tweeting from Court

American judges are increasingly embracing social media in their courtrooms. Reporters have been allowed to tweet and blog from judicial proceedings across the country, including, most recently, the proceedings in the high-profile trial of former Penn State assistant football coach Jerry Sandusky on sexual abuse charges.

One significant exception remains: The US Supreme Court continues to strictly prohibit all electronic communications. In fact, last March, the Court brought in US Marshalls to shut down an effort to live-tweet the oral arguments in the so-called 'Obamacare' case. A non-profit group opposing the law apparently had one of its staffers listening to the proceedings from the 'Lawyer's Room' adjacent to the Court; he would step into the hall to type out updates, which he would then send to a colleague who posted them to the organization's official Twitter feed. The feed garnered so much attention that the staffer was quickly caught.

In contrast, last year, the Lord Chief Justice of England and Wales – the head of the judiciary – issued practice guidelines for the use of live text-based communications in courtrooms during proceedings open to the public. Under this new policy, reporters can text, tweet, email, or blog as long as no restrictions have been imposed specific to the case. Photography and audio recording are still forbidden, however.

The Tweet heard 'round the world?

In this global age, it does not matter where one is sitting when she tweets or posts a defamatory comment. If an individual believes his reputation has been damaged in a country outside the US, he can file suit there – and can take advantage of the less speech-protective laws of these other jurisdictions. For example, in 2010, New Zealand cricketer Chris Cairns brought a libel action in England against Indian Lalit Modi, the chairman and commissioner of the Indian Premier League and vice-president of the Board of Cricketing Control for India. The case centered on a 24-word tweet suggesting that Cairns was involved in match-fixing. Modi tried to have the case dismissed on the basis that his tweets were not sufficiently read in the UK to constitute a real and substantial tort there. The English court found no merit in this argument and allowed the case to proceed. In sharp contrast to the US, English law requires the defendant to prove the truth of his statement. After the court determined that Modi had failed to do so, it ordered him to pay Cairns £90,000 ($141,100) in damages and £400,000 ($627,100) in attorney's fees. This cautionary tale should make anyone think twice before tweeting accusations about an individual with any nontrivial connection to England.

In January 2012, Twitter announced that it would begin blocking accounts and censoring tweets on a country-by-country basis in order to comply with the laws of jurisdictions with greater restrictions on speech. (Previously, this was done on a global basis.) Twitter will post a notice when content is withheld and will share information on the demands it receives with the internet censorship monitoring project Chilling Effects. Twitter explained that censorship is effectuated only in response to specific legal requests, not through filtering of the nearly 1.4 billion tweets sent every four days. The blocked account or tweet would still be available outside the jurisdiction at issue. This new practice has only recently been put into place, and it is yet to be seen where or how often it will be used.

Caution is key

There is no doubt that social networks have enriched communication and debate in many respects but, as with all media, they are not outside the law. Protections for free speech and expression are not absolute and will be evaluated against protections for reputation, privacy, and all other legal rights. As these early examples demonstrate, a little forethought and self-editing can go a long way in harnessing the power, while avoiding the pitfalls, of social media.

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03: The perils and pitfalls of digital and HD filming.

Cameras and the associated digital workflow are increasingly becoming more sophisticated and have resulted in many claims under the Hiscox Media Production Insurance policy.

A common source of camera claims concern 'dead pixels'. This is where a fault develops with the Charge Couple Device (CCD) or complementary metal-oxide-semiconductor (CMOS), which is the image sensor for the camera. Many cameras include automatic pixel correction systems to rectify problems caused by 'dead pixels', but they can sometimes work with varying degrees of success. Some cameras have pixel correction functions in the user menu and earlier cameras will need correction by a broadcast engineer.

Digital and HD cameras need to be black balanced to remove dead pixels. This should take place on a routine basis, as faults can develop with pixels at any time. Once pixels become faulty, they appear on screen as tiny bright stars. The process of long black balancing attempts to switch off the faulty pixels or correct them and this can sometimes be achieved by a camera operator while working on location. Black balancing is a function of the camera and should be completed at the start of every day's shooting, or ideally at the start of the day and then half way through the shooting day when the camera is 'hot'.

In addition to black balancing, a production should also routinely spot check the rushes on an appropriately sized monitor. We appreciate that sometimes it is particularly hard to identify dead pixels, but again, this is why it is necessary for rushes to be viewed on an adequate monitor. Some productions have attempted to view footage and establish technical acceptability, using a small LCD monitor, which under normal circumstances, it is recommended should only be used for framing purposes. If problems are not detected on location, this can lead to a reshoot or corrections in post production. Furthermore, insurers expect for the spot checking to be completed as promptly as possible.

Owing to the large number of different cameras available, it is necessary for the camera operator to be as familiar as

possible regarding the use and functions/ systems available on the camera being used. Problems may be caused by cameras having a self-correct function and due to the camera self-correcting, the appearance of faults during spot checking, have sometimes been masked. This is something to be aware of as the next opportunity to view the footage and potentially detect a fault is usually at the completion of recording, when the media is viewed in an online edit facility.

There is an increasing popularity for productions to use Digital Single Lens Reflex (DLSR) cameras. Some modern DSLRs have large sensors which are suitable for professional use, but it is important for productions to realize the potential limitations of these cameras and particularly for the operator to be aware of them. From recent claims experience, it has been found, in some instances, that the image sensor can overheat, resulting in image drop out or pixilation. The only way of overcoming this in a production environment is for a number of camera bodies to be used. Again, it is recommended these cameras are used in conjunction with adequate spot checking routines and workflow to determine that the recorded and saved media is satisfactory for broadcast purposes.

Most productions have moved away from tape formats and data is now being saved on disc or memory cards. However, there is still the same chance the storage medium may fail, as with tape based systems. Furthermore, faults have resulted from card readers overheating and again, if high volumes of data are being backed up, care should be taken ensuring that all data is safely backed up. To fulfil this role, a Data wrangler or Digital Information Technician (DIT), or an experienced individual with a similar skill set, is an essential member of a crew using a data based system. The DIT will be responsible for the security and integrity of all data files. Files must be backed up to a minimum of two (preferably three or more) destinations in order to provide cover for faulty drives and/or processes. There are various software packages that will copy files to multiple destinations and simultaneously perform a 'bit by bit' comparison, in order to achieve exact replicas. These types of software are relatively inexpensive, and are an essential investment for any production using data systems.

Hyperion have dealt with numerous claims where discs or memory cards have become corrupted as a result of software

faults. If data files are not adequately backed up, this can result in the loss of data. When media is saved on to a hard drive, any corruption can disturb the indexing that details where on a hard drive the data is located. If the directory is corrupted, then the data is unrecoverable, unless it has been backed up to alternative destinations. In an attempt to retrieve the directories, the data cards have to be returned to the manufacturer and this may be a highly time consuming process and there is no certainty that the lost data is recoverable.

Once the data is backed up, it should be thoroughly checked prior to deleting the disc or memory card. Ideally, the discs/ memory cards should be rotated, as opposed to shooting, transferring and deleting, as once the memory card is deleted, if the transfer process is faulty, there is no way of going back to the master material. Although spot checking can be a time consuming process, it is usually preferable to purchasing a large number of expensive memory cards.

If necessary, the DIT can carry out preliminary technical quality checks of the duplicated material on location. This does not replace the final technical control of the image material in post-production, but can contribute greatly to production safety with the aim of assuring the best possible technical quality of the material.

A better alternative to backing up on to a laptop is for footage to be stored on LTO (Linear Tape Open) tapes and although these are not field units and are generally more expensive, they arguably provide a far safer storage medium, particularly where large quantities of media are being stored over a long period of time. Additionally, while shooting on location, productions should consider a workflow that incorporates the use of an uninterruptable power supply during the back up phase. This is particularly important when the backup is being done at locations where power interruptions are a regular occurrence. A recent claim arose out of a cinematographic production that was recording on location in Iraq. Unfortunately footage was lost as a consequence of a power supply interruption during the night, while the back up process was taking place. The production was not alerted to the fault by any error codes and the loss of media was only discovered during the final stages of the edit process.

To summarize, the perils and pitfalls of digital and HD filming can largely be overcome by using crew who are experienced and familiar with the cameras being used on a production, as well as using the services of an experienced DIT to ensure that media is securely backed up. In the event all of this fails and a fault is still experienced, resulting in a reshoot or additional post production work, this is where your Media Production Insurance becomes of prime importance in completing a production satisfactorily.

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Contribution also made by Visual Impact (www.visuals.co.uk)

04: Cutting the cost of UK libel actions!

Over the last ten years, countless litigants in libel actions have been all but bankrupted through the astronomic costs of defamation proceedings. The names are legion – Simon Singh, Dr Peter Wilmshurst, and even big companies like Channel 4 and the Guardian (Matt Fides and Trafigura). According to the Libel Reform Campaign, "The average cost of a libel trial in England and Wales is up to 140 times the European equivalent. The most expensive libel action in 2008 cost £3,243,980 (US $5,093,028.57) and the average cost for the 20 most expensive trials was £753,676.95 (US $1,183,268.16)". Libel is undoubtedly a rich man's sport.

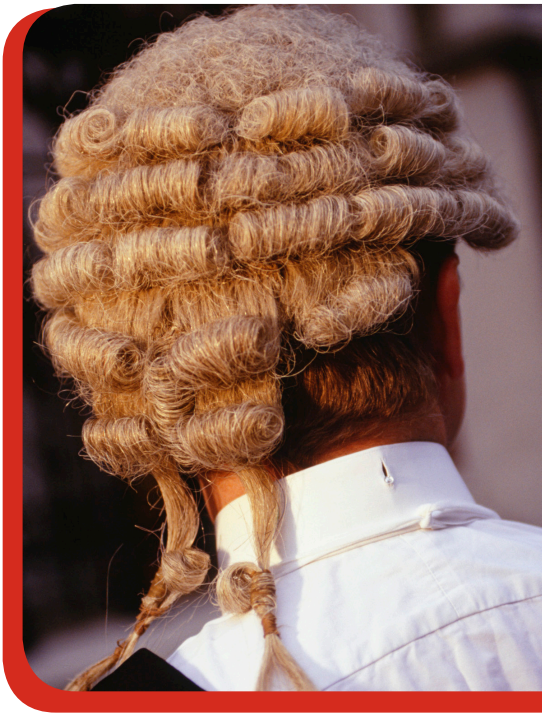
On 10th January, while taking evidence from the Editors of the FT, the Daily Telegraph and the Independent, Lord Justice Leveson indicated that he was interested in finding a new 'arbitration body' which would offer value-for-money and would address issues such as privacy and small libel claims. All the Editors who have given evidence to Leveson have welcomed the idea of

low cost arbitration and like Leveson are looking for a body which can provide this kind of service.

Early Resolution CIC (ER), a not-for-profit company, offers just such a service. It was set up last summer with Sir Charles Gray, a retired High Court libel judge as its Chairman and three experienced lawyers as its directors. The ER board believes that the cost of libel proceedings has escalated out of all proportion and there is a real need for key issues in libel actions to be arbitrated on day one of a dispute. ER's main purpose is therefore to help those locked in expensive and complex libel disputes to settle them quickly, fairly and cost effectively at the outset.

It is widely accepted that in most defamation actions the meaning of the words complained of lies at the heart of the action. Likewise, whether the words are 'comment' or a 'statement of fact' can plague litigation for years and cost thousands of pounds to resolve. Huge amounts of money can be saved if key issues are determined at the outset of libel proceedings through voluntary arbitration. Resolving meaning at the outset of a case enables a defendant to make an immediate offer of amends or the claimant to back off if he has been over-sensitive about a particular article or programme.

Under the ER scheme, the parties can choose to have two lay assessors sitting with the legally qualified arbitrator to bring a 'mini-jury' element to the proceedings e.g. in a meaning dispute. Another key aspect of ER's system is that commercial



defendants are normally expected to pay for the cost of the arbitration – rarely more than about £2,500 (US $3,924.98) – and not to seek to recover any of their own initial legal costs. By doing this – a Jackson style one-way costs shifting arrangement – the defendant can avoid being liable to pay an ATE premium and a claimant lawyer's success fees if the defendant loses the case and the claimant has the benefit of a conditional fee agreement with his lawyers.

For regional newspapers or bloggers these are all critically important issues. Far better to spend a few thousand pounds in the first few weeks and know exactly where you stand than litigate over two years and worry, every night, that you

could go down for up to half a million in legal costs and lose everything.

Early Resolution has only one problem. It is a voluntary scheme and too many lawyers are more interested in running a libel action for as long as they can rather than resolving it on day one. If Lord Justice Leveson recommends a mandatory statutory adjudication system, like that in the Construction Industry, for media cases, then no one will be able to go to the High Court without first going through an Early Resolution type arbitration/adjudication ADR system. As in the Construction Industry, key issues could be determined in the first few weeks and few if any libel actions should end up in the High Court.

Early Resolution hopes that Lord Justice Leveson will recommend that an Early Resolution type of arbitration/adjudication should be mandatory before anyone can bring 'publication proceedings' in the High Court. In the meantime, ER hopes that every litigant in libel proceedings or every insurer who is actually insuring a party to libel proceedings will contact Early Resolution to see if it can short circuit a libel dispute and enable both parties to resolve their differences before buckets of money are spent.

For more information, please go to Early Resolution's website at www.earlyresolution.co.uk to see ER's principles, a list of its experts, the lawyers who know about the scheme and how it works.

Alaistair Brett
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05: Film Finance interview.

Since being founded in the 1950's, Film Finances Inc. have assisted with the completion and delivery of approximately 6,000 feature films, television series, movies of the week, films on tape, documentaries and CD-ROM productions shot in all parts of the world. While the name Film Finances Inc. would suggest that their business activities involve providing finance for films; this is not entirely accurate. Hiscox had the opportunity to talk to Kurt Woolner, Co-President, and Steve Ransohoff, Esq., Co-President, of Film Finances, Inc. Los Angeles to find out more.

For the benefit of those who are not familiar with the activities of Film Finances. Please explain briefly how your activities fit between film producers and film financiers.

KW: "We provide a service to the financiers of films. We guarantee that the film producers will meet their obligations to produce and deliver the film. It's a necessary instrument for a financier to agree to the cash flow of a movie. The financiers are typically banks that are lending against pre-existing contracts and their decision making involves the analysis of the producer. Firstly whether the contracting party is a good credit risk and the second question is, how does the bank know that the producer will deliver the production satisfactorily? So the answer is a company that provides completion bonds that guarantees the producers performance in that respect."

SR: "Film Finances started in 1950 in London, and at that time its mission was to help producers get financing for their movies, by providing guarantees to the financiers which the producers were unable to give. I think in that first year it provided a guarantee on one film, but the next year was 13 films and now its grown to a Worldwide business dealing with well over 200 movies a year in seven countries. So it's a product which has been used by independent film makers to enhance their ability to get their films financed. We provide the guarantee which they are unable to, given that they do not have the capital to do so. To do that, we need to buy large amounts of insurance which we do through Hiscox and others at Lloyds markets, so it's been a very good relationship for us."

Given the amount of capital available, do the big studio films buy completion guarantees or is it just independent film producers?

KW: "Well, it's a mix of both. We actually bond many studio films and those are done for a variety of reasons. It could be due to the infrastructure we put in place to provide checks and balances for the production. Another reason could be that some studios will basically outsource a movie to be bonded because they promised the film maker they could work independently or that the studio has an independent arm which isn't under the same regime as the bigger studio films. Also, a lot of movies that one would perceive as a studio movie are actually movies that were made by an independent producer who has a deal with the studio to release the film. Black Swan would be a good example of that, The Expendables would be another good example."

SR: "These are films that are made all over the world and each filmmaker will have their own specific needs. The needs of an Australian producer in purchasing a completion guarantee might be totally different than that which a US or English based producer may have. More or less these are people who are raising money from sources who don't want to bear any more financial risk than they have to, and that's how we get involved in it. We provide a number of services for the producers, not just a financial one, but consultation too, it's all kind of wrapped up in the package."

So Film Finances are the vehicle that helps everything run smoothly?

SR: "That's what we'd like to think."

KW: "Well, we do. There is no company like us that is involved in as many productions as Film Finances is, so we have the benefit of a lot of information that people often access. It can be as simple as "I'm going to do a film in China, can you recommend a good co-production partner?", or more importantly, "I need a really good insurance company to provide my insurance, can you recommend a good company?" We try very hard to provide a helpful advisory service so that when producers need a bond, we're being constructive and helpful to them in ways beyond just providing a bond. It's satisfying to be able to help people when you have that sort of information.

SR: "Also, just to go back to Hiscox, working with Lloyds and the London Market has been very good for us because they are able to look at these different kind of odd risks that we get involved with and understand them and be flexible. The way the risk then gets spread out through the market, not with just one person taking a huge risk has been a very good mechanism for us. We have been able to build our business and work with people all over the world and that has been really vital to our growth over the years. Film Finances has been buying insurance in London for 60 years continuously so it's been a very good and long-term relationship."

What criteria do you look for in a project when assessing the feasibility of providing a completion guarantee?

KW: "We take a very detailed look at the actual production papers, which is the script, the budget and the schedule, but by far the most important criteria is the people that are actually going to manage the movie. We look at the

producers, director, production staff, accountants and the key creative talent. The cast even come in to it, certain actors especially. If you are doing a Meryl Streep movie you can be sure that it's going to be on schedule because of her influence on preparation and punctuality, so that's a good sign. There are of course actors and actresses that are on the opposite extreme. So cast is an important consideration as well as the terms of a cast contract, sometimes actors have certain approval rights and scheduling restraints which are important to understand. Stop dates are one of the most serious issues because you can't finish a movie if you don't have access to the actors any more."

When assessing the key crew, would you look at their past experience or require meetings for each new project? And how would you approach first time directors?

KW: "Collectively in Film Finances, we have a big line of movies, we have a lot of existing relationships so a lot of the time we do have a working relationship with the key crew, and with new production teams appearing, you are always meeting new people and so it's a combination of both. If we need to feel comfortable about a person we don't know, who doesn't have a track record and that you can actually do due diligence on, a first time director for instance, it's common is to ensure that they are being surrounded by people in other key roles that we believe will be supportive and help the person through. The great thing about what we do is that every movie is a different challenge with different logistics and a different combination of personalities, the combination is infinite."

Would you offer assistance at the early stages and recommend when more experienced persons should be involved?

KW: "We are a voice in the discussion about what the best structure is. We're not the final decision, but we're the decision as far as our involvement goes. People with whom we have relationships utilise our involvement as a means of gathering information but we're not the producers of the film, we're not actually making the final decision. We're just saying "well here's what we know and here's how it will affect us".

SR: "You have to remember that each film that we do is like a mini business where you watch the birth of company, the activity of actually getting the project together, the making of it, and then it's finished and hopefully marketed in a manner so that many people all over the world will see the finished film. Pretty much everybody then goes off and does something else, most films are done like that, unless if we're dealing with an established company. We'd like to see ourselves as an advisor so if someone said "we're thinking of hiring these people what do you think?" we could provide some sound advice. Like Kurt said, we have so much experience that we know the people who are suitable for the jobs or we can find out what their last work experience was like. We've taken a lot of chances over the years on first time people and worked closely with them. Helping people get established has been

a big part of our business, and we've developed long term relationships with people because of that. There are always new people coming to the business which makes it exciting."

What are the most common causes which lead a project to stray from its schedule or budget?

KW: "The artistic appetite that is not curbed by management."

SR: "That and bad planning. Sometimes you have situations where natural disasters happen. We were involved in a film many years ago in Australia which was supposed to take place in a desert. They went to a place where it rains one day every three years and they set it up for six weeks and it got four weeks of rain! It was a green pasture instead of a desert. We were involved in a film many years ago that used snow mobiles and they were shooting in a place which had frozen lakes, but that year it didn't freeze so that had to move the show up to Northern Sweden to find ice. If you are shooting with an actor who is available for four days and the ice is supposed to be frozen in a lake and it's not then you have to travel, it gets very complicated with the scheduling. You can't just go; you've got to prepare the places and deal with all the other logistics involved."

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Hiscox, the international specialist insurer, is headquartered in Bermuda and listed on the London Stock Exchange (LSE:HSX). There are three main underwriting parts of the Group - Hiscox London Market, Hiscox UK and Europe and Hiscox International. Hiscox International includes operations in Bermuda, Guernsey and the USA. Hiscox ASM Ltd, Hiscox Underwriting Ltd and Hiscox Syndicates Ltd are authorized and regulated by the UK Financial Services Authority.

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