DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Michael D. Fricklas

Executive Vice President,
General Counsel & Secretary, Viacom

THE SPEAKERS

Michael D. Fricklas
Executive Vice President, General Counsel & Secretary, Viacom

Richard B. Kendall
Partner, Kendall Brill & Klieger LLP

Robert Schwartz
Partner, O'Melveny & Myers LLP

Leslie Gordon Fagen
Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP

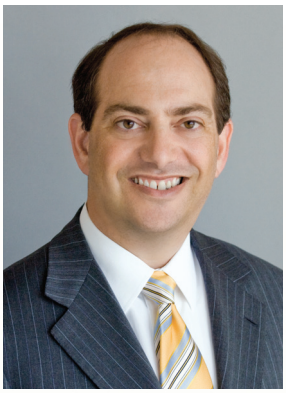
Christopher G. Caldwell
Partner, Caldwell Leslie & Proctor, PC

TO THE READER:

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments and of his company's leadership as a corporate citizen, we are honoring Michael Fricklas, General Counsel of Viacom. His address will focus on key issues in media and entertainment from the viewpoint of the General Counsel. The panelists' additional topics include other issues facing the entertainment industry: protecting a creator's intellectual property rights; perspectives on how Hollywood deals are done; and managing major business litigation.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator



Michael D. Fricklas
Executive Vice President, General Counsel & Secretary, Viacom

Michael D. Fricklas is Viacom's Executive Vice President, General Counsel and Secretary. He joined Viacom as Vice President, Deputy General Counsel/Corporate in 1993, became Senior Vice President, Deputy General Counsel in 1994 and became General Counsel in 1998. He assumed the additional title of Executive Vice President in May 2000, following the Viacom/CBS merger. As General Counsel, he is responsible for Viacom's legal affairs and management of its law department. A former mergers-and-acquisitions lawyer, Mr. Fricklas has played key roles in a wide variety of corporate transactions, litigation, intellectual property, policy and other matters while at Viacom.

Mr. Fricklas received a B.S.E.E. from the University of Colorado, College of Engineering and Applied Sciences in 1981 and a J.D. *magna cum laude* from Boston University School of Law in 1984. Mr. Fricklas is a member of the Board of Trustees of Jazz at Lincoln Center, the Board of Trustees of the American Jewish Committee, New York Chapter, the Advisory Board of the Legal Aid Society, and the Board of Visitors of Boston University School of Law. He is a member of the Executive Committee of the Association of General Counsel and the immediate past chair of the General Counsel Committee of the New York City Bar Association. Mr. Fricklas also is a member of various other bar associations including the General Counsel Committee of the National Center for State Courts, the Board of the National Chamber Litigation Center, and the General Counsel Committee of the American Bar Association. Mr. Fricklas has given numerous professional presentations and published several articles. He has also received several awards including the Association of Corporate Counsel's Excellence in Corporate Practice Award, Boston University School of Law's "Silver Shingle" for distinguished service to the school of law, the American Jewish Committee's Stanley M. Isaacs Human Relations Award, the UJA/Federation Steven E. Banner Award and the Boy Scout's "Good Scout" Award for outstanding community service. He is a member of The Century Association.

Mr. Fricklas is married to Dr. Donna Astion and they have four daughters, ages 21, 19, 10 and 5 years.

JACK FRIEDMAN: Good morning! I'm Jack Friedman, Chairman of the Directors Roundtable. We are a civic group that has organized over 700 events throughout the U.S. and globally. Our mission is to offer the finest programming for Boards of Directors and their advisors.

We are very pleased to have the privilege in recent years of giving this greatest honor to General Counsel on a global basis. The background of this global honor is as follows: Boards of Directors have said to us that basically corporations rarely get credit for the good that they do. If their name is mentioned anywhere, it's usually criticism. Directors believe that it's good for the business community to speak on positive aspects of their activities, and to talk about major issues to other business leaders.

Following this event, we will be sending out the transcript to about 150,000 people nationally and globally. That is a unique feature of this particular series.

We are very pleased that the General Counsel of Viacom, Michael Fricklas, is giving us the honor of permitting us to host him. We feel that the honor truly comes from the guest, although formally, we are presenting you the honor.

Mr. Fricklas' career started at Boston University Law School. He has held numerous positions, and at one time he was an M&A lawyer. We are recognizing his entire career, not just his current position. He'll be speaking first as the Guest of Honor.

We have four panelists who are participating. Let me just introduce them now. They are Richard Kendall from Kendall Brill & Klieger; Robert "Bobby" Schwartz of O'Melveny & Myers; Les Fagen of Paul, Weiss; and Christopher Caldwell of Caldwell Leslie & Proctor. Each one will present their own topic after our guest speaker has spoken. They will make brief opening remarks to set up our later Roundtable discussion. Without further ado, I would like to invite Michael D. Fricklas, Executive Vice President, General Counsel and Secretary of Viacom to make his remarks.

MICHAEL D. FRICKLAS: Thank you, Jack, for that kind introduction, and thank you all for being here so early. In particular, I'd like to thank Dick, Chris, Bobby and Les for being here. All of them, except Les, are based on the West Coast, so it's particularly early for you guys. So thanks for doing this, and we'll try to keep you awake!

Jack, in particular, I'd like to thank you for putting on these events. Jack is right that many corporations, ourselves included, are only in the press when something goes wrong or when somehow the personalities are interesting. We do have a few of those. It couldn't be more important for businesses to have opportunities

to talk about the things we do right, and the opportunity is very much appreciated.

For those of you who aren't familiar with Viacom, we're a little $14.5 billion entertainment company. Our brands include names like MTV, Nickelodeon, Paramount Pictures, BET, Comedy Central and Rock Band, and our brands live on T.V. and movie screens, the Internet, mobile devices, video games, and I'm sure a bunch of new distribution means that I haven't heard of yet.

Because I don't want anyone to think of us as old media, though, I'm going to ask each of you to reduce my remarks to 140 characters so you can Twitter later.

Like most companies, Viacom is filled with people who take a lot of pride in doing their jobs well. They have developed great expertise in how to do them, and they strongly believe that what they do is good, not just for themselves and for the company, but for the world. We don't just entertain, but we inform and we give back through a huge array of social initiatives and programs.

Jack, your program gives us a chance to talk about what we're doing right, so that hopefully when people hear something that sounds like we're doing something wrong, they at least don't accept that at face value.

I very much appreciate the honor. I have to say, I feel very fortunate to be able to work in a job where I'm challenged every day with new and interesting things to work on, and where I have the opportunity to work with some of the best of the brightest. I couldn't do what I do without my terrific CEO and CFO, Philippe Dauman and Tom Dooley. Philippe, in fact, is a former General Counsel, and it's great to be working with somebody who understands the role. Mark Morril is also here. I couldn't do what I do without my friend and Deputy General Counsel. Mark's been Deputy G.C. of Viacom for ten years, and with him and some of the many other inside and outside lawyers that are here, and some that aren't here, it would really be impossible to do my job.

I'm lucky to work in such an industry – an industry that's a lot of fun – and to get to work with such talented people.

These positions are a lot of challenge, to be sure. They consume huge amounts of your energy, and you have to really enjoy tension, but the opportunity to have a meaningful impact on undertakings that matter is about all one could ask from your job. Of course, in this environment, I could also say it's nice to have a job!

But rather than cover the waterfront of legal corporate governance or being General Counsel while we're all Twittering, I thought maybe it would be a little more interesting to touch on a couple of the issues where I'm spending most of my attention, and then let's see what springs out of the conversation!

To my mind, the thing that's most important for General Counsels in my industry are the attacks on property rights that have come to be known as the "copyright wars". I think the modern copyright wars can be said to have begun, when in the early 1980's, Universal Pictures sued Sony over the launch of the Sony Betamax. That particular story is described in colorful detail in a book called *Fast Forward: Hollywood, the Japanese, and the Onslaught of the VCR.*

In short, the studios objected to the sale of videocassette players that included a timer connected to the "record" button, which was clearly designed to allow consumers to tape their favorite T.V. programs. The

studios' objection was misplaced. Those clocks mostly blinked 12:00. But two huge new industries were born.

The first industry was the packaged home entertainment business for movies and television. That business is now the largest source of revenue for the movie and T.V. businesses.

The second industry was the advocacy business for consumer rights to copyrighted works. The first of these was the Home Recording Rights Coalition, which Sony had a hand in organizing, but which took copyright to the streets. People had developed a new right: the right to use their copyrighted stuff however they want to.

Along the way, copyright turned from an issue about artists and writers and journalists into an issue where many believed it was about big companies pushing the little guy around. Fifteen or so years after Betamax, Napster introduced the public to the idea of sharing songs, and entrepreneurs jumped in to provide consumers with places to play their shared music, and with a host of other new services. Cloaking themselves in the romantic image created by Dave Hewlett and Bill Packard's garage, they not only adopted the name "pirate"; they claimed they were helping the public by doing what the record companies were too "dumb" to do for themselves.

The records companies managed to put Napster out of business, but they didn't change people's minds. The labels eventually put their music on iTunes, but at the same time, they sued music fans who posted songs to share.

Now, as a lawyer, it's not hard to see that these people were stealing, and that the labels had a right to be compensated. But the public saw it differently. They saw a cavalcade of high-priced lawyers descending on their homes, demanding thousands of dollars for innocuously sharing their music with their friends. Their outcry recruited tens of thousands more advocates for the little guys being sued by the big corporations.

It wasn't long before music sales began to fall, and down the street from here, the Virgin Megastore was following Tower Records down the path of obsolescence.

Our opponents blithely argue that consumers are better off, because they have access to all of these works in all sorts of new ways, but distribution is only part of the content economy. The other part of the system is having content to distribute. You can draw a lot of people to a supermarket that gives away the food for free, and you can call it innovation, but pretty soon, there's no food to distribute.

That the public values media and entertainment is apparent. Tens of billions of dollars a year are spent on media, and one recent study put the value of the copyright industries at $1.25 trillion in annual gross domestic product. But if the public values entertainment and media, and if the public interest values an informed public, it doesn't make a lot of sense to allow companies, new and old, to be allowed to intercept their transactions and create new so-called "rights" that undermine the entire way content is financed.

> "Public relations has become an industry where split-second decisions matter. You have to put out the fire while it's still a spark, before the flames engulf you.... the general public or members of it interested in your company have the ability to organize instantly in response to information. And a failure to understand this can lead to harmful or fatal positions to your company."
>
> – *Michael Fricklas*

Some argue that the new electronic tools make professional content unnecessary. Well, I can tell you, I own an HD camera, a microphone and an Apple computer, but that doesn't make me Steven Spielberg or Wynton Marsalis. Artistic genius will *not* be replaced by amateurs who have access to new and cooler tools to record their stuff. Blogs reporting on other people reporting the news won't replace great investigative journalism and commentary. Woodward and Bernstein needed a paycheck to investigate Watergate.

Anti-copyright forces argue that if we can't stop theft, perhaps there ought to be a tax on computers, and the government can pay the money based on what it thinks is valuable. I can tell you, I'm not comfortable with the idea of having the government decide what it thinks consumers want, and I'm particularly uncomfortable with having the government control the purse strings of the press.

Copyright provides the only way we know how to allow markets to finance our stream of information of entertainment, and allows us to elevate art to its appropriate station. Copyright is the only way we know how to allow professional artists to sell their intellectual labors to the people who want to buy them.

Alright, I could go on and on about copyright issues, and it's actually not my principal point today. My point is that the new forms of electronic communication present, not just opportunities, but a threat. And not just to our business, but to all of your businesses, and to the public. Of course, you all have an interest in a reasonably robust media. More directly, though, you have an interest in what's being said about your business.

For the past decade, while we've been making our important points in traditional media about the fact that copyright helps consumers, the anti-copyright forces were using non-traditional ways to communicate. While the big media companies carefully considered every public remark, while we thought about long-term implications of every position, and how it would reflect on each of our constituencies, folks were using BlogSpot and Facebook, MySpace and, yes, 140 characters at a time, Twitter. They were engaged in a huge interactive conversation that included millions. Some of that conversation was carefully constructed, but most of it was like a spontaneous snowball; it started, and then some people thought it was important enough to share and to add to, and then to add some more.

Before long, an avalanche of public opinion was armed with the talking points and spin on the talking points. We were five minutes into the game, and we were down 30 points.

Malcolm Gladwell, in his book, *The Tipping Point*, talks about epidemics of social change. Some ideas die out; other ideas appear to hit a tipping point, where they accelerate and become highly important and relevant. You can see this concept in action as the public searches for scapegoats in the financial crisis. Armed with the barest minimum of information, electronic networks light up with emotional outbursts until our politicians and institutions need to respond and take real-world actions.

Traditional media has had to adapt, and quickly. My friends who are reporters find themselves under pressure to blog constantly, before they've had an opportunity to investigate their information adequately, or even to consider thoughtfully what they have. Public relations has become an industry where split-second decisions matter. You have to put out the fire while it's still a spark, before the flames engulf you.

And these electronic crowds can cause enormous harm in the hands of the nefarious, whether used to perpetrate child abuse or character assassination, financial fraud, or just to change public policy to benefit private interests.

I'll give you an example. When Viacom first launched its effort to take down pirated material on YouTube, a blogger reported that we were indiscriminately taking down material we didn't own. It didn't help that we *did* take down a clip, by mistake, of a Harvard professor who studies copyright! These things happen! I believe – I think the clip showed him and some friends out at dinner. It was not John Stewart. A blogger noted that Viacom was probably just reviewing the so called "metadata" – that is, there's a small number of keywords that users use on a site to describe their own clip. Within an hour or two, this speculation was being reported on as *fact*. Within a few hours more, we got a letter from the ACLU of San Francisco threatening to sue us if we didn't change our behavior, because we were only looking at the meta data. The good news in this particular case is that we managed, within a day – within the same day, actually, that we got the letter from the ACLU, to sit down with them or talk with them on the phone and explain that that was not, in fact, what was happening.

We were lucky. We were able to act quickly and demonstrate that we were correct in the way we were handling this. We spoke to people we trusted and who trusted us, who were close to the ACLU of San Francisco, like Fred von Lohmann at the Electronic Frontier Foundation. We showed him our processes and our efforts to avoid take-downs of creative works, and we talked with him about a number of issues that he cared about, like fair use. The issue quickly quieted down.

I later learned that the ACLU was close to filing a lawsuit on behalf of the public, based on a claim that we failed to use good faith in taking down clips. That rumor had become fact, had become what was about to be a lawsuit. The press conference had already been organized. The good news is that we reacted quickly. If we hadn't, I'm sure that it would have become the accepted wisdom that we were wrong, and as a result, we would have been sued by the ACLU.

So what's my point? The advent of electronic and social media has dramatically changed the world of In-House Counsel. For one thing, the public feels empowered, and not everyone in the public feels an obligation to be responsible, or fair, with that power. For another, the general public or members of it interested in your company have the ability to organize instantly in response to information. And a failure to understand this can lead to harmful or fatal positions to your company.

What should Directors and the General Counsel do about this? I wish I had all the answers, but I can point out a few key things that we've learned. First, make sure you communicate quickly and well when you're making a decision that can be controversial. When you're in a dispute, you can't hide behind the standard, "We don't comment on matters of litigation." The public demands an explanation in nanoseconds, and litigation takes years. Explain why the public should care about your perspective, especially when the litigation relates to a matter of public interest. Public reaction is also not a bad proxy for how a judge or jury or a shareholder will react.

Second, be a good listener. You may completely disagree with the public, but you can't always change their minds. When the political winds are blowing in the other direction, try not to head directly into them.

Third, remember that your audience will not be as invested in your issue as you are. Make the story simple and clear, and when you can, even test it out. Use the tools of modern PR and marketing to understand what the public thinks and how it can be persuaded. You'd be surprised at how sophisticated they are, but you'll also be surprised at how skeptical they are.

Fourth, how you do things matters. Be a business people trust. Dov Seidman's book, *How*, explains the importance of out-behaving the competition. Develop a reservoir of goodwill that you can put to use when you need it. Don't wait until the crisis has struck or the dam has broken to try to make some friends.

Jack, thanks for putting together this forum honoring me in the role of General Counsel, and most importantly, thanks for letting us have this opportunity to talk, and hopefully we added a little bit to the reservoir of goodwill I'm sure we're going to need. I'm looking forward to the conference.

JACK FRIEDMAN: Thank you very much. Let me ask one quick question. You were talking about the private bloggers. Is the reaction in Washington just as fast? Do the politicians criticize, just right away?

MICHAEL FRICKLAS: Well, absolutely. Certainly, when there is an issue that has that much public concern, it's a little bit like a web site, trying to monetize traffic. You know, politicians trade in attention, and they trade in making people feel like they're being responsive. So at least some segment of the political community is bound to respond when there's an issue that has a tremendous amount of attention, by definition.

JACK FRIEDMAN: I noticed that there was an announcement by a company that they were going to eliminate 5,000 U.S. jobs, a controversial decision. They were quoted as saying, if these quotes are correct at the press, they were moving the work to India. One of my reactions was, that the Directors Roundtable could have wonderful programming about how to deal with the speed of public relations crises today. The question that I am thinking about is this: how do you control the public dissemination of announcements that could be very sensitive to the public image or the political image of a company, and not just leave it to the normal functionaries, such as the head of an operating division talking to the head of the PR Department, to write a press release? How does a corporation make sure that things that are sensitive are vetted at the very, very highest level to make sure there aren't broader implications that the technical people didn't think about?

MICHAEL FRICKLAS: Well, I'd say it's extraordinarily difficult to control in this environment. I work in an industry where people throughout the organization talk to the press every day. It is part of what we do. And then everybody's organizations have people who are blogging every day and who are communicating every day. It has become much harder to control information, and it has become much harder to develop perspective.

I think you have to assume that your perspective will not be the only perspective that is out in the community, and that it's important just to be clear and per-

suasive in your communication, and make sure that it's disseminated in the broadest possible way, so that when people hear the debate, they have at least your side of the story. But there's no way to make sure that they have your side of the story.

JACK FRIEDMAN: As an example, a company could say, "We will downsize 5,000 jobs," but don't have in the press release that the work will be sent to India. You don't have to put that in the press release.

MICHAEL FRICKLAS: I think my point is that the press release is only going to start the conversation. So whether you put it in the press release or not, you're going to have to deal with it. So you're going to have to talk to people about it, and you're going to have to explain it, and you're not going to want to let – whether you deal with it in the press release up front, or you deal with it in your communications that happen immediately, simultaneously with the press release – you can't just leave that issue on the table and allow the other side to develop it.

JACK FRIEDMAN: Our next speaker is Richard Kendall of Kendall Brill & Klieger. Thank you.

RICHARD B. KENDALL: It is a great privilege for me to join all of you in honoring Mike Fricklas today. Mike is one of the finest lawyers I have ever met, and he has put together an extraordinary Legal Department at Viacom and its operating divisions, many of whom are here today.

Taking off on Mike's theme of how General Counsel are spending a lot of their time in the media industry focusing on copyright issues, historically the content owners, the large companies which purchased content or created it, such as motion pictures and T.V. programs, also controlled the pipeline of distribution to the public, a classic example being broadcast networks. But over the growth of the Internet, what's happened is that the service providers have created enormous pipelines, and today, service providers such as YouTube and Facebook and MySpace have millions and millions of users, all viewing, every day, motion picture content on the Internet. Facebook, for example, just passed 200 million members. There now exists an enormous distribution apparatus, particularly the search engines, the service providers and the social networks, fighting to leverage their market power to control the monetization of the content that's appearing on the Internet. To give you a sense of the scope of the activity even at this early stage, each day about 4 million videos are uploaded onto Facebook. And then you have on the other side, the incumbents who have controlled this distribution for a long time, and as Mike says, are responsible for the creation of the content that people want to watch, fighting to retain their traditional control over that content, and a share of the monies to be earned from it.

This is all happening on an accelerated pace, now, with the fusion of television and the Internet. Many people who are watching the evolution of the Internet believe that broadcast television will soon be greatly deemphasized, and in most homes, the television programming will be watched via a fiber optic cable on an Internet that will be hooked up to a monitor, and that's how you'll watch T.V.

So this battle between those two opposing groups is occurring, as Mike said, against the background of copyright law. But copyright law is created by Congress every once in a great while, and by courts continuously. As you know, there is a major case occurring right now between Viacom on the one side and YouTube, which is owned by Google, on the other, having to do with the responsibilities of YouTube to police content. By the time that case is over, the evolution will have progressed another 30 times, and who knows whether the landscape, technologically, will look very much like it does today, by the time that case wends its way through the various courts.

And the other question which I think many of us on the West Coast, especially who are focusing on these media issues all the time, are always being asked is, from a content owner, "How can we best enforce our rights to control our content?", and also, "How can we most effectively use these huge networks of consumers constructively to make money?"

So I wanted to talk a little bit about a couple of issues that have come up a lot these days. We're all supposed to just talk for a few minutes, tease out some of the issues, and then open it up for discussion later.

One case in the Ninth Circuit, where I practice, that has created a lot of controversy is the *Perfect Ten* case. The plaintiff Perfect Ten, which is primarily a web site containing unretouched photographs of nude models, sued Google and Amazon for infringing its copyright in photographs. I will focus on what Google was alleged to have done. One of the things that Google was alleged to have done was enable Google users to do a search across the web using the words, say, "nude photograph", and up would pop little thumbnails showing nude models from Perfect Ten's web site, and if the user clicked on one of those thumbnails, the user would be directed to any sites that might happen to have a copy of that particular picture in full size. That might be Perfect Ten's site, but it also might be one of the many sites that were pirating Perfect Ten's pictures.

One of the issues that arose in the case was whether, when Google did this, Google's use of its own proprietary browser within which it framed whatever web site the user was directed to, constituted copyright infringement. This is called "inline linking". For example. A Google user might search for and find the Comedy Channel web site, and when Google presents it to the user the web site would appear inside a Google browser. Now, the user would see whatever content there is on the Comedy Channel web site, but they will also see advertising in the Google browser that is directed to people who happen to be interested in the Comedy Channel. And so in this way, Google is making money off of the content from the Comedy Channel.

This is interesting enough in the current scenario, but imagine, for example, that networks are putting virtually *all* of their content on the Internet in real time for viewing, and instead of watching CBS as CBS in the CBS viewer, you can now watch CBS through a Google viewer and see, along the side, advertising from Google. This would be a profound change in the broadcast network's control over the monetization of its content through the sale of advertising accompanying its programming.

The copyright analysis by the court in the *Perfect Ten* case was that although there is a protected copyright in the *display* of copyrighted material, it is only protected if the defendant has actually made a copy of the infringing material, and since Google doesn't actually make a copy of the material – it just directs a user to where they can find that copy somewhere else, enclosing it in its web site – they're not engaging in the display of copyrighted material within the meaning of the copyright act.

The implications of this Ninth Circuit decision are beginning to be debated quite a bit by commentators, and they create all kinds of interesting questions for lawyers as we try to advise clients.

Another issue very much on the minds of copyright practitioners representing content owners is what happens when the content owners want to use these huge groups of consumers organized in Facebook and the other social networks to engage, for example, in viral marketing of their products. From a marketing perspective, there's nothing better for the Comedy Channel than to have virtually everyone in Facebook talking about the latest John Stewart episode – that's terrific.

The problem is, how do you control the copyrighted content, if you do decide to let that happen?

Consider, for example, the issues posed by Facebook's "terms of use". In the handout, you'll see them written down. According to those terms of use, any Facebook user who uploads any video into the Facebook network is representing that the user has all rights – in other words, the copyright rights – in that video, and that Facebook is entitled to do basically anything they want to do with that material – reproduce it, display it, distribute it, create derivative works from it – anything they want to do.

This raises the question, if you allow and, in fact, encourage users to download your copyrighted content in an authorized way, and you then encourage them to post it on the network so that their "friends" within the meaning of the social network can see it, and pretty soon it's virally being distributed throughout the social network, do you still retain control over your content, or do these terms of use actually trump your control over your copyrighted content? There aren't any cases describing this particular phenomenon, but there are cases that say that even if you don't actually agree to the "terms of use" that are set forth in a network site, if you use that network site, and it could be said that a studio that is causing users to post the studio's material on a network site is using it, you are deemed to consent to the terms of use.

So these are just two of the issues we are discussing these days. Most of the media counsel in Los Angeles spend every day being confronted with one issue after another that they've never heard before, as this fusion of television and the Internet progresses. Thanks.

JACK FRIEDMAN: Our next speaker is Christopher Caldwell of Caldwell Leslie & Proctor.

CHRISTOPHER G. CALDWELL: Good morning. Let me start by first saying how pleased I am to be here today and have a chance to join you in honoring Mike Fricklas.

In preparing my remarks for today, one thing that I came across again and again in looking at some of the FCC decisions and case law was that it was striking, the number of cases that Viacom and different Viacom entities have been involved in. And I'm not making that point because they're litigious, although as an outside litigation counsel, I like litigious clients. But I'm actually making that point because it shows kind of the breadth of issues and the fact that in his job as General Counsel of Viacom, Mike constantly has to deal with the cutting edge issues that are facing the industry today. I would also note that in the years that I've had the pleasure of working with Viacom, they're a terrific client from the perspective of they've got good lawyers and they know how to make decisions, which is something I always appreciate, but they also care about doing what's right, and that's something that also makes me proud to be able to say it regarding the Viacom lawyer.

The topic I want to talk about for a few minutes this morning is use of race and other — what we would consider suspect — criteria in casting and programming decisions in terms of what you end up seeing on television or in the other forms that we see content being delivered these days – the Internet, radio programming, all of those things. And I think that the entertainment industry has to be the one place left in America that when you look at the casting sheets, or the "breakdowns," as they're called, where you're trying to cast for a particular program – that breakdown is going to call out and say, "We want a female African-American between ages 25 and 35 to play this particular part." And the question that comes up is, is that a permissible practice? It's actually an issue that's being addressed in a case that I'm handling right now, where a producer of a television show maintains that he was discharged from his position because he complained about racial profiling in casting decisions, and it's something that you not only see in casting, but it actually cuts more broadly across television. I think that if you looked at game show contestants, for example, there is no question that there is an effort made to consider race and gender in terms of who is going to end up being contestants on game shows on any particular day. And the question is, once again, is that permissible?

In the case that I'm dealing with, our first line of defense is, of course, that was not the reason this person was discharged, and I think that we'll be able to show that. But then we also have raised the issue before the court of, even if you believed what this plaintiff was saying, isn't that a permissible practice, anyway, because of the First Amendment rights of the creators of this television show.

There is a slew of law review commentary on this issue, and virtually all the law review commentary comes down on the same side and says, "Absolutely, you can't do this. Why should you be allowed to consider race or gender or age in this context, when you can't do it in any other type of employment decision under our law today?"

There is almost no case law addressing the issue, which I found somewhat surprising. You would have thought, particularly in Los Angeles, that we would see cases brought by women, people of particular ages, or an African-American or Latino artist saying, "I didn't get this casting job because of my gender, my age, or my race." And it's basically not out there.

There is a little bit of case law that talks about it. There is really one case that addresses it somewhat tangentially, and it's the *Ingels* case, a 2005 case from the California Court of Appeal, where the Court faced the issue of whether age can be considered in selecting who are going to be chosen as the callers that call into a radio show? And someone sued and said, "I was told that I wasn't allowed to get on air as a caller because I was too old." And what the Court of Appeal said in that decision was that's a permissible practice because of the First Amendment rights of the creators of the radio show.

And I happen to think that that's the right decision in that case, but I have to say, it is a hard issue to line up with the law. Under Title 7, the employment discrimination statute, you talk about BFOQs – bona fide occupational qualifications – and it says that gender can sometimes be a BFOQ. The statute also says that age can sometimes be a BFOQ. But the law also says that race can never be a BFOQ. But once again, there's no question that you see race as a factor in television casting and television program content decisions.

The other legal area where you see this issue played out, is in the FCC regulatory area. The enabling statute for the FCC says that programming has to be delivered in a non-discriminatory manner. And the FCC, as those of you who work in this area know, has very specific guidelines and programs regarding non-discriminatory employment practices by licensees. It also has programs that look at the ownership of licensees in order to try to encourage minority ownership of different television stations and radio stations. And it has, in fact, looked at the issue of program content as a licensing consideration. It's an issue that actually came up. It hasn't been looked at for more than 30 years, but in the 1970's, the FCC had a series of decisions involving television stations in the South that weren't carrying any content where any African-Americans were depicted as part of the content, and stations had their licenses revoked as a result of that.

Once again, if you look at the law review commentary out there today, there are individuals who are suggest-

ing that this is an issue that the FCC should be looking at again today. When you start to talk about the FCC and what it's doing in that area, it's hard to talk about it without talking about should the FCC be regulating in this area at all, particularly when you think about the fact that certain types of programming that are not on free-to-air or broadcast networks are basically not regulated by the FCC, and if you look at cable channels, for example, there's no question that there are cable channels that target particular audiences. There's BET. There's Oxygen that reaches out to the female audience. There's the LOGO channel for the gay and lesbian audience. And the question that comes up is, why is that permissible, why is that unregulated? If the same practices were being followed by CBS or any other broadcast network would that raise an FCC concern?

I'm predicting that we will see more of this issue, particularly as we now have a president who is rightly raising the issue of race in America and how we deal with this issue in our society. As I stated at the outset, I think that broadcasters have a First Amendment right to make casting and programming content decisions to create whatever program they want, even if race, gender or age is expressly taken into consideration in making those decisions. It should be analyzed in the same way as a painter who is painting a picture. No one would suggest that the government has any legitimate role in preventing the painter from choosing the race, gender and age of what he or she is painting. But the courts have not yet confronted this issue head-on. I predict it will be an interesting issue to see how the courts grapple with it as it plays out.

JACK FRIEDMAN: Let me just ask a follow up question. There can be a big difference between whether you define a character inclusively, meaning defining it to make sure that a minority can get a position, versus preferential treatment which responds to the complaint that in Hollywood minorities are not in front of the camera enough.

CHRISTOPHER G. CALDWELL: Well, I think, for example, if you look at – the FCC decision says very specifically that race should be considered as a factor in making programming decisions, and obviously, where the FCC is going with that is ensuring that programming is inclusive and that you will see minorities, you'll see women, when you see programming on television. But at the same time, if you'll look at the vast majority of – and there are statistical studies out there that are included in some of these articles – the vast majority of casting breakdowns, the vast majority of them specify that if you're going to have a romantic lead, they typically call for a white person to play that role.

One of the interesting anecdotes that comes up is the *Hitch* motion picture, where Will Smith played an African-American romantic lead. The casting breakdown for that said that the female love interest should not be African-American, because too many people in America would not go to see a show with two African-American leads. And the part was eventually cast with Eva Mendez. The marketing studies showed that a Latina female lead would play well with audiences, because white people would still go see that movie; even though they wouldn't go see it if it became just a "black movie" or an "African-American movie" because both leads were African-American.

So even, yes, I think you do have to distinguish between situations where you're making these decisions in an effort to try to be more inclusive, but if you look statistically at what's happening in general, the vast majority of the casting breakdowns continue to call for white people to play the leads in situations where race has nothing to do with the character's part.

JACK FRIEDMAN: I'm almost overwhelmed with the thought of this issue, but we'll move on. Our next speaker is Robert "Bobby" Schwartz from O'Melveny & Myers.

ROBERT SCHWARTZ: Thanks, Jack. Good morning, everyone. I'm Bobby Schwartz. I'm from Los Angeles, O'Melveny & Myers, and it's a real pleasure to be here. I love coming to New York, and I love working with Viacom. We're in the midst of something right now – I see Mark Morril sitting there. It's a terrific group of people to work with. It makes my job a lot easier. So, thank you very, very much.

What I wanted to talk about was, I guess if I had to put a title, and everything in Hollywood has to have a title, it would be something like, "The Hollywood Code of Uncivil Procedure," otherwise known as, "The Separate Legal System That Maybe Governs the Entertainment Business."

Now, presumably everyone here is a lawyer. We think of the American legal system as the bedrock of much of our way of life. The rule of law is important not just to our society, but to the way America's businesses run. It provides stability. It provides predictability. And people know how to order their affairs around a set of rules.

Unfortunately, California is often accused of being the land of flakes and nuts, and when it comes to the entertainment business, that's no different. It affects the way the legal system works, and it drives people like Mike Fricklas and those who work with him crazy in a number of ways. So, I thought I'd share some of those with you this morning, and perhaps come up with some ideas for how to solve these problems.

The fact is that there is a way of doing business in Hollywood, where people think they operate on a set of rules that works for them. Yet, when they need to enforce those rules and their rights, they go into a legal system that doesn't understand or accept those rules and doesn't understand even the language Hollywood uses. As our Ninth Circuit Judge Kozinski likes to say, "the courts do contracts whereas Hollywood does lunch." So what happens is that Hollywood's players don't come out of the courthouse quite the way they thought they would or at least the way they came out of lunch.

So how does this actually affect things? One is, very rarely are contracts actually signed. It's surprising that billions of dollars are put at risk every year in the production of television shows and motion pictures where the "talent" – the writers, actors, director, the producer even – don't have signed contracts. Why is that? One reason is, there are talent law firms, the boutiques that represent a lot of these performers, have policies to the effect that, "We never let our clients sign contracts." And then there are the studios and the networks that have to get shows on the air, and they just can't wait for the contracts to be finalized to everyone's satisfaction. So they go ahead and they produce the show, and the talent is in the show.

And then somebody decides, "Well, wait a second. We need to enforce our rights." So you can have a case involving an actress, such as Kim Basinger, who agrees to do a movie called *Boxing Helena*. She doesn't sign the contract. And then her agent decides that maybe she shouldn't do the movie after all, so she walks away. And then the production company sues her. But they don't have a contract! So they have to sue on an oral contract. In fact, they did sue her, and recovered an awful lot of money from her that was reversed on appeal because her lawyer, or I guess the production company's lawyer, did a bad job with the jury instructions. During the trial of that case there was some interesting testimony from people like Ms. Basinger's agent, who was the head, I think, of ICM – one of the three major talent agencies at the time. He sat in the witness box and told the jury, "My word is my bond, but you just can't rely on it." He really said that.

> "How you do things matters. Be a business people trust. ... Develop a reservoir of goodwill that you can put to use when you need it. Don't wait until the crisis has struck or the dam has broken to try to make some friends."
> – *Michael Fricklas*

What often happens is you have people sign deal memo – a short form agreement – and then they feel they have enough on paper to make the movie and get folks to render their services, at which point they turn to negotiating the long form. Comments go back and forth. Drafts are revised and circulated. And the studio lawyers have stacks of contracts on their desks, and the talent lawyers have stacks of contracts on their desks. And the lawyers just kind of shuffle the paper back and forth without finalizing the contracts until, quite often, it's long after the services have been rendered that some difficult issues arise. These issues can involve, for example, the back end deal and how it's to be calculated. We've seen lots of disputes on very successful films where nobody really knows what the deal is, because you're dealing with handwritten notes on pieces of paper that go back and forth, and you tell the client, "Look, I don't know where we stand on this, and maybe they're right, maybe they can convince the judge to see it their way, based on this handwritten comment, or not." It creates huge uncertainty and risks for both sides. The fact is, there are some, let's call it "difficult", or maybe even unscrupulous people, who do take advantage of that. And that creates further problems that I'll talk about in a second.

But even if you do have a signed contract in the entertainment industry, under this "Hollywood Code of Uncivil Procedure", even that quite often can be not worth the paper that it's printed on. The head of Columbia, Sam Cohen, used to say, "An oral contract isn't worth the paper it's printed on." Well, in Hollywood, that can also be the case of a written contract.

What happens is, particularly in the television business, you have a hit show, and after three years or so, people's view of the sanctity of that contract changes. I know one talent lawyer very well whose view is that, if you have a hit show, after the third or fourth season, that is the moment in time where you tell your client not to show up for work. I can set my calendar by this. Every summer, in late July and early August, I get phone calls from people who say, "So-and-so on such-and-such a show is holding out." Why are they holding out? Because it's time to renegotiate.

Now, 40 or 50 years ago, in the entertainment industry, I'm told a contract meant something. To use or even raise the concept of "renegotiation" was taboo. It was almost a dirty word. Now, it's a standard practice. If an unknown actor did a T.V. series pilot, and the show was picked up, and became a hit, and even if the actor wasn't chosen by *People* magazine as one of the most "beautiful people in the world," that actor (or his lawyer or agent) will decide that it's time for a ten-fold increase in compensation. So they don't show up for the onset of the next season of their T.V. show. And the studio is left with a situation where, under the Thirteenth Amendment, one can't force an employee to go to work, so what leverage does the studio have over them? And in California, the leverage you have is a negative injunction that keeps them from rendering services for anyone else while they are refusing to work for you. The debate in Hollywood that nobody ever really wants to litigate fully is what remedy can you really get from such a negative injunction? Can you get an injunction that only prevents someone from working on a different T.V. show while they are holding out, because that's the extent to which their services are exclusively the studio's under the contract? If that's all one can get accomplished in court, the actor will just go do movies and thumb his nose at the studio. Or can the studio keep the actor from doing any work at all?

I think I know what the answer is. A California Court of Appeal decision involving Warner Bros. Records explains that you can keep a performer from rendering any work at all. The lawyers representing talent say, "No, that's not the law." So again, we have a situation where there's the Hollywood mindset as to what the legal system provides, and then there's what the legal system itself provides.

That crops up in another situation out west, where quite often, and this is particularly so in the television business, where a T.V. series can go on for many, many years, and if they're fortunate enough to have that success, quite often you have performers rendering services under contracts for more than seven years. Now that's great for the series, and means the actors are getting more that just "steady" work. Except that Biblically and under California Labor Code section 2855, after seven years, the employee is entitled to have a period of rest, or at least freedom to test the market for his or her services. So under California law, no contract for personal services is enforceable after seven years from the commencement of services.

Sounds fair, right? Well, what does one do on a show like *Friends* or *Seinfeld*, where the show is running into its eighth, ninth, or even tenth season? And what do you do with a contract that's been renegotiated during that period? Remember that we were talking about that a moment before. So the talent lawyers try to exploit this. They call up the studio and say, "Guess what? We're not showing up for work, because even though in Season Four you gave my client a ten-fold increase in his compensation, under the Labor Code, Section 2855, you can't enforce your contract against us." The contract is dead (or at least a one-way bargain that only I can enforce)." The network or studio usually responds along the lines of, "Well, wait a second, we started a new seven-year clock when we renegotiated your contract in 2005, and so you're wrong."

This is another area where no one in the entertainment industry really wants to know what the law really is. We do not have a single appellate decision from the Ninth Circuit or the California Courts of Appeal that tells us whether, when you renegotiate a contract during its term, does the clock (or calendar) on the Seven Year Rule start anew?

There are unpublished decisions that we all have in our files, ready to throw out at one another and argue about whether the clock should run again or shouldn't. Advice is given to performers and studios and networks. People ask whether, in any of the prior renegotiations, there was a "moment of freedom" when the performer was free to render services for someone else, such that the studio could more powerfully argue that the clock did, in fact restart. But nobody really knows for sure, and no one has pushed it to the point of an appellate decision, so it's a risky proposition for each side.

There's another crazy aspect of the Hollywood Rules of Un-Civil Procedure that drives GC's around town a little crazy. It's the "self-help rule" in California. Now, self-help is often not a good idea. And some people in Hollywood, and their lawyers, have taken it to extremes. I'm happy to say that I think people are starting to realize that it's not acceptable to engage in self-help when you have some of these disputes. I'll give you an example. The Walt Disney Company has been very successful over the years with *Winnie the Pooh*. Years ago, the children of the man who originally acquired the merchandizing rights to *Winnie the Pooh* from A.A. Milne sued the Walt Disney Company, claiming that Disney hadn't accounted correctly for their royalties on Pooh merchandise. It's a huge, perhaps, billion dollar a year business for Disney. Lots of money at stake, so it's worth fighting over. Turns out that the plaintiff wasn't happy with how the case was going, so they decided to take matters into their own hands. What did they do? They hired a private investigator. And according to the decision from the trial court and the affirmance by the California Court of Appeal, the plaintiff said, "The PI was asked solely to hang out at the trash yard over there by the Disney lot and dive in the dumpster once in a while to see if Disney had thrown out any papers that were germane to the case." But that's not what happened. Disney showed the trial judge that this person had a remarkable diving success rate. It seems that every time

he jumped into the dumpster, he somehow miraculously emerged with attorney-client privileged communications to and from the Disney Legal Department! And he did so from dumpsters placed outside of buildings where nobody in the Disney Legal Department worked! Hmm. Do you think maybe this person was diving or fishing somewhere else? In fact, Disney's lawyers established that this PI was probably breaking and entering onto the premises, going into the Disney Legal Department or to the facilities of the outside vendor Disney had hired to shred the trash, and poring through the trash, and finding all kinds of documents that concerned the defense of the case.

The reason I mentioned this here, in terms of its peculiarity is that those efforts didn't just stop there; it infected the outside law firms that were representing the plaintiff. And these are lawyers from established firms in the L.A. legal community who were taken to task, but in my view, not sufficiently, for making use of this material, knowing where it came from, filing discovery responses that were misleading. In my view, and I think you can see it from the Court of Appeal decision, suborning perjury of their clients, or looking the other way. The trial judge said, "Enough. This has so infected this case that the only thing I can do is to give a sanction in the form of dismissing it with prejudice." That was a pretty surprising result at the time, at least to the plaintiffs. Disney seemed gratified by the decision, which was affirmed on appeal.

I don't know if it's the water – well, actually, it couldn't be the water, because everyone in California drinks bottled water that comes from somewhere else. But there is certainly something that people do out there that, you know, I'll get on a soap box here and say it's really wrong. And I hope that we will turn the ship a little bit. And cause people to think more carefully about what they are doing and behave more responsibly.

There's one well-known Hollywood lawyer (and also a director and still others) who's on his way to jail for hiring a private investigator to wiretap the communications between his client's adversary and her counsel. In other words, imagine opposing counsel in one of your cases hiring someone to wiretap and record the phone conversations you have with your client. That's what was going on. And then the information was used in a mediation. Now this is one of the name partners in a very well-known firm in Los Angeles. I said these were the rules of Un-Civil Procedure. You tend to think of Hollywood as part of the Wild West. I'm hoping people are now erring on the side of caution.

I'll end on a lighter note. There is also the ego-driven litigation. And everyone in Hollywood says it's a "relationship business." It is. But that expression is used to justify crazy settlements or crazy resolutions of disputes. People do need to continue to do business with one another, so those relationships matter. And when they sour, lawsuits get filed. And then there are those people who don't really care at all about relationships, and the person I have in mind is author Clive Cussler. Now, I'd never heard about the guy before he sued over a movie. I guess I don't hang out enough in airport bookshops, but supposedly he sold a hundred million copies of his pulp fiction. One production company bought the rights to his book, *Sahara*, made it into a movie and hoped to release it through Paramount, only to find that Mr. Cussler was unhappy with the script (even before they made the movie) and was badmouthing the movie online, and that is a viral form of marketing, as you know. So he sued the studio for failing to properly consult with him on the script, ruining his book franchise, and failing to fully pay him for the right to produce a sequel.

> "I think that the technology companies not only need content, but I also think they begin to acquire I.P. of their own and begin to understand the value of that, and begin to understand that to mature, they want to be dealing in the licensed arena, and they need us, and we need them."
> – *Michael Fricklas*

It turned out, unfortunately Mr. Cussler had a few problems, including self-control in his deposition, and at trial. The defendant established that *he* was the problem in getting the script approved and in making the movie. He was being difficult in exercising his script approval rights, rejecting them before reading them, complaining about the hiring of Jewish writers and African-American people to work on the movie, and certain actresses of whatever ethnicity. For his decision to sue the makers of this movie, he ended up getting a $5 million judgment against him for dashing the chances of the movie, and also a $15 million attorney fee award against him.

But, in any event, consider yourselves lucky. You live in a land where you don't have our wacky parol evidence rule, where judges look at contracts as something to be enforced. While it's fun to be a lawyer representing these companies, it's probably a lot better for the clients to work and live in a saner legal environment. So, my parting advice for those of you from California or in the entertainment industry is this: Choice of law: New York! Thank you.

JACK FRIEDMAN: I was at a seminar here, and a lawyer from New York said, "Do you know why," he said, "Do you know why California has such squirrelly laws?" It's because the state legislature works only half a day, and spends the other half a day surfing. That's the image that California has around the country.

Our concluding speaker is Les Fagen of Paul, Weiss.

LES FAGEN: Good morning, everybody. I'm Les Fagen from Paul, Weiss. I work in New York, where contracts are sacred, ego is unknown, and contracts are never renegotiated.

I'm very honored to participate in this Mike Fricklas event. Mike's been a friend and a client for many years, and I can say from sometimes painful experience that I can think of no way to better honor Mike than addressing my subject today: the subject of litigation costs and cost containment.

JACK FRIEDMAN: Our Guest of Honor finds this one of the most important topics of the day!

LES FAGEN: Indeed! I don't know of a more educated consumer of legal services, or one more vigilant. Or one who prompts more visits to our firm's Billing Committee than the General Counsel of Viacom.

The subject of how to manage litigation in the year 2009 is a very, very hot topic, and for some very obvious reasons. Things are bad out there, and the media and entertainment business has been no stranger to the economic meltdown. *The Hollywood Reporter* reported that for '08, there were nearly 28,000 or more layoffs in that industry, and in the first couple months of '09, nearly 7,500 more. And not surprisingly, law departments of media, and entertainment companies have all been impacted. Altman Weil, the legal consultants, conducted a survey and reported at the very end of last year that 75% of law departments faced budget cutbacks, and that same survey found that the bulk of reductions would be targeted at, you guessed it, outside law firms.

And, of course, everyone here has read the stories of the problems that many law firms are facing. We've all seen stories about layoffs and declining profits. But at the same time, for better or worse, the evidence may suggest a rise in the need for those outside counsel, and those outside litigation counsel in particular. Economic trouble breeds litigation; new administrations breed new regulation and new laws.

Not surprisingly, the Fulbright & Jaworski survey of well over 350 In-House Counsel has reported that up to 40% of those counsel in the bigger companies pre-

dict a huge run up in litigation; only 8% are predicting a decline; and about 35% of the large company In-House Counsel are predicting an increase in regulatory activity. All of that data was gathered before the results of the last presidential election.

And that same survey says that along with labor and good old commercial contract disputes, I.P. is predicted to be an area of significant litigation growth.

So, given these unfortunate conflicting and likely trends — economic pressure, and a litigation uptick — it is no surprise that everybody is talking about litigation management and cost control.

In preparing for these remarks, I was absolutely *stunned* by the avalanche of speeches and articles and literature on this subject. The ideas expressed are really very old. They've been talked about for years. But somehow now, there's more urgency and more focus.

This is a large subject, but because I only have a few minutes, I'm going to just focus on two points drawn from the literature and scores of conversations that I've had with clients. Those two subjects are the subjects of billing and communication.

Let me talk about billing first. There's been enormous commentary on a *Forbes* article written by Evan Chesler of the Cravath firm last January. The article has a picture of Evan; and it's entitled, "Kill the Billable Hour." The thesis – again, not a new one – is that the incentives in billing hours are all wrong. Lawyers take on a case on a billable hour basis, and if they win it or they successfully resolve it very quickly, the client is delighted but the lawyer is poorer. If the lawyer takes forever to litigate a case, the client is unhappy, but the lawyer is richer.

The issue has long been talked about, but the fact that such a prominent and respected lawyer at such a prominent and respected law firm has taken this position publicly has become a headline, and the subject of a lot of controversy. So, given the subject matter of today's discussion, I went to a blog to see what people's reactions have been to this issue, and what blog do I choose? The popular blog, *Above the Law*. That had the following reaction by a variety of bloggers to the Evan Chesler thesis:

(Quote) "Die, billable hour, die." (Quote) "Yawn." (Quote) "Even if Evan Chesler didn't look exactly like the Fonz, I'd say he is correctamundo." (Quote) "The billable hour is an excellent indicator of base prices for legal services. The only problem is the exploitation by unethical lawyers." And, lastly, my favorite, (Quote) "Don't allow them to kill the billable hour. If we do this, then they win. You know who they are! Why do they hate us for our freedoms?"

The debate can go on and on. My own view is, perfect or imperfect, the billable hour is not disappearing. It is a metric that can be evaluated, monitored, negotiated, budgeted, reported, and given the inertia in our profession, people are used to it.

Now, of course, there's been more and more focus on alternative billing arrangements. We all know them. None are perfect.

1. Contingency fees, be they total, or hybrid together with discounted fees. This can be scary for both client and lawyer. It's easier to do when you're on the plaintiff's side, looking for money. It's harder in other kinds of cases, when you're on the defense or you're seeking different kinds of relief for the plaintiff. And, of course, defining "success" in non-plaintiff or non-monetary cases is always very difficult. There is a potential for betting wrong and being embarrassed.

2. Fixed fees. The fixed fee arrangement is more and more popular, especially in the transactional world; less so in litigation. But the literature suggests that usually, one side may get killed. And many clients fear that with fixed fees, there is the risk that counsel will lose attention and favor more lucrative matters.

3. And lastly, the periodic budgets and fixed fees, subject to revision, where you do three months of work on a fixed fee and then look back and look forward on costs for the next period. But, of course, this approach is an invitation to perpetual negotiation.

Obviously, no formula fits all relationships, all cases, or all transactions.

One client of ours who recently spoke to us said that while the billable hour is very useful in monitoring and reporting to management, it is largely irrelevant. What counts is value, budgeting and control, staffing decisions, and good risk and reward analyses. And, of course, the key is finding the right equitable and managed arrangement between lawyer and client.

In my remaining few minutes, let me talk about the second point, which is the subject of communication between client and lawyer. It is really shocking, after so many years of focus on the legal market and the relationship between client and lawyer, and the heavy competition in the legal services market, that the overwhelming message in the literature, even more so than cost, is the subject of adequate communication between client and lawyer, or, frankly, the lack of it.

Clients complain that outside counsel just don't get it. They don't appreciate the needs of In-House Counsel to timely and effectively participate in the management process in their companies namely to do their job of giving advice in a timely and effective way. Instead there is inadequate reporting and consultation. There are too many surprises and crises, and often the surprises relate to adverse and unexpected results in litigation, and of course, the subject of cost.

Also, to a surprising degree, clients still complain of the lack of responsiveness by outside counsel. One of our clients has a top ten list of tips. His first and last is, (quote) "return the damn phone calls and the e mails." And, amazingly, lots of lawyers don't. Obviously, there can never be enough reporting by outside counsel to the client on litigation events, planning, strategy, changes in anticipated costs or outcomes, and most important, an ongoing risk reward analysis of every step being taken and what is worth fighting for.

But the literature also comments on the challenges of communication faced by inside counsel in managing litigation. They, too, have the obligation, the need, the challenge to communicate information about the business and its goals in the case. Input is essential, so that those critical risk reward analyses in each step of the litigation, motions, discovery, trial, appeal, can be correctly and adequately evaluated. In short, again, what is worth fighting for.

I also think that outside counsel needs information about what In-House Counsel needs. What *are* their duties, their schedule in reporting to management, their time table to meet budget and other needs? What crises lie in the future for their businesses that outside counsel has to prepare for?

And lastly, maybe most importantly, inside counsel has to communicate *how* to communicate: Blackberry, phone, periodic meetings, reports or whatever.

In the end, in today's difficult environment, lawyers and clients have to navigate together. That's the way to get through litigations in hard times. And it's like so many other challenges in hard times, success is based on the relationship and collaboration. The key is long-term, not short-term, arrangements. And it requires mutual respect from both sides and an interest in the avoidance of disproportionate benefits and costs. If

you do this right, the client and lawyer will be together when the crisis is over. Thanks.

JACK FRIEDMAN: We're going to move on to an interactive discussion among the speakers and eventually with the audience on several key issues.

The world center for entertainment is in L.A., and the world center for new technology is in Silicon Valley. What are some of the ways in which they work together? What is going on between those two poles?

MICHAEL FRICKLAS: Well, they're obviously, as you point out, very interrelated. The technology industries are interested in ways to distribute content, and they're building up new business models like YouTube and Facebook and others that have been mentioned. They tend to have, as we talked about earlier, a very different view of the value of content as compared to the value of what they do, which is largely in the distribution area.

But the answer is, we're talking all the time. You saw this morning that Walt Disney Company reached a deal with YouTube on distribution of clips from ESPN and from ABC. CBS has a major operation now in the Silicon Valley with the acquisition of CNET. The collaborations are going to continue to grow, and get ever closer.

You all remember that Apple Computer and Disney have a particularly close relationship with Steve Jobs having sold them his Pixar business, which is a technology company but based in Northern California, engaged in the animation business.

So, the ties are close. We all know each other very well. And I think as time goes on, frankly, I think our interests become more and more aligned. I think that the technology companies not only need content, but I also think they begin to acquire I.P. of their own and begin to understand the value of that, and begin to understand that to mature, they want to be dealing in the licensed arena, and they need us, and we need them.

JACK FRIEDMAN: Who gets financial benefits from the new technology?

MICHAEL FRICKLAS: The negotiation between distribution and content is not new. In 1993, when Viacom acquired Paramount, and back in '87, when Sumner Redstone acquired Viacom, he said, "Content is king." That was a statement about where he viewed the world vis-à-vis distribution. I think that battle continues from long before that, when the networks were fighting with the producers over television programming, and their power in those markets, to the days when the cable operators were the unique way to distribute paid television programming in their regions, to today, when various other companies are intermediaries in not so much the wires as they are in the aggregation and promotion of content. But I think that negotiation will go on, and that battle will go on forever.

I think what's different now is that there had cropped up, and has cropped up, this implied threat that if you can't come to terms, that people will use the content anyway. And that's the battle that we're fighting with YouTube and Google, and I think even Google has – Dick was talking about how, as the years go by, the facts change, and litigation can sometimes be a poor fit to a particular problem. Even Google has now moved away from the position, or at least the conduct, that initiated the lawsuit, in terms of taking active steps to remove pirated content from their web sites, that they can reach deals, and I'm sure that was part of what facilitated their ability to get to a deal with Disney.

RICHARD KENDALL: Just amplifying on Mike's comment, one of the interesting things about the way the service provider market power has evolved is the fiction that there are actually passive recipients of content from millions upon millions of users. The early copyright law arguments made by Napster, ultimately unsuccessfully, in that some of the same arguments that are made by YouTube today, presented as if, "well, there's not a whole lot we can do; we're just an aggregation of users who are having content supplied to us." But if you really think about what's going on, these are networks that are built upon the exchange of what Sumner Redtone described as the most valuable commodity that was the king: content. And they really are nothing more than distribution pipelines for content. It's just that it is the individual users who are the ones who select what content to put on the network, as opposed to in the old days, the network itself which decided what was going to be on at 8:00, and that's what everybody watched.

It still, I think, is the content that ought to be in control, but at the same time, these networks have created something really valuable, and that is aggregations of people who are sufficiently involved in the content that they want to exchange it. And monetizing that in a fair way between the aggregators of those consumers and the owners of the content is really what the job of the next decade is likely to be about. My argument would be, while the courts are one solution for it, it's better to have really good policy, thinking this through. Not have to wait for the courts to resolve the situation before everyone on all sides can figure out how to create value, monetizing it.

CHRISTOPHER G. CALDWELL: One thing I would add to that, is that you are writing the rules on shifting sands, because technology is changing so quickly. I think this is one reason why the courts are, frankly, ill-equipped to resolve these issues. Litigation is a slow process, and the rules that are written by the time you get the Napster case all the way through the appellate levels may be irrelevant by the time you actually have the final decision.

MICHAEL FRICKLAS: There's a great example of that in a case that's being litigated out in California right now with RealNetworks. In that case, there was a company called Kaleidescape – there is a company called Kaleidescape, that allows people to take their DVD collections and put them on a hard disk drive located in their house and watch their whole DVD collection on any television that they may have around their house. The dispute had to deal with copyright, but also with returns of the license by which encryption is put onto DVDs. The judge at the trial level found, "You know, this is a $35,000 piece of equipment. It's not that there's going to be a lot of DVD losses and a lot of copies that are lost as people put these on their systems and then as the DVDs that they had get disposed of on eBay and resold or whatever." Probably before the ink was dry on the

decision that this is a $35,000 box and not a problem, RealNetworks introduced a $50 piece of software that did the same thing. So there's another round of litigation dealing with the question of, okay, the same facts, but now it's $50. The technology moves very quickly, and the cases really do become obsolete fast.

ROBERT SCHWARTZ: Jack, I was wondering if I could add something. I think that if you look at the Silicon Valley/L.A. axis and what's going on there. A lot of it was driven ten years ago by, let's call it an immaturity about copyrights, and an assumption that if you had the file, you had some, maybe not right, but some ability to do something with the content. Even if you had nothing to do with getting permission

in the first instance to have that content, that group has matured to the point where they realize maybe that's not a right philosophy, and you can't just monetize something because you come into possession of it.

What troubles me, frankly, to kind of peer down the road a bit, is that a lot of people who drive these disruptive technologies have grown up in an environment in the last ten years, maybe even more, where even though they know something may be wrong, nobody really cares that it's wrong, so the initial mindset that's brought to bear on these technologies is, "If I can invent something and quickly flip my company to somebody else, that's a good thing, and that's the way I'll approach it, and I'll leave it to other people to clean up the mess."

I just don't know if that by maturing, the industry is coming around to thinking, "that's not an acceptable way of doing business and I should really come up with something else to spend my time on," or whether it will just continue to migrate in that direction. And if it does, then the legal system will not be able to keep up with it, and we'll be constantly litigating these problems or making policy on these problems from the rear-view mirror of what the technology was at a given moment in time, and by the time you deal with it, then there's some new technology. Look at Skype. That voice over Internet protocol business was built by the same people who came up with, and wrote the code for, Grokster and Kazaa, which is very disruptive movie and music downloading software. They couldn't monetize that business, but they sold Skype to eBay for billions of dollars.

MICHAEL FRICKLAS: And then launched a licensed content business.

ROBERT SCHWARTZ: Right. So it's really unclear. You talk to a lot of younger entrepreneurs. I get a lot of phone calls from people who are saying, "Here's my idea, and what do you think of it?" And it's like, "Oh my God, you can't be serious! This is just out and out piracy!" Or it'll be, "You know, you can do that as long as you remake the web site so that it doesn't look like you're sponsored by 'blank'." It's just too easy when you can right-click on something to copy it and throw it up on your own web site to make it look like it's authorized.

So honestly, I think we're still stuck in this kind of tornado of uncertainty.

LES FAGEN: If I could just add one thing, an observation on the frailty of the court system with respect to these ever-evolving technologies. I grew up in the litigation system at a time when, in intellectual property matters, if you went to a jury and you waved around the trademark registration or the copyright registration with a seal and a ribbon and everything else, your chances of winning were good.

That's changed. My experience in the recent past in front of juries and in jury research is that what Mike interestingly referred to earlier as "electronic crowds", people who have gotten used to having free access to content. Well, they're in the jury pool. And many people today have a skepticism on content ownership which requires real advocacy to turn around. I think it's becoming increasingly challenging, if any of these cases do get to the jury, to get the jury on the side of the content owner.

MICHAEL FRICKLAS: Well, there's an – apropos of your comment about legal fees and about that issue about the practicality of getting these cases to trial – a traditional copyright case that, among the obligations, you go in and you have to show that you own the copyright, that it was prepared in the right way, that you have not only the registration but licenses out and licenses in are all in good order. Try doing that when you're dealing with a hundred thousand copyright violations. And if you're a defendant in these cases, think about how long you can take to go to trial, if you want to go into the court and spend the jury's time digging through the question of whether each particular contract of the hundreds of contracts that make up each particular copyrighted work are signed at the right page.

JACK FRIEDMAN: Could you go over that, by the way, just a little bit? Could you explain that a little bit in terms of the numbers of parties to a copyright? This reminds me of the old Texas story about an oil company putting together an oil field having to go to maybe thousands of little farm families and saying, "Can we have the right to drill under your little acre," and "your acre," and "your acre," and so forth to each one. Is intellectual property that way with lots of little parties that you have to take into account?

MICHAEL FRICKLAS: It can be. It rarely is. There are certainly times when, you know, there's an old story or an old concept that a number of people have touched, and we get into very intricate law school examination-type questions about "such and so was the author of 'X' thing and died and has 22 heirs, and which one of those heirs actually controls the rights? Was the registration renewed at the right time?" And all those things.

But really, what I'm talking about is, every movie has a number of actors who have conveyed rights to their images and their likenesses. Each movie has writers, many times a number of writers, with various drafts. You have various people who have submitted parts of the ideas. Actors, directors, set designers and all kinds of other people, and there's a series of quite normal agreements and arrangements with those people to make clear that what they're doing is a work that's made for hire, and that the studio owns the agreement to the copyright, often with responsibilities to pay royalties.

Obviously, to sue on a copyright, you have to have the right to sue, and the defendant can certainly take a

look. At least they'll argue that they have the right to take a look at every one of those pieces of paper and make sure that they're all in order.

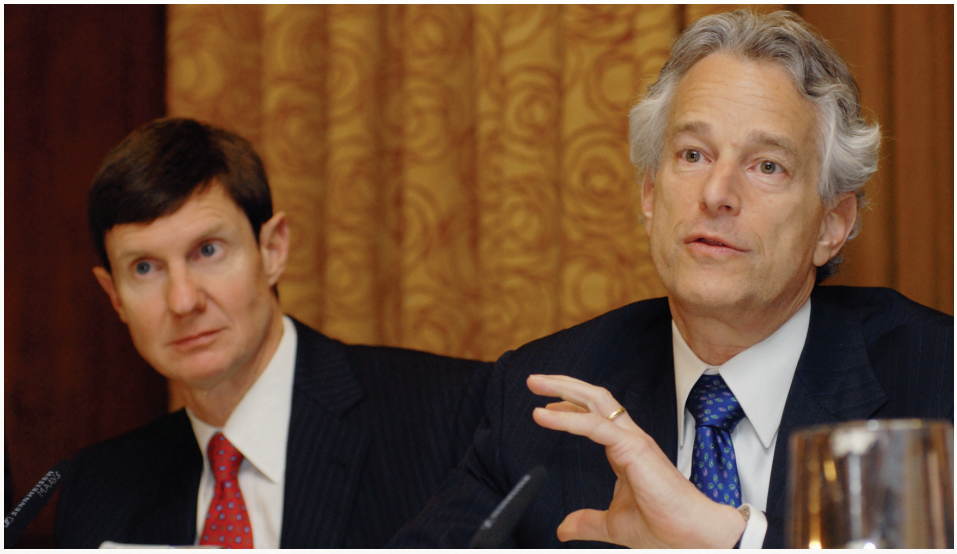
When you're dealing with massive copyright infringements, if you will, we've taken down, I think, at last count, more than 400,000 clips off of YouTube alone, it can be difficult to administer a case.

JACK FRIEDMAN: There was a study done — I don't know how precisely accurate it is — that the amount of money that all corporations generally together spend on intellectual property litigation, including patents, copyrights and so forth, is equal to all the other litigation put together.

MICHAEL FRICKLAS: I'm not surprised. Look, I think the real problem, while people like to yell at their outside counsel about outside legal hourly rates and, of course, it's all justified, but separate from that, at the end of the day, we have a legal system where it's extraordinarily difficult to get rights enforced in courts today, because of the cost. And that's a problem not just for businesses like ours that have resources. It's more of a problem for the average person who has a right that's been violated and has a $20,000 dispute, and there's just no way that you actually – the government is actually providing you with a cost-effective way to get your disputes resolved, and that results in people's rights being trampled all the time, because the transaction costs are too high.

And electronic discovery has introduced a whole new wrinkle now, where instead of a case being decided on a few hundred documents, it's being decided on a few million. And we're still applying basically the same techniques of having lawyers read every one, or every one that could even conceivably be relevant, and cases that used to cost a million dollars to get to trial are twenty million dollar cases now. And, in my view, that ends up hurting the outside firms, because the product has been priced to a point where people can't afford to use it. And that's because at the end of the day, we're using a bunch of traditional techniques. And, again, that's not a new problem. People have been complaining about the cost of discovery for a very long time. But I think in the last five or ten years, it has amped up to a point where these cases are about discovery and not about the underlying merits of the dispute, and not about getting to the point where the finder of fact, whether it's a jury or judge, has an opportunity to actually consider the case on the merits – the reason that you're involved in the lawsuit to begin with.

RICHARD KENDALL: I spent my first five years in criminal prosecution, and when I first left the U.S. Attorney's office and I started doing civil cases, and I found out how long they took, I asked myself, "Why is it that in cases that involve life and liberty, we get to trial within six months, or maybe a year on a really complicated case, but in civil cases it usually takes at least two years? Of course, the FBI has powers to conduct investigations, and can find the facts more efficiently than lawyers can through civil discovery, but do the lawyers really need to spend the time and resources that are consumed on discovery?" Because if you think about it, fighting over the exchange of money between middle-aged wealthy people, we spend far more in societal resources than we do when the issue is whether somebody should go to jail for life. There is something wrong and very peculiar about that system. Particularly since on the civil side, what we *really* ought to be doing is achieving economic efficiency, since that's ultimately the context in which we are fighting.



JACK FRIEDMAN: Another big issue is how the entertainment industry is financed. They made movies as early as the 1930's about Hollywood moguls fighting with their New York bankers. Hollywood has certainly found that an interesting topic for movies.

What is the source of the financing, and what are some of the disputes or issues that arise between investors and the entertainment companies?

RICHARD KENDALL: The sources of financing seem to run in cycles, and about every three years, there's a new group of investors. So it might go from German dentists to hedge funds to some other group somewhere in the world that has tax advantage reasons for investing in films to foreign banks. Some people truly understand the risks, and sometimes they don't.

RICHARD KENDALL: That's right. And Les and I are handling one of those cases just now, and there is another lawyer in this room who represented some of the investors who say they were surprised at the risks that they undertook... there will always be new sources of financing coming, always hoping that they will have better judgment than the last group about which movies to invest in. The fact is that it's a very risky business with enormous rewards and great potential for picking the wrong movie to invest in.

MICHAEL FRICKLAS: And secondary benefits, it's a lot more fun to invest in movies than it is to invest in oil futures or rolling stocks.

JACK FRIEDMAN: In the early '80's, I did guest research for Barron's on limited partnerships in Hollywood. I looked at every public deal – there were only a limited number in those days. I interviewed, believe this or not, the attorney, the accountant, and the banker listed in the prospectus. I asked every one of them, "Would you recommend for anyone in your family or any client or yourself, in any financial or tax situation, this deal or any of the other deals for the public that you've seen?" Every single one, 100% of the attorneys, 100% of the accountants and 100% of the bankers who had underwritten them had the view that, "No. I can't imagine recommending this or any other deal to anybody I know of in any situation."

If that isn't quite a data point right there!

MICHAEL FRICKLAS: Actually, I've looked at it at a different level; I think that in some ways, when, at the times over the past 15 years I've been around the movie business, but longer ago than that, that there have been ample amounts of funds to invest directly into motion pictures, have largely worked out to be bad times for the movie business. And the reason I say that is that consumers have a certain capacity of consuming movies. They're only going to go to one or maybe two on a weekend, and they're only going to see a certain number. And when a lot of the crazy money and a lot of the people who didn't know what they were doing were throwing money at Hollywood pictures, it's resulted in too many films trying to chase too few screens,

too much money trying to chase too few stars and too few scripts, and it's resulted in actually a system where you had bubbles in those things, where distribution was too scarce and where production costs were too high for people to really make money in the business. At times when money has been scarcer, like now, I think there are fewer movies chasing the same audiences, that there's more ability to negotiate reasonable deals with the people who are involved in helping you make pictures, and this is actually a better time, I think, for the studios than the periods of time when all that cash is available.

JACK FRIEDMAN: One of the issues we haven't taken up yet is the international aspects of the industry. What are some things that you as General Counsel get involved with outside the United States?

MICHAEL FRICKLAS: Well, I think that our industry is viewed in a lot of different ways around the world. I think we find ourselves confronted with different views of competition laws, different views of the role of government in setting business models for content. Oftentimes we're negotiating the business deals with the legislatures and the governments of particular countries, which may include things that you would think are matters of private negotiation in this country, like the windows in which movies become available for paid television or for Internet. You may see a little more hostility in that they view – a lot of countries view the movies, anyway, and television to a lesser extent, as U.S. exports, and so it's about protecting their own industries against U.S. imports, not so much about making sure that the property right is respected as a general matter.

And in those circumstances, we try to be very careful about making the points that to have your own country's economy develop, it's very important to establish a content industry of your own. And to do that, you have to-

JACK FRIEDMAN: There can be protectionist quotas regarding foreign content and the like.

MICHAEL FRICKLAS: There are. There's an exception under the trade rules for so called "cultural assets". So there's something called a "television without frontiers directive", for example, in Europe, where there's a 50% quota for television that has to be produced within the European Union. That's something that wouldn't be allowed under most trade agreements in other commodities, but it's accepted in our industry. So it results in a number of different kinds of business practices actually having to be negotiated, with people having to understand the value of what you're doing.

JACK FRIEDMAN: Regarding the piracy matter, you can go onto Internet sites to the Movie and DVD section where it says that the seller is from "Hong Kong". A listed DVD may be for something that's obviously current enough that it still has legal protection, not a 60-year-old or 80-year-old movie; and they're selling it back into the U.S. I don't know whether Hollywood has somebody who sits there and goes through a protocol where you press a button and it prints out everybody that's selling DVDs from Hong Kong so that you could start checking it out.

MICHAEL FRICKLAS: A lot of that's done by computer programs. People do try to police it. Tiffany just sued eBay, did not prevail at the trial court level, on just that question. They said, "Okay, well, we told you that X, Y or Z company on eBay has been selling pirated Tiffany material, and you didn't terminate that seller's eBay account. At some point, doesn't eBay become responsible, as opposed to Tiffany, when they know a seller is violating trademark law on a regular basis?" The trial courts felt no. They felt it was up to Tiffany to continue to police. But those issues are very hot issues for all I.P. owners, all kinds of trademark owners and copyrighted folks.

JACK FRIEDMAN: Turning to the other speakers, what are some of the international matters that you run across. Obviously Sony, for example, is a large owner of a studio. It's Japanese-based. I assume that everything that has been said about enforcing rights is harder, given an international deal where you're distributing to Asia or to Europe or elsewhere.

ROBERT SCHWARTZ: Well, I'll make it one step worse. When we were, eight, nine years ago, starting a lot of these copyright war cases against downloading companies or entities involved in that, I remember there was one that said they were located in the Gaza Strip and "come and get us." Yep! Or in Kazakhstan. You think it's hard enough suing Napster. Try enforcing your copyright interest at the point of a gun!

The other thing that you see a lot of internationally is just a lot of these very strange, tax-driven motion picture financing deals that Germany and New Zealand and Australia did, and no different there – investors get disappointed with the outcome and decide that, why not take a shot at filing a lawsuit.

JACK FRIEDMAN: I'd like to go back to a big issue that we touched on before, which I think is important, which is this whole question of First Amendment rights and so on and so forth. I always wonder how – it's not just rights; it can also just be being responsible to, how far can you go to be responsive to different groups in the audience. You have the right to present certain things, but it's offensive, and we're not just talking about minorities and women; we're talking about alcohol, drug presentation; people, every time "The Little Mermaid" comes on on television or something, I hear a parent, people criticize the fact that she was not too obedient to her parents, and it gives a bad example. I think religious groups are offended, you know how they are presented, and so on and so forth. Could you talk a little bit about the enormous pressure to deal with an audience segmented with their particular case and values, you know, several hundred million people, all of whom critique that you're presenting wrong values, whether it's legal or not, and that Hollywood is unresponsive to whatever.

MICHAEL FRICKLAS: The fact is, is we produce a lot of different content, a *huge* array of content, that is targeted to different audiences. And it's really up to viewers and for children, parents, to learn about it and make responsible decisions. We do a lot to make sure that we communicate with people about what we're doing and what we're airing, and to make sure that they find the content that they expected to find, and don't stumble on something that is going to be offensive to them.

JACK FRIEDMAN: As one example of leadership in Hollywood, I had a conversation once with Frank Rothman, a very big Hollywood executive, as well as an attorney, before he passed away. We discussed that Hollywood has often been on the forefront of trying to create opportunities for diverse people in terms of jobs and presenting themes ahead of society. In other words, many times Hollywood has been a leader in opinion towards recognizing human rights and the value of different groups. When we turned to the 1930's, in two seconds, he said, "Except for the blacks." It was very close to his heart, instantly and intensely. That Hollywood has done many good things, but it had lagged in that particular area.

I'd like to open up this discussion to the audience.

QUESTION FROM AUDIENCE: What is the significance of the Digital Millennium Copyright Act?

MICHAEL FRICKLAS: It's a broad question. There's a lot of provisions of the DMCA that mean a lot of different things. I think in the case of our

YouTube case, there is obviously enough that people can argue about it for a long time, and so it would be nicer if it were complete and unambiguous, so that everybody could understand that it was written in a way that favored our side!

As to whether opening it up, it would be feasible to get closer to that position or not, I don't know. I do think that it does need to begin to make the case, that it is not as broad an exemption as some people would like it to be. But on the other side, we believe it requires you to use, in order to be able to take advantage of the exemption, you must use the technical means that are reasonably available to you. We're not looking for perfection. I don't think we're looking for eBay to find every one of those infringements. But I do think courts need to enforce the requirements that, to the extent a site can know about infringement, to the extent that you can use the technologies that are available, that you should be using those technologies, and that the people who are benefiting from these new technologies, these companies, should share in the responsibility to make sure that their sites are policed.

RICHARD KENDALL: One of the problems with the DMCA is that in many circumstances it places the burden on the many thousands of copyright owners to use measures to figure out whether their works are being infringed, and then to notify the service provider. It's not a very efficient system, when the service provider could use the tools that Mike was describing to do that same work. Generally, in society, when there's a burden that is more efficiently borne by one who can then spread the cost over many, that's where the burden should lie. And then what we have here is every one of the content owners actually has a responsibility to notify Google if there is infringing material. Well, think of all the dollars that have to be spent by all those different content owners in order to discover that, and wouldn't it be more efficient if that responsibility was more clearly on the service provider.

QUESTION FROM AUDIENCE: An industry with similar issues is the pharmaceutical industry, in terms of I.P. monitorization and protection. Does the panel see any lessons to be learned from the pharmaceutical industry, or anything you can teach them?

ROBERT SCHWARTZ: Well, we don't have generics in the entertainment industry!

MICHAEL FRICKLAS: Well, that's not quite true! Just look at reality television!

It is a very good question. Patent law is so different than copyright law on a number of different fronts that it's difficult. I will say they've done a great job about protecting the patent system and protecting their right to maintain their exclusivities. The difference between copyright where, in essence, by law, the idea that's expressed in your copyright is available to the public. That's part of what we do is express ideas, and then everybody gets to use them, as compared to the patent arena, where absolute priority is a requirement, but then you actually have a monopoly on an idea for a period of time. The policy differences are so strong that it's hard to draw a lot of analogies between the two.

JACK FRIEDMAN: I would like to ask a personal question. I noticed in doing our research that you have four daughters.

MICHAEL FRICKLAS: Yes.

JACK FRIEDMAN: And one from college age down to 5. And I know that Viacom has Nickelodeon, which is the number one children's station.

MICHAEL FRICKLAS: And the General Counsel is right there, for Nickelodeon.

JACK FRIEDMAN: In the entertainment field, there must be incredibly rapid change between when a daughter who is now 21, was five, and one who is now 5. Also, in the five minutes a month that you have free, what do you like to do for vacation or hobbies?

MICHAEL FRICKLAS: Well, on the first question, I have to say, one of the great things about the kids' programming business, about the kids' media business, is that everything is new to a four-year-old or a five-year-old or a six-year-old, and so unlike us grown ups who want to see something we haven't seen before, they haven't seen it before! And I can pull a video tape of Blues Clues out from when my ten-year-old was five, and for my five-year-old, it's brand new. And my five-year-old is watching Sponge Bob, which my 21 year-old loved when she was in high school. And Disney can pull out Pinocchio from, I think, 1939, and turn it into a best-selling DVD. The kids' programming really lasts a long time when it's well constructed, and I think nobody constructs kids' programming better than Nickelodeon. So it's a wonderful business in that way, and they really do enjoy a lot of the very same things.

On the other, what do I do for when I get a chance to relax, besides read briefs and mark up contracts? The answer is in the four kids! What I like best is to spend time with my four daughters, in pursuing whatever activity they like to direct. So my ten-year-old's a swimmer, and my kids are all skiers now.

JACK FRIEDMAN: I remember talking to the Chief Judge of one of the federal circuits. She remarked about her professional and personal schedule and she said, "I'm a mom. I'm on call. When my daughter's coming back from college, she tells me what my schedule is." So you can be a leader in the world of affairs, but in terms of family, your kids often tell you when to be available.

MICHAEL FRICKLAS: Exactly right.

JACK FRIEDMAN: In concluding this special event we want to thank our Guest of Honor and our distinguished speakers for sharing their wisdom with us. Thank you.

Robert M. Schwartz

Partner,
O'Melveny & Myers LLP

O'MELVENY & MYERS LLP

Robert Schwartz is a partner in O'Melveny's Century City office, Chairman of the Entertainment and Media Litigation Practice, and a member of the Business Trial and Litigation Practice. He is named a leading lawyer by *Best Lawyers in America, Chambers, Hollywood Reporter,* and *Law Dragon*. During his 25 years at the Firm, his entertainment litigation practice has involved significant representations in the following substantive areas, at the trial, regulatory, and appellate levels:

- Accounting for participations and royalties
- Antitrust and trade regulation
- Class and representative actions
- Contracts, both commercial and personal services
- Copyright, trademark, trade dress, and anti-piracy
- Corporate governance and internal investigations
- E-commerce
- False advertising
- First Amendment
- Governmental investigations and regulatory proceedings (including FTC, DOJ, public utility commissions, and bank and thrift regulatory agencies)
- Media/content creation, promotion, distribution, and exhibition, including film, television, music, videogames, interactive media and Web sites
- Mergers and acquisitions
- Right of privacy and publicity, defamation
- Unfair competition, including Lanham Act and California *Business & Professions Code* Sections 17200/17500

Bobby received his JD from the University of Southern California and his BS from the University of California at Los Angeles. He serves on the Board of Directors for Bet Tzedek – House of Justice, a community legal services organization.

O'Melveny & Myers LLP

Since its founding in 1885, O'Melveny & Myers LLP has been on the cutting edge of legal activity. Today, driven by its values of excellence, leadership, and citizenship, O'Melveny is an acknowledged national and international leader in providing legal services to clients around the world, transcending traditional barriers between practices and industries, as well as national boundaries. With more than 1,000 lawyers on three continents, and strong ties to the local culture in all our locations, we serve clients all over the world.

During our firm's long history of exemplary client and public service, many organizations have honored our achievements. As we continue to evolve and innovate in the 21st century, recognition comes from an increasingly diverse array of sources. Included here is but a sampling of the accolades O'Melveny and its people have received from the global community in the last two years.

- Recognized by *The American Lawyer* as among the top litigation firms in biannual "Litigation Department of the Year" surveys
- Placed in the top tier in *The Asia Pacific Legal 500* in a variety of practice areas, including dispute resolution, and recommended specifically for intellectual property, technology, media, and telecommunications
- Appears on *The National Law Journal's* "Appellate Hot List"
- Recommended in *The Legal 500: Europe, Middle East & Africa* for, among other things, competition, customs, trade, WTO and regulatory compliance
- Placed in the top tier for intellectual property in complex corporate transactions in *The Legal 500 US*
- Named to *The American Lawyer's* A-List, and described as a "go-to" law firm by American Lawyer Media
- Singled out as "Competition Team of the Year" by *Legal Business Awards*
- Ranked by *Global Arbitration Review* as one of the world's leading arbitration practices
- More than 60 O'Melveny lawyers recognized in *Chambers USA* (2008)
- 26 lawyers across 13 practices ranked among the world's best by *Chambers Global* and *Chambers UK* (2008).
- 20 lawyers across 15 practices in China, Hong Kong, Japan, and Asia-wide ranked among the world's best by *Chambers Asia* (2008).
- 19 partners, of counsel, and counsel listed in the 2008 edition of the *International Who's Who of Business Lawyers*, recognizing the foremost legal practitioners in 27 distinct areas of the international legal marketplace from 110 countries.
- 46 lawyers named among *The Best Lawyers in America* (2008)

Throughout its history, O'Melveny has received this type of recognition by understanding its clients and working closely with them to help achieve their most significant business objectives.

Richard B. Kendall

Partner,
Kendall Brill & Klieger LLP

Richard B. Kendall is a founding partner of Kendall Brill & Klieger. His practice encompasses a wide range of trial and appellate matters.

Mr. Kendall has tried over 30 cases in the federal and state courts, and has also supervised numerous litigations in European and Asian courts. In his appellate practice, he has argued major cases before the United States Supreme Court, the United States Court of Appeals, the California Supreme Court, the Delaware Supreme Court, and the California Court of Appeals. He has twice argued before the United States Supreme Court: in 1996, he argued *Smiley v. Citibank* on behalf of Citibank; and in 2008 he argued Winter v. NRDC for the Natural Resources Defense Council.

Over the years, Mr. Kendall has frequently represented major companies in both the media and banking industries, as well as foreign governments. He has litigated on behalf of the Paramount, Columbia Tri-Star, and Universal film studios, and also for several television networks, including MTV, VH1, CBS, UPN, Showtime, and Nickelodeon. In radio, he has represented the CBS Radio Group, and in outdoor advertising he represents CBS Outdoor and Clear Channel Outdoor. In banking and securities litigation, Mr. Kendall's clients have included Citigroup, JPMorgan Chase, and Credit Suisse First Boston. Foreign government clients have included the Philippine government in its cases against Ferdinand and Imelda Marcos, the Bank of China and the China National Coal Development Corp., and the Brunei Investment Authority.

Mr. Kendall is a co-author of a four-volume treatise on California federal pretrial procedure, entitled *R. Kendall, R. Seeborg, M. Shartsis, and F. Smith, Federal Pretrial Civil Procedure in California* (LexisNexis, 2004). He has been honored by the Century City Bar Association as its "Litigator of the Year," and has been recognized as a leading media & entertainment/litigation lawyer by Chambers & Partners in its *Chambers USA Leading Lawyers for Business Guide.* In addition, Mr. Kendall has been selected for inclusion in *The Best Lawyers in America* for 2007-2008 in commercial litigation as well as entertainment law. He was also designated a "Southern California Super Lawyer" by *Los Angeles Magazine* in 2006 through 2009.

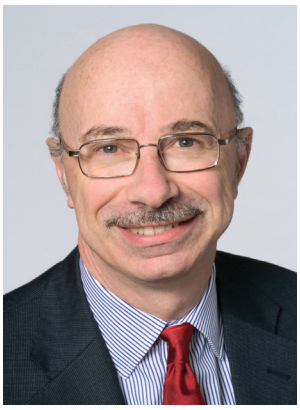
Kendall Brill & Klieger LLP

Kendall, Brill & Klieger is a litigation boutique founded by Richard Kendall, Laura Brill, and Robert Klieger. KBK combines outstanding advocacy with the efficiencies and focus of a small firm.

KBK's clients include major media companies such as Viacom, Paramount Pictures, MTV, Black Entertainment Television, CBS Entertainment, CBS Outdoor, Showtime, and Clear Channel Outdoor. The firm's attorneys have broad experience in handling cases at trial, in numerous state and federal courts of appeals, and before the United States Supreme Court.

KBK Partners have successfully litigated high-stakes cases involving banking, foreign sovereign immunity, aviation, constitutional law, computer and DVR technology, and media and entertainment law.

Founded in Los Angeles in 2009, KBK focuses on realizing the highest goals of the legal profession. These include excellence in advocacy, participatory governance, flexible billing arrangements aligned with client objectives, a strong commitment to public service, and ensuring meaningful work and career development opportunities for junior attorneys who join us.



Leslie Gordon Fagen

Partner,
Paul, Weiss, Rifkind,
Wharton & Garrison LLP

Paul | Weiss

A senior partner in the Litigation Department and member of the firm's Management Committee, Leslie Gordon Fagen has litigated on behalf of plaintiffs and defendants for over 30 years, handling clients' most complex civil litigation matters.

Mr. Fagen is recognized for his broad experience across an array of legal disciplines, including general commercial litigation, antitrust, insurance, intellectual property, product liability and securities law issues, and is noted as a leading attorney for Commercial Litigation by *Chambers USA*, *Chambers Global*, *The International Who's Who of Business Lawyers*, and *Lawdragon 500*.

His work on behalf of ACNielsen & Co. and other clients was profiled in a January 2006 *American Lawyer* cover story, "The Lifesavers," in which Paul, Weiss was selected as the best litigation firm in the United States.

Mr. Fagen has a strong track record of wins and favorable settlements at the trial and appellate levels in federal and state courts across multiple jurisdictions, and in alternative dispute resolution proceedings.

He is a member of the Association of the Bar of the City of New York, and has served on several Bar committees, including committees on the Judiciary, State Legislation and Transportation. He is also a member of the American Bar Association and International Bar Association, and has been a member of the New York State Bar Association Section of Commercial and Federal Litigation, where he served as chairman of the Committee on Magistrate Judges.

Mr. Fagen is a director of the Lawyers Committee for Civil Rights Under Law and a Fellow of the American College of Trial Lawyers. He has served as a member of the Board of Trustees of Maimonides Medical Center, and trustee, president and vice chairman of The Educational Alliance, Inc., a multi-disciplinary social service agency.

Mr. Fagen is an adjunct lecturer in law at Columbia Law School and an adjunct professor of law at Brooklyn Law School. He graduated from Yale College in 1971 and Columbia Law School in 1974.

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Paul, Weiss, Rifkind, Wharton & Garrison LLP is a firm of more than 500 lawyers, with diverse backgrounds, personalities, ideas and interests, who collaborate with clients to help them conquer their most critical legal challenges and business goals. Our long-standing clients include many of the largest publicly and privately held corporations and financial institutions in the United States and throughout the world. We continue to serve as counsel to numerous start-up companies and investment funds, and over the years have nurtured many through their growth into industry players. While widely recognized as a leading litigation and corporate firm, Paul, Weiss has developed equally strong practices in the areas of bankruptcy and corporate reorganization, employee benefits and executive compensation, intellectual property, personal representation, real estate and tax law.

From the firm's inception, the Paul, Weiss Litigation Department has been involved in nearly every high-stakes litigation of its time, handling the most complex and threatening cases; cases that require cutting-edge and ground-breaking litigation strategies; cases that shape the financial markets, corporate board rooms and society for decades to come.

First and foremost, we are trial lawyers. We handle high-stakes disputes in every forum, from state and federal trial and appellate courts to domestic and international arbitrations, and from alternative dispute resolution proceedings to administrative tribunals of all kinds. To each, we bring a sure grasp of the underlying substantive issues and the forensic skills and strategic insights necessary to produce successful results.

We have achieved a reputation for unparalleled excellence. In its January 2006 cover story, *The American Lawyer* selected Paul, Weiss as the best litigation firm in the United States over the past two years. This "Litigation Department of the Year" award reflects not only the depth of our litigation practice and our ability to deliver consistently successful results, but also our unique culture of teamwork and our commitment to diversity and pro bono causes.

Christopher G. Caldwell

Partner,
Caldwell Leslie & Proctor, PC

One of the founders of Caldwell Leslie & Proctor, Chris Caldwell practices in all areas of civil and criminal business litigation, with a particular emphasis on the entertainment industry, intellectual property (copyright and trademark), employment, professional liability, and white collar criminal cases. In his wide-ranging practice, he spends roughly half of his time as a plaintiffs lawyer and half as a defense lawyer, and also equally splits his time between federal and state courts. He works closely with many of the largest studios and major media companies, as well as with the Motion Picture Association of America. An experienced negotiator and trial lawyer known for obtaining pre-trial rulings dismissing claims brought against his clients, he also has an extraordinary trial record of victories. Early in his career, Mr. Caldwell served as a prosecutor with the United States Department of Justice in Washington, DC. He is a frequent commentator on entertainment and white collar criminal law issues for national news organizations including CNN, Reuters, Associated Press, and MSNBC. Mr. Caldwell has repeatedly been honored as a "Southern California Super Lawyer" by the publishers of *Los Angeles* magazine and *Law and Politics* magazine.

Caldwell Leslie

Caldwell Leslie & Proctor, PC ("Caldwell Leslie") is dedicated to providing strategic, creative and costeffective representation in cases that matter most. Our record of success at trial, on appeal and in alternative dispute resolution proceedings has attracted a loyal roster of clients, including Fortune 500 corporations, closely held businesses, major studios and networks, cities and counties, state and local agencies, foreign companies, professionals and community groups. Even prominent law firms rely on Caldwell Leslie for excellent representation in high-stakes litigation. Founded in 1988 as an intelligent alternative to large law firm representation, Caldwell Leslie offers clients a standard of quality, level of responsiveness and measure of value that are second to none. The firm is comprised of skilled negotiators and trial attorneys whose intellect, ingenuity and experience give our clients a competitive edge.