Editor's Note

With the completion of this issue, JIMEL marks the end of another very productive year. As always, our editors strive to offer a diverse selection of scholarly articles of interest not only to academics, but also to the membership of our two sustaining ABA Forums, the Forum on Communications Law and the Forum on the Entertainment and Sports Industries. This appeal to our diverse constituencies is evident in the design of our February 7, 2014, symposium on remotely piloted aircraft, entitled "The Use of Drones in the Media and Entertainment Industries: The Domestic and International Legal and Policy Issues." For those unable to make it to Southwestern Law School in Los Angeles, a complete transcript of the conference's proceedings—including the presentations of media and entertainment experts from around the world—will be provided in our next issue.

I am also extremely pleased with the diverse articles that were selected for this issue. The topics, all timely and relevant, should appeal to a broad section of our readers.

Prof. Warren Grimes' article, "*The Distribution of Pay Television in the Unites States: Let an Unshackled Marketplace Decide*," is particularly germane in light of the recent standoff between CBS and Time Warner Cable. The article argues for a more rigorous application of antitrust principles to American television distribution. For cable customers, seven programmers account for ninety-five percent of television viewing hours in the U.S., and subscription fees are rising at twice the national inflation rate, while more and more consumers defect from pay television in favor of cheaper and more particular distribution channels. The author links this increase in price, and corresponding consumer loss, to "forced bundling," a practice by which programmers require distributors to carry less popular channels in order to carry the more popular "must-have" channels.

The article draws a comparison between the Canadian and American television distribution systems and how the American system might benefit from a look to the Canadian model. It proposes a hybrid formula by which consumers can choose between various more specialized ("narrower") bundles and à la carte choices of channels. The author, a leading expert on antitrust law, concedes that the effect might be a marginal increase in per-channel price, but that increase would be offset by consumers' newfound ability to choose the channels they actually want.

Katharine Larsen and Julia Atcherley's article, "*Freedom of Expression-Based Restrictions on the Prosecution of Journalists Under State Secrets Laws: A Comparative Analysis*," explores the constraints that the right to free expression—and the derivative rights to receive and impart government information—impose on the nature and scope of state secrets laws as applied to journalists. The article examines the jurisprudence of domestic and international courts, as well as the policies and principles of intergovernmental entities, to offer an overview of the right to obtain government information and the growing international consensus on the burdens to be imposed on government bodies when they seek to prevent access to data or documents touching upon national security matters. The authors specifically survey the laws, policies, and practices of state governments and intergovernmental bodies applicable to journalists working at the intersection of the public's right to receive sensitive state information on matters of public concern and the government's efforts to prosecute the receipt and dissemination of that very same information. Ultimately, the authors identify the free expression-based constraints that, in this modern constitutional era, guide the evaluation of the validity of state secrets laws as applied to the work routinely undertaken by national security reporters.

Dr. Lazaros Grigoriadis' article, "*Exhaustion and Software Resale Rights in Light of Recent EU Case Law*," examines the potentially significant impact of the landmark *UsedSoft* ruling in Europe. The recent EU Court of Justice finding that the owner of copyright of a computer program cannot contest the resale of a copy of the program which was incorporated into a data carrier and sold in the EU raised a new question: whether permanent copies stored in a material medium, that are sold or downloaded by sale, can also not be opposed by the owner of the copyright. The *UsedSoft* case answered that the availability (by means of material medium or download) does not matter; rather, there must be a transfer of ownership. The exhaustion doctrine dictates that a user may legally resell a copy to another user and such subsequent acquisitions are lawful. The online transmission of a work falls within the right of distribution.

The author, an academic based in Greece, argues that this is an advantageous holding for users, but poses remedial implications for manufacturers seeking ways to circumvent this new holding. Still, a downloaded copy of a computer program does not entitle the acquirer to divide the license and resell only the user right—this would violate the exclusive right of reproduction. Thus, manufacturers will likely respond by renouncing the sale and instead grant a right to use a copy of a program for an unlimited period in return for payment of a fee. The

article looks comparatively to the "first sale" doctrine under U.S. law, which similarly authorizes a purchaser of a copy to resell that particular copy, without violating the copyright owners' rights when copies are lawfully made.

Grace Clements' article, "*A Fistful of Dynamite: How Independent Film's Cowboy Culture Creates Unstable Sales Agency Agreements*," posits that sales agency agreements for films may be revocable regardless of the contractual inclusion of an "irrevocable" provision. Since most sales agency disputes are arbitrated instead of litigated, the number of actual sales agents facing revocation by producers is unknown. But, the author argues, even the *possibility* that the sales agency is revocable may be enough to derail international agreements. As the international appetite for independent film grows, both in mainstream consumption and within niche markets, the potential instability of these agency agreements threatens detrimental ramifications to a multi-billion dollar industry.

Is an agency revocable at will even when it contractually claims to be irrevocable? The answer, to the chagrin of many agents, is *yes*; unless it is a "power coupled with an interest." Unfortunately, what that means is unclear, and has been for two hundred years. The author investigates the meaning of "power coupled with an interest" through case law from the analogous hotel industry, where management companies were shocked to find their agency revoked by hotel owners. Special attention is given to the inadequacy of current remedies for foreign sales agents and the business solutions that must be put in place to protect foreign sales agents in contemporary practice. Because the strength of a contract is built on its stability, and the strength of an industry is built upon its contracts, the author concludes that fissures in the sales agency agreement must be sealed in order for the industry to advance.

Our dedicated volunteer staff is now actively reviewing submissions for Volume 5, Issue 2, scheduled for publication in mid-2014. Please feel free to contact us if you would like to suggest an article topic or if you would like us to consider an original manuscript for publication.

Michael M. Epstein
Supervising Editor
jimel@swlaw.edu