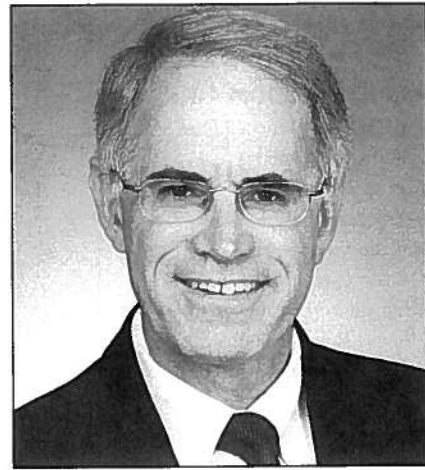


The digital countdown

Edwin Komen of Sheppard Mullin Richter & Hampton on the new rule of digital law



AUTHOR
Edwin Komen is a partner in the entertainment, media and communications group at Sheppard Mullin Richter & Hampton.

February 17, 2009 will be one of our most important historic dates. No president will be sworn into office. No one will land on the moon. Instead, television in the US, as we know it, will simply be turned off. The switch from analogue to digital TV will be thrown at midnight. Many will awake on February 18 to find their beloved televisions don't work. Welcome to the Digital Age.

"I will never film another film on film." These words were spoken several years ago by George Lucas upon release of what is arguably the most expensive experimental film ever made, *Star Wars: Episode Two: Attack of the Clones*. Widely regarded as one of the planet's best and most innovative filmmakers, Lucas was commenting on bringing the film establishment kicking and dragging into the digital age. Lucas had taken it upon himself to produce a major Hollywood feature using experimental high definition video cameras that he helped develop. No one knew if they would work. If not, well over a hundred million dollars could have disappeared. Instead, Lucas demonstrated what we now take for granted, the digital video pallet opens new worlds of story telling not previously available, placing celluloid film on the endangered species list.

Incidentally, George Lucas and Lori Drew have something in common. But more on that later before I have my "last word".

We are all familiar with digital's impact on our everyday lives even though we don't give it much thought. Many of us grew up buying "records" and other products at brick-and-mortar stores. Now we go online to compare prices and purchase with goods delivered to our door or, better yet, downloaded magically to our USB thumb drives. Others converse online with people they have never met and likely never will...at least not in the physical realm. We play online games and live in virtual worlds

of the imagination which have no "real world" counterpart. But few ever ponder the philosophical implications of life without touching let alone the more mundane aspects of regulating human conduct in this new realm through "rules of the game" otherwise known as laws. And this, of course, is how we get to a discussion of copyright and other laws as they both affect and are, in turn, affected by, the digital conversion.

A few examples will help to make my point. An article in the Sydney Morning Herald, on 12 December 2008, reported that Master Harper of the ACT Supreme Court had allowed a default judgment served on the defendant's Facebook pages. As most know, Facebook is a highly popular social networking website. It seems unlikely that the defendants anticipated receiving legal process rather than personal gossip. On the other hand in our increasingly diverse society, Facebook is likely a more reliable means of giving legal notice than publication in a newspaper of general circulation. Should anyone, based on this precedent, be surprised when virtual tools come to the aid of the legal system?

Example two – On December 16 both Variety and The Hollywood Reporter reported on how TV networks, faced with the possibility of a strike by the Screen Actors Guild, were planning on producing new programming under contracts with the other actors union, the American Federation of Television and Radio Artists. This would have previously been contractually impossible since SAG covered shows shot on film while AFTRA covered shows on video. In the digital age, most shows are converting to high definition video formats making it possible now to deal with the latter, smaller union which had already signed with the producers.

Example three – Now for Lori Drew, the new poster girl for digital transgressions,

who was convicted of driving her daughter's 13-year-old friend to suicide through cyber harassment on MySpace. Drew used an assumed virtual personality, posing as a young male suitor who eventually turned on the girl, all in cyberspace, who then killed herself in real life. The case was tried in the federal courts under the Computer Fraud and Abuse Act, previously thought primarily applicable to computer hacking offences, on the theory that Drew had unlawfully gained access to the deceased girl's computer by violating the MySpace Terms of Use. Lori Drew had inadvertently stumbled into the Alice in Wonderland world of cyber law, where the "rules of the game" – the Terms of Service promulgated to regulate intellectual property and similar behaviour – were given the same legal force and effect as statutes passed by the state and federal legislatures. In short, what George Lucas had begun with films, Drew has now done by inaugurating the nascent jurisprudence of the non-physical, all-digital cyber world of the mind.

Copyright has been the traditional tool for regulating digital behaviour but may have now evolved to something much more important as the convergence of digital technologies itself converges with our digital flesh and blood. As copyright lawyers, we must be aware of and responsibly assume this new burden as we find ourselves in the uncomfortable role of shepherds for the new rule of digital law.

Happy Virtual New Year. Drive safely. And mind your cyber manners in 2009. ☘