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Chasing Rainbows: Exposing the Role of Color in Trademark Law through *Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.*

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Chasing Rainbows: Exposing the Role of
Color in Trademark Law Through
*Christian Louboutin S.A. v. Yves Saint
Laurent America, Inc.*

*Rachany Son**

I. INTRODUCTION

What do red carpet events, high fashion models, royal princesses, and Jennifer Lopez have in common? Aside from their obvious connections, they all pay homage to the French footwear designer, Christian Louboutin. His red lacquered shoes grace the feet of celebrities and other A-listers at red carpet events, are donned by high fashion models as they strut the catwalk, are worn by royals at exclusive events, and are sung about in pop culture hits by none other than Jennifer Lopez.¹ So why is this French designer fighting for his day in court? Christian Louboutin intends to protect the trademark he was awarded for the lacquered red soles that made him famous.

II. FACTUAL BACKGROUND

Plaintiff Christian Louboutin is a French footwear designer known for his high fashion women's shoes.² Sometime around 1992, Christian Louboutin began coloring the sole of his shoes a glossy vivid red.³ Over time, these high fashion women's shoes with lacquered red soles gained such widespread recognition in the fashion industry and throughout the world that Christian Louboutin was eventually awarded a trademark with United States Trademark Registration No. 3,361,597 ("Red Sole Mark") on January 1, 2008.⁴

Founded in 1962, Defendant Yves Saint Laurent is an American fashion house that also produces footwear in its seasonal collections.⁵ Since the

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1. *Christian Louboutin S.A. v. Yves Saint Laurent Am., Inc.*, 778 F. Supp. 2d 445, 448 (S.D.N.Y.), *appeal filed*, No. 11-3303-cv (2d Cir. Aug. 15, 2011); *see also* Princess Beatrice In Elie Saab & Alberta Ferretti For Petra Ecclestone And James Stunt Wedding Celebrations (Aug. 30, 2011), RED CARPET FASHION AWARDS, <http://www.redcarpet-fashionawards.com/2011/08/30/princess-beatrice-in-elie-saab-alberta-ferretti-for-petra-ecclestone-and-james-stunt-wedding-celebrations/> (last visited June 3, 2012).

2. *Louboutin*, 778 F. Supp. 2d at 445.

3. *Id.* at 447.

4. *Id.* at 448.

5. *Id.* at 449.

1970s, some of these collections have featured footwear with red outsoles.⁶ In 2011, Yves Saint Laurent released an additional four models of shoes in its YSL Cruise 2011 collection that similarly featured bright red outsoles.⁷

In January 2011, Christian Louboutin approached Yves Saint Laurent to discuss the red outsoles which appeared on the four shoe models promoted by Yves Saint Laurent in its Cruise collection.⁸ Christian Louboutin took issue with the similarity between the shade of red used on the outsoles of Yves Saint Laurent's shoes and Christian Louboutin's protected Red Sole Mark.⁹ Christian Louboutin requested that Yves Saint Laurent remove the contested shoes from the market but was met with a flat refusal.¹⁰

A. Description of Plaintiff's Claims

Christian Louboutin filed this action in the United States District Court for the Southern District of New York against Yves Saint Laurent on April 7, 2011, asserting multiple causes of action under federal law in accordance with the Lanham Act, 15 U.S.C. § 1501 *et seq.* and New York state law.¹¹ Plaintiffs allege: (1) trademark infringement and counterfeiting under the Lanham Act, (2) false designation of origin and unfair competition under the Lanham Act, (3) trademark dilution under the Lanham Act, (4) trademark infringement under New York state law, (5) trademark dilution under New York state law, (6) unfair competition under New York state law, and (7) unlawful deceptive acts and practices under New York state law.¹²

In response, Yves Saint Laurent counterclaimed asserting that Christian Louboutin's Red Sole Mark should be cancelled because it is: (1) not distinctive, (2) ornamental, (3) functional, and (4) was secured by fraud before the United States Patent and Trademark Office.¹³ Furthermore, Yves Saint Laurent seeks damages for (1) tortious interference with business relations and (2) unfair competition.¹⁴

6. *Id.*

7. *Louboutin*, 778 F. Supp. 2d at 449.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; Complaint and Jury Demand, *Christian Louboutin S.A. v. Yves Saint Laurent Am, Inc.*, No. 11-CV-2381 (S.D.N.Y. Apr. 7, 2011), ECF No. 1.

12. *Louboutin*, 778 F. Supp. 2d at 449.

13. *Id.*

14. *Id.*

III. PROCEDURAL AND SUBSTANTIVE HISTORY

This action was brought before the Court on Christian Louboutin's motion for a preliminary injunction.¹⁵ Christian Louboutin sought to prevent Yves Saint Laurent from marketing any shoes bearing the same or similar shade of red on its outsoles as that protected by the Red Sole Mark during the pendency of the case.¹⁶

A. District Court Holding and Overview of Rationale

The United States District Court for the Southern District of New York held that Christian Louboutin failed to meet his burden for a preliminary injunction against Yves Saint Laurent.¹⁷ The Court determined that Christian Louboutin did not establish that the Red Sole Mark was likely to be found entitled to trademark protection.¹⁸ As such, the Court held that Christian Louboutin did not demonstrate the likelihood that he would succeed on his claims of infringement necessary to warrant relief in the form of a preliminary injunction for any of his claims.¹⁹

B. Court's Rationale

The Court begins its analysis by establishing that for a movant to be entitled to a preliminary injunction, it must demonstrate "(1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in [its favor]."²⁰ As such, Christian Louboutin has the burden of proof in the action at bar.²¹

The Court first addressed Christian Louboutin's claims of trademark infringement and unfair competition under federal law through the Lanham Act.²² The Court set forth the requisite standard to succeed under these claims compelling Christian Louboutin to establish that its Red Sole Mark is entitled to protection and to demonstrate that Yves Saint Laurent's use of the same or similar mark would likely lead to confusion between the brands among their consumers.²³

15. *Id.*

16. *Id.*

17. *Louboutin*, 778 F. Supp. 2d. at 449–50.

18. *Id.* at 449.

19. *Id.* at 449–50.

20. *Id.* at 450 (emphasis placed by the Court).

21. *Id.*

22. *Louboutin*, 778 F. Supp. 2d. 445

23. *Id.*

In determining whether the Red Sole Mark is entitled to protection, the Court acknowledged a statutory presumption of validity based on Christian Louboutin's certificate of registration awarded by the United States Patent and Trademark Office for the Red Sole Mark.²⁴ However, because this presumption may be rebutted, the Court delved into the question of when color is a protectable trademark.²⁵ The Court recognized that while a color may be protected when it has attained a secondary meaning, that protection ends when color is functional and becomes "essential to the use or purpose of the product, or affects the cost or quality of the product."²⁶ The United States Supreme Court held that color may be protected by trademarks for use in industrial products.²⁷ The District Court, however, distinguished the role of color and its use in industrial products from the action at hand.²⁸ The Court determined that the use of a single color as a trademark in industrial products is protected specifically because it merely serves to alter the appearance of the product to help distinguish one source from another.²⁹ Because fashion is unique in that color is a defining characteristic of not only the source of the product but also as a means of expression, the Court found that there is nothing supporting extending the protection granted by the United States Supreme Court for industrial products in *Qualitex* to articles of fashion.³⁰ The Court further concluded that in fashion, color has only been protected as a trademark when it is used in a distinct pattern or a combination of shades and colors that identify "a conscious effort to design a unique identifiable mark embedded in the goods," and not as a single shade or color.³¹

To further develop the uniqueness of the case at bar, the Court employed an inventive hypothetical likening fashion to art.³² In this scenario, Monet encounters a legal challenge from Picasso, who seeks an injunction to prohibit the display of Monet's latest work.³³ Picasso's complaint states that the indigo used by Monet to depict the water below his water lilies is the same or too similar to the shade Picasso employs to depict the water in the paintings he produced during his Blue Period.³⁴ The Court then asks whether

24. *Id.*

25. *Id.*

26. *Id.* at 450.

27. *Louboutin*, 778 F. Supp. 2d. at 450; *see also* *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 159 (1995).

28. *Louboutin*, 778 F. Supp. 2d at 450.

29. *Id.* at 451.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Louboutin*, 778 F. Supp. 2d at 451.

34. *Id.*

Picasso should be granted relief.³⁵ In answer, the Court reasoned that one painter should not be prevented from using a particular shade of a color to express a basic concept such as water merely because another painter had already claimed the use of that particular shade.³⁶ To further emphasize this analogy, the Court asserted that fashion depends on creativity and its expression requires the full use of the range of colors in its palette in order to appeal to its patrons and consumers.³⁷

The Court further considered whether the use of a single color in fashion was viable and could be protected by a trademark through an examination of the functionality of its use.³⁸ The functionality doctrine specifically “forbids the use of a product’s feature as a trademark where doing so will put a competitor at a significant disadvantage” and the feature is “essential to the use or purpose of the article or affects [its] cost or quality.”³⁹ Although aesthetic appeal can be deemed functional, the Lanham Act generally does not protect the functional use of color.⁴⁰ Christian Louboutin himself stated that he selected the color red for the soles of his shoes because of its “energy,” its “sex[iness],” and because it is “engaging” and “attract[ive],” all of which constitute nontrademark functions of color in fashion.⁴¹ Moreover, the Court highlighted that the red soles result in a higher cost of production, which contributes to a much more costly and exclusive final product.⁴²

Because the red soles are not merely a source identifier but also serves other nontrademark functions and affects the cost and quality of the product, the Court was led to address the question of whether preserving Christian Louboutin’s trademark rights would “significantly hinder competition” and “permit one competitor (or group) to interfere with legitimate (nontrademark-related) competition through actual or potential exclusive use.”⁴³ After recognizing the various reasons behind the use of red on the outsoles of shoes, such as attempting to achieve a cohesive look through color-coordinating shoes and garments and the development of a monochromatic shoe (one that is red in its entirety) in Yves Saint Laurent’s case, the Court concluded that allowing a monopoly on red would effectually hinder competition in the designer shoe market.⁴⁴ Furthermore, the Court reasoned that supporting a mo-

35. *Id.*

36. *Id.* at 453.

37. *Id.* at 454.

38. *Louboutin*, 778 F. Supp. 2d at 453.

39. *Id.* (internal citations omitted).

40. *Id.*

41. *Id.*

42. *Id.* at 454.

43. *Louboutin*, 778 F. Supp. 2d at 454.

44. *Id.*

nopoly on the color red for its use on the soles of shoes may not end at high fashion women's shoes, but may intrude upon other women's garments such as dresses, coats, hats, or gloves as well.⁴⁵ In this respect, the Court also found that other designers would be prevented from not just using the same red as that used in Christian Louboutin's Red Sole Mark, Pantone No. 19-1663 TP, but a broad spectrum of other shades of red for fear of litigation.⁴⁶ The Court illustrates this point with the case at hand since Yves Saint Laurent did not use Pantone No.-1663 TP specifically, but another shade of red which Christian Louboutin deemed too similar.⁴⁷ When faced with a proposition by Christian Louboutin to declare shades within a designated range of Pantone No.-1663 TP to be off-limits, the Court concluded that this not only falls outside the scope of the injunction but is impractical in reality since it would require designers to either go to court or to Christian Louboutin himself to determine if a color falls within the designated range.⁴⁸ The Court found that "conferring legal recognition on [Christian] Louboutin's claim raises the specter of fashion wars" and would encourage other designers to monopolize other shades or colors for use in their particular products as well.⁴⁹

The Court then assessed the ambiguity and uncertainties related to the Red Sole Mark, namely that while Christian Louboutin identified the specific shade used on its outsoles as Pantone No.-1663 TP, the specific shade is not noted on its registration.⁵⁰ Christian Louboutin even conceded that the shade of red depicted in the drawing on paper is not necessarily representative of the color as it is applied to the sole of a shoe.⁵¹ Additional ambiguity exists despite Christian Louboutin's assurances that it would not try to enforce a claim of infringement of its Red Sole Mark on flat shoes, wedges, or kitten heels, because Christian Louboutin's registration of "designer shoes" applies to all types of footwear, not just heels.⁵² Further uncertainty exists over the coating of the soles since it is registered as lacquered.⁵³ Based on this specification, the Court determined that this opens up the floor for debate over whether Christian Louboutin's Red Sole Mark would apply to a flat red.⁵⁴ Because suit was brought against Yves Saint Laurent for the use of a flat red on the soles of its shoes, the Court deduced that Christian Louboutin would

45. *Id.*

46. *Id.* at 455.

47. *Id.*

48. *Louboutin*, 778 F. Supp. 2d at 455-56.

49. *Id.* at 457.

50. *Id.* at 455.

51. *Id.*

52. *Id.* at 456.

53. *Louboutin*, 778 F. Supp. 2d at 456.

54. *Id.*

answer this question in the affirmative.⁵⁵ As such, since Christian Louboutin failed to meet its burden, the Court found that Christian Louboutin is not entitled to injunctive relief based on trademark infringement and unfair competition under the Lanham Act.⁵⁶

Following this conclusion, the Court then addressed Christian Louboutin's remaining claims for trademark infringement under New York state law, trademark dilution under federal and New York state law, and unfair competition under New York state law.⁵⁷ Because Christian Louboutin failed to sufficiently demonstrate that the Red Sole Mark is entitled to protection, the Court found it unnecessary to address whether Yves Saint Laurent's shoes are likely to cause consumer confusion or if Christian Louboutin will suffer irreparable harm without an injunction.⁵⁸ Accordingly, the Court quickly dispensed with these claims.⁵⁹

Finally, the Court addressed Yves Saint Laurent's counterclaims requesting the Court to cancel the Red Trade Mark and to obtain damages.⁶⁰ However, because Yves Saint Laurent failed to file a motion for summary judgment, the Court refused to dispense with these claims *sua sponte* to allow Christian Louboutin a reasonable time to respond.⁶¹

IV. CRITIQUE OF COURT'S APPROACH

It is difficult to perceive how a mark that has gained such widespread recognition among the fashion industry and throughout the world would not be protected. While the District Court offered a convincing argument otherwise, the ramifications of its ruling are extensive. As a result of its decision in this case, the use of single colors in fashion can never be protected despite it being a distinctive feature of a particular designer or brand. Furthermore, the Court's decision may lead to the employment of higher standards or greater scrutiny by the United States Patent and Trademark Office in formulating its decisions when awarding trademarks. This opinion may also lead to the cancellation or weakening of current trademarks awarded for color across the United States.

The Court's decision was primarily based on the assumption that fashion is like art and requires the use of the entire spectrum of colors available. However, we should take a closer look at the merits of the Court's argument and ask whether fashion is truly like art. While many would not hesitate to agree with the Court in this respect, others may be quick to argue that at the

55. *Id.* at 456.

56. *Id.* at 457.

57. *Id.* at 457.

58. *Louboutin*, 778 F. Supp. 2d at 457.

59. *Id.*

60. *Id.* at 457–58.

61. *Id.*

very least the Monet hypothetical employed by the Court is far from similar to the action at bar. Monet and Picasso both created a picture consisting of various shapes, colors, and textures. Christian Louboutin's outsole on his shoes was simply a flat red. Is a painting consisting of an entirely red canvas truly considered art?⁶² The Monet and Picasso paintings referenced by the Court are arguably more like a design or pattern which have attained recognition and association with its artists, such as the Louis Vuitton Toile Monogram many of us know so well, which features the LV initials along with a curved diamond motif design and a circle with a four-leafed flower inset.⁶³

On the other hand, both fashion and art are deeply rooted in creativity. Would protecting a red outsole on high fashion women's shoes really impose that large of a constraint and have the wide-reaching effect on the industry that the District Court envisioned? It is difficult to see many others rushing forward to register pink or yellow or even blue outsoles on shoes with the United States Patent and Trademark Office, much less buttons, dresses, hats, or gloves.⁶⁴ After all, Christian Louboutin had been using red lacquer on the soles of his women's high fashion shoes for 16 years before he was awarded a trademark. But even if there is a surge in designers who rush forward to register their products, the products are unlikely to have attained the secondary meaning required to be awarded a trademark. On the other hand, red outsoles have gained such a strong association with Christian Louboutin's high fashion women's shoes that the United States Patent and Trademark Office approved registration of the Red Sole Mark.⁶⁵

But is the color of the outsole of a shoe truly functional? A product is functional, and not protected, where it is essential to its use or purpose or affects the cost or quality of the product.⁶⁶ The Court determined that because the outsoles were painted red, this increased the cost or quality of the product.⁶⁷ While painting the outsoles red might cost more than leaving it the color it was previously, it can be argued that the red outsoles are not what increase the cost or quality of the product, but instead, the fact that it is produced by Christian Louboutin, a high-end shoe designer. The painting of the outsoles red may be such an insignificant cost that really has no effect on the overall cost or quality of the shoes, and as such, the functionality of the

62. The Museum of Modern Art considers an entirely *blue* canvas to be art. See THE MUSEUM OF MODERN ART, http://www.moma.org/collection/object.php?object_id=80103 (last visited Nov. 11, 2011).

63. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 112 (2d Cir. 2006).

64. *Louboutin*, 778 F. Supp. 2d at 457 (referencing the Court's argument that protecting the Red Sole Mark would lead to imperial color marks and eventually affect hostile color grabs that may expand to other articles of clothing).

65. *Id.* at 448.

66. *Id.* at 450.

67. *Id.* at 454.

shoes. Furthermore, while the Court maintained that the color red is generally functional in fashion because it promotes creativity, allows the color coordination of outfits, and is used as a means of expression, it is difficult to perceive how a red *outsole* specifically is functional in a shoe. The color of the outsoles of shoes is not necessarily essential to its use or purpose. The shoe would be just as “functional” even if the outsole were black instead.

Despite these limitations in the Court’s argument, the District Court’s decision in *Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.* was in alignment with past precedent. In *First Brands Corp. v. Fred Meyer, Inc.*, the Court of Appeals for the Ninth Circuit affirmed the district court’s decision to deny a motion for preliminary injunction.⁶⁸ In *First Brands*, Union Carbide was claiming infringement of trade dress and seeking relief to prevent the defendant’s use of the color yellow as a background on F-style shaped one-gallon jugs.⁶⁹ Similar to the action at bar, the Court of Appeals employed the color depletion theory and noted that granting protection of the yellow background color for an ordinary shaped container would deplete the use of a primary color by competitors.⁷⁰

However, why award a trademark when courts are going to question the protection of the mark anyway and suggest it be cancelled? Although a district court has the power to order cancellation of a mark under the Lanham Act,⁷¹ the Court’s decision in the action at bar suggests that the standards utilized by the United States Patent and Trademark office were not sufficient. Will this did not prompt the United States Patent and Trademark Office to invoke greater scrutiny in issuing trademarks for color, leading to a higher bar for designers in the fashion industry overall? This may be beneficial as it might lead to a reduction in the number of trademarks that are granted by the United States Patent and Trademark Office that end up being cancelled by the courts. However, the effect of this action on current and future trademarks will certainly be an interesting point to observe.

V. CONCLUSION

While *Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.* has us seeing red, it is merely the first battle of potentially many to come in the fashion war over color. Many trademarks for color have already been granted.⁷² Will this action weaken current and future trademarks awarded for

68. *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1380–81 (9th Cir. 1987).

69. *Id.*

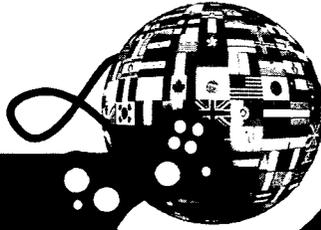
70. *Id.* at 1383.

71. *Hot Stuff Foods, LLC v. Mean Gene’s Enterprises, Inc.*, 468 F. Supp. 2d 1078, 1089–90 (D.S.D. 2006).

72. *See SSJR Obtains Trademark for Yellow Plastic Bats*, ST. ONGE STEWARD JOHNSTON & REENS LLC (Nov. 4, 2008), <https://www.ssjr.com/articles/view/72> (trademarking yellow Whiffleball bats); *see also* TIFFANY & CO., <http://>

color? While logically this would seem to be the case, until the Red Sole Mark has been cancelled, it will be difficult to arrive at this conclusion with certainty. Although the battle over red may be winding down, who knows what color of the rainbow we will be chasing next.

m.tiffany.com/Service/policy_tra.aspx (last visited Nov. 11, 2011) (trademarking Tiffany Blue); *see also* UPS, <http://www.ups.com/media/en/trademarks.pdf> (last visited Nov. 11, 2011) (trademarking UPS Brown).

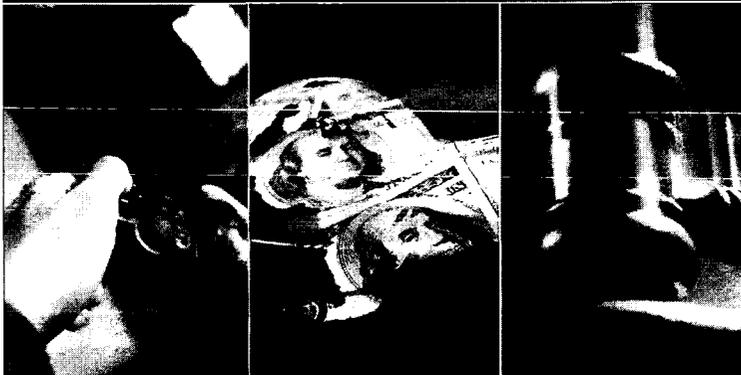


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-David McCombs, Partner at Haynes and Boone

WEDNESDAY, JANUARY 25, 2012

9:00 A.M. – 9:15 A.M. OPENING REMARKS

9:15 A.M. – 10:30 A.M. KEYNOTE ADDRESS

An independent studio in the console market for nearly 20 years, Insomniac Games has achieved commercial success and has been recognized globally for its unique “non-corporate” culture. In March of 2011, the company announced a new division, Insomniac Click, dedicated exclusively to social games. Ted Price will discuss secrets to the company’s success, how the company has handled legal/business issues, and the strategy behind how console gaming will help it become a major player in the social world.
Ted Price, President and Chief Executive Officer, Insomniac Games

10:30 A.M. – 10:45 A.M. BREAK

10:45 A.M. – 12:00 P.M. SESSION I
**SOCIAL GAMING LEGAL ISSUES’ IMPACT ON
CREATIVE, DEVELOPMENT AND BUSINESS SUCCESS**

The moneymaking, creation of, and delivery methods within the framework of social gaming create interesting legal and business issues for the video game industry as a whole. In this session, leading industry attorneys, creative experts, and game technologists will discuss the current environment and how to handle and prepare for the rise of lawsuits involving major social gaming companies.

Moderator: Richard Hilleman, Chief Creative Director, Electronic Arts
Carolyn Hoecker Luedtke, Partner, Munger, Tolles & Olson LLP

12:00 P.M. – 1:30 P.M. LUNCH

1:30 P.M. – 3:00 P.M. SESSION II
PAYING AND PLAYING

In 2010, digitally distributed games made up a quarter of revenue in the video game market according to the NPD Group. Google+ Games integrated Google In-App Payments and American Express recently acquired a virtual currency monetization platform specifically for games. How does the way people pay and play impact the industry now, what are the legal implications, and what is on the horizon? This roundtable discussion will answer such questions and more.

Moderator: Mark Methenitis, Corporate Counsel, MetroPCS Wireless
Steve Nix, General Manager, Digital Distribution, GameStop
Pietro Macchiarella, Research Analyst, Parks Associates

3:00 P.M. – 3:15 P.M. BREAK

3:15 P.M. – 4:45 P.M. SESSION III
OPEN FOR BUSINESS: ARE GOVERNMENT INCENTIVES WORKING?

In the search for high paying, environmentally “clean” and fast-growing companies, states and major cities are actively recruiting the video game industry through a vast array of economic incentive programs. States are in the throes of legislative tug-of-wars and federal tax inducements have come under heavy scrutiny. Panelists will talk about the pros and cons of various incentives as well as what lies ahead.

Moderator: Peter E. Raad, Founder and Executive Director, The Guildhall at SMU
Evan E. Fitzmanrice, Director, Texas Film Commission
Jeff Patrick Pellegrin, Executive Director, Louisiana Digital Gaming Initiative, Inc.
Sean Thordson, Law Office of Herman Thordson

6:00 – 7:00 P.M. RECEPTION
Sponsored by Munck Carter, LLP

7:00 – 8:00 P.M. DINNER WITH ADAM SESSLER
Adam Sessler, Industry veteran, journalist and television host Adam Sessler will offer his unique blend of wit and wisdom on all-things-video game.



THURSDAY, JANUARY 26, 2012

9:00 A.M. – 9:15 A.M.

WELCOME

9:15 A.M. – 9:30 A.M.

SESSION IV

THE YEAR IN VIDEO GAME LAW

A review of 2011 cases, outcomes and issues of note will be summarized and distributed to attendees.

Xuan-Thao Nguyen, Professor, SMU Dedman School of Law

Professor W. Keith Robinson, Assistant Professor, SMU Dedman School of Law

9:30 A.M. – 10:30 A.M.

SESSION V

BROWN V. EMA/ESA: U.S. SUPREME COURT STOPS

CALIFORNIA FROM PLAYING GAMES WITH THE FIRST AMENDMENT

In June of 2011 the U.S. Supreme Court ruled in the case *Brown v. EMA/ESA*, striking down a 2005 California law that would have regulated the sale and rental of computer and video games. This session will present an overview of the *Brown* case, the impact of the Court's decision and the next generation of legal challenges for the video game industry.

Christian Genetski, Senior Vice President and General Counsel, Entertainment Software Association

10:30 A.M. – 10:45 A.M.

BREAK

10:45 A.M. – 12:00 P.M.

SESSION VI

THE INS AND OUTS OF VENTURE CAPITAL

Why do some good games get funded and some brilliant games fail at securing necessary financing? Successfully maneuvering through the venture capital process and its associated legal ramifications requires understanding the interplay of many variables. Independent developers, legal experts and venture capitalists will share experiences from their distinct vantage points. Topics will include what VCs look for, trends that affect their decisions, potential tradeoffs to both parties, legal considerations, the makings of a stellar deal and red flags of deals-gone-wrong.

Moderator: M. David Burton, Partner, Haynes & Boone, LLC

John Adler, General Partner, Silver Creek Ventures

Eric Engineer, Partner, Sevin Rosen

Scott Ticer, Lone Star Angels

12:00 P.M. – 12:15 P.M.

BREAK

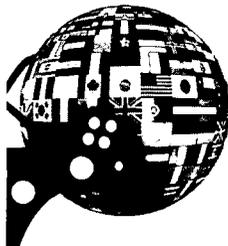
12:15 P.M. – 2:30 P.M.

SESSION VII

LUNCH & GAME PITCHES IN ACTION

The Texas Entrepreneur Network will facilitate a forum in which four independent studios will pitch their individual games to a group of venture capitalists who are seeking to fund the right project. The panel will also include business development leaders and game attorneys. As spectators, the audience will watch the entire process and maybe even witness the first steps to the next biggest title in video games.

Moderator: Hall T. Martin, Director, Texas Entrepreneur Network



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